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

DECISION AND ORDER

IN THE MATTER OF THE APPEAL OF:

DARRIN TURNER, Appellant-Petitioner,

v.

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

A prisoner in Denver's Downtown Detention Center ("DDC") was being escorted by Denver Deputy Sheriff Darrin Turner (Appellant) and Deputy David Gardner. They were taking the prisoner ("DR") to a release area where he would wait to be turned over to another jurisdiction. The deputies noticed that DR was attempting to leave the DDC with a souvenir of his stay, specifically, a blanket, which DR had stuffed under his t-shirt. When asked to return the blanket DR and another prisoner, DC, started arguing as to whether the blanket had actually been a gift to DR. Appellant escorted DR to speak with a Property Officer who informed them that the blanket had not been given to DR. Appellant then escorted DC back to the release area and property desk, heatedly arguing with him along the way. Appellant suggested that he and DC go to an area where there were no cameras, and DC responded that he (Appellant) should go ahead and hit him (DC). Deputy Gardner overheard the exchange, and evidently, fearing that Appellant was about to do something rash, admonished Appellant, "[f]orget about it. He's not worth losing your job over." Appellant, apparently, evaluated the situation differently.

Appellant and Gardner then escorted DC back to his cell which he shared with DR. Appellant began arguing with DR about the blanket. Appellant removed DR from his cell and escorted him back to the release area. On the walk back, Appellant shoved DR into a wall with his elbow. The two met up with Deputy Gardner. Gardner was about to tell DR that he knew his souvenir blanket had actually been stolen, but before he could, Appellant guided DR away, handed Gardner his glasses, asking Gardner to hold them because he did want them to get broken. Appellant directed DR to a property desk in a room off of the release area, arguing

with DR all the while. The argument resulted in DR taking swing (and a miss) at Appellant which, in turn, resulted in Appellant grabbing DR by the neck and pushing him onto a metal table (faceup). As another Deputy (Pacheco) was attempting to secure DR's wrists, Appellant punched DR in the face. Deputy Gardner then entered the room and had to drag Appellant from the room.

Involved and witness deputies gave statements in their mandatory reporting of the incident. In his statement, Appellant neglected to mention that he had handed his glasses to Deputy Gardner and asked him to hold them. In her statement, Deputy Van Dyke mentioned the glasses. Appellant asked to read her statement. When he saw the reference to the glasses, he crossed it out and told her that she did not need to include that in her report. Van Dyke, however, refused to alter her report per Appellant's request.

After a formal investigation of the incident, the Denver Department of Safety and the Denver Sheriff Department (Agency) discharged Appellant for lying during the investigation and for use of inappropriate force against inmate DR. Appellant appealed his discharge to a Hearing Officer. The Hearing Officer determined that the Agency proved that Appellant used inappropriate force on DR and further, that he committed three separate deceptive acts during the course of the investigation[1]. The Hearing Officer upheld the Agency's decision to discharge Appellant.

Appellant then appealed the Hearing Officer's decision to this Board. After a complete review of the record and consideration of the parties' arguments, we AFFIRM the Hearing Officer's decision.

Appellant first claims that the Hearing Officer erred in finding that Appellant lied on three separate instances during the investigation of the incident with DR.

First, the Hearing Officer found that Appellant lied when he denied he had been arguing with the prisoners. Appellant claims there is insufficient evidence in the record to support this finding. We disagree. In fact, Appellant's argument in his brief admits that there is sufficient evidence in the record supporting the Hearing Officer's finding. For example, Appellant cites the testimony of an Officer Schott who claimed he heard Appellant "bickering" with inmate DC.

[1] The Agency charged Appellant with committing ten deceptive acts. The Hearing Officer found that the Agency failed to prove seven. Proof of one deceptive act would have been sufficient to support Appellant's discharge under the circumstances.

The American Heritage College Dictionary defines "bickering" as engaging in a petty quarrel. "Quarrel" is then defined as "a cause of a dispute or an argument." Further, Appellant cites to the testimony of Deputy Pacheco who claimed to have heard loud voices arguing, though he had no idea what the argument was about. We find it indisputable and, actually undisputed, that the record of this case contains sufficient evidence to support the Hearing Officer's finding that Appellant lied during the investigation when he claimed he was not arguing with inmates.

The Hearing Officer also determined that Appellant lied to the Agency when he denied making the comment to an inmate that "there are no cameras back there."[2] The Hearing Officer, in part, based her findings on the testimony, given at hearing and under oath, by Deputy Gardner. Appellant, in his brief, offers other record testimony which could call into question Deputy Gardner's statement. But it is the Hearing Officer's responsibility to assess credibility and resolve conflicts of evidence. We cannot say that the record lacks sufficient evidence to support the Hearing Officer's finding and conclusion regarding the "no camera" statement.

The Hearing Officer also found that Appellant lied when he denied asking Deputy Van Dyke to remove from her statement about the incident, a reference to Appellant asking Deputy Gardner to hold his glasses, just before the physical altercation between Appellant and inmate DR occurred. Appellant's argument here is that there are inconsistencies in the Hearing Officer's rationale.[3] There is no dispute, however, that her conclusion that Appellant lied when he denied asking Deputy Van Dyke to alter her statement is supported by record evidenced, that being, actual statements by made by Deputy Van Dyke.

Appellant further claims that the Hearing Officer erred in concluding that Appellant violated the Agency's use of force policy and that he used inappropriate force on inmate DR. First, we find that the Hearing Officer did not misinterpret any rule or policy concerning use of force. Second, we believe the record contains sufficient facts to support the Hearing Officer's factual findings.

It is undisputable that Appellant was, as they say, itching for a fight. He almost started a fight with inmate DC. He initiated unwanted and unnecessary physical contact with DR during their walk in the hallway. He was angry with DR for using racial slurs and punched DR in the face while holding DR down on a metal table with his head on the table and Appellant's hand

[2] The subtext to this comment is that Appellant could take the inmate back to that area and rough him up and his actions would not be caught on video.

[3] This is not grounds for overturning a Hearing Officer's decision under Career Service Rules.

on DR's neck; all while DR was being controlled by at least one other deputy. We see no reason to overturn the Hearing Officer's findings and conclusions that Appellant's use of force against inmate DR was both inappropriate and in violation of policy. In addition, given Appellant's use of inappropriate force, his lies during the investigation, and his prior record, we are certain that the Hearing Officer did not err in concluding that discharge was an appropriate punishment for Appellant's misconduct.

Finally, Appellant claims that his right to confront and cross-examine witnesses was violated when the Hearing Officer did not allow him to call as a witness and question Executive Director of Safety Stephanie O'Malley. We find no error in the Hearing Officer's decision to not allow Appellant to call Executive Director O'Malley as a witness. We note that Appellant has based his legal argument primarily on the case of *McLure v. Independent School District No. 16*, 228 F.3d 1205 (10th Cir. 2000). In *McClure*, the employer attempted to discharge its employees primarily through the use of affidavits rather than live testimony. McClure, therefore, did not have the ability to cross-examine witnesses who had, in essence, testified against her because they never actually gave testimony. The Tenth Circuit found this practice to violate McClure's due process rights. Executive Director O'Malley, however, did not offer any testimony against Appellant.

In our case, Appellant was given the opportunity to cross-examine the individuals who gave testimony against him. Shannon Elwell, the Agency's Civilian Review Administrator, had been granted the authority (by Executive Director O'Malley) to be the decision-maker on Appellant's discipline. Cross examination of Ms. Elwell by counsel for Appellant did take place, and we have no doubt that it was vigorous, thorough, and competent. Appellant has pointed us to no authority which states that because Executive Director O'Malley had the right to approve or disapprove of Ms. Elwell's recommendations, that Ms. O'Malley, therefore, needed to be presented for cross-examination. In sum, we do not believe Appellant's due process rights were violated by the Hearing Officer's refusal to allow Appellant to question Executive Director O'Malley.

For all of the above reasons, the Hearing Officer's decision is AFFIRMED.

SO ORDERED by the Board on November 2, 2017, and documented this 17th day of May 2018.

BY THE BOARD:

Neil Peck, Co-Chair

Board Members Concurring:

Patti Klinge

Karen DuWaldt

Patricia Barela Rivera

Tracy Winchester