HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO
Appeal No. 01-17

DECISION AND ORDER

DARRIN TURNER, 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 Mar. 7 and May 10, 2017 before Hearing Officer Valerie McNaughton. Appellant appeared and was represented by Reid Elkus, Esq., and Lucas Lorenz, Esq. Assistant City Attorney John Sauer appeared for the Agency. John Schott, David Pacheco, Denise Van Dyke. David Gardner, Shannon Elwell, and Carla Comey testified during the Agency's case in chief. Appellant testified on his own behalf, and presented the testimony of Jeffrey Smith.

I. PROCEDURAL HISTORY

Appellant Darrin Turner appeals his Jan. 4, 2017 dismissal from the position of Deputy Sheriff for the Denver Sheriff's Department (Agency or Department) based on a use of force incident with an inmate on Jan. 28, 2016. The parties stipulated to the admission of Agency Exhs. 1, 3, and 13 – 23, and Appellant Exhs. A – H, and J – T. Exhibits 5 – 11 were admitted during the hearing.

II. FINDINGS OF FACT

Appellant has been a Deputy Sheriff with the Agency for approximately 15 years. On Jan. 28, 2016, he and Deputy David Gardner were assigned to 1-Corridor in the Downtown Detention Center (DDC), a hallway lined with cells for prisoners released from the DDC and awaiting transfer to another facility. At 12: 26 pm, Appellant and Gardner escorted three inmates from the release area to a 1-Corridor cell to wait for processing by Arapahoe County Deputy Sheriff John Schott. The deputies noticed that one of the inmates, DR, had a jail blanket under his t-shirt. When asked to surrender it, DR and a second inmate, DC, began to argue about whether DR had been given the blanket by the DDC property officer.

Appellant returned to the release area and asked the Property Officer, Deputy David Pacheco, whether he had given DR the blanket. Pacheco said no. Appellant returned to 1-Corridor and escorted DC back to the property desk, arguing heatedly with DC along the way. When they arrived at the desk, Appellant told DC there were no cameras back there. DC responded, "[g]o ahead and hit me." Gardner, who had overheard the exchange, stepped between them and told Appellant, "[f]orget about it. He's not worth losing your job over." [Gardner, 11:30 am, 1:00 pm.]

Gardner and Appellant returned DC to the 1-Corridor cell he shared with DR. Appellant stood at the cell door and continued to argue with the inmates. He then removed DR and directed him back to the release area. As they walked, Appellant shoved DR into the wall with his elbow. Gardner met them at the door to the release area, grabbed DR by the shirt, and was about to tell him that he knew Pacheco had not given him the blanket. Appellant guided DR away, and handed his glasses to Gardner with the words, "[h]old these. I don't want them to get broken." Appellant directed DR toward the property desk, a separate room to the right of the release desk. Pacheco and Release Officer VanDyke heard them arguing on the way in. Appellant said, "[d]on't call me nigger again." DR took an aggressive stance and said, "[f]uck you, let's go", and swung at Appellant. [Exh. 2-1.] Appellant grabbed DR's neck and pushed him onto the metal property desk, face up. As DR struggled, Pacheco tried to hold the inmate's wrists from the other side of the desk. A second later, Appellant punched DR in the face. Gardner, who had just placed Appellant's glasses on the release desk, headed into the property area without breaking stride. Gardner hooked his forearms under Appellant's shoulders and pulled him from the room. [Exhs. 15 – 20.] DR, still being held down by Pacheco, told him, "[f]uck you guys. Now I can sue. I'm getting paid." [Exh. 2-1; Pacheco, 10:00 am.] A camera above the property desk captured the incident on film. [Exh. 20.]

The jail video shows VanDyke reacting to the commotion in the property room with alarm. She walked around her desk and headed toward the property room, then turned back to call for assistance, hands outstretched in a helpless gesture. Just as VanDyke and another officer proceeded to the property room to respond, Gardner removed a struggling Appellant from this second confrontation, only three minutes after he had separated Appellant from DC in the same room. [Exhs. 14, 17, 18.] Gardner tried to calm Appellant down by saying something like, "[i]t's not worth it, Turner." [Exh. 7-25.] Once Appellant seemed calmer, Gardner leaned against the desk and breathed heavily. Gardner then re-entered the property area and brought DR back to his 1-Corridor cell. [Exh. 18.]

All deputies present during the incident submitted Offense in Custody (OIC) Reports. [Exh. 2.] Appellant submitted his report at 1:01 pm, a half hour after the incident, and did not include any reference to his glasses. An hour later, VanDyke printed out her report to review it. Appellant asked to read it. Appellant took a pen, crossed off the word glasses, and told VanDyke, "[y]ou don't need to put that in there." Gardner heard the remark, and later told VanDyke she should leave it in. VanDyke did not alter her report for several reasons: she had been trained to report everything she sees, it was on the jail video, and she did not believe it was right to exclude that part of her account. [VanDyke, 10:40 am.]

The Agency's Internal Affairs Bureau (IAB) investigated the event to determine if Appellant had violated any rules during the course of the incident. Ultimately, Appellant was charged with violations related to use of force, false statements, and the commission of conduct prejudicial to the department. The Civilian Review Administrator assigned a Conduct Category F to the conduct, and imposed the presumptive penalty of dismissal. Appellant filed this appeal to challenge the Agency action.

III. ANALYSIS

The Agency bears the burden to establish the asserted violations of the Career Service Rules by a preponderance of the evidence, and to show that dismissal was within the range of discipline a reasonable administrator may impose under the circumstances. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994).

A. VIOLATION OF DISCIPLINARY RULES

1. Violation of rules related to commission of a deceptive act, CSR §§ 16-60 A, L.[1]

Appellant was found to have violated the above Career Service Rules and departmental regulation RR-200.4.2 prohibiting willful departure from the truth. The Agency alleges that Appellant's statements on the following subjects were deceptive:

First, Appellant denied he was angry with the two inmates. He conceded that he was irritated with both inmates at some point, and was still "somewhat still irritated" with DR when they walked into the property area. [Exh. 9-51, -52.] The Agency contends Appellant displayed his anger by cursing at the inmates and calling DC a boy several times. Appellant emphatically denied he called DR a boy, but was not asked the same question about inmate DC. [Exh. 9-22.] He agreed he was "excited", although not angry, by both inmates calling him "nigger". [Exh. 9-23.] Gardner testified that Appellant was acting normally and was not out of control before he entered the property area, despite the abusive language from DR. [Gardner, 3/7/17, 11:57, 12:20 am.] VanDyke stated Appellant did not threaten DR. [VanDyke, 3/7/17, 10:53 am.] Inmate CC, who was in 1-Corridor being interviewed by Arapahoe Deputy Schott, testified that she believed Appellant was angry. [CC, 3/7/17, 10:57 am.] However, Gardner's testimony that Appellant was reacting in a normal manner to the inmates' hostile behavior is more convincing because it is based on Gardner's long experience with Appellant in the jail setting.

Appellant did demonstrate irritation with the two inmates during the five-minute incident. He ignored other activity in the corridor and made unnecessary trips to and from the release area. He lingered in front of their cell and re-started the argument after having resolved his issue with DC. [Exh. 9-31.] He directed DR out of the cell in order to have Pacheco tell him to his face that he did not give him the blanket. That purpose did not relate to DR's detention, since DR had already been released from the DDC. When DR swayed in front of him, Appellant shoved DR back with his left arm. On the anger continuum, Appellant appeared to be annoyed and even frustrated, but not out of control.

In addition, Appellant's characterization of his own mood as slightly irritated or excited is not demonstratively false based on the jail video or any other evidence. Appellant was questioned six months after the event, and had trouble reconstructing the incident even after viewing the video. Appellant's memory of his perception of his own

[1] CSR Rule 16 was amended on Feb. 12, 2016. Since the events upon which the discipline was based occurred on Jan. 28, 2016, the former version of Rule 16 is applicable in this appeal. Am. Comp. Ins. Co. v. McBride, 107 P.3d 973, 977 (Colo.App.2004.)

emotional state as "slightly irritated" is personal to him and may have been weakened by the passage of time or the influence of subsequent events. The Agency decision-maker did not consider the effect of the long delay on Appellant's memory. [Elwell, 3/7/17, 4:07 pm.] I find that the video and the testimony of two officers are more reliable on the issue of whether Appellant was angry than the momentary impression of the observer inmate. I also find that Appellant's statement that he was slightly irritated, as opposed to angry, was not a willful departure from the truth under the departmental rule.

Second, Appellant denied he was arguing with the inmates, and instead characterized it as "conversating", or conversing, with them. On this detail, Appellant is contradicted by Schott, Gardner, VanDyke, Pacheco, and CC, all of whom characterized Appellant's interactions with the inmates as arguing. [Schott, 9:05 am; Gardner, 11:35 am; VanDyke, 10:34 am; Pacheco, 9:40; CC, 11:06 am.] Appellant himself described the exchange as "I'm trying to outtalk them. They're trying to overtalk me." [Exh. 9-20.] Based on the video evidence and the unanimous testimony of five observers, I find Appellant denied arguing, a fact material to this investigation, with knowledge that his statement was false, in violation of RR-200.4.2.

Third, it is alleged that Appellant falsely stated that he removed DC from the cell to separate him from DR to keep the disturbance down and to counsel DC against using improper language. [Elwell, 3/7/17, 2:56 pm; Exhs. 1-12, 9-22.] The Agency claims this is false because he returned DC to the same cell after the counseling. [Elwell, 3/7/17, 2:28.] However, the video shows that it was Gardner who led DC back to the same cell. [Exh. 15, 12:24:52.] Moreover, the disturbance was caused not by a disagreement between DC and DR, but between Appellant and the inmates. [Exh. 9-20; Elwell, 2:28.] There is no convincing evidence that Appellant falsely reported his own then-existing motivation for moving DC.

Fourth, Appellant is charged with deception by stating that he took DR back to the property area in order to ask Pacheco if he had given DR the blanket. [Exh. 9-23.] Pacheco testified that Appellant asked him that question even before Appellant brought DC back to his desk. [Pacheco, 3/7/17, 9:31] However, Appellant's mistake about the sequence of events – a minor point in this context - did not render false his answer that he intended to ask Pacheco the question in the inmates' presence to resolve the blanket issue, and to counsel the inmates. Appellant told IAB he wished to confront DR with the fact that he knew the blanket was stolen. "I didn't want[DR] to question why I took the blanket from him", and so he sought to end the argument by going to the source. [Exh. 9-24, -25.] The evidence did not establish that Appellant knowingly made a false statement of material fact.

Fifth, it is said that Appellant lied when he told IAB he pushed DR to create distance as they were walking down the hall and DR kept saying, "I'm going to fuck you up." [Exh. 9-26.] The Agency claims that the real reason for the shove was his anger at DR for using insulting racial epithets. The video and witness testimony both support Appellant's version of events. The video shows that DR turned his head to Appellant and stepped closer toward him right before the push, which was just hard enough to change DR's direction. [Exhs. 14, 16, 12:26:27.] Inmate CC testified that she did not hear DR using the racial insult in the corridor. [CC, 3/7/17, 11:00 am.] Gardner observed that Appellant's behavior was normal during the escort. The video does not show angry body

language at the time of the shove. The Agency did not prove that Appellant's statement six months after the event was intentionally deceptive under the departmental rule.

Sixth, the Agency found deceptive Appellant's absolute denial that he told the inmates he would take them back to where there were no cameras. The Agency's case on this point in based on the IAB statement given by former inmate CC, who told the investigator she heard Appellant telling DR , "'I got you on camera.' I think that's what he said." [Exh. 4-7.] At the hearing more than a year after her statement, CC testified that Appellant said "something about I take you back where no camera are at." [CC, 5/10/17, 11:03 am.] Appellant forcefully denied this. "Those words never came out of my mouth." [Exh. 9-27.] Appellant also said he did not recall mentioning an area where there are no cameras, although he is aware there are no cameras in the changing area next to the property desk.[2]

Deputy Gardner testified that a few minutes before that time, he heard Appellant and DC arguing when he was at the left wall of the changing area, about 15 feet away. [Exh. 23.] Gardner heard Appellant's voice saying, "[t]here are no cameras back here". Gardner is familiar with Appellant's voice because they have worked together two to three days a week for the past three years. [Gardner, 3/7/17, 11:30 am, 1:08 pm.] The accounts of Appellant's co-worker and a disinterested prisoner indicate that Appellant made the remark on two occasions: near the property desk with DC, and in the corridor with DR. This evidence is more credible than Appellant's stated lack of recollection on the issue. I find that Appellant denied that he told DR "there are no cameras back there", or words to that effect, in an effort to deceive the Agency about a fact material to his later use of force on DR.

Seventh, the Agency claims Appellant lied when he told IAB that he shoved DR in order to create distance after DR said, "I'm gonna fuck you up" but contradicted that when he also quoted DR as saying, "if you touch me, I'm going to fuck you up." [Exh. 1-13.] When asked if DR had threatened him before, Appellant answered, "Yes. Well, I wouldn't … I don't know if you would call it a threat, but he was saying, 'Fuck the sheriffs; you're all pussies,' this and that. Just his voice and tone. If you touch me 'I'm going to fuck you up' or 'I'm gonna fuck you up.' [DR] said that all throughout the whole time while he was in there, the whole time he was inside the cell."[3] Exh. 9-26.] Appellant apparently intended to convey that DR had said both versions of the statement at some point during the encounter. These statements would not have caused the investigator to believe Appellant was claiming his shove was self-defense. Indeed, the disciplinary letter shows that the Agency did not interpret Appellant's statement as a claim that DR posed an imminent risk of harm to Appellant. [Exh. 1-16.] Appellant's statement was not intended to, and did not, deceive the Agency regarding the existence of a threat.

Eighth, it is alleged that Appellant dishonestly stated that DR had his hands clenched in a fist as they were walking through the records area, but after being shown

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[2] In fact, there is a camera just over the property desk. [Exh. 20.]

[3] Appellant also said DR made the same threat right at the time he gave Gardner his glasses "just in case he decided [DR] was going to do something to protect my eyes, protect myself." [Exh. 9-30.] This was corroborated by Gardner, who stated in his OIC report that "I heard [DR] say something about he was going to fuck Officer Turner up" when Appellant and DR were in the property and changing area. [Exh. 2-3.]

the video changed his account to, "I was thinking that his fists were clenched. Looked like they were clenched on his waist in front of him." [Exh. 9-38.] The video shows that DR's hands were in front of him out of Appellant's view, and were holding his waistband. [Exh. 18.] Appellant's testimony indicated his perception just before his use of force, a perception that could easily be checked by a review of the video. His memory of his present sense impressions from six months in the past is relevant to the reasonableness of his force decision, even though it may not reflect objective reality for many reasons. His impression that DR's fists were clenched was not shown to be clearly wrong by the evidence, and the inaccurate statement did not manifest an intent to deceive the Agency.

Ninth, the Agency alleged that Appellant lied when he denied taking his glasses off "to engage in a physical altercation", and instead claimed it was "to protect my eyes" in case DR attacked him. [Exh. 1-13.[4]]. Appellant later expressed his reasoning more broadly: he removed his glasses "so they wouldn't get broken … and so my face wouldn't get damaged" because, in the investigator's words adopted by Appellant, he believed "the situation could go south." [Exh. 9-39, 9-45.] At hearing, Appellant repeated his statement: "I took my glasses off to protect myself." [Appellant, 5/10/17, 11:41 am.]

In order to find his statement dishonest, I would have to determine that, six months after the event, he made it with knowledge that it was false. However, DR did swing at Appellant as soon as they reached the property room. [Exhs. 2-1; 9-10.] In addition, removal of his glasses did not demonstrate that Appellant intended to hit first, since the glasses would be at risk in any fight, regardless of who initiated it. The Agency therefore failed to prove that Appellant lied about his reason for taking off his glasses, or that he intended to deceive the Agency by claiming he removed his glasses to protect his eyes.

The tenth and last dishonesty allegation is that Appellant denied telling any deputy to leave out of the OIC report the detail that Appellant gave his glasses to Gardner. [Exh. 1-14.] Appellant was asked, "[d]id you ever ask a deputy not to include the fact that you removed your glasses?" Appellant replied, "[n]ot at all, Sarge." When told that two deputies reported he had asked one of them – VanDyke – to omit information from a report, Appellant said, "I absolutely don't recall that." [Exh. 9-56, -57.] Appellant maintained that position at hearing. [Appellant, 5/10/17, 12:01 pm.] Given the difference in the accounts of the three officers, the evidence must be examined further.

VanDyke wrote her report shortly after the incident, and printed it out while Appellant was in the room. VanDyke credibly testified that Appellant asked to see her report, then crossed out the word "glasses" with the words, "[y]ou don't need to put that in." [VanDyke, 3/7/17, 10:49 am.] Gardner's testimony corroborated that of VanDyke. He saw Turner hand a sheet of paper back to VanDyke and say, "'I wouldn't put that in there.' I told her, '[d]on't get yourself in trouble. Put in everything you saw and heard.'" [Gardner, 11:51.]

The most credible evidence demonstrates that Appellant did advise VanDyke to remove the reference to his glasses from her report, a detail that could well be viewed as pre-planning for an assault. Appellant later backtracked on his definitive denial by

[4] Appellant was not charged with making a false report based on his failure to mention the glasses in his OIC report. [Exh. 2-1]

stating he "absolutely" did not recall that conversation with VanDyke. Gardner and VanDyke vividly recall it, however, and both believed VanDyke would get in trouble if she followed Appellant's advice. "My feeling is that it wasn't right to try to hide it," VanDyke said. [VanDyke, 10:51 am.] I find that Appellant did say those words, and denied saying them or recalling that he did, with the intent to mislead the investigator and avoid discipline for attempting to interfere with the investigation.

In sum, the Agency proved three allegations of dishonesty. Appellant denied arguing with the inmates, denied telling an inmate there were no cameras, and denied advising VanDyke to omit an important detail from her report. In making those knowingly false statements, Appellant attempted to deceive the Agency about facts material to the investigation. As a result, the Agency proved that Appellant neglected his duty as a law enforcement officer to be truthful in his statements to investigators under former CSR § 16-60 A, and violated § 16-60L and RR 200.4.2.

2. Violation of rules related to inappropriate force, CSR §§ 16-60 A, L.

Appellant is charged with neglect of duty and violation of three departmental rules related to the use of force in the performance of his duties. The first rule is general, and prohibits a violation of any departmental rule. RR-300.19.1. The second and third rules are the specific use of force rules that Appellant is claimed to have violated. DSD Departmental Order (D.O.) 5011.1M. permits a use of force "if it is reasonable and appropriate in relation to the threat faced to accomplish a lawful [detention related] function." It also prohibits use of force as punishment, and states officers should use "departmentally approved use of force techniques that are taught in training." [Exh. 1-2.] The third states that "inappropriate force shall not [be used in] dealing with a prisoner." DSD Rules and Regulations (RR) 300.22. [Exh. 1-3.]

Appellant does not dispute that he grabbed DR by the neck and punched him in the face while DR's head was on the metal property table. [Exhs. 2-1, 9-31.] He claims that these actions were intended to control DR, who was still fighting back. [Appellant, 5/10/17, 11:35; Exh. 9-11.] The immediate circumstances with which Appellant was presented when they entered the property area is that DR continued to use an offensive racial slur and swear at Appellant. When Appellant instructed him to stop using "that word", DR responded, "[f]uck you, let's go", and swung his fist at Appellant. Appellant used his weight to press DR against the property desk. Pacheco immediately grabbed DR's left arm and face. With four hands pinning DR to the desk, the danger presented was greatly limited. Instead of holding DR's free hand to gain control of him, Appellant struck DR in the face while continuing to hold him by the neck. Seeing this, Gardner pulled Appellant away from DR and wrestled him into the release area. The Agency noted that Gardner's immediate reaction was to protect the inmate and try to calm Appellant down, rather than to assist in controlling the inmate. [Elwell, 3:38 pm.] When the event is slowed down and viewed in retrospect, Gardner's instinct appears to have been correct.

Appellant used two unapproved force methods - a neck hold and a punch to the face - instead of relying on the obvious strategy of immobilizing the prisoner against the desk, with or without the help of the three readily available deputies. Appellant is much larger and heavier than DR, who is short and slight of build, a factor that Appellant should have considered in determining whether to escalate the force being

used. His choice of punching DR in the face against a metal desk was objectively unreasonable given the minimal remaining threat presented, and raised a risk of causing a serious head injury. The inmate's upper body was bent backward onto the desk, between two deputies with hands on his arms, neck and head. [Exh. 20, 12:26:49.] Instead of de-escalating to the degree of force appropriate to the new circumstances as the departmental order requires, Appellant delivered a blow directly to the inmate's face.

Further, the chain of events show that Appellant himself created the circumstances producing the inmate's single attempted aggression. DR had been released from DCC and was safely locked up in his cell, awaiting release to the Arapahoe County deputy who was already processing other transferees. Appellant was so exercised about the blanket issue that he escorted DC to the back area to "counsel" him. Had Gardner not separated Appellant and DC, there could have been an earlier use of force incident. After separating them, Gardner advised Appellant to drop the issue and think about the risk to his job. Instead of cooling off, Appellant stood at the cell door and re-started the argument with the second prisoner, DR. Once again, Appellant opened the door and removed a prisoner on his way out in order to prove his point. Back they went to the release area. When Gardner tried to stop DR at the door and convey Pacheco's information, Appellant cut him off and guided DR to the area where he believed there were no cameras. Appellant took no steps to de-escalate what had been thus far a merely verbal dispute, thanks to the timely intervention of Gardner.

While DR's unsuccessful swing at the officer justified defensive force, Appellant engaged in offensive, unauthorized and out of proportion force on the smaller inmate. The video of the entire incident shows that Appellant was determined to confront the inmates with his knowledge about the blanket before their departure. That motive had nothing to do with the Agency's mission to provide for the care and custody of inmates, nor Appellant's own role to monitor the safety and operations of 1-Corridor. Thus, the force was applied to punish DR for his attempted theft of the blanket, DR's verbal abuse and/or DR's attempt to strike Appellant, none of which justified choking DR's neck and punching him in the face.

"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." DO 5011.1M. Absent Appellant's decisions to free DR for no legitimate detention-related purpose, continue the heated argument, and lead DR to the back, the entire incident would not have occurred. [*See* In re Fuller, CSA 46-16 (10/11/2016). Throughout, Appellant failed to use verbal persuasion, warnings, distance, or lesser force measures to resolve the verbal dispute. See In re Kemp, CSB 19-13, 4 (7/29/14). It was left to another vigilant officer to forestall more serious injuries. Gardner's earlier intervention prevented an incident with DC. However, Appellant failed to recognize Gardner's efforts as an opportunity to change the pattern of his conduct during this five-minute chain of events.

Based on these findings. It is determined that Appellant violated RR-300.19.1, which prohibits disobedience to departmental orders and other rules, as it pertains to D.O. 5011.1M (use of force) and RR-300.22 (inappropriate force). Based on this same

evidence, the Agency also proved Appellant violated his duty to provide for the safety and security of prisoners, contrary to former CSR § 16-60 A.

3. Violation of rules related to prejudicial conduct, CSR §§ 16-60 A, L, Z

The third and last category of violations relates to "conduct prejudicial to the good order and effectiveness of the department … or conduct that brings disrepute on or compromises the integrity of the City", language common to both CSR § 16-60 Z and RR-300.11.6. While former 16-60 Z. requires proof of actual harm to the department or city, the departmental order does not, grounded as it is in the principle of paramilitary professionalism intended to model a higher code of conduct for law enforcement officers. In re [Redacted], CSB 31-12, 3 - 5 (10/3/13).

The decision-maker here, Civilian Review Administrator Shannon Elwell, found Appellant's behavior throughout the incident caused observers to be "shocked, scared and dumbfounded", including inmates and deputies in the Agency and from another jurisdiction, a situation creating demonstrable actual harm to the image and reputation of the department. [Elwell, 3/7/17, 3:17 pm.]

Former inmate CC testified that she observed the argument between Appellant and an inmate. She noted that she had never seen anything like it, but did not describe her emotional reaction to what she observed. [CC, 11:01 am.] Arapahoe Deputy Schott also heard the argument. His only expressed concern was whether inmate DC was going to make the trip to Arapahoe, "because of his mouth." [Schott, 9:16 am.] Schott did not testify that he was shocked, scared, or dumbfounded by the incident. Gardner, a deputy with about the same number of years' experience as Appellant, testified that he did not think Appellant was out of control, and intervened only because he believed Appellant was allowing the inmate's abuse to "get under his skin." Gardner's only emotional reaction was confusion that Appellant handed him his glasses. [Gardner, 11:37 am, 12:10, 12:27 pm.] Inmates DC and DR did not testify. There is no evidence that the observers viewed the department or city more negatively because of this incident, and therefore no proof of the actual harm necessary to find a violation of CSR § 16-60 Z. There was also no evidence that the incident brought disrepute on or adversely affected the integrity of the city under either § 16-60 Z or RR-300.11.6. These charges are therefore not sustained.

B. APPROPRIATENESS OF PENALTY IMPOSED

The Agency established two of the three types of offenses: commission of three deceptive acts, and inappropriate force. A violation of RR-200.4.2, commission of a deceptive act, is a Category F offense under the departmental disciplinary matrix, even for a first offense. [*See* In re Roybal, CSB 44-16, 2-3 (5/18/2017) (holding that the Agency has clearly and consistently enforced the rule that deception during an investigation will result in termination)]. Inappropriate force can be a Category D – F, depending on the circumstances. [Exh. 13-92.] The Agency categorized the inappropriate force as Category F, quoting the factors listed under that category, without further evidentiary support.

At hearing, CSA Elwell further explained her reasoning as to this finding. She viewed the incident "in the totality", and found that Appellant created the situation by removing the inmate, who was securely behind the cell door and had been released from DDC custody. [Elwell, 3:26 pm.] Elwell noted Appellant shoved the compliant inmate without reason, as shown by Appellant's failure to take defensive precautions during their walk. She found Appellant's removal of his glasses was evidence that he premeditated an imminent assault on the inmate. [Elwell, 3:29 pm.] Elwell found Appellant's course of conduct was a willful and wanton disregard of the department's number one guiding principle, safety, in that Appellant did the opposite of providing a safe and secure setting. "He attacked. He provoked. He instigated. He continued to engage and to incite." [Elwell, 3/7/17, 3:49.] The evidence showed that Appellant was motivated by his own interest in showing the inmates he knew DR lied about the blanket, rather than by any legitimate detention-related function. It also showed that Appellant repeatedly took actions contrary to his duties in order to further his own interest. The end result was a hard strike to the prisoner's face against a metal desk, causing a scratch on his neck, a sore jaw for a few days, and a fist mark that lasted a week. [Exh. 5-41, 6-29.] The finding that Appellant willfully disregarded the guiding principle of safety was supported by the record. However, the Agency presented no evidence regarding Appellant's violation of any other guiding principles.

Elwell also found that the misconduct demonstrated a serious lack of integrity, ethics and character because he "continued to engage" with the inmates instead of walking away, citing again to her finding that Gardner was "dumbfounded and shocked". [Elwell, 3:47 pm.] As previously stated, that specific finding was unsupported by the evidence. Elwell's other findings as to this conduct category are merely conclusory and lack support in the evidence. [See Exh. 1-15.]

The Agency's findings that Appellant's dishonesty and inappropriate force fell into Conduct Category F are consistent with the evidence. The Agency next considered whether mitigation should be applied under the matrix and Career Service Rules.

During Appellant's 15 years of service, he has been disciplined six times, most of which were verbal or written reprimands. [Exh. A.] In 2012, the Agency imposed a 13-day suspension for conduct prohibited by law and conduct prejudicial under a stipulation and agreement. [Exhs. 1-5; A-139.] His evaluations have consistently been exceeds expectations, and he has received nine commendations for educational presentations and providing security at city festivals. [Exh. A.] During the disciplinary process and at hearing, Appellant maintained that he was defending himself against DR, contrary to the video evidence and witness testimony. The evidence showed he was dishonest to the investigator regarding three material matters. Appellant expressed no remorse or sign that he had learned from the event and would correct his conduct in the future.

The purpose of discipline is to correct inappropriate behavior or performance, if possible. CSR § 16-20. The Career Service Rules require that whenever practicable, discipline shall be progressive. CSR § 16-50. Progressive discipline "governed by due process, personal accountability, reasonableness and sound business practice" is a critical part of the City's merit system. CSR Rule 16 Purpose statement; In re Ford, *supra*, at 8-9.

Here, Appellant has had a long and successful career with the Agency. On the other hand, Appellant has been given the opportunity of progressive discipline in six prior disciplinary actions, one of which was a long suspension. Most significantly, Appellant was specifically warned by a fellow deputy that his actions could jeopardize his employment just minutes before this event occurred. In response, Appellant re-commenced the blanket argument with DR, and ordered him out of the cell for no legitimate purpose. He failed to apply the Agency's use of force rules by responding to a minimal threat by unauthorized and excessive force. Thereafter, Appellant failed to take responsibility for the natural consequences of his actions, and was dishonest in his denial of three factual events.

Based on the evidence found in the appeal, I conclude that the Agency acted reasonably in refusing to apply a mitigated penalty in this disciplinary action.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, the Agency decision imposed on Jan. 4, 2017 is AFFIRMED.

Dated this 26th day of June, 2017.

Valerie McNaughton
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board for review of this decision, in accordance with the requirements of CSR § 19-60 *et seq*., within fifteen calendar days after the date of mailing of the Hearing Officer's decision, as stated in the decision's certificate of delivery. See Career Service Rules at www.denvergov.org/csa. **All petitions for review must be filed with the:**

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

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

AND opposing parties or their representatives, if any.