

DECISION REVERSING SUSPENSIONS

CARLOS HERNANDEZ and BRET GAREGNANI, Appellants,

v.

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

I. INTRODUCTION

A hearing in this consolidated appeal of the suspensions imposed for alleged violations specified below was held on September 18 and 19, 2017, before Hearing Officer Bruce Plotkin. Appellants Carlos Hernandez and Bret Garegnani were represented by Donald Sisson and Lucas Lorenz of the law firm of Elkus & Sisson, PC. The Agency was represented by Assistant City Attorneys Shelby Felton and John Sauer. Agency exhibits 3, 5, 6, 9, 12, 14-17, 19, and 24-30 were admitted, as were Appellants' exhibits A-D, F-H, P, Q, and T-W. The Agency called the following witnesses: Helen Ajao, Ashlee Allison, Monica Biscard, and Shannon Elwell. Appellants Carlos Hernandez and Bret Garegnani testified and presented the testimony of Smajo Civic, Sarah Bautista, Tracy Moore, Keri Adcock and Eishi Yamaguchi.

II. ISSUES

The following issues were presented for appeal:¹

- A. whether the Appellants violated either Career Service Rule (CSR) 16-60 A or L;
- B. if the Appellants violated either of the aforementioned Career Service Rules, whether the Agency's decision to suspend them conformed to the purposes of discipline under CSR 16-20.

III. FINDINGS

The Appellants, Carlos Hernandez and Bret Garegnani, have been employed as Deputy Sheriffs at Denver Sheriff's Department for nine years. Their duties include providing for the safety and security of inmates in their charge, and for the safety of the public.

Housing unit 4D in Denver's Downtown Detention Center (DDC) is known as a special management unit. Dangerous and mentally impaired inmates there require the highest level of monitoring and care.

On November 11, 2015, a 4D inmate, Michael Marshall, after refusing psychotropic medicine for his schizophrenia for several days, [Exh. 15-27], became highly unstable, tearing at his food, cramming it in his mouth, tearing up trash, smearing his feces, and pulling foam from his

¹ At the beginning of hearing Appellants also raised a motion to disqualify the decision maker. The motion was denied.

mattress. He appeared to deputies, who instructed him to clean up his cell, to be unable to comprehend their instructions. He was allowed out of his cell so that his cell could be cleaned, but he aggressively approached another inmate and was unresponsive to deputies' instructions.

Consequently, deputies escorted Marshall to the nearby sally port where he could remain separated from other inmates while the deputies had his cell cleaned. They also placed a request for Marshall to be reclassified so that he would be moved to a "camera cell" where he could be more effectively monitored, and so that emergency medication could be administered.

While the reclassification was occurring, Marshall began pacing the sally port, strewing trash from a blanket he had carried with him from his cell. He refused multiple instructions to return to the bench and to remain seated. He tried several times to walk past Hernandez toward the inmate common area. [Exh. 30 at 18:30:50].

Garegnani was assigned to another area, but was alerted to the issues with Marshall. When Garegnani looked at Marshall's actions on a remote monitor, he went to the 4D sally port to assist. He attempted to engage Marshall in conversation, but Marshall did not respond. Marshall tried to push past Garegnani to leave the sally port. To prevent a security hazard by allowing Marshall past him, Garegnani pushed Marshall lightly in the chest with one hand as Marshall tried to walk past him and, with the other hand, Garegnani pointed toward the bench and told Marshall to return there. Marshall's upper body rocked backward from the push, then he rocked forward and, seemingly unrelated to the push, fell down. [Exh. 2-7, n. 4; Exh. 30 @ 18:32:51 – 18:32:55].

At that point, other deputies who had been summoned and were observing from just outside the sally port, entered to assist with controlling Marshall as he fell to the floor.² The deputies turned Marshall onto his stomach. Four deputies each attempted to control one of Marshall's arms and legs. Hernandez attempted to control Marshall's right leg, while Garegnani applied pressure to Marshall's upper back with his hands, and temporarily Marshall's lower back with a knee. [Exh. 32 @ 18:33:18]. Marshall resisted violently, and Garegnani called for additional officer assistance.

Even with a deputy on each appendage and Garegnani pressing on Marshall's shoulder blades, they had difficulty controlling Marshall. That difficulty continued even after applying handcuffs, leg restraints, and pain compliance holds, all of which were ineffective in stopping Marshall's resistance.³ [See Exh. 2-7 to 2-8]. As Marshall continued to struggle, Garegnani continued to apply pressure to Marshall's back, and Hernandez unholstered his Agency-issued nun chucks (known in the Agency as OPNs), [Exh. 2-7, bottom, and n. 7]. He held Marshall's right foot with the OPNs while Marshall continued to struggle [Exh. 27 @ 18:38:58 et seq.; Garegnani testimony, Hernandez testimony; Civic testimony; Allison testimony]. All the while, deputies continued to yell at Marshall to stop resisting because they were there to help him. [Exh. 3-10; Exh. 5-23; Exh. 6-14; Exh. 9-7; Exh. 12-9].

When the deputies gained control of Marshall, they began to sit him up, anticipating that they would raise him to his feet to escort him back to his cell. However, Marshall began vomiting, and became limp and unresponsive. The deputies laid Marshall on the floor and

² The Agency deemed all deputies' reactions up to this point to be "reasonable, necessary and legitimate." [see In re Johnson, [pending issuance] at Exh. 2 n. 4; Exh. 2-5].

³ The deputies were uniformly surprised, given Marshall's small size, at his strength, continuing resistance, and unresponsiveness to pain-compliance. [Exhs. 3-27; 5-45; 6-14].

turned him on his side, in order to minimize aspiration of vomit. Garegnani performed a sternum rub but Marshall remained unresponsive, prompting Garegnani to call for a "medical emergency." [Garegnani testimony; Exh. 5-33]. Garegnani and several other deputies moved Marshall from under the bench in order to allow medical responders better access.

As five nurses arrived, Marshall regained consciousness and immediately struggled violently again. Deputies, who had released their holds on Marshall, again held Marshall face-down by his limbs. Garegnani held Marshall with his hands at the shoulder blades and with a knee on Marshall's pelvis in order to enable nurses to tend to him. Nurse Allison took Marshall's vital signs which appeared to be stable. She checked his lungs and determined he had bronchial spasms, which she described as tightness which occurs during hard exercise or as a result of struggle or vomiting. She asked the deputies to relieve any pressure on Marshall's back and when she looked up they had complied, and held Marshall only by his limbs. [Exh 2-8].

A nurse suggested deputies place Marshall in a wheelchair to take Marshall to the medical unit, but due to Marshall's nearly continuous combativeness, one or more deputies responded negatively to that suggestion. The responders quickly settled on calling for a restraint chair. A spit mask was placed over Marshall's mouth, due to his vomiting. Deputies secured him in the restraint chair. Marshall was not resisting and appeared unresponsive.

Nurse Allison checked Marshall's vital signs, then checked his heart with her stethoscope. She heard two and a half heart beats then silence. She checked his pupils with a light, but his pupils remained fixed. She instructed the deputies to release him from the restraint chair which they did, and lowered him to the floor.

While Allison called out instructions and pulled emergency equipment from her emergency response bag, Garegnani immediately began chest compressions. He continued for 16 minutes, except to turn Marshall on his side several times in order to allow nurses to clear vomit from his mouth, and three times for medical staff to attach defibrillator leads and obtain readings.

Emergency Medical Technicians arrived and, after attaching leads from their defibrillator, and observing, they wanted to "call it," but Garegnani continued chest compressions while nurses continued life-saving measures. Hernandez relieved Garegnani after 16 minutes, continuing chest compressions for two and one-half minutes. Marshall's heartbeat was re-established and deputies carried Marshall to the waiting ambulance. Marshall never regained consciousness and died in the hospital nine days later.

An internal investigation ensued, resulting in a recommendation of no discipline. [Exh. F]. Nonetheless, letters in contemplation of discipline issued to both Appellants, and contemplation of discipline meetings were held on March 22, 2017, for Garegnani, and the following day for Hernandez. Each attended his own meeting with legal counsel. On April 19, 2017, the Agency served notices of discipline on both Appellants, assessing a 10-day suspension on Hernandez, and a 16-day suspension on Garegnani, both signed by the decision-maker, Civilian Review Administrator Shannon Elwell. [Exhibit 24]. Their appeals followed timely on April 20, 2017.

IV. ANALYSIS

A. Jurisdiction and Review

Jurisdiction is proper under CSR § 19-10 A.1.b, as the direct appeal of a suspension. I am required to conduct a *de novo* review, meaning to consider all the evidence as though no previous action had been taken. Turner v. Rossmiller, 532 P.2d 751 (Colo. App. 1975).

B. Burden and Standard of Proof

The Agency retains the burden of persuasion, throughout the case, to prove Hernandez and Garegnani violated one or more cited sections of the Career Service Rules, and to prove its decision to suspend their employment complied with CSR 16-20. The standard by which the Agency must prove its claims is a preponderance of the evidence.

C. Career Service Rule Violations

1. CSR 16-60 A. Neglect of duty or carelessness in performance of duties and responsibilities.

The only allegations under this rule were tied to the other rules and agency policies immediately below. Elwell, the decision maker in both cases, stated this rule violation was based upon Appellants' violations of the duties under DO 5011.1M and RRs 300.19.1 and 300.22. [Elwell testimony]. I continue to assert that, when an agency's proof of violation of this rule depends entirely on proving the violation of another rule, such allegations are an impermissible piling on of charges and must be dismissed. [See In re Gale, CSA 2-15, 5 (11/23/15), *aff'd In re Gale*, CSB 2-15 (7/21/16); see also In re Mitchell, CSB 57-13, 3 (11/7/14)]. No further evaluation of this rule is required.

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

As it pertains to:

Denver Sheriff Departmental Rules and Regulations

RR 300.19. 1 – Disobedience of Rule

Deputy Sheriffs and employees shall not violate any lawful departmental rule (including CSA rules), duty, procedure, policy, directive, instruction, order (including Mayor's Executive Orders), or Operations Manual section.

As it pertains to:

Department Order (DO) 5011.1M – Use of Force

It is the policy of the Denver Sheriff Department (DSD) 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 used will be reasonable and appropriate in relation to the threat faced to accomplish

a lawful objective. In all cases, force will be de-escalated once the legitimate function is achieved or the resistance has ceased.

The DSD recognizes the value of all human life and is committed to respecting human rights and the dignity of every individual...With these values in mind, an officer shall use only that degree of force which is necessary...under the circumstances.

It is important for officers to bear in mind that there are many reasons a suspect/inmate may be resisting or may be unresponsive. A person's reasoning ability, physical limitation, language, drug interaction, or emotional crisis, are some examples. An officer's awareness of these possibilities, when time and circumstances reasonably permit, should then be balanced against the facts of the incident facing the officer when deciding which tactical options are the most appropriate to bring the situation to a safe resolution.

Law enforcement requires that at times an officer must exercise control of a violent, assaultive, or resisting individual to make an arrest, to detain a person, or to protect the officer, other officers, or members of the general public from risk of imminent harm. Each situation is unique. Sound judgment and the circumstances of each situation will dictate the force option the officer deems necessary. Officers may either escalate or de-escalate the use of force as the situation progresses or the circumstances change.

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 each situation. When reasonable under the totality of circumstances, officers should use advisements, warnings, verbal persuasion, and other tactics and recognize that an officer may withdraw to a position that is tactically more secure or allows an officer greater distance in order to consider or deploy a greater variety of force options. When a suspect is under control, either through the application of physical restraint or the suspect's compliance, the degree of force shall be de-escalated accordingly.

The force option applied must reflect the totality of circumstances surrounding the immediate situation...Officers must rely on training, experience, and assessment of the situation in deciding an appropriate force option to be applied.

The community expects and the DSD requires that peace officers use only the force necessary to perform their duties.

Use of less lethal devices shall be considered use of force and must meet the requirements of all Department policies...The less lethal devices that the DSD has authorized are listed below... OPN...The less lethal devices listed above may be used in the following situations, but are not limited to: a. controlling a defensive resistive or active aggressive person(s) or inmate(s).

As officers commissioned with authority to use force to protect and serve the public, we must reach decisions that will ensure that the lives and rights of citizens are preserved when the use of force is necessary.

It is imperative that officers have an understanding of exactly what authority they do have regarding the use of force in situations where resistance, interference, or threats to physical well-being of another or themselves exists. Officers must also be cognizant of what the limitations are with respect to their authority in use of force situations.

And as it pertains to:

Rules and Regulations (RR) 300.22 – Inappropriate Force

Deputy sheriffs and employees shall not use inappropriate force in making an arrest, dealing with a prisoner or in dealing with any other person.

Hernandez's Use of Force

The Agency has interpreted the above rules to require that deputies use the minimum degree of force necessary to control the situation. [5011.1M; Exh. 25-15; Elwell testimony]. At the same time, these use of force rules permit and require officers to control violent, resisting or assaultive inmates with force in order to protect themselves, the inmate, or others. Thus, the measure of permitted force depends on the threat faced when objectively viewed under the totality of circumstances.

The Agency's only basis for its claim against Hernandez under these rules was that his use of OPNs to control Marshall's right foot was excessive as he could have restrained Marshall with his hands. The notice of discipline specified "[w]hile the use of OPNs to control a defensive resistant inmate can be within policy, there is nothing [in] evidence in the video surveillance footage or deputies' statements to justify Deputy Hernandez's escalation from a control hold to a restraint device at that time." [referring to timestamp 18:38:58 in the video; Exh. 25-16]. The notice continued "[a]t approximately 18:38:58 there was no movement or struggle from either the deputies or inmate Marshall." The notice also stated Hernandez's application of his OPN "caused inmate Marshall to begin to resist again and [caused] the deputies to have to reengage with inmate Marshall.

The video recording was not sufficiently clear to make such conclusions and was equally susceptible to contrary interpretation. Marshall's struggling, if not constant, was cyclical according to all witnesses, including kicking his legs and moving his feet side-to-side, and bracing with his head to attempt to rise, even when held by five deputies. [Exh. 3-24, 3-25; Exh. 6-7; 6-34; 6-40; 6-41; 6-46; Exh. 12-6; 12-9; 12-12; 12-37; 12-38; Exh. 15-46; Exh. 16-4]. He struggled before and after Hernandez's use of OPNs. [Exh. 6-14 @ 258-259; Hernandez testimony; Exh. 12-10; 12-40; 12-50; 12-53]. When Bautista came to help, she assisted Hernandez with Marshall's legs. She stated Marshall's legs were difficult to control even after placing leg irons on him. [Exh. 3-6; 3-9; 3-10]. Deputy Phuvapaisalkij ("Pouva") told IA that Marshall resisted with extraordinary force, requiring additional force to control him even when five deputies were on top of him. Even then, pain compliance holds were ineffective, according to Pouva. [Exh. 12-21, 12-31. In addition, the use of leg irons does not prevent leg movement, as there is a length of chain between the cuff, as for handcuffs, but longer, which would allow an inmate to walk, and also to kick. [See Exh. 3-29; 6-41]. Deputy Civic also felt compelled to use OPNs to control Marshall's leg based on his resistance. He stated Marshall did not respond to the OPNs, so he applied more force with them, but they broke. [Civic cross-exam].

It was unreasonable, based on the video evidence alone, to conclude Hernandez's application of his OPNs caused Marshall's resistance. It was well-documented by those present, and comparing those statements with the video time stamps, that Marshall strongly resisted both before and after the use of OPNs. [Exhibit 16-23 @ 1025-1027; 5-38; 6-42]. Adcock, who was directly observing the scene as on-site supervisor, noted the deputies were having difficulty controlling Marshall's legs and feet. [Exh. 1-13]. In viewing the video evidence for the Agency, Yamaguchi, who the Agency consulted as an expert in the use of force before assessing

discipline, determined Marshall was still resisting when Hernandez applied the OPNs, and such application was proper. [Exh. T-24-26].

Asked for his opinion whether the Appellants' actions, from the very beginning to the very end of the video, were reasonable and appropriate, Yamaguchi concluded "Yes, sir, most definitely, I have zero concerns about anything they did. I was expecting to see something different. Actually, I'd love to have the video just for training..."

For these reasons, Ewell's conclusion is not more persuasive by a preponderance of the evidence.

Another basis for Ewell's conclusion that Hernandez's use of OPNs was excessive was her determination that, when Deputy Bautista took over holding Marshall's leg from Hernandez, she held Marshall's leg with her hands without difficulty. This accusation is not persuasive since Bautista told IA she pinned one of Marshall's legs with both her shin and her hands, indicating she used significant force. [Exh. 3-25, 3-26]. That two deputies were holding Marshall's legs even after placement of leg irons could well indicate Marshall was resisting with significant force, which, in turn, could justify the use of OPNs. Civic, Hernandez, Garegnani, and Bautista all affirmed their surprise at the strength of Marshall's resistance.

In addition, when the other deputies terminated their holds on Marshall, Hernandez re-holstering his OPNs. [Exh. 27 @ 18:43:23-18:43:45]. That action could indicate Hernandez timely de-escalated his use of force in accordance with the cessation of resistance by Marshall. [Elwell testimony; see Exh. 30 @ 18:43:26-18]. Moreover, after holstering his OPNs, Hernandez then used only his hands to control Marshall's legs along with Bautista. [18:43:45-18:45:51].

Elwell claimed at hearing that Hernandez's application of OPNs caused unnecessary pain to Marshall, but the only possible basis for that conclusion, the video evidence, does not support that conclusion. It was equally plausible that Hernandez applied the OPNs in response to Marshall's continued resistance. One explanation is not more likely than the other. Moreover, deputies uniformly stated that, even with pain compliance holds, Marshall continued to resist and appeared not to feel any pain. [Exh. 12; Hernandez testimony; Civic testimony; Exh. 3].⁴ Pouva also stated he controlled Marshall's head because he was concerned Marshall would bite one of the nurses. [Exh. 12-37].

Yamaguchi was asked what was reasonable and appropriate force for an inmate who was having a psychotic episode. He replied such an inmate cannot understand commands, will inevitably fight, and requires pain compliance. [Exh. T-15 to T-16].

For all the reasons stated immediately above, the Agency's evidence was not persuasive, by a preponderance of the evidence that Hernandez used excessive force on Marshall in violation of DO 5011.1M or RR 300.22. It was at least as likely that Hernandez's use of force was reasonable and appropriate under the circumstances. The preponderance of evidence, above, demonstrates Hernandez's use of OPNs on Marshall conformed to its permissible use of controlling a defensively resistive or actively aggressive inmate under DO 5011.1M, and in did not result in a violation of RR 300.22. Consequently, no violation of CSR 16-60 L was established by the Agency as regards Hernandez.

⁴ This conclusion is based on statements of deputies who had voluntarily subjected themselves to pain compliance tools such as OPNs and found, as soon as applied, they felt so much pain that they had no option but to comply. [Civic testimony]. Marshall's continued resistance, therefore, suggested he did not feel pain as some suggested. [Exh. 12-15].

Garegnani's Use of Force

The Agency claimed Garegnani violated the same rules as Hernandez for applying excessive pressure to Marshall's "head and neck area" under circumstances including: Marshall was heavily restrained; Marshall was having difficulty breathing ("gasping for breath"); Marshall was unconscious; and Garegnani continued to apply pressure on Marshall even after nurses told him to release pressure on Marshall's upper body because they feared Marshall might aspirate on vomit. It was unclear if the Agency's findings that Garegnani placed his left knee on Marshall's pelvis was considered a violation of any of the above-cited rules. [See Exh. 24-15]. The pertinent factors in the totality of circumstances include the following.

1. While the evidence affirms, as alleged by the Agency, that deputies handcuffed Marshall and placed leg restraints on him, the evidence also affirms that, even after the restraints were applied, he continued to struggle significantly. [Exh. 3; Exh. 5; Exh 6; Exh. 12; Exh. 30; Garegnani testimony; Hernandez testimony].

2. Allison, who was right next to Garegnani as she tended to Marshall, gave a statement to the Agency's Internal Affairs Bureau which refuted the Agency's conclusion that Garegnani's pressure on Marshall caused his breathing difficulties. IAB asked "was any of that pressure [on Marshall's back] interfering with his ability to breathe; from what you saw?" She replied "No, cuz he was breathing for me... before that point." [Exh. 15-33], and later, in response to being asked "[w]as there ever any call out from the Sheriffs or anything from inside the room where Mr. Marshall was... that indicated he was having difficulty breathing?" Allison replied "not that I remember, cuz we would have gone right back in and reassessed him again." [Exh. 15-36]. Allison told IAB that Marshall developed breathing difficulty, but denied that difficulty arose because of the pressure Garegnani exerted on Marshall. Rather, Allison asked for hands to be removed from Marshall's back because she was concerned that deputies' hands on Marshall's torso, in general, might interfere with her ability to take medical assessments of his condition or might interfere with Marshall's breathing, as seen in this exchange:

Question: [A]t that time, do you know if pressure is being applied on his back or anywhere that was interfering with his breathing?

Allison: No. There shouldn't have been because I can't do my assessment very well. [After which Allison drew a picture to show where on Marshall's torso she takes various assessments of his condition].

...

Question: [T]hen after you heard the bronchial spasms... tell me what interactions [you had] with the deputy sheriffs.

Allison: I just reiterate this: make sure there's no pressure on his back, in case there was, or clear his back, stay off his back cuz there's breathing issue. And then I tell them that we need to get him up, so I can listen to him better and so he can breathe easier.

[Exh. 15-34, 15-35] [emphasis added].

Nothing in that exchange suggested that, after Allison determined Marshall had bronchial spasms, she connected Marshall's breathing difficulties with pressure exerted on Marshall by Garegnani.

3. When Allison determined Marshall might have difficulty breathing and she asked deputies to make sure no hands were on Marshall's back, she looked up and saw they complied immediately, as no hands were on his back. [Exh. 15-35].

4. Nurse Chavez, who was next to Allison and Garegnani, told IA Garegnani held only Marshall's shoulder to control him. [Exh. 14-19 to 14-20]. Chavez specified Garegnani used "just enough [pressure] to keep [Marshall] from hurting himself and he was gonna kick or [bang his head]." [Exh. 14-22].

5. Both before and after Marshall became unconscious, Garegnani took measures that showed his concern for Marshall's well-being, including: talking to Marshall in the sally port to try to have him comply with verbal commands even after Marshall fails to comply; when using force initially, lowering Marshall to the sally port bench while holding the back of his head [Exh. 30 @ 18:32:56]; lowering Marshall to the floor carefully [*Id.* at 18:32:58-18:33]; using as little weight as possible to control Marshall [Exh. 5-7]; performing a sternum rub on Marshall when he first became unconscious; moving Marshall from underneath the bench to enable nurses easier access to him [Exh 5-6; 5-23]; and, most significantly, even after struggling to control Marshall, performing chest compressions on Marshall almost continuously for sixteen minutes and continuing even after responding Emergency Medical Technicians argued for stopping. [Exh. 5-24 @ 287-305; 590-611; Exh. 10-38].

6. Yamaguchi has been a trainer on the use of force for the Agency for six years, and also is assigned to the Emergency Response Team for the Agency. [Exh. T-2, T-3]. After viewing the video recording of the incident he found both Appellants' actions were reasonable and appropriate under the Agency's use of force policy, and he went further by asking for a copy of the video in order to show in training sessions how the use of force policy should be implemented. [Elwell cross-exam; Exh T]. Yamaguchi stated when an inmate is violently resisting, a knee on the pelvis or the shoulder is important to keep such inmate flat to prevent him from rising to a combat position. [Exh T-16 through T-19]. After viewing Marshall's unresponsiveness followed by new combativeness, Yamaguchi said the safest position for officers and inmate is to place him back on the ground in a controlled prone position. [*Id.* @ 21].

Elwell relied heavily on Nurse Ajao's IA statement and testimony that she told Garegnani to release pressure on Marshall when she feared he might aspirate, and her recollection that Garegnani refused. [Exh. 18:41:23]. First, it is not certain by a preponderance of the evidence that she gave that instruction. Other staff who were near Ajao did not remember her making such a statement. [Exh. 15-48; Allison testimony]. Also, as noted above, deputies testified, and their supervisors affirmed, unanimously, they used only enough pressure to contain Marshall's significant resistance.

Even if Ajao did make such a statement, she did not know how much (or how little) pressure Garegnani was applying. [Ajao cross-exam]. Also, Allison stated as soon as she asked all deputies, presumably including Garegnani, to release any pressure on Marshall's back, they complied. [Allison testimony; Exh. 15-50], obviating Ajao's stated concern that Garegnani refused and her inference that Garegnani's application of pressure might have caused Marshall to aspirate vomit, or limited his breathing.

Deputies, including Garegnani, re-applied pressure when Marshall began resisting forcefully again after the first time he became unconscious. Such re-application of pressure to Marshall's upper back was appropriate under the above policies and orders concerning use of force, since the safety of responding staff takes priority. "Law enforcement requires that at times an officer must exercise control of a violent, assaultive, or resisting individual to make an arrest,

to detain a person, or to protect the officer, other officers, or members of the general public from risk of imminent harm." [D.O. 5011.1M]. Allison affirmed nursing staff is unqualified to assess the amount and kind of pressure that should be exerted on a combative inmate, [Exh. 15-51], and Ajao was unable to speculate whether Garegnani's force on Marshall seemed excessive beyond that required to restrain a violent inmate.

It was revealing that the notice of discipline decried Garegnani's pressure on Marshall's "head and neck area" as opposed to specific places on one or the other, or both. The reason for the vague phrase becomes clear in reviewing the video, in which Marshall is barely or not at all visible as the camera view was obscured by the deputies holding Marshall. Based on that limited view, it was not possible to determine where Garegnani applied pressure, other than somewhere on Marshall's upper body.

The preponderant evidence indicates Garegnani's control holds on Marshall's upper body and pelvis were unrelated Marshall's vomiting or aspiration. [Exh. 16-26 @ 1134-1140]. Bisgard noted that, when she first arrived, Marshall was being held down, but his face was to the right side. She also observed that after Marshall vomited the first time, he was not having difficulty breathing. [Exh. 17-12, 17-13]. Nurse Chavez stated Garegnani used only enough force to keep Marshall from hurting himself. [Exh. 14-22].

As stated above, Allison's testimony contracted that of Ajao who said she asked Garegnani to release pressure on Marshall's head and neck and was "not pleased" that Garegnani refused when she asked him. [Exh. 26-28 @ 18:40:50-41:30]. Elwell did not state why she found Ajao's testimony more credible than that of Allison, and I find no reason to find Allison any less credible. In addition, other factors fail to establish Garegnani unduly continued to apply pressure on Marshall after being told by a nurse or nurses not to. In addition to Allison's testimony the Agency's rules make it clear that, when faced with a crossroads of safety and medical concerns, safety is paramount. [Exh. 19-2; 19-9]. This is only logical, as all staff who were present, including both nurses and deputies, uniformly stated Marshall was resisting even after nurses arrived, so that for Marshall's safety, deputies' safety, nurses' safety, and to enable nurses to tend to Marshall, deputies would be required to restrain Marshall who was resisting violently.

Elwell also testified Garegnani should have allowed Marshall to move his head freely so as to avoid the danger of aspirating vomit that pooled on the blanket under his head. The preponderance of evidence, beginning with the video recording, and including statements of all present, does not support the conclusion that Garegnani held Marshall's head in his own vomit, or prevented Marshall from breathing. Moreover, all deputies who were present were concerned that Marshall's significant resistance included a good chance breaking free, and spitting or excreting vomit onto staff. [Garegnani testimony, Exh. 5-12; Hernandez testimony, Exh. 6-34; Civic testimony]. Thus, even if the evidence proved Garegnani held Marshall's head, such restraint was reasonable and appropriate to "exercise control of a violent, assaultive, or resisting individual to ... protect the officer, other officers, or members of the general public from risk of imminent harm." [DO 5011.1M].

Elwell also determined Garegnani could have controlled Marshall without using his knee on Marshall's torso. [Elwell testimony; see also Exh. 24-15]. First, it was unclear if that action was a basis for discipline. Also, Elwell was alone in that assessment. Based on the preponderance of the evidence, the safety of responders required more than handholds to subdue Marshall for his own safety and that of responding nurses and officers. The Agency's own expert in the use of force concluded all actions taken were appropriate under the circumstances, and responders were uniform in stating Marshall was exceedingly difficult to control. In addition to all other

evidence, the Agency's own IAB, after reviewing the evidence, declined this case for further action. [Exh. F].

For reasons stated above, the Agency failed to establish that Garegnani's use of force on Marshall was unreasonable and inappropriate under the circumstances. The same evidence indicates he used only the minimum degree of force to carry out his duty to control a combative inmate while protecting both the inmate and responders, including nursing staff. Consequently, the Agency failed to prove Garegnani violated CSR 16-L, via RRs 300.19.1, 300.22, or DO 5011.1M by a preponderance of the evidence.

V. DEGREE OF DISCIPLINE

When no rule violation is established, discipline must be reversed. [*In re Rolando*, CSA 40-15, 9 (1/26/16); see also *In re Underwood*, CSA 55-15 (4/29/16)]. Had the Agency established one or more of the alleged violations, extraordinary mitigation would be required under the circumstances. Neither had any prior discipline; both attempted to talk to Marshall to persuade him to comply with lawful orders and, when discovering those efforts were unavailing, used only that force required to prevent harm to responders; when Marshall's heart stopped, both Appellants, and Garegnani in particular, engaged in extraordinary measures to save Marshall's life, even when told by outside medical responders to cease resuscitative measures.

VI. ORDER

The Agency's 10-day suspension of Deputy Carlos Hernandez is reversed. The Agency's 16-day suspension of Deputy Bret Garegnani is reversed.

DONE November 3, 2017.

A handwritten signature in black ink, reading "Bruce A. Plotkin" with a stylized flourish at the end.

Bruce A. Plotkin
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
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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.

Certificate of Service

I certify that, on, November 3, 2017, I emailed a correct copy of this Decision to the following:

Donald Sisson, Esq., dsisson@elkusandsisson.com
Elkus & Sisson, supportstaff@elkusandsisson.com
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A handwritten signature in black ink, appearing to be "RHR" followed by a flourish, positioned above a horizontal line.