

DECISION AND ORDER

THOMAS TRUJILLO, Appellant,

v.

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

I. INTRODUCTION

Appellant Deputy Thomas Trujillo (Appellant) appeals the Department of Safety, Denver Sheriff Department's (Agency) May 20, 2019 suspension of him, for alleged violations of Career Service Rule (CSR) 16-28 R. On August 12, 2019, Hearing Officer Federico C. Alvarez conducted a hearing to determine the propriety of the discipline. Mallory Revel, Esq. and Melanie MacWilliams-Brooks, Esq., represented Appellant; and Rachelle E. Hill, Assistant City Attorney, represented the Agency. Appellant's exhibits A and the Agency's exhibits 1 through 14 were admitted into evidence. The Appellant testified on his own behalf. Civilian Review Administrator (CRA) Alfredo Hernandez testified on behalf of the Agency.

II. ISSUES

The issues presented for appeal were whether:

A. Appellant violated CSR 16-28 R, as it pertains to Agency Rules and Regulations (RR) 200.19;¹ and

B. the Agency's decision to suspend Appellant, if he violated CSR 16-28 R, conformed to the purposes of discipline under CSR 16-41.

III. FINDINGS²

Appellant has been employed by the City and County of Denver (City) with the Agency as a Denver Deputy Sheriff since March 2008. On Sunday August 26, 2018, the Agency had assigned Appellant to work at the Denver Detention Center (DDC), specifically in its pod 3/Medical, in which it houses inmates with medical needs. Exhibits 3 and 4 are 17 minute, twenty second videos of the medical station that include the incident in which Appellant was involved with Inmate ZJ (Incident) and for which the Agency disciplined him. Exhibit 3 is from a camera located in the ceiling, outside of Inmate ZJ's cell, almost adjoining its door on its left side. It recorded the activity outside the cell door but very slightly into the cell when its door was open.

¹ The Agency suspended Appellant for three days for a violation of RR 200.3, which he conceded.

² The Parties stipulated that: (1) There is no DSD policy or procedure regulating when cell doors may be opened; (2) The rule that is promulgated throughout the Department is that if a deputy knows an inmate is hostile, the Deputy should call a Sergeant; and (3) Otherwise, the decision to open a cell door is left to the Deputy's judgment.

Exhibit 4 is from a camera located in the ceiling at the end of a hallway facing the cell door from about 20 paces away. It recorded what was visible through the window, about two feet wide by three feet long in the upper part of the door, or through the door when it was open.

Before 9:30 p.m., Deputy Losciale, the corridor officer, escorted inmate ZJ, who had come from another floor, to the medical station in pod 3/Medical for the nurse to see him. He instructed Inmate ZJ to sit on the bench to await that activity. Appellant walked by, saw Inmate ZJ on the bench and asked Deputy Losciale for Inmate ZJ's identify. Appellant then asked Inmate ZJ if he was okay, to which inmate ZJ replied that he was fine. At this time, no other deputies were in the immediate area and the nurse was attending to business elsewhere. Appellant also needed to make rounds, to check the status of the inmates in the cells in the pod, so he directed inmate ZJ into and locked him a holding cell adjoining the medical station. Deputy Losciale then left the medical station and returned to his post in the corridor.

The video recordings start at 9:30 p.m., and document most of the following physical description of the Incident but they do not record sound. The other physical and the oral findings are based on testimony and/or the statements of individuals from the disciplinary file. [Exhibit 2]. At 9:30:12, Inmate ZJ knocked on the window as Appellant approached the cell from its side, not apparently visible to Inmate ZJ. At 9:30:14, Appellant approached the cell door to speak to Inmate ZJ. Inmate ZJ demanded of Appellant through the window an explanation of why he was confined since he was supposed to be released. Appellant responded that he did not know the answer but would find out. Upset with Appellant's response, Inmate ZJ escalated their conversation. At 9:30:31-2, Inmate ZJ punched the window twice. He raised his elbow to about chest level and jabbed his arm forward forcefully to punch it with a closed fist at about Appellant's head level. When Inmate ZJ hit his second punch, Appellant retrieved his cell keys and approached the left side of the cell door to unlock it. Appellant took about ten seconds to open the door, at 9:30:42. Just before he opened it, Inmate ZJ punched it a third time.

Appellant opened the door outward from the cell and stood just outside the doorway while Inmate ZJ stood just inside the doorway as they spoke. Inmate ZJ gestured with his left arm while he spoke, pointing behind Appellant. At 9:30:57, Deputy Losciale returned to the medical station from the corridor, putting on plastic gloves as he did so. He returned because he had heard Inmate ZJ's "loud banging" on the door. [Exh. 2-5; 2-100; see also Exh. 2-168]. He stood about four steps behind Appellant. At 9:31:25, Deputy Losciale moved to the doorway, opened the door wider to make room for himself and then stood one to two steps behind and to the right of Appellant. Deputy Losciale faced Inmate ZJ as he stood in the path of Inmate ZJ's gesturing motions.

At 9:31:37, Inmate ZJ leaned his upper body partly outside the doorway as he gestured again. Appellant pushed Inmate ZJ in the chest back into the cell with his right hand, which Inmate ZJ tried to grab. Appellant promptly pushed Inmate ZJ again and simultaneously, at 9:31:41, walked rapidly into the cell while pushing Inmate ZJ backward. Appellant had perceived that Inmate ZJ was going to try to swing at him, so he moved to control Inmate ZJ. Deputy Losciale entered the cell behind Appellant about one second later. Inmate ZJ fell backward, as Appellant pushed him back, and appeared to land partially seated against the back wall of the cell. Appellant landed on top of and straddling Inmate ZJ, and swung his fists at Inmate ZJ about seven or eight times to hit, and/or fend off blows from, Inmate ZJ. Inmate ZJ also hit Appellant in the face and upper body. This action is not visible in the video as it occurred beyond Appellant, but he later became bruised from it. Deputy Losciale intervened and pulled Inmate ZJ by his arm more onto on his back. This action caused Inmate ZJ's head to be toward the left side of the cell. Deputy Losciale next pulled Inmate ZJ's upper body out from under Appellant so Inmate ZJ now had his head toward the cell door. They held Inmate ZJ down on his

back, as he struggled against them. Deputy Losciale held his upper body and Appellant held his legs, awaiting other deputies to arrive and help.

Deputy Wannamaker heard the commotion and, at 9:32:34, entered the view of the camera and walked to the cell doorway to survey the scene. After some brief conversation, at 9:32:45, he stepped into the corridor, requested help from other deputies and radioed Sergeant Cole, the supervising officer on duty. He then returned to the cell doorway at 9:32:57. At 9:33:15, Deputy Fazio entered the station, briefly surveyed the scene from the cell door and got and put on plastic gloves from a dispenser on the left side of the door. Deputy Wannamaker now entered the cell, helped Appellant and Deputy Losciale handcuff Inmate ZJ, and then exited the cell and stood outside the doorway. Deputy Horan was making rounds but at 9:33:48, interrupted that activity to enter the medical station to assist with the incident. He surveyed the scene from behind the two deputies outside the cell and also put on plastic gloves. At 9:34:56, Sgt. Cole arrived and directed the deputies mostly from outside the cell.

At 9:35:45, Deputy Losciale exited the cell and Deputy Fazio entered the cell to replace him to help control Inmate ZJ. At Sgt. Cole's instructions, Appellant and Deputy Fazio sat Inmate ZJ on the bench in the cell. Deputy Losciale lingered outside the door and then went to clean up blood from Inmate ZJ that he had on himself. During the struggle, Inmate ZJ's self-inflicted, preexisting cut on his right arm had reopened and begun bleeding, onto both Appellant and Deputy Losciale. At 9:36:20, Nurse Weir entered the camera view, with a medical cart. At 9:36:54, Appellant exited the cell and Deputy Horan replaced him in the cell to help control Inmate ZJ. Appellant also went to clean up the blood from Inmate ZJ that he had on himself.

Nurse Weir appeared to visually check Inmate ZJ's arm from outside the cell, as he was combative and refused a personal examination. At 9:37:40, she left the immediate area. Appellant and Deputy Losciale remained in the area but did not reenter the cell. Sgt. Cole continued speaking either to Deputies Fazio and Horan or Inmate ZJ or to all of them. At 9:44:55, Deputies Fazio and Horan exited the cell and closed the door, leaving Inmate ZJ alone so that he could calm down. Sgt. Cole and the five deputies conversed outside the cell door but at 9:46:05 the deputies dispersed. Sgt. Cole alone remained and continued speaking to Inmate ZJ through the closed door.

Subsequently, Inmate ZJ cooperated and nurse Weir, assisted by Deputies Wannamaker and Anderson, checked his arm and recommended that he receive treatment to his bleeding cut at the hospital. The deputies transported inmate ZJ to the hospital without further incident. Appellant contacted the City's workplace safety unit about potential contamination from Inmate ZJ's blood. Sgt. Cole had Inmate ZJ tested at the hospital for possible contaminants.

While awaiting the transport, Sgt. Cole debriefed Appellant about his involvement in the incident. Then at intervals during the rest of his shift, Appellant wrote his Offense In Custody (OIC) report detailing the incident, required by the Agency of deputies involved in or witness to an incident such as this one.

On August 29, 2018, Deputy Losciale complained to the Internal Affairs Bureau (IAB) that Appellant had used excessive force during the incident and thereby instigated its investigation. On November 2, 2018, Steve Franz, IAB Senior Investigator, interviewed Appellant for the investigation. At that interview, Appellant described details that were contrary to the video evidence or not in his OIC report.

Appellant described that he did not state in his OIC report that he had struck Inmate ZJ or that Inmate ZJ had grabbed him in a headlock and struck him in the face. Appellant contradicted the video evidence with statements that: (1) Inmate ZJ was knocking on the door

window, rather than punching it, (2) Inmate ZJ was not irritated or aggressive when he decided to enter the cell, (3) Inmate ZJ became agitated only after Appellant entered the cell, (3) Appellant took Inmate ZJ down because Inmate ZJ had his hands on Appellant's face, and (4) Inmate ZJ got behind him and grabbed him in a headlock from behind.

Appellant's statement to Mr. Franz now supplemented his OIC report, including: (1) after he went into the cell, Inmate ZJ grabbed and punched him, so he punched Inmate ZJ once or twice, (2) while on the floor, Inmate ZJ got behind him, put him in a headlock from behind and hit him in the face, (3) Inmate ZJ continued to struggle until he and other deputies handcuffed and placed Inmate ZJ on the bench, (4) Inmate ZJ ripped Appellant's radio off during the struggle so he could not report the incident as it occurred, and (5) he did not realize that he had struck Inmate ZJ or that Inmate ZJ had struck him until a day later when he had bruises on his face and chest.

Appellant also told Mr. Franz that he did not supplement his OIC report when he recalled the additional details to not discredit it. He believed that if he supplemented it upon returning to work several days later, he would create the impression that he had lied in it. He concluded by stating that, even in hindsight, he would not have acted differently with Inmate ZJ.

On April 29, 2019, Appellant and counsel Mallory Revel, Esq. and Erin O'Neill, Esq., met with Sheriff Patrick Firman, Chief Elias Diggins, Nate Emswiller, Brigitte Sadler, Independent Monitor Nicholas Mitchell, Gregg Crittenden, Assistant City Attorney Jennifer Jacobson and CRA Hernandez for a contemplation of discipline meeting. Counsel read Appellant's statement, that he had opened Inmate ZJ's cell door to have a face-to-face conversation, and that his OIC report lacked details, for which he took responsibility. After considering the totality of the circumstances, the Agency found that Appellant committed two violations of CSR 16-28 R and on May 20, 2019, it suspended him for 33 days, including 30 for the alleged RR 200.19 violation.

IV. ANALYSIS

A. Jurisdiction and Review

The Career Service Hearing Office has jurisdiction over this appeal pursuant to CSR 20-20 A.2. as it is a direct appeal of a suspension. The Hearing Officer is not to conduct a *de novo* review. CSR 20-56A.

B. Burden and Standard of Proof

The Appellant retains the burden of proof throughout the case to prove that the decision of the Agency was clearly erroneous and/or that the application of its disciplinary matrix was clearly erroneous. CSR 20-56A.

C. Career Service Rule Violations

1. Authority

CSR 16-28 R authorizes discipline for:

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.

The Agency alleged that Appellant violated CSR 16-28 R as it pertains to:

200.19 Performance of Duties (A-F)

Deputy sheriffs and employees shall use sound judgment and discretion in the performance of duties.

CSR 20-56 B.1. states in relevant part:

- c. Discipline shall be deemed to be "clearly erroneous," in whole or in part, in the following circumstances:
 - i. The decision, although supported by the evidence, is contrary to what a reasonable person would conclude from the record as a whole;
 - ii. If the EDOS fails to follow the applicable Departmental guidelines, rules or regulations, an applicable matrix or its associated guidelines, and absent such failure the discipline imposed would not have resulted; or
 - iii. If the EDOS otherwise exceeds his or her authority.

Subsection 13.1.4 of the Agency's Discipline Handbook (Handbook) defines Conduct:

Category D - Misconduct that: (i) is contrary to the guiding principles of the Department or interferes with its mission to provide care and custody to inmates in accordance with those guiding principles; (ii) substantially interferes with the Department's operations or professional image; (iii) involves a demonstrable risk to the safety of a deputy sheriff, an employee, a detainee, or the public; ... or (vi) involves the failure to adhere to the duties to intervene in, and/or report, any use or attempted use of force falling within this Conduct Category D.

2. Discussion

Appellant argued that the Agency's finding that he violated RR 200.19 was clearly erroneous. His principal argument was that Inmate ZJ was not aggressive and inmates routinely bang on cells doors, so it is not a sign of aggression. Appellant also argued that the Agency wrongfully determined that he acted unreasonably in opening the door as no rule regulates the opening of cell doors, it was not foreseeable that Inmate ZJ would have reacted aggressively toward him, other deputies would have opened the cell door, and his CIT training had never failed him. Last, Appellant argued that CRA Hernandez was unqualified to impose discipline as he lacked experience as a deputy sheriff.

The Agency responded to Appellant's arguments by arguing that the evidence sustained its finding that Appellant violated RR 200.19, based upon an analysis of the investigation results pursuant to applicable rules and guidelines.

The crux of Appellant's case is that Inmate ZJ was not acting aggressively when Appellant opened the cell door. Per the stipulation, Appellant agrees that the Agency's informal rule requires a deputy to call the sergeant on duty when an inmate is hostile. As aggression can be a form of hostility, this rule provides a point of reference for analyzing Appellant's actions. If Inmate ZJ met its threshold, Appellant should have called Sgt. Cole for direction, not opened the door while alone with Inmate ZJ. Appellant has always claimed his opening of the door was

appropriate. However, he has varied between alleging the need to use crisis intervention training (CIT), applicable to distressed inmates, to de-escalate Inmate ZJ, and alleging Inmate ZJ was merely confused or not understandable, but not aggressive.

Appellant's differing allegations impair his credibility. In his August 26, 2018 OIC report Appellant stated that Inmate ZJ "...was asking me something that I couldn't understand so I opened the door to talk with him..." In his November 2 interview with Mr. Franz, Appellant stated discrepancies from his OIC report as described above. In this interview, he also stated:

...he started banging on the door to get my attention. So then I went up to him and I said, Hey, what's going on? He's like, I want to get out of here. I'm getting released. I said, Okay. So I tried to explain to him through the door what, you know, what the process was. He -- he was having -- he seemed disoriented. He wouldn't -- he couldn't make eye contact with me so I opened the door. ... and I was talking to him... [Exh. 2-168. Ln. 57-68.]

I find it better for myself if -- if I open the door and talk to them, I can CIT them better and I can bring them down better and try to get them to understand where I'm coming from instead of yelling at them through the door 'cause they seem to get more agitated when you're trying to talk through the door, and I think that person to person, it kind of gives them a reassurance that, you know, you're actually there to help...It's always worked great for me...This was the only time that actually it went south. [Exh. 2-171. Ln. 138-149.]

In the April 29, 2019 contemplation of discipline meeting, Chief Diggins asked Appellant for his rationale for opening the cell door:

CHIEF DIGGINS: Deputy Trujillo, so you -- or as your attorney read in your statement, you opened the door to try to engage in CIT?

DEPUTY TRUJILLO: Yes, sir. [Exh. 2, P. 153, Ln. 89-92.]

At hearing, Appellant reverted to his explanation that he opened the door to speak to Inmate ZJ but not to administer CIT to him. His reason for doing so was that he could not understand Inmate ZJ, who made no eye contact, so it was difficult to communicate through the cell door. He did express confidence in opening the door because of his extensive training and skills in CIT. Regardless, he described Inmate ZJ as frustrated and anxious to be released but not hostile.

Under the circumstances, the better evidence is the video recordings of the Incident. Exhibits 3 and 4 show that Appellant and Inmate ZJ spoke through the cell door and that Inmate ZJ was angry at Appellant's responses. This is understandable as Appellant lacked the authority to and was not going to release Inmate ZJ on his claim that he should be released. Appellant had to retrieve custodial information about Inmate ZJ to relay it to him. Although speaking to Inmate ZJ face to face was better than speaking through the cell door, Appellant still appeared to be dissembling since he lacked the details of Inmate ZJ's release. Appellant would have been more direct with Inmate ZJ had he told Inmate ZJ that he would leave to access the custodial details, an estimate of time to do so, and that he would then return with the details.

Inmate ZJ established his hostile state when he punched the window forcefully with his arm raised so that his elbow was at chest height. His posture when he punched it placed his knuckles first toward it. This meant that his contact to the window with his knuckles would have been painful. Inmate ZJ could have avoided pain by keeping his elbow by his side and hitting the window in a hammering motion with the side of his fist outside of his little finger. Yet Inmate ZJ disregarded any such caution. He hit the window, very likely incurring pain, and promptly hit it again. Figuratively, Inmate ZJ directed his punches at Appellant as he aimed them at Appellant's face in reaction to Appellant's comments. So, Inmate ZJ clearly evidenced hostility as he expressed his anger to Appellant with violence. At this point, Appellant should have

followed the informal rule and called Sgt. Cole for direction on how, or for more information with which, to proceed. Instead, having just witnessed Inmate ZJ's violent action, he opened the door to repeat his response, and thereby invited more reaction from Inmate ZJ. Under these circumstances, Appellant's disregard of the rule showed his failure to exercise sound judgment and discretion, establishing a violation of RR 200.19.

Appellant raised other defenses that are distinct from the analysis of the facts in the Incident. One defense is that some deputies who were interviewed about the Incident said they would have opened Inmate ZJ's door. That others would have failed to use sound judgment and discretion is not a valid defense to Appellant's violation. Another defense is that CRA Hernandez lacks experience as a deputy sheriff and is thereby unqualified to judge Appellant's conduct. This argument implicates anyone involved in the disciplinary process or any appeals thereof. Taken to its logical conclusion, it would preclude the participation of any Director of Safety and designees, hearing officers, Career Service Board members, judges and justices who lack such prior employment. However, all these potential participants act pursuant to legal authority, which Appellant's argument cannot supersede. See [In re Fuller](#), CSB 39-14A, 3-4 (8/6/15); see also [In re Gale](#), CSB 02-15A, n.1 (7/21/16). Another defense is that the Agency failed to substantiate its finding that Appellant violated RR 200.19 because it did not identify the foreseeability of Inmate ZJ's harm upon Appellant's opening the door, in alleged disregard of the Handbook's Subsection 26. However, Subsection 26 requires an assessment of the "Causal Connection Between the Conduct and the Harm [i.e., the foreseeability] for Purposes of Determining the Appropriate Conduct Category," and not for determining whether misconduct occurred. So, these other defenses are unavailing.

As described above, Appellant's prompt opening of the cell door after Inmate ZJ punched it in a hostile manner at him, instead of contacting Sgt. Cole for direction on a deliberate intervention with Inmate ZJ, was a failure to use sound judgment and discretion. Therefore, Appellant failed to show that the Agency was clearly erroneous in finding that he violated CSR 16-28 R, as it pertains to RR 200.19.

V. DEGREE OF DISCIPLINE

CSR 16-41 Purpose of Discipline:

The purpose of discipline is to correct inappropriate behavior or performance, if possible. The type and severity of discipline depends on the gravity of the offense. The degree of discipline shall be reasonably related to the seriousness of the offense and take into consideration the employee's past record. The appointing authority shall impose the type and amount of discipline he or she believes is needed to correct the situation and achieve the desired behavior or performance.

Appellant argued that, should the Hearing Officer sustain the Agency's claim of his violation, its discipline of him therefor is clearly erroneous. He argued that it was not foreseeable that Inmate ZJ would inflict the harm that occurred after he opened the door, CRA Hernandez based the discipline on the incorrect impression that he failed to take responsibility for his actions, and CRA Hernandez violated Subsection 22.4 of the Handbook.

The Agency responded that it suspended Appellant pursuant to the applicable guidelines and its Matrix, and described its process therefor.

The Agency analyzed Appellant's actions during the Incident as described above. It categorized Appellant's violation of RR 200.19 as Conduct Category D, based on three parts of

its definition from the Handbook's Subsection 13.1.4, that his misconduct: (i) is contrary to the guiding principles of the Department or interferes with its mission to provide care and custody to inmates in accordance with those guiding principles; (ii) substantially interferes with the Department's operations or professional image; and (iii) involves a demonstrable risk to the safety of a deputy sheriff, an employee, a detainee, or the public.

The evidence described above supports the Agency's findings that Appellant's misconduct violated these three subparts of Subsection 13.1.4. Appellant's decision to open the cell door while alone with Inmate ZJ was a departure from the core competency of the Agency's guiding principle of safety, to protect all from harm. It simultaneously departed from the Agency's mission to provide safe and secure custody to Inmate ZJ. His decision interfered with the Agency's routine operations as it required the response from other deputies on an emergency basis and medical treatment for Inmate ZJ. Appellant's decision also exposed Inmate ZJ and all deputies who responded to a demonstrable risk to their physical safety.

The Agency determined Appellant's 30-day suspension for his RR 200.19 violation from its Disciplinary Matrix. It assessed his discipline at a Penalty Level six, the presumptive penalty for a Conduct Category D violation, where the violator has a prior violation of an equal level within a seven-year span. The Agency considered as a mitigating factor Appellant's limited disciplinary history as compared to his years of service. It considered as aggravating factors the demonstrable legal or financial risk to the Agency and the City, his decision to engage with Inmate ZJ through an open door resulting in the use of force, and his failure to acknowledge his wrongdoing for this action. After weighing the mitigating and aggravating factors, CRA Hernandez concluded that they did not justify supplanting a presumptive penalty.

Appellant's argument of the lack of foreseeability of harm by Inmate ZJ does not affect the Agency's findings. Subsection 26.3 describes the application of foreseeability, stating:

In certain instances, conduct is categorized based, in part, upon the foreseeable harm or injury that arises from the conduct (for example, conduct that foreseeably results in serious bodily injury).

The parameters of the foreseeability analysis preclude its application in this case. The Agency disciplined Appellant, among other things, for exposing others to a demonstrable risk to their safety but not for any actual harm or injury from his misconduct.

Appellant argued that he took responsibility for his actions, but the Agency erred in finding that he failed to do so, on which it improperly determined his discipline. Appellant's argument herein is misplaced as he took responsibility for his problematic OIC report, not for his RR 200.19 violation. In the May 20, 2019 Discipline Letter, CRA Hernandez already credited Appellant with the mitigating factor of "his taking responsibility ... for his inaccurate and incomplete report." But throughout the disciplinary process, Appellant denied responsibility for his RR 200.19 violation.

Appellant also argued CRA Hernandez violated Subsection 22.4 of the Handbook by considering his failure to take responsibility for his RR 200.19 violation as an aggravating factor. Subsection 22.4 states:

As a general rule, the absence of any mitigating factors should not be considered aggravating. Likewise, the absence of any aggravating factors should not be considered mitigating.

The threshold issue herein is whether Appellant's failure to accept responsibility for his RR 200.19 violation is an aggravating factor. Subsection 19.9 prefaces its list of aggravating factors with "Aggravating circumstances may include, but are not limited to" those listed. Subsection 19.9.10, which succeeds the listed aggravating factors, states:

The above potential aggravators are intended as a guide only. It is impossible to list all the circumstances that might be considered aggravating in a particular case.

Subsection 19 thus allows the Agency to consider "failure to accept responsibility" as an aggravating factor. It is well within the relevant considerations regarding discipline to merit such consideration. An "agency's reasonable interpretation of its own regulations" is entitled to deference unless the interpretation "is inconsistent with the plain language of the regulation" Rags Over the Arkansas River, Inc. v. Colorado Parks & Wildlife Bd., 360 P.3d 186, 192 (Colo.App. 2015). And this interpretation of Subsection 19 is not inconsistent with its plain language.

Assuming for argument that CRA Hernandez should not have considered the "failure to accept responsibility" as an aggravating factor because it was not so serious, this action would not be a per se failure to follow the Matrix or any applicable guidelines. The issue still would be whether Appellant showed that CRA Hernandez violated Subsection 22.4. In this case, other aggravating factors existed on which CRA Hernandez could premise Appellant's presumptive penalty. Even if no other any aggravating factors existed, CRA Hernandez could still impose a presumptive penalty consistent with Subsection 22.4's clause, "the absence of any aggravating factors should not be considered mitigating." So, Appellant did not show that CRA Hernandez violated Subsection 22.4 and that he therefore violated the Matrix or any applicable guidelines.

1. Seriousness of the proven offense

Appellant's misconduct is serious. He stipulated to the Agency's informal rule requiring a deputy to call a sergeant to help manage a hostile inmate. The Agency promulgated this rule although it has deputies expert in CIT, whom it did not exempt from the rule. Yet Appellant ignored the rule, citing a benevolent intent to assist an inmate, most commendable, but about whom he had assumed incorrect facts. He had assumed Inmate ZJ was not aggressive when in fact Inmate ZJ had assaulted deputies before. Consequently, Appellant and Inmate ZJ struck each other, Appellant and Deputy Losciale ended up with possible contamination from blood, four deputies and Sgt. Cole had to assist Appellant in an avoidable emergency, and the Agency had to provide medical attention for Inmate ZJ and test his blood.

2. Prior Record

On July 19, 2017, the Agency disciplined Appellant with ten-day concurrent suspensions (Conduct Category D, Penalty Level 5), for his violation of Full Attention to Duties, Protecting Prisoners from Physical Harm, and of Misleading or Inaccurate Statements.

3. Likelihood of Reform

Whether Appellant will reform is uncertain. He has almost 12 years of experience with limited discipline and three prior successful evaluations. However, he insists that he would repeat the same actions if confronted with the same situation. He did not justify his refusal to report a hostile inmate to Sgt. Cole. He acts oblivious to the value to the Agency of an organized intervention with a hostile inmate versus a confrontation that required other deputies to assist on an emergency basis. Yet he may accept the need to use better judgment and discretion. The Hearing Officer gives him the benefit of the doubt and does not declare Appellant as unlikely to reform.

VI. CONCLUSION AND ORDER

Considering the evidence, the Hearing Officer concludes that the Agency's suspension of Appellant was not clearly erroneous as it comports with what a reasonable person would conclude from the record as a whole; CRA Hernandez followed the applicable Departmental

guidelines, rules and regulations, and the Matrix and its associated guidelines; and CRA Hernandez did not exceed his authority. Also, the record reflected a sufficient, reasonable, and articulated justification for the Agency's suspension of Appellant, it was within the range of alternatives available to a reasonable and prudent administrator, and it was not clearly excessive. See [In re Economakos](#), CSB 28-13A (3/24/14); [In re Romero](#), CSB 28-16A, 2 (6/15/17); [In re Mancuso](#), CSB 76-17A, 4 (9/6/18).

Accordingly, the Hearing Officer **AFFIRMS** the Agency's suspension of Appellant for his violation of CSR 16-28 R as it pertains to RR 200.19.

DONE August 22, 2019.



Federico C. Alvarez
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this final order, in accordance with the requirements and limitations of CSR § 21-20 et seq., within fourteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the certificate of delivery, below. 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.