

**HEARING OFFICER, CAREER SERVICE BOARD
CITY AND COUNTY OF DENVER, COLORADO**
Appeal No. 13-11

DECISION

IN THE MATTER OF THE APPEAL OF:

MATTHEW CAROTHERS, Appellant,

vs.

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

I. INTRODUCTION

The Appellant, Matthew Carothers, appeals the termination of his employment by his employer, the Denver Sheriff's Department (Agency), on March 18, 2011, for alleged violations of specified Career Service Rules. A two-day hearing concerning this appeal was conducted on October 11, 2011 and November 9, 2011, by Bruce A. Plotkin, Hearing Officer. The Agency was represented by Robert A. Wolf, Assistant City Attorney, while Sergeant Deric Wynn served as the Agency's advisory witness. Mr. Carothers was represented by Daniel S. Foster, Esq. and Marcy L. Ongert, Esq. Agency exhibits 1- 7, 8.1 - 8.96, 8.105 - 8.106, 8.114 - 8.119, 8.148, 8.166, 8.167, 8.169 - 8.171, 9, 14, 15.20 - 15.29, 15.49 - 15.53, 15.54 - 15.57, 17.1, 17.41 - 17.83 were admitted into evidence. Appellant's exhibit A was also admitted. The following witnesses testified for the Agency: Sergeant Joseph Sanchez, Sergeant Jurgen Mohr, Major Venessie Brown, Sergeant Wynn, and Deputy Manager of Safety Ashley Kilroy. The Appellant testified on his own behalf, as did Division Chief Phil Deeds and Sergeant Charles DeNovellis. For reasons which follow, the Agency's termination of the Appellant's employment is **MODIFIED to a 10-day suspension.**

II. ISSUES

The following issues were presented for appeal:

whether Carothers violated any of the following Career Service Rules: §§ 16-60 B., E.3., L., M., Y., or Z.; and

if Carothers violated any of the aforementioned Career Service Rules, whether the Agency's decision to terminate his employment was proper under the purpose of discipline, CSR § 16-20.

III. FINDINGS

Appellant, Matthew Carothers, was employed as a deputy sheriff with the Denver Sheriff's Department from May 30, 2006, until his dismissal on March 18, 2011. The primary duties of all deputies are the care, custody, and control of inmates. In addition, Carothers' duties included inmate intake, transportation, and housing management. Carothers received consistently high ratings in his work reviews, with one "successful" rating and the remaining "exceeds expectations" or "exceptional" ratings. His supervisors characterized him as "dependable" and "makes the extra effort." [Sanchez, Deeds Testimony].

On November 20, 2009, Deputies Carothers and Phyllis Compton were assigned to pick up an arrestee, Martinez, from Denver Police Department (DPD) District Station Two. A video recording of the interior of the holding cell, where Martinez was confined, revealed the following sequence of pertinent events. Martinez was clearly intoxicated, moving slowly, unsteadily, and responding to officers in slurred speech. One officer removed Martinez' shoes, then handcuffed him, seated, to the bench. Shortly thereafter, Sergeant Jurgen Mohr entered the holding cell and questioned Martinez how he sustained abrasions on his head and fingers. Martinez told him he had a fight with his brother, and stated he suffered from dementia. Another officer entered the cell, took pictures of Martinez' injuries and brought him water in a Styrofoam cup.

Later, Martinez discovered a butane lighter in his pants pocket, and played with it for a minute. Then, he picked up the water cup, took a sip, and tossed the rest of the water toward the door resulting in a puddle on the floor below the door. He lit the cup on fire with the lighter, and let it burn until it was almost completely incinerated, leaving smoke and floating particles of burned Styrofoam in the cell.

A short time later, Carothers and Compton arrived and spoke to Martinez through the holding cell door, before they entered the cell. Martinez yelled to the deputies that he was there on a "bullshit warrant," and did not comply when Deputy Compton directed him to put on his coat.

Carothers entered the cell, carrying Martinez' shoes, while Compton remained outside of the cell. Carothers asked Martinez why there was smoke in the cell, and if he had been burning something. Martinez replied that he did not know, and that he did not have anything to burn since they had already

searched his pockets. Carothers directed Martinez to put his arms in his coat. Martinez complied, however, he continued to complain about the warrant which caused his arrest, stating that he was going to "walk on this shit." Carothers handcuffed Martinez' wrists, and directed him to stand up, face the wall, and place his hands up on the wall above his head. Martinez mumbled "I can't. I'm hurting;" however, he complied. Carothers, with a neutral attitude, searched Martinez, whose hands slid down the wall. Compton sharply ordered him to put his hands higher up on the wall, but Martinez just yelled back at her, and this exchange repeated, with Compton ordering Martinez to place his hands higher on the wall, and Martinez yelling back at her without complying. Meanwhile, Carothers found the lighter in his pants, and handed it to Compton, stating flatly, "that explains the burning shit." Carothers retrieved Martinez' shoes and began leading him to the door by the wrist, directing Martinez to walk with him. Martinez shuffled three steps, but when he arrived at the door, he stopped abruptly, looked down toward the puddle, and pulled back.

When Martinez stopped and pulled back, Carothers lost his grasp on Martinez' wrist. Carothers became annoyed, and reached back to grab the chain between Martinez' handcuffs, yelling "what the fuck are you doing? What's wrong with you?" Carothers braced to overcome Martinez' pull-back, and jerked on the handcuff chain, pulling Martinez out of the cell. The stocking-footed Martinez stumbled as he stepped through the puddle. His left foot slid forward, while his right foot splayed behind him, so that he flew, face-first, by Carothers' right side and into the wall on the opposite side of the hallway. Martinez hit the left side of his head on the wall and collapsed to the floor. Carothers was still holding the handcuffs, as he leaned over Martinez, and told him to get up, attempting to pull him to his feet. However, Martinez continued to lie on the floor moaning. Carothers and Compton noticed Martinez was bleeding from the head. Compton went for assistance while Carothers remained with Martinez. Martinez sustained a head laceration, which required nine stitches to close. DPD officers took pictures of the scene.

Police Sergeant Mohr asked the deputies what happened, and asked them to call their supervisor, Sergeant Sanchez. Compton stated Martinez had been uncooperative and, while Carothers was trying to get him out of the holding cell, he slipped and hit his head. Carothers explained that, while he was escorting Martinez out of the holding cell, Martinez pulled away from him, slipped on some water that was on the floor, and hit his head on the wall. [Exhibit 8-48]. Mohr had both deputies write statements, and he also wrote his own report. [Mohr Testimony; Exhibit 8-49 – 8-51]. Sanchez came to District Two to review the reports and to speak with both deputies. After reviewing all of the statements, and speaking with the deputies, Sanchez wrote his own report on November 20, 2009. [Exhibit 8-48].

Division Chief Phil Deeds filed a complaint against Carothers with the Internal Affairs Bureau (IAB), alleging Carothers used excessive force. [Exhibit 8-7]. On November 24, 2009, Major Venessie Brown, supervisor of Internal Affairs, assigned the case to Sergeant DeNovellis. DeNovellis conducted interviews and investigated the charges, but Brown reassigned the case to Sergeant Phil Swift on July 9, 2010, some eight months after assigning it to DeNovellis, as DeNovellis was unable to complete his investigation due to personal circumstances. Swift was unable to complete the investigation due his involvement in another investigation. Consequently, Brown reassigned the case, for the second time, from Swift to Sergeant Deric Wynn, on October 15, 2010. DeNovellis had already completed all interviews except for Sanchez, which Wynn completed. Wynn was unable to contact Martinez. [Exhibit 8-13]. He typed summaries of the interviews, wrote a summation, and submitted the investigation file to Division Chief Phil Deeds. [Wynn Testimony]. Deeds sustained the investigation findings against Carothers and set the matter for pre-disciplinary meeting in January 2011. [Exhibits 8-142; 8-148].

The pre-disciplinary meeting was re-scheduled three times, for various reasons, and was finally convened on March 3, 2011. Carothers was placed on investigatory leave the same day, [Exhibit 8-117], which was 15 months after the incident. During the 15 months of intermittent investigation, Carothers continued his normal duties, including inmate contact.

Interim Manager of Safety Ashley Kilroy, the disciplinary decision-maker, approved the termination of in Carothers' employment, effective March 18, 2011. This appeal followed in timely fashion on March 24, 2011.

IV. ALLEGED CAREER SERVICE RULE VIOLATIONS

The Agency terminated Carothers based on its determination that he violated certain Career Service Rules related to excessive use of force on arrestee Martinez on November 20, 2009, and related to Carothers' dishonesty regarding his actions toward Martinez. The outcome of the case hinges largely upon the most objective evidence: the DPD District 2 recordings of the interaction between Carothers and Martinez on November 20, 2009. [Exhibit 8-166 CD]. That disc contains views of the incident both from inside Martinez' cell, and from the hallway. A review of both views is necessary to establish what actually happened. The first alleged violation reviewed is the Agency's allegation of excessive use of force by Carothers against arrestee Martinez. The outcome of all other allegations against Carothers flow from this first determination.

A. CSR 16-60 L. Failure to observe written departmental ... regulations, policies, or rules.

An agency establishes an employee's violation of this rule by showing it provided notice to the employee of a clear, reasonable, and uniformly enforced rule, regulation, or policy, and the employee failed to follow it. In re Mounjim, CSA 87-07, 6 (CSB 1/08/09). The Agency claimed Carothers was aware of, yet failed to observe Agency limitations on the use of force, principally Departmental Order 5011.1H, the pertinent portions of which include the following.

Departmental Order 5011.1H Use of Force

Purpose: The purpose of this order is to prescribe policy and guidelines for the use of force within the Department. [Exhibit 14-5].

Policy: It is the policy of the Department 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 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. [Exhibit 14-6].

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. [Exhibit 7-3].

An officer shall use only that degree of force which is necessary and objectively reasonable under the circumstances. [Exhibit 14-17](emphasis in original).

The reasonableness of an officer's use of force is based upon the totality of the circumstances known by the officer at the moment the force is used. The force used must be objectively reasonable and appropriate to the threat posed by the suspect/inmate and the seriousness of the immediate situation. It is recognized and understood that circumstances are usually unpredictable and may change rapidly. [Exhibit 14-58](emphasis in original).

The community expects and the Denver Sheriff Department requires that peace officers use only the force necessary to perform their duties. Colorado law mandates the same and holds an officer accountable to do so in CRS 18-8-803. [Exhibit 14-48].

The force option applied must reflect the totality of circumstances surrounding the immediate situation. [Exhibit 14-25] (emphasis in the original).

The elements of proof derived from these sections include: notice of the rule; use of force that is reasonable and appropriate; and the totality of the circumstances which determine reasonableness. Carothers did not dispute his awareness of this Agency rule, nor of the uniformity of its enforcement. The dispute was twofold: whether Carothers engaged in unreasonable and inappropriate force against Martinez; and the circumstances surrounding Carothers' physical engagement with Martinez.

Kilroy testified she found Carothers violated Department Order 5011.1 H. because he faced no threat by Martinez, yet jerked him by the handcuffs, against approved Agency techniques, forcing his head into the wall opposite his cell. Carothers maintained Martinez pulled away, breaking contact so that pulling on his handcuffs, while admittedly harder than required to enforce compliance, was simply intended as a legitimate means to regain control over a resistant arrestee. Consequently, Martinez' injuries were the accidental result of his slipping while being pulled. I find the truth lies somewhere between the two positions.

In order to determine whether Carothers exceeded the permissible use of force pursuant to Agency rule, it is first necessary to determine what force is permitted. The answer is not plainly stated in one place within the rule. I find the following scattered pieces of this rule, together, form the standard of conduct.

1. Physical Force. The Agency defines physical force to include the use of manual means to compel compliance with a lawful order, or to overcome resistance. [Exhibit 14-3]. By Carothers' admission, he pulled on the chain between Martinez' handcuffs to compel compliance and to overcome Martinez' resistance to compliance. Carothers therefore used physical force as contemplated by the rule.

2. Colorado Revised Statutes (CRS).¹ CRS § 17-20-122. Justification of officer. If an inmate sentenced to any state correctional facility resists the

¹ Rule 5011.1H incorporates several state use of force statutes by reference, including (1) CRS § 18-1-707. That statute, which applies to arrest and escape situations, does not appear to apply to the current case. (2) CRS § 18-8-111. This section concerns false reporting of a crime or emergency to authorities, and appears to be inapplicable here. (3) CRS § 18-8-802. The only section under this statute which may apply here relates to dishonesty in reporting. That violation is discussed in detail below, along with other related rules. (4) CRS § 18-8-803. This section defines and criminalizes a peace officer's use of excessive force. "Excessive force" is defined as exceeding the degree of physical force permitted under CRS § 18-1-707, which, as already stated herein, relates to peace

authority of any officer or refuses to obey any officer's lawful commands, it is the duty of such officer immediately to enforce obedience by the use of such weapons or other aid as may be effectual. If in so doing any inmate thus resisting is wounded or killed by such officer or such officer's assistants, such use of force is justified...but such officer shall not be excused for using greater force than the emergency of the case demands. [Exhibit 14-29].

This rule at least partly justifies Carothers' use of force to regain control of Martinez when Martinez pulled away and broke contact. At the same time, the degree of force Carothers used to extract Martinez was more severe than necessary, considering Martinez' drunken state, and considering the situation was not an emergency. However there is no exact measure of force by which appropriate force is measured. Rather, the totality of circumstances, as described next, determines what level of force was acceptable.

3. Totality of Circumstances. The remaining factor that determines the permissible level of force depend upon the totality of the circumstances. [Exhibits 14-17; 14-21; 14-23; 14-25.] To that end, the following facts were significant:

- Martinez was drunk, and unsteady;
- Martinez threw a cup of water, which pooled near the cell door;
- Martinez was verbally resistant to commands before Carothers searched him, and while Carothers searched him;
- Carothers became aware, during his frisk of Martinez, that Martinez had used a lighter to ignite a Styrofoam cup in his cell, resulting in ash floating in the air, and a smell of burning material;
- Carothers handcuffed Martinez, hands in front;
- Martinez resisted Compton's orders;
- Martinez was in stocking feet as Carothers led him out by the wrist;
- Martinez pulled back as Carothers led him out of the cell door;
- Martinez' physically resisted Carothers by pulling back and breaking contact;
- Carothers became angry that Martinez broke contact;
- Carothers grabbed the chain between Martinez' handcuffs;
- Carothers braced himself, then pulled on the chain of Martinez' handcuffs;
- Martinez' front leg slipped forward as he went through the puddle, while his back leg splayed behind him;

officers' use force to prevent escape - something not alleged in the present case. Thus, only CRS 17-20-122 retains relevance to the present case.

Martinez' face hit the wall, gashed his forehead, and required nine stitches to close the wound;
Carothers complied with Agency requirements to seek medical assistance;
Grabbing the chain between handcuffs is not prohibited, but merely not recommended for officer safety. [Exhibit 8-93];
Sgt. Mohr, Denver Police Department District 2, who required Carothers and Compton to write reports, and viewed photos of the injuries to Martinez, found Carothers did nothing wrong and that Martinez was drunk and belligerent.

I conclude the following from the facts, above:

When Martinez broke contact with Carothers by pulling back, it was objectively reasonable to Carothers to regain control by physical force;
Carothers intent in pulling on Martinez was to regain control and not to inflict injury;
Carothers pulled Martinez harder than necessary to regain control, but Martinez was resisting;
Martinez' face-first fall into the wall was caused in part by Carothers excessive pull, partly by Martinez' unsteady, drunken state, and partly by slipping as he passed through a puddle on the hard floor.

The above conclusions are based upon the following evidence. Compton, who had no partner or other special relationship with Carothers, was the only witness to the incident. She saw Martinez pull back from Carothers, breaking contact. [Exhibit 8-70 through 8-73]. This evidence was un rebutted by the Agency. The most objective evidence, the video recording, shows Carothers lost contact with Martinez at 3:18:35:04. He then reached back to grab Martinez' cuffs, [Exhibit 8-166 @ 3:18:36:01-3:18:36:02, hallway view], strongly supporting Carothers' view that Martinez had pulled away, and caused Carothers to lose contact. Kilroy, and other Agency witnesses who advised her, stated they did not see Martinez pull away and break contact in the recording, but if he did, such would constitute defensive resistance justifying the use of force of regain control. [Kilroy cross-exam; Deeds cross-exam; Major Brown cross-exam].

The evidence for the conclusion that Carothers intended to enforce Martinez' compliance and did not intend harm appears in Exhibit 8-166 CD video sequence, hallway view, beginning at 3:17:37:01. Carothers braced, then pulled Martinez hard, but stopped pulling when Martinez cleared the door and was even with Carothers in the middle of the hallway, at 3:18:38:01. [Exhibit 8-166, hallway view]. Had Carothers intended to inflict harm, rather than enforce

compliance, it would have been more likely that Carothers would continue to pull so as to drive Martinez into the opposite wall, instead of ceasing to exert force once Martinez was out of the cell. The difference is consequential, because it represents the difference between harm resulting from an intent to inflict harm, and harm as the accidental consequence of enforcing compliance, without intending harm.

It is important to note Carothers' lack of intent to harm Martinez is one factor in the totality of the circumstances, and is not the standard by which wrongdoing is directly measured under CSR 16-60 L, since intent, under this rule, is irrelevant. In re Mounjim, CSA 87-07, 6 (CSB 1/08/09) ("To the extent the Hearing Officer interpreted this rule as requiring proof of intent before discipline may be imposed, that interpretation was incorrect. The Agency needed only to prove that there was a written policy, the employee was aware of the policy and the employee failed to follow the policy").

Carothers did not dispute he was aware of the Agency's use of force rule and policy. The most pertinent circumstances were that Martinez was resisting, but not severely, Carothers became angry, and pulled on Martinez' cuffs, unreasonably in excess of what was required to enforce compliance. Based on those factors, Carothers was in violation of the Agency's use of force rule, 5011.1 H, and therefore he violated CSR 16-60 L. His lack of intent to harm Martinez remains as a factor in the degree of discipline, below.

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

This policy is also part of Agency Order 5011.1H. Carothers' anger, swearing, and excessively hard pull were punitive in response to his perception of Martinez' non-compliance. A violation of this portion of Agency Rule #5011.1H is established.

Officers should rely on departmentally approved use of force techniques that are taught in training. Officers are responsible for justifying their actions and must report use of force incidents in accordance with departmental rules and CRS. 18-8-111 and CRS 18-8-802 to command staff personnel or a supervisory officer as soon as the situation has stabilized. [Exhibit 14-9]. Officers are responsible to ensure that medical screening is provided to any person who has been injured or alleges injury as a result of being subjected to the use of force. [Exhibit 14-11].

The only factor referred to by the Agency under this use of force policy was its determination that Carothers' pulling on the chain between Martinez' handcuffs was not an approved Agency technique. As determined above, however, the Agency reference to the practice was simply a caution

specifically aimed at officer safety. This caution does not translate to a prohibited technique. Accordingly, no violation was established here. The remaining Agency rules Carothers is alleged to have violated under CSR 16-60 L. are as follows.

Departmental Rules and Regulations:

200.4 Deputy Sheriffs and employees shall not depart from the truth, knowingly make misleading statements or falsify any report, record, testimony or work related communications.

The proof for this rule is the same as for CSR 16-60 E., regarding dishonesty. For the same reasons stated below, no violation is found here, either.

300.10 Deputy Sheriffs and employees shall not indulge in immoral, indecent or disorderly conduct that would impair their orderly performance of duties or cause the public to lose confidence in the Department.

Kilroy testified Carothers breached this rule by disorderly conduct in how he treated Martinez. No evidence was presented that the public lost confidence in the Department as a result of the incident. What remains is whether Carothers' excessive pull was disorderly performance of a duty. This term is not defined by the Agency, but is defined by the state statute, [CRS 18-9-106], each section of which is analyzed for pertinence to the present case.

(1) A person commits disorderly conduct if he or she intentionally, knowingly, or recklessly:

(a) Makes a coarse and obviously offensive utterance, gesture, or display in a public place and the utterance, gesture, or display tends to incite an immediate breach of the peace; or

Even though Carothers swore at Martinez, it obviously was not a public place.

(b) (Deleted by amendment, L. 2000, p. 708, § 39, effective July 1, 2000.)

(c) Makes unreasonable noise in a public place or near a private residence that he has no right to occupy; or

This section is inapplicable for the same reason as stated immediately above.

(d) Fights with another in a public place except in an amateur or professional contest of athletic skill; or

There was no public place involved in the incident, rendering this section inapplicable.

(e) Not being a peace officer, discharges a firearm in a public place except when engaged in lawful target practice or hunting; or

This section does not apply for the same reasons stated above.

(f) Not being a peace officer, displays a deadly weapon, displays any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon, or represents verbally or otherwise that he or she is armed with a deadly weapon in a public place in a manner calculated to alarm.

This section does not apply as Carothers was a peace officer, and did not employ a weapon. No violation is found under this Agency rule.

300.19 Deputy Sheriffs and employees shall not violate any lawful rule, duty, procedure or order.

This rule is given effect only in the absence of other more specific violations. The Agency's reference to many other, specific rules obviates application of this catchall rule.

300.20 Deputy Sheriffs and employees shall not indulge in any conduct that is contrary to Career Service Authority (CSA) rules and regulations.

This rule is given effect only in the absence of *other*, more specific Career Service Rule. The Agency's reference to other, specific Career Service Rules obviates the application of this catchall rule.

300.21 All employees of the Department shall read and obey all directives and orders issued by the Mayor, the Manager of Safety, Director of Corrections and Undersheriff, command officers or their designees that relate to the Denver Sheriff Department's duties and assignments.

This rule is given effect only in the absence of other more specific violations. The Agency's reference to many other, specific rules obviates the application of this catchall rule.

400.3 Deputy Sheriffs and employees shall give clear, concise and reasonable orders to prisoners and shall handle prisoners in a firm and fair manner.

Kilroy claimed, in conclusory fashion, that Carothers' handling of Martinez was not firm or fair. While Carothers' handling of Martinez violated other, similar rules, it is not apparent what evidence the Agency intended to prove this violation. It is improper for a hearing officer to assume the prosecutor's duty to link facts with violations. This violation is unproven.

400.4 Deputy Sheriffs and employees shall not impose or permit the imposition of humiliation, indignities or cruel and unusual punishment on any prisoner.

Carothers' anger, swearing, and excessively hard pull appear to have been punitive in response to his perception of Martinez' non-compliance with following him out of the cell, and remaining in contact. However, the question is whether Carothers' punishment was cruel and unusual in violation of Agency Rule 400.4. Kilroy testified Martinez' injuries were evidence of Carothers' use of cruel and unusual punishment.

The central inquiry in determining whether the use of excessive force against a prisoner constitutes cruel and unusual punishment does not depend on the extent of injury; rather, the core inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Wilkins v. Gaddy, 130 S. Ct. 1175, 1178 (2010). Consequently, the Supreme Court determined intent is critical. Under this test, Carothers, even though using more force than required, and in angry fashion, was nonetheless restoring control and order where a recalcitrant arrestee had been verbally and physically resistant, and broke free of contact. The evidence, for reasons already stated, does not indicate that Carothers threw Martinez into the wall, maliciously or sadistically, intending harm. Consequently, this violation is not proven by preponderant evidence.

400.6 Deputy Sheriffs and employees shall not injure or strike any prisoner except in the defense of themselves or another, or to prevent a disturbance or attempted escape, and then only using that amount of force necessary and reasonable.

Carothers' excessive force on Martinez was a proximate, if not sole cause of Martinez' injuries. The same evidence which proved Carothers' use of force was excessive, also prove this violation. Unlike Agency rule 400.6, immediately above, Carothers' lack of intent to inflict injury was irrelevant under this rule.

400.7 Deputy Sheriffs and employees shall be alert to prevent the injury of prisoners by other prisoners and shall take every reasonable precaution that a prisoner's constitutional rights are not violated by any other prisoner or by any employee.

This rule is inapplicable. If "any employee" were intended to include the employee himself, as well as other employees, it would render meaningless the rules, above, prohibiting excessive force by the employee.

The Agency's exhibits specifically incorporate Colorado use of force statutes into Agency use of force policy. The following statutes are incorporated by reference into the Agency's policies: CRS 18-8-803, Use of Force; CRS 18-1-707, Use of force in making an arrest or preventing an escape. Since Kilroy, as decision maker, did not consider those statutes, I do not consider them here.

B. CSR 16-60 B. Carelessness in performance of duties.

A violation under this rule occurs for performing an important duty poorly, where the duty was communicated in such a manner as would make a reasonably astute employee aware of its requirements. In re Mestas et al., CSA 64-07, 61-07, 62-07, 67-07, 16 (5/30/08).

The same factors which established Carothers used excessive force to compel Martinez' compliance, above, constitute a violation of Carothers' primary duty, the care of those in Agency custody. Carothers was aware of the duty of care, and his force against Martinez was excessive, and therefore careless, in violation of this rule.

C. CSR 16-60 E.3. Any act of dishonesty, which may include, but is not limited to... Lying to superiors... with respect to official duties, including work duties, disciplinary actions...

A violation of this rule is established where an employee makes any knowing misrepresentation within the employment context. In re Mounjim, CSA 87-07, 5-6 (CSB 1/08/09). Since an admission of dishonesty is unlikely, proving violations of this rule usually derive from circumstantial evidence. In re Webster, 03-11, 5 (8/09/11).

The Agency contended Carothers was dishonest with respect to three aspects of the incident: that Martinez would not keep his hands up on the wall; that Martinez pulled away from him; and that Martinez slipped on water. [Kilroy

testimony].

1. Hands on the wall. First, it was Compton, not Carothers who ordered Martinez to keep his hands on the wall and to raise them higher. [Exhibit 8-166 CD]. Carothers was occupied with frisking Martinez, and not paying attention to Martinez' hands, other than Carothers' original command to have Martinez place his hands on the wall. Martinez complied initially, then began to lower his hands. Even if Carothers had ordered Martinez to bring his hands higher on the wall, the video evidence is clear Martinez' hands did fall from their original height twice, and he disobeyed Compton's directive to raise his hands higher on the wall. This evidence is consistent with the statement that Martinez failed to keep his hands on the wall, as it could well be interpreted to mean "high on the wall." No dishonesty is found with respect to Carothers' statement about Martinez' hands on the wall.

2. Slip in the water. Some Agency witnesses stated they did not see Martinez slip in water, as alleged by Carothers. The video evidence is not directly clear on this point, as no puddle can be seen. However, the video shows: Martinez took a sip of water from the Styrofoam cup previously handed to him by DPD, then threw the remainder of the water toward the cell door; when Martinez was being led out of the cell by Carothers, he looked down at the approximate location where water would have pooled; Martinez was partly pulled off his feet by Carothers, but Carothers' explanation, that Martinez fell, because he slipped, stocking footed, on in the water, is plausible as one part of the reason Martinez fell. More objectively, Sgt. Mohr observed water in the pathway to the door so that one would have to walk in or through a puddle to get to the doorway from the bench inside Martinez' cell. For these reasons, the Agency failed to sustain its burden to prove this alleged dishonesty by a preponderance of the evidence.

3. Pulling away/Breaking contact. A careful review of the video evidence shows (a) from the cell-view: that while Carothers was leading Martinez out of his cell, Martinez stopped moving forward at the cell door and pulled his arms back; (b) from the hallway view at the same moment: that Martinez pulled back, as established by the cell view, Carothers lost contact with Martinez, and reached back to regain contact. Thus, it is more likely than not that Martinez did pull away, and that motion caused Carothers to lose his grip on Martinez' wrist. [Exhibit 8-166]. Consequently, Carothers was not dishonest in stating Martinez pulled away and broke contact.

4. Miscellaneous dishonesty. Kilroy also claimed Carothers was dishonest because Sgt. Sanchez quoted him as saying Martinez fell back, when he did not, [Kilroy testimony]. Carothers disputed making that statement. Even if he had, the statement is similar to Carothers' consistent statements that Martinez pulled back. In addition, Sanchez affirmed Carothers' written report was consistent with what he reported by phone earlier. [Exhibit 8-48]. Kilroy also claimed Carothers was

dishonest in stating Martinez fell out of his (Carothers') grip and into the wall, because Carothers forced ("slammed") Martinez' head into the wall. [Kilroy testimony]. Carothers' statement is consistent with the video evidence, as described above: Carothers stopped pulling once Martinez was in the hall, but Martinez' fall carried him past Carothers, and into the wall. This alleged dishonesty is not established. No other dishonesty was apparent from the evidence, thus no violation is found under CSR 16-60 E.

D. CSR 16-60 M. Threatening, fighting with, intimidating, or abusing employees or officers of the City, or any other member of the public, for any reason.

This rule is violated where the Agency establishes that a reasonable employee, city officer, or member of the public in the same situation as the target would have been in fear of bodily harm. In re Owens, CSA 69-08, 6 (2/06/09).

The Agency asserted Carothers violated this Rule for his use of excessive force on inmate Martinez. The rule only applies to victims who are City employees, officers, or members of the public. As I previously found, inmates are not members of the public and therefore, the rule is inapplicable to inmates, particularly as other rules specifically address inmate abuse. In re Weeks, CSA 26-09, 5 (7/20/09), *rev'd on other grounds*, City and County of Denver v. Weeks, No. 10CA1408 (Colo. App. Oct. 13, 2011); In re Webster, 03-11, 10 (8/09/11). This claim is not established.

E. CSR 16-60 Y. Conduct which violates the Rules, the City Charter, the Denver Revised Municipal Code, Executive Orders, or any other applicable legal authority.

This rule serves as a catch-all for conduct not otherwise covered by the agency's evidence under the other, more specific Career Service Rules. In re Abbey, CSA 99-09, 11 (8/9/10). Where the Agency failed to specifically assert which Rule Appellant's conduct violated, that was not already provided for under the specific alleged rule violations, this Rule is not violated.

F. CSR 16-60 Z. Conduct prejudicial to the good order and effectiveness of the department or agency, or conduct that brings disrepute on or compromises the integrity of the City.

To sustain an allegation of harm to the agency, the agency must prove the appellant's conduct hindered the agency's effectiveness, i.e., its ability to carry out its mission, or was prejudicial to the good order of the agency, i.e., evidence of actual injury to the City's reputation or integrity. In re Jones, CSA 88-09, 3 (CSB 9/29/10); In re Norman-Curry, CSA 28-07 and 50-08, 28 (2/27/09); In re Koehler, CA 113-09, 17 (4/29/10). Although the Agency clearly established that its mission was

the custody and care of inmates, the Agency failed to show that Carothers' use of force hindered this mission. The Agency failed to prove a violation of the second part of this Rule where, despite the IAB's repeated efforts to contact inmate Martinez to get his statement regarding Carothers' use of force, Martinez failed to respond to Sergeant Wynn in any way. Further, Martinez did not bring a civil suit against the City, the District Attorney did not prosecute Carothers for excessive use of force, and it did not otherwise result in negative publicity or other actual injury to the City's reputation. In re Jones, CSA 88-09, 3 (CSB 9/29/10).

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, the employee's past record, and the penalty most likely to achieve compliance with the rules, in imposing reasonable discipline. CSR § 16-20.

A. Severity of the proven offenses.

The most egregious factors were not established. The Agency failed to prove Carothers intentionally inflicted harm on Martinez, and that he lied about the incident. Those factors distinguish this case from other termination cases based on excessive use-of-force incidents where the conduct included intentional harm, and dishonesty. See In re Weeks, CSA 26-09, 5 (7/20/09), *rev'd on other grounds*, City and County of Denver v. Weeks, No. 10CA1408 (Colo. App. Oct. 13, 2011); In re Norman-Curry, CSA 28-07 and 50-08, 28 (2/27/09). On the other hand, Carothers failed to control his anger with Martinez, when Martinez broke contact. Carothers then pulled excessively hard to enforce compliance.

In addition, the Agency did not consider the incident sufficiently egregious, at the time it occurred, to remove Carothers from contact with inmates during the following 15-month investigation. Moreover, the fact that the Agency investigation took well over one year left some question about its urgency. To that end, Division Chief Deeds stated that if he believed Carothers was assaultive or abusive, he would not have let him work around inmates. Major Brown testified any deputy who intends harm to inmates would be placed immediately on investigatory leave by the Director of Corrections. Lovingier was the Director of Corrections at the time, was aware of the circumstances of the incident, yet did not put Carothers on leave. All these factors indicate the Agency did not consider the incident severe until late in its investigation, raising questions about its earnestness. Finally, Kilroy testified that, under the current rubric of discipline, proven excessive force would presumptively result in termination, but at the time of this incident, in 2009, there was no such presumption.

B. Past record.

Carothers was previously disciplined two times in the past two years, for unlawful discharge of a firearm and failure to complete an accident report, neither of which involved conduct similar to that alleged in his current case. Further, Division Chief Deeds testified that he has never seen Carothers exhibit verbal or physical abusive conduct towards inmates. Carothers' record and commendations from superiors are otherwise exemplary.

C. Penalty most likely to achieve compliance.

The Agency gave no consideration to whether Carothers may have been rehabilitated by a lesser degree of discipline. Instead, the Agency appears to have taken a zero tolerance regarding excessive force and dishonesty. While Kilroy stated excessive force, alone, justifies termination, she added that excessive force is a violation of criminal law. No criminal investigation was undertaken against Carothers.

The hearing officer must not disturb an agency's determination of the degree of discipline unless the decision was clearly excessive or based substantially on considerations which are not supported by the preponderance of the evidence. City and County of Denver v. Weeks, No. 10CA1408, at 11 (Colo. App. Oct. 13, 2011) *(add'l citation omitted)*. Based upon the findings and conclusions above, the Agency's decision to impose dismissal was clearly excessive because it was based substantially upon considerations not supported by a preponderance of the evidence, including the most grave allegations: intentional infliction of unnecessary harm to an inmate under the circumstances, and lying during the course of an investigation. Consequently termination was unjustified.

VI. ORDER

The Agency's decision to terminate the Appellant's employment on March 18, 2011 is MODIFIED to a ten-day suspension. Appellant's back pay and benefits shall be reinstated accordingly.

DONE January 5, 2012.



Bruce A. Plotkin
Career Service Hearing Officer

NOTICE OF RIGHT TO FILE PETITION FOR REVIEW

You may petition the Career Service Board to review this DECISION, in accordance with the requirements of CSR 19-60 through 19-80, within fifteen calendar days after the date this order is delivered as stated in the attached certificate of delivery. **Please note the 15-day deadline begins from the date sent from the Hearings Office, not the date you receive it.**

The Career Service Rules are available as a hyperlink at <http://www.denvergov.org/jobs/PublicNoticesandAnnouncements/CareerServiceAuthorityRuleRevisions/tabId/433593/Default.aspx>

All petitions for review must be filed with the:

Career Service Board
c/o CSA Personnel Director's Office
201 W. Colfax Avenue, Dept. 412, 4th Floor
Denver, CO 80202
EMAIL: Leon.Duran@denvergov.org

AND

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

AND

Opposing parties or their representatives, if any.

CERTIFICATE OF DELIVERY

I certify that, on January 5, 2012, I delivered a correct copy of this DECISION to the following, in the manner indicated:

Deputy Mathew Carothers, <u>mattcarothers@hotmail.com</u>	(via email);
Marcy Ongert, Esq., <u>mongert@fostergraham.com</u>	(via email);
Dan Foster, Esq., <u>Danny@fostergraham.com</u>	(via email);
Ms. Lori Uhlberg, <u>luhlberg@fostergraham.com</u>	(via email);
City Attorney's Office at <u>Dlefilng.litigation@denvergov.org</u>	(via email);
Ms. Lili Tran, HR., <u>Lili.Tran@denvergov.org</u>	(via email).

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