

Dep't of Correction v. Saint-Phard

OATH Index No. 172/11 (Nov. 23, 2010)

Respondent, a correction officer, found to have used excessive force by dispersing chemical agent within three feet of an inmate whose hands were behind his back and by then placing the inmate in a chokehold while taking him down to the floor. Penalty of 60-days suspension recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
-against-
STANLEY SAINT-PHARD
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding referred by the petitioner, the Department of Correction, pursuant to section 75 of the Civil Service Law. Petitioner alleges that on October 16, 2008, respondent, a correction officer employed at the George Motchan Detention Center ("GMDC"), used impermissible force against an inmate, Eric Smith, by dispersing a chemical agent in the face of the inmate, whose hands were behind his back, and then placing the inmate in a chokehold. Also alleged is that on October 27, 2008, respondent submitted a use of force report that was late, false and misleading.

At trial, petitioner presented the testimony of five witnesses, including inmate Smith. Respondent testified in his own behalf and also presented the testimony of another correction officer. For the following reasons, I find that the charges are sustained and recommend that respondent be suspended for 60 days.

ANALYSIS

This incident took place on October 16, 2008, within the 4 main housing area at GMDC, which is a mental health observation unit. Mr. Smith was assigned to the house detail and was asked to clean up the area close to the A station. The area needed cleaning because another inmate had recently thrown a liquid, probably medicine, at a correction officer, which had gotten on the floor and wall of the A station (Flemister: Tr. 41; Smith: Tr. 136; Saint-Phard: Tr. 170). Mr. Smith was using the sink in the slop sink area, near the A station, to fill up a bucket to clean the area with a mop. Respondent, who was assigned as part of the response team to the earlier incident, entered the slop sink area and told Mr. Smith to return to his cell to “lock in.” After some conversation, the nature of which is disputed, respondent dispersed oleoresin capsicum (“OC”) spray toward respondent’s face. Mr. Smith started to leave the room; respondent grabbed him and walked him to the front of the “A” station, where he placed Mr. Smith with both hands against the A station wall. When Mr. Smith started to take one arm off the wall, respondent forcibly brought him to the ground and restrained him. The parties dispute whether the use of the OC spray and the subsequent take-down were permissible under the use of force directive, directive 5006R-C, as well as the directive governing the use of chemical agents, directive 4510R-E.

Petitioner asserts that the use of OC spray was unjustified because Mr. Smith was not resisting when sprayed and because respondent was closer than three feet to the inmate, the maximum distance required for the dispersal of a chemical agent. Respondent disputes that the inmate was compliant and asserts that the inmate moved, thus causing the dispersal to be within a three feet radius. Respondent also denies that he used a chokehold, insisting that he used an upper body hold and that the take-down was permissible because respondent was still non-compliant and needed to be restrained.

Although there was ample witness testimony, including that of respondent and Mr. Smith, the crucial evidence was the videotape of the incident (Pet. Ex. 6, vestibule 1 and vestibule 4). The videotape lacks sound, but demonstrates that Mr. Smith’s hands were behind his back when respondent dispersed the OC spray, that the dispersal was within a three foot radius, and that respondent had his left arm around Mr. Smith’s neck and maintained that hold while forcing Mr. Smith to the floor.

More specifically, the videotape demonstrates that at approximately 1:50 p.m., respondent entered a slop sink area where Mr. Smith was mopping. Mr. Smith faced respondent and appeared to have a brief conversation with him. Then he bent and began mopping. The videotape does not show what respondent was doing at this time but Mr. Smith appeared totally engaged in mopping the floor and not focused on anything else. Mr. Smith continued mopping for about thirteen seconds and stopped, holding on to the mop and appearing to face respondent. Less than 20 seconds later, he let the mop fall to the ground. For about nine seconds after that, Mr. Smith appeared to be talking to respondent; during this interval, he moved his arms slightly as if gesticulating but did not make any dramatic movements and kept his arms close to his body. The videotape then indicates that Mr. Smith put his hands behind his back, while still facing respondent. Respondent is not shown on the videotape at this time, so the videotape does not establish what he was doing, but it does show Mr. Smith turning away from respondent, and bending down to the side before straightening up again. At that point, with Mr. Smith turned completely away from respondent, with his back toward respondent, respondent approached him with an outstretched arm, holding the OC spray. When Mr. Smith bent away from the spray canister, respondent moved closer to him, dispersing the spray close to Mr. Smith's face (Pet. Ex. 6, vestibule 1).

After being sprayed, Mr. Smith walked out of the slop sink area; respondent, walking right behind him, grabbed him by the back of his clothing and forcibly walked him to the area in front of the A station (Pet. Ex. 6, vestibule 1). The videotape then shows that respondent, with his left hand against Mr. Smith's back, pushed Mr. Smith against the wall in front of the A station. In this position, Mr. Smith's left hand was brought against the wall directly below the A station window. Mr. Smith's right arm was extended to the wall directly perpendicular to the A station window. Respondent was holding an emergency release bar (used to open and close cell door) in his right hand. The videotape shows that at one juncture, Mr. Smith started to take his left arm off the wall. Respondent pushed him back against the wall. Respondent then put his left arm around Mr. Smith's neck (with his left hand resting on Mr. Smith's right shoulder). While pulling Mr. Smith backwards, he used his left leg to push Mr. Smith's left leg out. With his arm still wrapped around Mr. Smith's neck, respondent brought Mr. Smith sideways to the floor and then turned him slightly so Mr. Smith's stomach was on the floor. Whether played in normal time, or viewed frame by frame, the videotape shows that respondent's arm was around Mr.

Smith's neck, not his chest (Pet. Ex. 6, vestibule 4, from 1:51:35.63 to 1:51:36.075). The whole incident, from the time respondent was brought to the front of the A station to the time he was brought to the ground, took only seconds.

Once respondent brought Mr. Smith to the ground, he put the emergency release bar that he had been holding into a slot on the wall, so that he could use both hands to handcuff Mr. Smith. Less than a minute later, one of the officers who had been in the A station retrieved the emergency release bar. Two officers then arrived and assisted in the handcuffing (Pet. Ex. 6, vestibule 4). One of these officers, Richard Reuter, testified that the inmate resisted being handcuffed (Tr. 106-07). However, Officer Reuter did not reach the scene until after respondent and the inmate were on the ground; thus, he could not attest to the method of the take-down nor anything that preceded it (Tr. 108-09). After the probe team arrived, Mr. Smith was handcuffed and taken out of the area (Pet. Ex. 6, vestibule 4).

Regarding the use of OC spray, respondent testified that he had ordered the inmates to return to their cell area so he could do the count (Tr. 171, 172). He told Mr. Smith to stop cleaning the area where the substance had been thrown and to "lock in" (Tr. 173). Mr. Smith replied, using profanity, that respondent was not his "C.O.," he did not have to listen to respondent, and respondent was not going to do anything to him (Tr. 173). Respondent testified that Mr. Smith reached for his mop wringer and did not put down the equipment when respondent told him to (Tr. 174). With Mr. Smith still holding the equipment, respondent attempted, unsuccessfully, to disperse the OC spray at Mr. Smith (Tr. 174, 189). Respondent's second attempt to disperse the spray was successful (Tr. 189, 190). Mr. Smith then began walking out of the room, saying "I'm going to get you" (Tr. 174). The incident in front of the control station followed. Respondent provided more detail in his use of force report, dated October 27, 2008 (Pet. Ex. 9). More specifically, he wrote that after he directed the inmates to go to their cell, Mr. Smith retorted, "Fuck you, I don't have to listen to you, you ain't my C.O." Respondent ordered Mr. Smith to step out of the slop sink area, but Mr. Smith refused. Mr. Smith then picked up the mop and mop bucket. Respondent became "concerned for his safety," and again ordered the inmate to put the equipment down and return to the cell area. The inmate then made a "jerking motion," and stated, "I'll fucking kill you." With that, respondent tried to disperse a two second burst of chemical agent toward Mr. Smith's face, but the OC failed to

disperse. Respondent's second attempt to disburse OC was successful. Mr. Smith ran out of the area, with respondent following (Pet. Ex. 9).

Mr. Smith submitted a written statement, dated October 16, 2008 (Pet. Ex. 1), in which he stated that respondent had originally told everyone but the inmate cleaning crew ("the house detail") to "lock in" to their cells. Mr. Smith wrote that respondent came back about five minutes later and told the house detail to lock in, and that he asked respondent if he could finish cleaning and was told he could not. According to Mr. Smith, at this juncture he saw that respondent had his hands on his OC spray, so he put his hands behind his back, but respondent sprayed him anyway (Pet. Ex. 1). Mr. Smith's testimony essentially mirrored his written statement. He testified that respondent initially directed everyone but the house crew to lock in and subsequently returned. Respondent was "hostile," and asked, "didn't I tell you to lock in?" (Tr. 131). In reply, Mr. Smith told respondent that he had told him to clean up. When respondent again told him to lock in, he asked why or asked if respondent was sure that he did not want him to finish cleaning (Tr. 141, 146). When respondent asked him if he was refusing to lock in, Mr. Smith said he was not refusing anything, and told respondent that he was "losing it" and "bugging out" (Tr. 137, 141). At this point, Mr. Smith testified, respondent "snatched" his spray; Mr. Smith then put his hands to his side but respondent attempted to spray him and followed him out of the laundry room into the hallway. He asserted that respondent had "kept spraying" him while he was on the ground in front of the A station (Tr. 137).

There is really no dispute that Mr. Smith did not immediately accede to respondent's order to return to his cell. While Mr. Smith did not admit cursing at respondent or telling him that he was not going to return to his cell, he admitted that he asked if he could finish cleaning up and why he had to lock in. His demeanor at trial also suggested that he could be quite argumentative at times. Captain Khalilah Flemister, who was assigned to investigate this use of force, noted that the videotape shows that Mr. Smith made motions with his arms, which is consistent with arguing with respondent (Pet. Ex. 6, vestibule 4; Tr. 25, 56).

However, the videotape contradicts respondent's written statement that Mr. Smith made a "jerking motion" prior to being sprayed. The videotape does not show Mr. Smith making any such motion. Rather, it shows that prior to being sprayed, Mr. Smith put down the mop and equipment, turned around, and put his hands behind his back prior to being sprayed. The only motions shown are Mr. Smith putting his hands behind his back, and then turning away from

respondent and bending down, prior to straightening up. It is not clear from the videotape whether respondent sprayed Mr. Smith at this first juncture, when he turned his face away and bent down, but it is clear that respondent came toward him with an outstretched arm after he had straightened up and while he still had his hands behind his back.

Respondent presented a witness, Joseph Archibald, who was a captain with the Correction Department and a use of force instructor at the Correction Academy prior to leaving the Department in 2007, in support of his defense that the spraying was justified. Mr. Archibald is currently a private investigator and has a contract with respondent's counsel's law firm, and was paid for his court appearance (Tr. 114-15, 125, 127). Mr. Archibald testified that Mr. Smith's putting his hands behind his back was not necessarily an act of compliance, since he could conceivably have been reaching for a shank or other weapon concealed in his pockets (Tr. 129, 131-32). However, Mr. Smith is not shown reaching for anything or making any such movement, immediately prior to the dispersal of the spray. Moreover, Captain Flemister concluded based upon her review of the videotape that Mr. Smith was not in an aggressive stance at the time of the dispersal, because he had his hands behind his back (Flemister: Tr. 39, 43). I concur with her assessment.

In sum, whatever resistance Mr. Smith may have previously offered to respondent's order to return to his cell, the videotape evidence shows that he was compliant and not aggressive immediately prior to being sprayed. Respondent's dispersal of the chemical agent was therefore prohibited under the governing directive, which provides that the dispersal of hand-held chemical agents is authorized to defend oneself, another employee, inmate or visitor, to maintain the safety and security of the facility, or to enforce Department rules where necessary to promote the good order and safety of the facility. Dep't of Correction Directive No. 4510R-E § V(A)(2) (eff. Aug. 22, 2008). However, the directive requires that a correction officer make attempts to resolve the situation prior to dispersing chemical agent, such as interpersonal communication or calling a supervisor, and also requires that a correction officer warn the inmate that chemical agents will be utilized prior to their dispersal. There is no evidence that respondent did any of these things.

Additionally, respondent's dispersal of the chemical agent was impermissible under the directive because the directive prohibits dispersal of chemical agent at a distance of less than three feet in light of the severe eye and skin irritation or other injury that may occur at closer

range. Directive 4510R-E § V(A)(4)(d),(g). According to respondent, his initial attempt to disperse spray did not work, so he tried again. Respondent testified that he was not within three feet of Mr. Smith when he first attempted to disperse the spray and that he only came closer to Mr. Smith because the inmate moved. He acknowledged, however, that he was “probably” within three feet of the inmate when he successfully sprayed him (Tr. 187). Mr. Archibald asserted that it can be “difficult to gauge” distance because the inmate is usually “moving back and forth” (Tr. 124). This was not a situation, however, where an officer was chasing an inmate or an inmate was moving around a large area. Mr. Smith simply turned his head and upper body away from respondent. Respondent went right up to him, pointing the OC canister at his face with an outstretched arm. The video does not demonstrate a justification for respondent to spray at such a close range.

Hence, petitioner established that respondent employed excessive force by dispersing OC spray within three feet of Mr. Smith’s face, at a time when Mr. Smith had turned away from him and had his hands behind his back.

With regard to the take-down in front of the A station, the videotape shows that respondent followed Mr. Smith when he left the slop sink area, grabbed him, marched him to the front of the A station, and had him place both hands against the wall of the A station and the adjoining wall. Respondent testified that he ordered the inmate to keep his hands and feet on the wall so he could handcuff him. According to respondent, Mr. Smith tried to push off the wall. He “attempted to guide” the inmate back to the wall. However, Mr. Smith removed his hand, and kept saying, “You gonna get it, I’m a killer, check my jacket,” referring to his criminal record (Tr. 176). Respondent was afraid that Mr. Smith might grab the telephone that was hanging on the wall to attack him (Tr. 192). He testified that he told Mr. Smith to stop resisting and tried to put Mr. Smith in an “upper body control hold” with one hand (Tr. 176-78, 190). This involved putting his arm around Mr. Smith’s “upper body” and shoulder. The control hold did not work, so he then brought Mr. Smith to the floor in “a controlled descent” (Tr. 184, 191). Respondent testified that he could not use two hands because he was holding the emergency release bar in the other hand and did not want to get the bar too close to the inmate; he did not want the inmate to be able to say that respondent had tried to hit him. Nor did he want to put the bar on the floor where other inmates could possibly have grabbed it (Tr. 176, 177, 193).

Respondent denied using a chokehold or putting the inmate's neck in his forearm, or the crook of his elbow; he testified instead that he had his arm around Mr. Smith's torso, or his chest (Tr. 178, 184, 186, 191, 196). Respondent also testified that he was wearing a heavy jacket on October 16, 2008, and that this may have resulted in the "misperception," upon viewing the videotape, that his arm was around the inmate's neck (Tr. 193). Similarly, Mr. Archibald testified, upon viewing the videotape, that respondent utilized an upper body hold across Mr. Smith's shoulders, not a chokehold (Tr. 120, 130).

However, both Mr. Archibald's testimony and that of respondent must be discounted because they run contrary to the video evidence. There is no ambiguity about this videotape. It illustrates without question that respondent had his forearm around Mr. Smith's neck, not Mr. Smith's upper body. When shown the videotape, Captain Dannie Lomas, an instructor for ten years at the Training Academy, Assistant Deputy Warden ("ADW") Felipe Laboriel, formerly the unit manager at GMVC, and Captain Flemister all testified that respondent utilized an impermissible hold around Mr. Smith's neck (Flemister: Tr. 39, 45, 66; Lomas: Tr. 76; Laboriel: Tr. 90, 95, 97). Although Mr. Smith wrote in his report only that respondent had jumped on his back and taken him to the ground (Pet. Ex. 1), he testified that respondent had choked him (Tr. 138). I did not credit Mr. Smith's additional testimony that respondent choked him by placing his hand around his neck (Tr. 143), since the videotape shows that respondent put his arm, not his hand, around Mr. Smith's neck. Respondent's hand was on Mr. Smith's shoulder, not his neck. The difference is not consequential, since an arm around the neck is still a chokehold.

Indeed, although petitioner's witnesses could not state that respondent actually choked Mr. Smith, all agreed that by placing his arm around the inmate's neck, respondent used an impermissible chokehold. There is a distinction between the medical interpretation of what a "chokehold" is, and the use of the term to define a type of prohibited force. Dr. Richard Leinhardt, the Department's chief medical officer and surgeon since 2000, testified that a chokehold is a hold around the neck that takes two basic forms: either cutting off air or cutting off blood (Tr. 12, 13). When shown the videotape, he declined to say whether respondent's arm around Mr. Smith's neck was "an actual chokehold," because he did not know whether it resulted in cutting off Mr. Smith's air or blood supply (Tr. 20). It is not clear from the videotape whether respondent actually suffered any restriction to his airway, as Captain Lomas acknowledged (Tr. 81). And both Captain Lomas and Mr. Archibald testified that a typical

reaction of a person being choked would be to try to pry the choker's arm off his neck, something that Mr. Smith did not do (Lomas: Tr. 81; Archibald: Tr. 120). Moreover, Mr. Smith did not report any injuries to the clinic and did not receive immediate treatment (Pet. Ex. 8), although he testified that about ten or twelve days after the incident, he felt pain and received physical therapy for his shoulder (Tr. 155).

Regardless, whether or not respondent actually choked Mr. Smith by wrapping his arm around his neck and pulling him to the floor is not dispositive of whether that hold constituted a chokehold under the Department's use of force regulations. Both Captain Lomas and ADW Laboriel were unequivocal in describing the force used by respondent as unauthorized and as a chokehold. When questioned by respondent's counsel, both defined a chokehold as the application of any force to a person's neck (such as a hand or forearm), and stressed that the term refers to the technique, not to the result. A person need not actually be choked or strangled in order for the technique -- the hold -- to constitute a chokehold (Lomas: Tr. 78, 80; Laboriel: Tr. 95). The technique is prohibited because of the potential that the hold can cause serious physical injury or even death (Leinhardt: Tr. 12-13). The use of this technique -- the application of force around the neck -- is precisely what is depicted on the videotape.

The sole remaining question, regarding the chokehold, is whether it constituted misconduct. Respondent gave detailed testimony that Mr. Smith was not compliant with his orders to remain on the wall and threatened that he was a "killer" and respondent would "get it." Mr. Smith denied saying anything to respondent or provoking him in any way before respondent brought him down to the ground (Tr. 142). However, I did not credit Mr. Smith's testimony. The videotape, again, is the most dispositive evidence, and it shows that at one juncture, Mr. Smith took his hand off the wall, as respondent testified. Captain Lomas acknowledged that the inmate might have been trying to push off the wall at this juncture (Tr. 75), as respondent also testified.

Captain Lomas acknowledged that respondent could have used force if he ordered the inmate to put his hand back on the wall and the inmate did not comply. In this case respondent should have employed one of several techniques to restrain the inmate, such as a wrist lock, elbow lock, or arm bar takedown. Captain Lomas's testimony is consistent with the use of force directive, which states that a correction officer may use force against an inmate "to enforce

Department rules” or to defend him or herself from a physical attack or an imminent physical attack. Dep’t of Correction Directive No. 5006R-C § IV (A)(1),(4) (eff. Jan. 31, 2008).

However, respondent is charged not simply with using force, but with putting Mr. Smith in a chokehold. The use of force directive prohibits the use of a chokehold except in circumstances where the use of deadly physical force is authorized. Directive 5006R-C § V(B)(2)(h),(C). Deadly physical force is authorized only when there is no other reasonable alternative to prevent or terminate an escape, or when a correction officer must “defend him/herself or another person from what he/she reasonably believes to be the use or imminent use of Deadly Physical Force by the inmate.” Directive 5006R-C § V (C).

Under no interpretation of the videotape can it be said that Mr. Smith was using or was about to use deadly physical force. Although there was a phone in the vicinity, Mr. Smith was not shown reaching for the phone at any point. Rather, the videotape shows that respondent had pushed Mr. Smith against the wall again, and had then put his arm around Mr. Smith’s neck and pulled him backward while almost simultaneously putting his leg between Mr. Smith’s legs and pushing out Mr. Smith’s back leg. The use of the chokehold was unnecessary and impermissible.

While insisting that he was not utilizing a chokehold, respondent seemed to try to justify the force used by contending that he was limited to the use of his left arm because he was holding the emergency release bar in his right hand and was afraid to put it on the floor where an inmate could have grabbed it. This explanation is spurious. Almost all of the other inmates were already locked in their cells. Moreover, the videotape shows that at the precise moment that respondent had Mr. Smith in a chokehold and stuck his leg between Mr. Smith’s leg, his right hand was adjacent to a slot in the wall in which he could have inserted the emergency release bar. In fact, once respondent forced Mr. Smith to the ground, he put the bar in this very slot so he could use two hands to attempt to handcuff Mr. Smith. Despite struggling with Mr. Smith to attempt to handcuff him, respondent simply reached out to put the emergency release bar in the slot. There is no plausible reason that respondent could not have put the emergency release bar in the slot in the wall thirty seconds earlier, prior to using the chokehold and bringing Mr. Smith to the ground.

In sum, respondent’s use of a chokehold to bring Mr. Smith to the floor constituted excessive force.

Also alleged is that respondent submitted a misleading and late use of force report. Captain Flemister testified that she ordered respondent to submit a use of force report (Tr. 45). Respondent's use of force report (Pet. Ex. 9) is dated October 27, 2008. Respondent testified that he did not write this date on the report, but acknowledged that October 27 was probably the date when he turned in the report. He also testified that the report was late because he had sustained injury in the incident and had been taken to the hospital (Tr. 180). The use of force directive requires a correction officer who employs force to report the incident "immediately" and to submit a written report on the force prior to leaving the facility, "unless medically unable to do so." Directive 5006R-C § V(F)(2)(a),(3). Thus, respondent was not required to submit his report prior to leaving the facility on October 16, 2010. However, respondent acknowledged that he "might have been" back to work before October 27 (Tr. 181). He testified that he wrote the report when he was ordered to submit it, but did not recall why he did not submit the use of force report on his first day back to work (Tr. 181). Having been in a use of force report incident, respondent was under an affirmative obligation to submit a use of force report. Even if respondent's testimony that he submitted the report when he was asked to do so is credited, respondent could provide no plausible reason for not submitting it on his first day back. His delay in submitting the report was not reasonable.

Beyond the late submission of the report, petitioner charged that it was false and misleading because, among other things, respondent wrote that Mr. Smith "refused" to step out of the slop sink area, while the videotape shows that respondent dropped the mop stick and put his hands behind his back. I do not find the statement that Mr. Smith "refused" to step out of the slop sink area itself to be false, since Mr. Smith argued with respondent about leaving the slop sink area rather than continuing to clean. However, there is no support in the videotape for respondent's statement in the report that Mr. Smith made a "jerking motion" with his hands. Nor does the videotape corroborate respondent's statement in the report that he "attempted to put [Mr. Smith] in an upper body controlled hold" as he "wrestled" the inmate to the ground. As discussed, respondent used a chokehold around Mr. Smith's neck. The reference to an "upper body controlled hold" is misleading. Additionally, the report contains material omissions: respondent does not mention putting his arm around Mr. Smith's neck, nor does he mention that Mr. Smith turned and put his hands behind his back prior to the dispersal of the chemical agent. *See Dep't of Correction v. Patterson*, OATH Index Nos. 2080/08, 2081/08, 2082/08, 2083/08,

2084/08, 2085/08, & 2088/08 at 16 (April 9, 2009) (correction officer's failure to note in use of force report that he used force by pushing two inmates into the pen is "a material omission which could not have been inadvertent as it goes to the heart of what the author of the report is required to include and describe"); *Dep't of Correction v. Cooper*, OATH Index Nos. 2585/08 & 2586/08 at 4 (Nov. 12, 2008); *Dep't of Correction v. Hall*, OATH Index Nos. 155/05 & 156/05 at 15 (Aug. 11, 2005).

Hence, I find that respondent submitted an incomplete and misleading use of force report.

FINDINGS AND CONCLUSIONS

1. On October 16, 2008, respondent used excessive force by dispersing chemical agent in close proximity of an inmate whose hands were behind his back and by then placing the inmate in a chokehold.
2. Respondent submitted a false, misleading and late use of force report on October 27, 2008.

RECOMMENDATION

Upon making these findings, I requested and received respondent's disciplinary record. It indicates that respondent has been on the force since 2005 and has no prior disciplinary record. Petitioner has requested that I recommend a 60-day suspension.

Penalties for the use of force have ranged from 30 days to termination, depending on "the employee's disciplinary record, the extent of force, the degree of provocation, if any; and the extent of any subsequent deception." *Dep't of Correction v. Scott*, OATH Index No. 376/06 at 5 (July 10, 2006) (imposing a 60-day suspension where respondent used "unprovoked, gratuitous, and excessive force" and "compounded that error by concocting a self-defense claim"); *see also Dep't of Correction v. Johnson*, OATH Index No. 1639/05 (Aug. 18, 2005), *modified*, Comm'r Dec. (Oct. 27, 2005), *modified*, NYC Civ. Serv. Comm'n Item No. CD 07-29-M (Mar. 14, 2007) (ALJ recommends 25-day penalty where officer pushed an inmate's head into a cell door during a struggle and submitted a misleading report about the incident; CSC modified penalty to 15 days considering that officer did not bear sole responsibility for the incident and had a clean disciplinary record); *Dep't of Correction v. Debblay*, OATH Index Nos. 2008/04, 2009/04, 2011/04, & 2012/04 (Dec. 3, 2004) (officers terminated for using excessive force or participating in a cover-up, where inmate sustained multiple injuries including fractured ribs, cut on eye, and

damage to ear drum); *Dep't of Correction v. Pannizzo*, OATH Index No. 1691/03 (Nov. 1, 2004), *modified*, NYC Civ. Serv. Comm'n Item No. CD 06-69-M (July 6, 2006) (60-day suspension where officer, who had a minor disciplinary record, struck inmate on side of the head, sprayed him with a chemical agent, and falsely claimed that force was used in self-defense, modified on penalty to 40 day suspension in light of lengthy service and lack of a significant disciplinary penalty); *Dep't of Correction v. Woodson*, OATH Index Nos. 597/04 & 603/04 (July 1, 2004) (termination of employment where officer, who had had a lengthy disciplinary record, slapped, punched, and choked an inmate in response to a "smart remark" and then falsely denied the use of force).

Of the cases cited above, *Woodson*, which was a termination case, is the only one that involved a chokehold and a false report; however, the force there was more extreme as the officer actually choked an inmate with his hand, leading to bruising around the inmate's neck. Officer Woodson also had a significant disciplinary record. OATH 597/04 & 603/04.

Despite this difference from *Woodson*, a significant penalty is still required here. Even though there was no evidence of actual choking, the use of pressure around a person's neck could potentially have serious, even fatal consequences, even if there is no intent to cause actual injury. The use of a chemical agent at close range is also potentially dangerous because of the risk of retinal damage to someone with a pre-existing condition. The submission of a false and misleading report must also be considered. And although respondent has no prior disciplinary record, he has only been on the job for five years. Considering all of the above, I believe the 60-day suspension sought by respondent to be warranted for respondent's unwarranted use of a chemical agent and of a chokehold, and for his subsequent submission of a false and misleading report. I recommend, therefore, that respondent be suspended for 60 days.

Faye Lewis
Administrative Law Judge

November 23, 2010

SUBMITTED TO:

DORA B. SCHIRO

Commissioner

APPEARANCES:

DAVID KLOPMAN, ESQ.

FLORENCE HUTNER, ESQ.

Attorneys for Petitioner

CARTER & ASSOCIATES

Attorneys for Respondent

BY: DAMOND J. CARTER, ESQ.