

Dep't of Correction v. Harris

OATH Index Nos. 525/12 & 526/12 (Apr. 4, 2012), *adopted*, Comm'r Dec. (Aug. 1, 2012)

Two correction officers charged with using excessive force, failing to report a use of force, and making false reports. Administrative law judge found proof, which consisted principally of inmate testimony, insufficient to sustain the charges and recommended that all of the charges be dismissed.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
CHARLES HARRIS AND ST. JOHN MCMILLAN
Respondents

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Petitioner, the Department of Correction, charged that respondents Charles Harris and St. John McMillan, correction officers, used excessive force against two inmates and submitted false reports about the incident. A hearing on the charges was conducted on January 23 and 24, February 8, and March 8, 2012. Petitioner presented the testimony of two inmates, a captain, and three other Department witnesses, as well as medical records. Respondents testified on their own behalf, denying any misconduct, and called another officer.

For the reasons provided below, I find that the evidence was insufficient to sustain the charges against the respondents and recommend that the charges be dismissed.

ANALYSIS

The charges concern an incident which occurred around 2:50 p.m. on March 19, 2010, at the school building near the Robert N. Davoren Complex (RNDC) housing area on Rikers Island. The charges allege that, after breaking up a fight between two inmates, respondents beat and kicked both inmates and that Officer McMillan hit one with an equipment belt. The charges

further allege that the officers failed to report this use of force and, when required to write reports, falsely denied using any force.

The incident took place in a corridor leading to the classrooms where the adolescent inmates attended school. A video (Pet. Ex. 18) shows the layout of the corridor as having bars and a gate near the end of the long corridor, near the stairs to the housing areas. Just beyond the gate are a large magnometer and a desk. All of the inmates entering and leaving the school passed single file through the magnometer and the gate. On March 19, 2010, Officer Harris was assigned to the desk, supervising the inmates entering and leaving the school. Officer McMillan was one of the escort officers, escorting some 60 adolescents to and from a housing area located in mod 2.

It was undisputed that, at the time of the incident, school had ended and the inmates were in the process of returning to their housing areas, one area at a time. Officer Harris explained that each of the housing areas was lined up separately in rooms and corridors beyond the corridor with the magnometer. The escort officers for each of the different housing areas would wait with their line of inmates until Officer Harris signaled that it was their turn to pass through the magnometer, down the stairs, and back to the dormitories.

All of the witnesses, including the two inmates, agreed that the incident began as a fight between two adolescent inmates, Mr. A¹ and Mr. Driver. Mr. A was not in class that day and was brought to Officer Harris's post in order to wait until the other inmates from his assigned housing area came through the corridor and then return with them to the dorms. At around 2:50 p.m., Mr. A was sitting on the floor in the school vestibule waiting for his housing area to exit (A: Tr. 243). Mr. Driver was among the last of his house to go through the mangnometer. Due to some grievance that Mr. A had against Mr. Driver, as Mr. Driver passed in front of him Mr. A attacked him. According to Mr. A, he punched Mr. Driver (Tr. 218-19, 244). Mr. A testified that the two of them then fought for around 10 seconds (Tr. 230), with Mr. A covering his face and Mr. Driver hitting him in the back of the head (Tr. 247). According to Mr. Driver, Mr. A "tried to swing at him" and punch him in the face (Tr. 160). Mr. Driver "defended" himself, as

¹ Due to the possible detrimental effect to this inmate by publication of this report, which contains references to the inmate's medical records, I find that withholding the inmate's name is appropriate. See *Taxi & Limousine Comm'n v. Anonymous*, OATH Index No. 1053/09 (Jan. 12, 2009) (employee's name withheld where decision discusses personal issues contained in medical records); OATH Rules of Practice, 48 RCNY § 1-49(d) (Lexis 2010).

Mr. A continued to swing at him for some three to five seconds, hitting him one time (Tr. 160, 164).

As to this portion of the incident, Officer Harris's and Officer McMillan's accounts were similar to that of the inmates. Officer Harris testified that inmate A was escorted up to school near the end of the day because he had just been transferred to a different housing area. Officer Harris instructed the inmate to stay on the other side of the gate, away from the desk and magnometer, while the classes were dismissed. Mr. A complained that he did not want to be assigned to the different housing area (Tr. 381-82).

Officer Harris testified that, around 2:50 p.m., he was at his desk, heard the sounds of a scuffle, and then saw inmates Driver and A, some ten feet away, punching one another in the face. He ordered them to stop (Tr. 382-83). Officer Harris saw Mr. A fall back and hit his head on the wall. Mr. Driver then began to kick Mr. A in the side (Tr. 384-85).

Officer McMillan testified that he was waiting in line with his inmates to enter the vestibule when he heard Officer Harris yell "Stop." From the end of the corridor, Officer McMillan saw Mr. Driver, assumed he was fighting with Officer Harris, and ran to offer assistance. When he approached the gate, he saw that Mr. Driver was "stomp-kicking" Mr. A (Tr. 472), who was curled up with his back toward Mr. Driver (Tr. 476). Officer McMillan estimated that Mr. Driver kicked Mr. A three or four times (Tr. 478). Officer McMillan yelled for Mr. Driver to stop or he would use his chemical spray. Mr. Driver stopped as he was ordered to do (Tr. 480).

In their testimony, both inmates insisted that, after their fight was broken up, Officers Harris and McMillan attacked them. Mr. A testified that the two officers punched him in the face. Mr. A fell to the floor and the officers began kicking him in the back (Tr. 220). Mr. A was ordered to "stand on my knees and face the wall" (Tr. 252). One of the officers then hit him with a belt, twice on his right side and twice on his left side (Tr. 220). Mr. A was unable to recall anything that the officers said during the beating (Tr. 223). After this Mr. A was unable to move his feet and lay in a fetal position on the floor (Tr. 221). Mr. A testified that Captain Brown arrived and, with another female officer, helped Mr. A up and carried him downstairs (Tr. 221, 231). Mr. A insisted that he told Captain Brown about the officers having beaten him. The captain's only reply was that he would take care of him and bring him to the clinic (Tr. 222).

Mr. Driver contended that, at this point, Officer Harris and Officer McMillan ordered the inmates to kneel facing the wall with their hands behind their heads (Tr. 161). The officers then took turns punching and kicking them multiple times, focusing most of their blows on Mr. A (Tr. 161-62). Mr. Driver stated that Mr. A was kicked “continuously” in his back and face for some 20 minutes (Tr. 163, 175). One took off his belt and hit Mr. A with it (Tr. 162). During the beating, the officers uttered “minor verbal expressions” such as “what’s wrong with you?” (Tr. 163). Finally Captain Brown arrived and “ordered them to stop” (Tr. 176). At that point, Mr. A was “bleeding out of his mouth” (Tr. 190). At the same time Captain Brown told Mr. Driver not to “worry about” the actions of the officers. The captain advised Mr. Driver to describe in Mr. Driver’s written statement only the attack by Mr. A and Mr. Driver’s own efforts to defend himself, without mentioning the force used by the officers (Tr. 168, 192).

The two officers denied using any force against the inmates and insisted that the incident ended as soon as the inmates were separated. Officer Harris testified that he ordered Mr. Driver to step back and took him around a wall to another area. He then returned, looked at Mr. A, and called Captain Brown on the telephone (Tr. 386). Captain Brown appeared, Officer Harris explained what had occurred, and Captain Brown directed Officer Harris to take Mr. Driver to the intake area, which he did (Tr. 387). After he returned to the school, Officer Harris, upon instructions by Captain Brown, took Mr. A to the clinic. Mr. A appeared to be in pain, and placed his arm over Officer Harris’s shoulders as he descended the stairs to the clinic (Tr. 391). Similarly, Officer McMillan testified that Officer Harris escorted Mr. Driver out of the area while Officer McMillan helped Mr. A to his knees and over to a nearby bench (Tr. 480). Captain Brown arrived and Officer McMillan returned to his housing area (Tr. 473).

Captain Brown, the school supervisor, largely corroborated the testimony of the two officers and contradicted that of the inmates. He indicated, in his testimony and in a written incident report (Pet. Ex. 3), that, at around 2:50 p.m. on March 19, he received a telephone call from Officer Harris (Tr. 33-34). Officer Harris told him there had been a fight between two inmates at the vestibule to the school. Captain Brown arrived at the area within a minute and observed Officer Harris standing by his desk, inmate A on “his knees facing the wall” (Pet. Ex. 3) and inmate Driver standing some distance away, by the visiting area (Tr. 34-35; Pet. Ex. 3). Captain Brown spoke to Officer Harris, who said again that the two inmates had been in a fight and had been separated after he gave them “verbal commands” (Tr. 39). Captain Brown next

spoke with inmate Driver, who said he had been hit from behind by inmate Quirondongo and then “defended” himself (Tr. 41). Captain Brown then spoke with inmate A, who admitted that he had started the fight and stated that Mr. Driver “knows why I hit him” (Tr. 42). Captain Brown noticed that Mr. A was “squinting” and seemed to be in some discomfort. Captain Brown asked Mr. A if he was hurt and he did not give a direct reply (Tr. 42). Captain Brown testified repeatedly that, during these initial interviews, neither inmate told Captain Brown anything about having been struck by a correction officer (Tr. 41-42, 64, 66).

Captain Brown ordered Officer Harris to accompany Mr. Driver to the intake area (Tr. 41). When Officer Harris returned, he escorted Mr. A to the clinic (Tr. 42). After Officer Harris returned, Captain Brown ordered him to write a report about the incident. In speaking with Officer Harris, Captain Brown discovered that Officer McMillan was also present during the incident. Captain Brown called Officer McMillan at his housing area post and also ordered him to submit a report (Tr. 39-40, 90-91).

Most of the evidence suggests that neither inmate complained on the day of the incident about being struck or kicked by correction officers. Mr. A was seen at the clinic at 3:45 p.m. by Physician’s Assistant Ojudun. According to the injury report (Pet. Ex. 6) completed by Mr. Ojudun, Mr. A told the clinic staff he had hit his head on the wall and had “headaches, dizziness, back pain, generalized pain.” He denied any loss of consciousness or chest pain. He was sent to the emergency room at Elmhurst Hospital. The following day another physician’s assistant noted on the injury report that Mr. A returned to the clinic, after the hospital had found a “stable fracture L2 - spine.” The Elmhurst Hospital records (Pet. Ex. 8) indicate that Mr. A had a “fracture – spine, thoracic, w/o spinal cord injury, closed” and “contusion – flank, back.”² Similarly, the March 19 injury report (Resp. Ex. G) for Mr. Driver recorded no statements made by the inmate and found “no visible injuries.”

Despite having written nothing on the injury report regarding anything except an inmate-to-inmate fight, Mr. Ojudun wrote, in progress notes (Pet. Ex. 7) on a Department of Health and Mental Hygiene form, that Mr. A said that he “also was involved in a use of force = the DOC.” At the hearing, Mr. Ojudun indicated he generally wrote down what the patient told him, but could not recall whether Mr. A used the phrase “use of force” (Tr. 108). He also indicated that

² Mr. Ojudun testified that the notation on the injury report indicated that Mr. A had a fracture of his second lumbar vertebra in his lower spine (Tr. 109-10), while the Elmhurst records indicated an injury to the thoracic area in the upper spine (Tr. 146-50).

he “usually” completed the injury report form prior to completing the entries for progress notes (Tr. 141).

Other than Mr. A’s apparent mention of “use of force” as commemorated in the clinic progress notes, Mr. A and Mr. Driver made no accusations against Officer Harris and Officer McMillan until the following day, March 20, after Mr. A had been found to have a fractured vertebra. These accusations were made to Assistant Deputy Warden (ADW) Phipps, who saw Mr. A at around 11:30 a.m. on March 20 in the intake area (Tr. 346; Pet. Ex. 17). Mr. A called out, “Dep Phipps, look, they beat me up” (Tr. 352). ADW Phipps gave Mr. A a voluntary statement form and asked him to complete it (Tr. 353; Pet. Ex. 10). In the statement, Mr. A wrote that “CO Harris and a big bald CO start beating me and Driver up, but kept stomping on my neck and hit me with the belt around my lower back.” The bald officer “kept punching me in my face and kicking me on my back” until “the captain came and saved me with another C.O.” He wrote that he had “neck pains, back bone is fractured, big bruise on my left back side.”

On March 20 at around 11:30 a.m., Mr. Driver wrote in a statement (Pet. Ex. 9) to ADW Phipps that the incident started with Mr. A attacking him from behind. After Mr. Driver used “self-defense,” Officer Harris and another officer told the two inmates to “get on our knees” and then kicked and punched them and “whipped” them with a belt. The officer “continuously beat” Mr. A and kicked him in the ribs, back, and head until he was unable to move. He ended his statement by indicating, “The two C.O’s that have done this damage to Martin are trying to say I have done this damage.”

Investigator Lynch and Investigator Merry interviewed Mr. A and Mr. Driver at around 5:00 p.m. on March 20. Both inmates provided written statements concerning the incident. Mr. A was in a wheel chair. The investigators took photos of both inmates (Tr. 280-81). In his statement, Mr. A wrote that, after he punched Mr. Driver in the face, Mr. Driver pushed him into the wall and punched him in the face. Officer Harris then punched Mr. A in the right side of his face, while another officer, “black, 6’2”, African, 250 lbs, muscular, goatee, either very low cut or balding, tribal tattoo on right forearm” kicked Mr. Driver and then struck Mr. A with a belt in his right and left ribs. Then one of the officers kicked him in his left neck and his left lower back. Mr. A fell to the floor and could not move and, two minutes later, Captain Brown arrived. Another white male officer helped Mr. A up, while a black female officer helped him to the clinic.

In Mr. Driver's written statement (Pet. Ex. 1) to the two investigators, prepared at around 6:20 p.m., he wrote that Mr. A punched him three times and Mr. Driver then grabbed Mr. A. Officer Harris then "broke us up" and "pushed Martin to the floor . . . on all fours." Officer Harris then "clasped his hands together and struck Martin to the lower middle back." Officer Harris and another officer, "black bald, tall, muscular, goatee," kicked both inmates and then continued kicking Mr. A. Then the other officer beat Mr. A with his belt. The officers hit Mr. A 4 to 8 times. A black female officer or captain arrived and asked what happened. The officers reported that Mr. A attacked Mr. Driver. The female officer left and "they continued beating and kicking" Mr. A until he was crying. Another male captain arrived and Mr. Driver was taken to another room.

At the time of the hearing, Investigator Merry was unavailable to testify and instead supplied an affidavit (Pet. Ex. 1), which included copies of both the inmates' statements and the photos. Because of the severity of Mr. A's injuries, in August 2010 the case was transferred to the Department of Investigation (DOI) for further investigation and review (Tr. 289-90). In June 2011, after DOI did not communicate any further information to the Department, charges were filed against both officers in order to meet the 18-month statute of limitations deadline of Civil Service Law section 75 (Tr. 292, 297-98).

Amid this welter of contradictory proof, the ultimate determination depends upon whether the inmates or the officers are found to be more truthful. As to the two inmates, there are a large number of credibility concerns. On the one hand, the inmates' account is corroborated in part by a hearsay statement taken from another inmate from Mr. Driver's housing area. In a written statement (Pet. Ex. 11), an inmate named Oates indicated that he saw a "kid" whose name he did not know punch Mr. Driver in the face. An officer named McMillan and another officer "told them to get on there [sic] knees." The officers then "punched and kicked both of them." Then Officer McMillan beat the kid with his utility belt about four to five times. A female officer pressed her security alarm and Mr. Oates was ordered to leave.

On the other hand, there are a large number of factors undermining the truthfulness of the inmate's accusations. Most prominently, it would appear that neither inmate reported being assaulted by two correction officers until the day after the incident. In fact, the records show that, the hours and days after the incident, both inmates gave a number of contradictory accounts

of the incident, first suggesting only that they had fought each other and then describing a brutal beating by two correction officers.

Mr. A provided four accounts of the incident, one to Captain Brown, one to Physician's Assistant Ojudun, one to ADW Phipps, and one to the Department investigators. As noted above, Mr. A told Captain Brown that he started the fight with Mr. Driver and did not mention anything about being hit or kicked by any officers. Although Mr. A insisted in his testimony that he told the clinic staff "exactly what happened," that he had a fight with another inmate and two officers then beat him up (Tr. 231-32), the credible testimony of Mr. Ojudun indicated otherwise. According to Mr. Ojudun, Mr. A said that he "hit his head on a wall" without mentioning having been struck by any officers. It is true that Mr. Ojudun also wrote that Mr. A also said something about force being used, prompting Mr. Ojudun to note in his progress notes that Mr. A "also was involved in a use of force = the DOC." However, this general notation about "force" is quite different from a statement that the inmate was punched, kicked, and beaten repeatedly by two correction officers.

At around 11:20 a.m. the next morning, Mr. A gave a different account to ADW Phipps. He described officers "stomping" on his neck, hitting him with a belt in his back, punching him in the face, and kicking him in the back until a captain and another officer intervened. Later that afternoon Mr. A told two investigators that Officer Harris punched him in the right side of his face, while another officer kicked Mr. Driver. The other officer then struck Mr. A with a belt in his right and left ribs and one of the officers kicked him in his left neck and his left lower back.

Mr. Driver also provided four versions of what occurred. He told Captain Brown only that Mr. A attacked him and that he then "defended himself" and included these two remarks in a written statement about the incident (Resp. Ex. A). In his statement during his first visit to the clinic, on March 19, the clinic doctor recorded no statements from Mr. Driver about the incident and found "no visible injuries" (Resp. Ex. G).

Mr. Driver then told ADW Phipps the following morning about being attacked by two correction officers, who forced the inmates to their knees and kicked and punched them and "whipped" them with a belt. He stated that one officer kicked Mr. A in the ribs, back, and head until he was unable to move.

Later that day Mr. Driver gave a more detailed version to the two Department investigators. He stated that Officer Harris pushed Mr. A to the floor and immediately struck

him in the lower back. Officer Harris and another officer kicked both inmates, mostly kicked Mr. A and struck him with a belt.

In a second clinic visit on March 20 at around 10:10 p.m., Mr. Driver complained of being “kicked” by an officer and having his right hand “stepped on” the day before. He said he had pain in his left lower back and left shoulder. He also said he had pain in his right jaw from being punched by an inmate. This time, the clinic physician’s assistant found a contusion to the left trapezius and “mild contusion to right mandible,” as well as “superficial abrasion” to the right hand and to the nose.

The contradictory accounts of Mr. A and Mr. Driver strongly suggested that their accusations against the officers were not truthful. In fact, at the time of the incident, both inmates had independent motives to blame correction staff for Mr. A’s serious spinal injuries. The severity of Mr. A’s injuries gave him a basis for a successful lawsuit against New York City, should the injuries be attributable to actions by City personnel. Indeed, Mr. A’s testimony indicated that he was well aware of the possibility of recovering compensation from the City. After initially denying that he had “any civil suits pending,” he indicated that he had initiated “some” civil lawsuits but “never called the lawyers for like almost a year” and did not know whether the lawsuits were still active (Tr. 228-29). This testimony indicates that, at least at the time of the incident, Mr. A could have believed that blaming correction staff for his injuries might result in a successful lawsuit.

Mr. Driver, too, had a motive to falsely accuse the officers of injuring Mr. A in order to evade being punished himself for causing Mr. A’s serious injuries. This motive was revealed in Mr. Driver’s written statement to ADW Phipps indicating that “[t]he two C.O’s that have done this damage to Martin are trying to say I have done this damage,” as well as by his verbal comment that “I’m not responsible, I’m not responsible” (Tr. 354). Mr. Driver admitted that he was served with an infraction for injuring Mr. A and said he was in “the box” for five months (Tr. 171).

Other evidence supported the conclusion that, at some time after the incident and before speaking with ADW Phipps, the two inmates discussed the incident and agreed that there would be a mutual advantage in reporting an attack by two correction officers. In Mr. A’s statement (Pet. Ex. 1) to the investigators, written on March 20, Mr. A stated that, in the intake pens, he and Mr. Driver spoke for ten minutes about what had happened at the school. In his testimony,

Mr. A protested that he could not remember ever speaking with Mr. Driver after the incident, did not read this statement, and signed it only because he was asked to do so (Tr. 261-62). Likewise, Mr. Driver denied speaking with Mr. A about the incident (Tr. 193-94). The credible testimony of Investigator Lynch established, however, that the investigators wrote down exactly what the two inmates told them about the incident and then had the inmates sign the statements. Mr. A's written statement supports a finding that, prior to making the accusations to ADW Phipps, the two inmates discussed what had happened and how accusing the officers of assault could have advantages for both.

Respondents offered additional evidence that Mr. Driver did, in fact, encourage Mr. A to blame the officers for injuring him. Officer Fallon, who has been an intake driver at RNDC for three and one-half years, testified that, at around 6:00 p.m. on March 20, 2010, he overheard an inmate resembling Mr. Driver speaking to another inmate, whom he identified as Mr. A. From the 8 pen cell, Mr. Driver yelled out to Mr. Qurindongo, in the 6 pen cell, "Yo, scrap, 6 pen" for around 15 or 20 minutes. When Mr. A finally replied, Mr. Driver said, "You have to say the police did this. You got to get some money" (Tr. 534-35).

On cross-examination, Officer Fallon conceded that he did not report overhearing Mr. Driver's remarks and indicated that the conversation occurred in late March 2011, instead of late March 2010 (Tr. 541, 545). He later indicated that the incident may have occurred in 2010 (Tr. 548). The officer's equivocation as to the exact date of the overheard remark provided some basis for questioning the reliability of his testimony. However, by his demeanor and by the detailed substance of his recollections, Officer Fallon was a credible witness. In addition, Officer Fallon's testimony was corroborated by Mr. A's admission that the two inmates had lengthy discussions about the incident and by Mr. Driver's remarks that he did not want to be held accountable for Mr. Driver's injuries. I therefore credited Officer Fallon's testimony that he overheard Mr. Driver encourage Mr. A to blame correction staff, not Mr. Driver, for Mr. A's back injuries.

Both inmates had criminal records suggesting a history of dishonesty. Mr. A admitted that he was convicted of robbery, but insisted he stole nothing and falsely stated that he did so in order to get a favorable plea bargain (Tr. 236). Mr. Driver admitted being convicted of two robberies in 2008 and 2010 (Tr. 178-79). He insisted that he did not commit the second robbery but lied and said he did in order to receive a concurrent sentence (Tr. 180).

In addition to his criminal record, Mr. A had some history of mental disorders. He admitted to a history that included a diagnosis of a bipolar disorder, depression and anxiety (Tr. 239). He takes seraquol and belutrin for these conditions. In the past, he has heard voices in his head, although he denied hearing any at the time of his testimony (Tr. 239).

There were a number of implausibilities in the inmates' account of having been attacked by the two correction officers. In the inmates' account, the two officers began spontaneously punching and striking the inmates in a public corridor without giving the inmates any warning or reason for the attack. It seemed odd that these officers, assigned to different areas of the facility, would abruptly attack two inmates merely because the inmates had a brief fight. It seemed particularly improbable that the officers would stage this savage attack in a heavily trafficked corridor, being used by hundreds of inmates and officers, just at the time school was over and the inmates would be passing through the corridor to return to their housing areas.

The inmates' account referred to a number of other eyewitnesses, none of whom confirmed the alleged beating. Both inmates insisted they told Captain Brown what happened, assertions denied by the captain. Both said they mentioned being beaten by officers to clinic staff, assertions also contradicted by Department records and the testimony of Mr. Ojudun. In his hearsay statement, Mr. Oates insisted that a female officer came upon the scene and activated an alarm, an assertion not confirmed by any facility records. Mr. Driver testified that the next day when he returned to the housing area and tried to tell a female officer about being beaten by the two male officers, but she "did not get back" to him (Tr. 165). In his statement to the investigators, he also mentioned a female correction officer arriving on the scene. Department investigators were evidently unable to find any female officer who could confirm witnessing the incident or having a conversation with Mr. Driver.

There were other details in the inmates' account that seemed inaccurate. Mr. Driver insisted that he was injured in his shoulder, back and head during the beating by the officers (Tr. 173), a statement at odds with the injury report that he had no visible injuries and did not complain of having any. Certainly the inmates' description of a lengthy assault on Mr. A was inconsistent with the photos taken the next day, which showed only a two-and-one-half inch bruise on Mr. A's lower right side and two small scratches on his lip and side. The inmates' statements that a female officer entered the corridor during the assault and the suggestion, in

inmate Oakes's written statement, that a female officer activated her body alarm, were not confirmed by any other Department proof.

The inmates' assertions that Officer McMillan beat Mr. A with his utility belt, leaving the welt on his lower back, was challenged by evidence that, given the number of items on Officer McMillan's utility belt, this would have been extremely difficult to do. Officer McMillan testified that, on the date of the incident, his utility belt contained his gun, a cartridge, magazine holders, his chemical spray, a flashlight, and a pouch for his gloves (Tr. 482-83). In a photo (Resp. Ex. H), purportedly of Officer McMillan's utility belt, the belt is shown to have some seven devices attached to it, such that stripping the belt in order to use it as a whip, as described by the inmates, would have been difficult and time-consuming. Neither of the inmates mentioned seeing Officer McMillan remove these attachments.

Other than the inmate accounts, the primary evidence relied upon by petitioner in support of its theory that the officers assaulted the inmates was the shape of the bruise on Mr. A's lower right side. The photographs taken by the investigators (Pet. Ex. 1, photos 6 and 9) show a reddish bruise approximately two and one half inches long and a half-inch wide in roughly a rectangular shape. The only witness who opined about the significance of the mark was Investigator Lynch, who concluded that the mark "was consistent with the inmate's allegation that he was struck with a belt" (Tr. 291).

I agree with Investigator Lynch that the photos of Mr. A's lower side injury are consistent with the mark a belt might make if swung with a great deal of force. It is also true, as observed by counsel for petitioner, that this injury could probably not have been inflicted by a punch. The bruise seems equally consistent, however, with the officers' account that Mr. A was kicked by Mr. Driver. The sole of a shoe, striking someone in the back in a sweeping motion, could conceivably cause a red linear bruise similar to that on Mr. A's back. It is also possible, as argued by counsel for respondents, that in striking the wall and falling, Mr. A hit his side against a six-inch-deep bench standing against the wall. Certainly, this mark, the most visible injury on Mr. A, does not support Mr. A's and Mr. Driver's statements that Mr. A was beaten repeatedly with a belt as well as being kicked several times, since there are no other bruises or marks on Mr. A's back. Furthermore, it seemed odd that Mr. Ojudun, the only witness with any medical expertise, was asked no questions about the possible cause of this mark, whether by a belt or a shoe or a fall against another object, all of which seemed equally plausible.

Respondents' accounts, unlike those of the inmates, presented very few credibility challenges. The officers offered largely consistent descriptions of the incident in their reports and in their testimony. They agreed that Mr. A first attacked Mr. Driver and Mr. Driver immediately began a far more brutal attack on Mr. A. Officer McMillan threatened to activate his chemical agent and the inmates stopped. Most significantly, Captain Brown corroborated the officers' account by stating that he was notified of the incident by Officer Harris, promptly went to the area, and spoke with the two inmates, who confirmed that they had been in a fight, without mentioning being struck by the officers. Even though the officers had a motive to falsely deny assaulting the inmates to avoid being punished, there is little evidence in the record to suggest that they actually did so.

In his closing, counsel for petitioner raised a number of challenges to the plausibility of respondents' statements. He argued that, from the end of the corridor and on the other side of the barred gate, Officer McMillan could not have seen Mr. Driver fighting with someone. He also argued that it was implausible that Officer Harris would have intervened so slowly and failed to stop Mr. Driver from kicking Mr. A several times. As to Officer McMillan's ability to see an inmate fight from the end of the corridor, the video (Pet. Ex. 18) confirmed only that this observation would have been difficult, primarily because of the barred gate, but not impossible. This also seemed an unlikely detail for the officer to fabricate, since it did directly refute the inmate's accusations. Finally, I found nothing implausible about Officer Harris's explanation that Mr. Driver was able to kick Mr. A several times before the two officers were able to stop him. It seemed possible that, since Officer Harris was separated from the inmates by the gate and as much as ten feet (Tr. 421), it would take him several seconds to reach them. It was plausible that, during these several seconds, Mr. Driver could have kicked Mr. A a number of times.

In sum, the largely uncorroborated and implausible accounts offered by the two inmates were insufficient to sustain the allegations as to beating the inmates, failing to report a use of force, or providing false reports about the incident. See *Dep't of Correction v. Patterson*, OATH Index Nos. 2080-85/08, 2088/08 at 8-9 (Apr. 9, 2009) (excessive force charges dismissed due to problems with inmate's inconsistent statements, exaggerated injuries, and overall credibility); *Dep't of Correction v. Winchester*, OATH Index Nos. 911/07, 912/07, 957/07, 958/07 at 14-15 (May 8, 2007) (excessive force charges dismissed due to problems with inmates' inconsistent

and uncorroborated statements, as compared to officers' corroborated and more credible accounts); *see generally, Dep't of Correction v. Perez*, OATH Index No. 179/83 at 36-37 (Dec. 21, 1983) (discussing inmate's and officers' motives to lie in use-of-force cases). All of the specifications against both respondents should be dismissed.

FINDINGS AND CONCLUSIONS

1. Specifications 1 through 5 of DR 393/11 against Officer Harris should be dismissed in that petitioner failed to prove by a preponderance of the evidence that Officer Harris used excessive force, failed to report a use of force, or submitted a false report.
2. Specifications 1 through 5 of DR 392/11 against Officer McMillan should be dismissed in that petitioner failed to prove by a preponderance of the evidence that Officer McMillan used excessive force, failed to report a use of force, or submitted a false report.

Accordingly, I recommend that the charges against both officers be dismissed.

John B. Spooner
Administrative Law Judge

April 4, 2012

SUBMITTED TO:

DR. DORA B. SCHRIRO
Commissioner

APPEARANCES:

DAVID KLOPMAN, ESQ.
PAUL MILLER, ESQ.
Attorneys for Petitioner

KOEHLER & ISAACS, LLP
Attorneys for Respondents
BY: PETER C. TROXLER, ESQ.