DenverDA
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January 7, 2015

Stephanie O'Malley, Executive Director
Denver Department of Public Safety
1331 Cherokee St., Suite 302
Denver, Colorado 80204

Dear Director O'Malley,

I am writing to you today about two issues related to the use of force investigation involving Denver Sheriff Deputy Thomas Ford. I want to alert you to my position on this case because it now appears the case may continue to draw public attention and I do not want you to be surprised that my findings are not consistent with the termination letter your office sent to Deputy Ford. I also want to share my concern about incorrect legal assertions made in that termination letter and the termination letter sent to Deputy Edward Keller.

My primary concern is the repeated reference in the Ford termination letter that Deputy Ford kicked inmate Kyle Askins in the July 13, 2014, use-of-force incident. There was an extensive and thorough investigation that looked for evidence of a kick. The commander of the DPD Internal Affairs Bureau, the commander of the DSD Internal Affairs Bureau, two of my senior chief deputies, and myself all reviewed this incident, including extensive review of the jail video, and determined *there was no kick involved in this incident*.

Page 14 of the Ford termination letter alleges: "At approximately 22:10:42, Deputy Ford kicked inmate Askin with his foot as he was on the ground. Deputy Ford then stepped over inmate Askin…" Page 16 then mentions two small bruises to Askin's chest area, and a shoulder "laceration," and footnote 3 states: "The apparent age and extent of these injuries is consistent with the finding that Deputy Ford kicked and dragged inmate Askin."

The bottom line for me is that a careful study of the video by numerous law enforcement personnel shows no proof of a kick, much less a kick to Askin's chest or shoulder area.

I encourage you to watch the video yourself, particularly from what your letter refers to as "Camera 2." I believe you will see that it shows Deputy Ford taking steps, not kicks, near Askin's lower legs before he stepped over Askin with his right leg. There is no video evidence of a kick to the chest or shoulder area.

I do not know how Shannon Elwell, Civilian Review Administrator, and Jess Vigil, Deputy Director of Safety, came to their conclusion that there was a kick, and particularly that injuries to the inmate were caused by a kick. In fact, there was never any allegation of a kick to any part of Askin's body until Ms. Elwell and Mr. Vigil repeatedly made the allegation in the termination letter.

EXHIBIT K

I refrained from contacting you about this in September when the letter was made public because I respect the fact that your disciplinary investigation differs from our criminal investigation. But this groundless allegation continues to live in perpetuity, most recently repeated by The Denver Post in an opinion piece written by Vincent Carroll on January 4, 2015. I will stand by the findings of law enforcement officers, and my staff, that Deputy Ford punched the inmate but did not kick him.

The other issue is the misapplication of criminal law in both the Ford and Edward Keller termination letters (DSD IAB Cases ## S2013-0220 & S2014-0243). I would note, first, that I understand these letters involve matters of employment law and, ordinarily, I would not bring my concerns to your attention. However, in these two cases, the letters were the subject of a news release and made widely available to the public.

Each letter purports to make certain findings of fact and determinations regarding violation of the policies and procedures of the Denver Sheriff's Department or Denver Career Service Rules. While findings and determinations of that nature are not within my statutory authority or responsibility, each letter also claims the deputies violated Colorado criminal laws. It is these assertions I bring to your attention as they can create confusion or misunderstanding of criminal law AND the role of the Department of Safety.

The Denver District Attorney is the chief state law enforcement officer for the Second Judicial District, which includes the City and County of Denver. No other officer has the responsibility for prosecuting state crimes and determining whether state charges should be filed.[1] In the Keller letter, the following language is found on page 17:

> Therefore, as Deputy Keller had no legitimate correctional purpose, nor any other justification for his actions, Deputy Keller's use of inappropriate force on inmate Hunter *constituted an Assault in the Third Degree*, a Class One misdemeanor, as proscribed by CRS 18-3-204. [Italics added.]

Thereafter, midway through the second full paragraph on page 20, this statement appears:

> Therefore, by *a preponderance of the evidence, Deputy Keller committed the crime of Assault in the Third Degree* by knowingly causing bodily injury to another, without justification. Assault in the Third Degree is a class One misdemeanor pursuant to Colorado Revised Statutes. [Italics added.]

On page 24 of the Ford letter, this statement appears:

> *Therefore, by a preponderance of the evidence, Deputy Ford committed the crime of Assault in the Third Degree* by knowingly causing bodily injury to another person, without justification. . . . As such, *Deputy Ford engaged in such criminal conduct* while on duty and under the color of his authority as a Denver Sheriff Deputy. . . [Italics added.]

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[1] Denver City Attorneys who prosecute lower level state crimes are "cross-deputized" so they may act with the authority of the District Attorney.

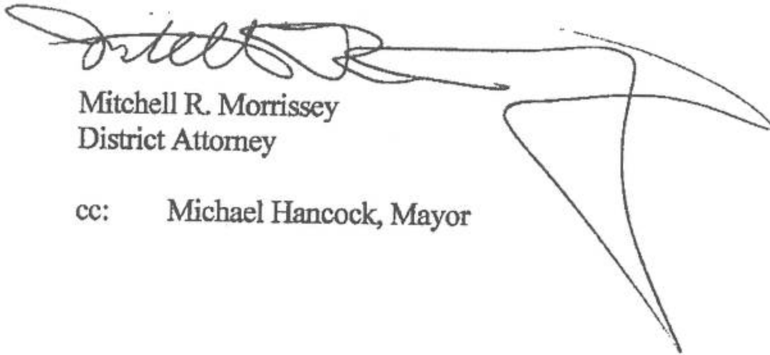
As you know, before a person may be held responsible for a state criminal offense, the charges must be **proven beyond a reasonable doubt** after considering all reasonable affirmative defenses. The standards applied by your office (a "preponderance of the evidence") belong to the civil realm.

To put it bluntly, the statements by your office that "by a preponderance of the evidence," Deputies Ford and Keller "committed the crime of Assault in the Third Degree" are not legally cognizable assertions. Your investigators can say, if they believe it to be so, that there is a preponderance of evidence showing a deputy struck an individual improperly. But to suggest someone should be held criminally responsible for the violation of a Colorado statute because "it is more likely than not" or that there is "a preponderance of the evidence" he committed the crime is a misapplication of legal doctrine and, as such, highly misleading to the public.

Again, with the likelihood that these cases may continue to be of public and media interest, my purpose is to be clear about my position and clarify the critical legal concepts at issue in these cases.

If you have any questions about my position in the Ford matter or my concerns in the two termination letters, please feel free to let me know and we can discuss them further.

Very truly yours,



Mitchell R. Morrissey
District Attorney

cc: Michael Hancock, Mayor

Stephanie Y. O'Malley
Executive Director of the Department of Safety

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January 29, 2015

Mitchell R. Morrissey, District Attorney
Second Judicial District
201 W. Colfax Avenue, Dept. 801
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Dear Mr. Morrissey,

Please be advised that I have received and reviewed your letter dated January 7, 2015 in which you share your thoughts and concerns about the administrative determinations my office has made with respect to incidents involving former Deputy Sheriff Thomas Ford and former Deputy Sheriff Edward Keller and inmates in the custody and care of the Denver Sheriff's Department (DSD). I appreciate that you have taken the time to share your perspective.

Although you made a determination not to bring criminal charges against Deputy Ford, my office conducted a thorough administrative review of Deputy Ford's conduct, as is required by the DSD's Disciplinary Code (Matrix) and Career Service Authority Rule 16-61, and came to the conclusion that sufficient evidence exists to believe that it is more likely than not that Deputy Ford's actions violated departmental policies and warranted the imposition of disciplinary penalties authorized by the Matrix and Career Service Authority Rules. Our review of the incident involving Deputy Keller compelled a similar conclusion.

As you know, when my office conducts an administrative review of an employee's conduct to determine if departmental rules and policies have been violated, we are required to evaluate the information collected during an investigation by the "preponderance of evidence" standard, rather than the "proof beyond a reasonable doubt" standard that your office applies. As set forth in our Disciplinary Letter to Deputy Ford, as a result of our administrative review, and after applying the preponderance standard, we concluded that Deputy Ford's actions violated DSD's rules and regulations pertaining to Use of Force Policy and Conduct Prohibited by Law.

In your letter you express concerns with our determination that Deputy Ford engaged in Conduct Prohibited by Law when you found no criminal law violations. However, under the Matrix, a deputy may be subject to discipline for committing a law violation, even if proof beyond a reasonable doubt that the law violation was committed does not exist, so long as sufficient evidence exists to show that there is a preponderance of evidence indicating that the law violation occurred. Appendix C, page 3, of the DSD Discipline Matrix specifically addresses the Conduct Prohibited by Law specification, and states that:

> Whenever a preponderance of the evidence shows a deputy engaged in conduct that is forbidden by a felony statute, misdemeanor statute, municipal ordinance, or other law, the Department may discipline the deputy for violating RR-300.11.1 or RR-300.11.2 (depending upon the type of misconduct). No requirement of criminal conviction: The standard of proof in an administrative setting for establishing the violation of a disciplinary rule by a deputy who has passed probation is the 'preponderance of the evidence' standard, which is a lower standard than the 'proof beyond a reasonable doubt' standard applicable in a criminal proceeding. Therefore, there is no requirement that a deputy actually be convicted of a criminal offense for the Department/Manager of Safety to find that the deputy has engaged in conduct that is prohibited by law. Nor is there any necessity for the deputy even to be arrested or charged with a crime. Refusal of criminal filing by prosecutor not dispositive: It is noteworthy that a prosecutor can refuse to file a criminal case for a variety of reasons that may not be relevant to the decision to bring a disciplinary action, such as (a) The prosecutor may believe that there is no reasonable likelihood of obtaining a criminal conviction . . . . Therefore, a prosecutor's refusal to file a criminal case does not compel a conclusion that a violation of RR-300.11.1 or RR-300.11.2 should not be charged or sustained against a deputy. Nor does a prosecutor's refusal to file charges serve as a mitigating factor in the administrative action. Thus, if the preponderance of the evidence establishes that the deputy has engaged in conduct that is prohibited by law, the Director/Manager of Safety may sustain a violation of RR-300.11.1 or RR-300.11.2 even though the prosecutor refused to file criminal charges.

Appendix C further addresses Conduct Prohibited by Law and specifically contemplates a scenario in which a deputy may be sustained for violating this rule and regulation by committing a criminal assault when it states that the Department considers "conduct involving assaultive or threatening behavior" to be serious departures from Department standards.

Additionally, in addressing the goals and purposes of disciplinary sanctions, Section 11 of the Matrix specifically notes that:

> It is important for all members of the Department and the public to understand that the goals and purposes of the discipline system are different from those of the criminal justice and civil law systems. Those systems are administered under separate rules and principles and provide for sanctions which are different from the discipline system. While some of the factors taken into consideration in the civil and criminal systems may overlap with factors considered in the discipline system, it must be remembered that the purposes of disciplinary sanctions are different from the purposes of civil and criminal law sanctions . . . . [D]isciplinary sanctions are not intended to function as 'sentences' or 'punishment' which may be available under the criminal law for deputy misconduct that rises to the level of a probable cause offense. It is not the function of the prosecutor's office, through the criminal justice system, to enforce the rules, regulations, and policies of the Sheriff Department. Nor is it necessary that a deputy be criminally convicted in order for the Department to discipline the deputy for misconduct which is prohibited by law.

Section 10 of the Matrix further states that "[t]he Department always bears the burden of proving that a violation has been committed by an accused deputy. In determining whether there is sufficient evidence to establish that a violation has occurred, the reviewer must apply the standard of proof known as 'preponderance of the evidence.' To prove something by a 'preponderance of the evidence' means to prove that it is more likely than not. Therefore, the Department has the burden of proving that the evidence establishes that it is more likely than not that the alleged violation was committed and that the accused deputy committed it."

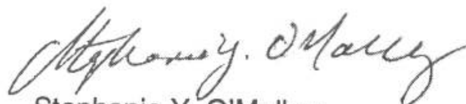
The Department of Safety has been using a "preponderance of the evidence" standard in Conduct Prohibited by Law cases in both the DPD and DSD disciplinary system for many years. Disciplinary matters where this office has sustained criminal law violations by a preponderance of evidence include those of DPD Officer Christopher Pinder, Case Number IC2013-0075, decided April 9, 2014, and DSD civilian employee Dean Altman, Case Number S2014-0056, decided May 7, 2014. In each case, the employee was charged with a criminal offense and disciplined before a criminal disposition. In each case, there were findings of fact and determinations that the preponderance of the evidence shows that the employee engaged in conduct prohibited by law. Furthermore, each case discussed the required elements of the applicable provisions of the criminal code and found, by a preponderance of evidence, that the employee committed a criminal act.

Additional examples of administrative determinations that Conduct Prohibited by Law occurred involved the actions of DPD Officers Charles Porter, Cameron Moerman, and Luis Rivera, who were all disciplined in 2010 for violations of DPD RR-115, Law Violation, as it pertains to CRS 18-3-202, Assault in the First Degree, and other related criminal charges, including Complicity and Accessory to Crime. As we recall, your office unsuccessfully prosecuted Officer Porter for the criminal assault but did not prosecute Officers Moerman and Rivera.

This office is also required to consider Career Service Authority Rules when we conduct administrative reviews of employee conduct. Pursuant to CSR 16-61, "[i]f an employee has been charged with a crime, before imposing discipline, the department or agency must determine there is a preponderance of the evidence demonstrating that the employee engaged in the conduct which forms the factual basis for the crime with which the employee is charged." The Career Service Authority Rules recognize the responsibility of my office to review actions of a deputy irrespective of whether criminal charges are ultimately proven and to impose appropriate discipline where there is a preponderance of evidence indicating that a criminal law violation was committed.

My office is firm in its belief that the disciplinary determinations involving both former Deputies Ford and Keller were appropriate and supported by the evidence.

Sincerely,



Stephanie Y. O'Malley
Executive Director of Safety

CC: Michael Hancock, Mayor