

## ***Dep't of Correction v. Victor***

OATH Index No. 388/15 (Apr. 2, 2015), *adopted*, Comm'r Dec. (June 4, 2015), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2015-0794 (Aug. 20, 2015), **appended**

Correction officer found to have used excessive and impermissible force by striking inmate in the face and stomping on his face as he lay on the floor. Considering nature of force as well as officer's disciplinary history, which included a similar incident, termination of employment is recommended.

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### **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF CORRECTION**  
*Petitioner*  
*-against-*  
**AUBREY VICTOR**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**FAYE LEWIS**, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Correction, pursuant to section 75 of the Civil Service Law, against respondent Aubrey Victor,<sup>1</sup> a correction officer assigned to the Robert N. Davoren Complex ("RNDC") on Rikers Island. The charges allege that on March 31, 2011, at about 10:24 p.m., respondent used excessive, unnecessary, and/or impermissible force against Inmate Humphrey by striking the inmate in the face without provocation and by stomping on the inmate's head three times as the inmate was lying on the floor, causing physical injury (ALJ Ex. 1).

At a one-day trial, petitioner presented the testimony of three witnesses: Captain Joanne Miller, Officer Porsha Wiggins, and Captain Danny Lomas. Petitioner also presented documentary evidence, including a video of the incident. Respondent testified in his own behalf and presented documentary evidence.

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<sup>1</sup> Respondent's motion to redact his name from the OATH decision was denied upon my finding that reports and recommendations issued by OATH, an independent tribunal, are not "under the control" of the Department of Correction and thus do not fall within the confidentiality provisions of section 50-a of the Civil Rights Law. *Dep't of Correction v. Victor*, OATH Index No. 388/15, mem. dec. (Feb. 3, 2015).

For the reasons set forth below, I find that the charges are sustained. I recommend that respondent's employment be terminated.

### ANALYSIS

It is undisputed that on March 31, 2011, respondent, who was assigned as a mental health escort officer, engaged in a use of force against Inmate Humphrey, who was then a 16-year-old teenager housed at RNDC. The use of force occurred in a vestibule to the Modular One housing area, during respondent's escort of the inmate from a housing area in a Central Punitive Segregation Unit ("CPSU") in One Central to a mental health observation area in Modular One. The force involved multiple blows with respondent's hands as well as strikes or stomps with respondent's legs. The inmate sustained injuries to his face, including a swollen and bruised lip. The parties dispute the nature of the force and whether it was justified.

Petitioner contends that respondent used excessive and unnecessary force, including stomps to the inmate's head, in retaliation for the inmate having punched him previously. Respondent asserts that the force was permissible under the Department's use of force directive because he had a reasonable belief that the inmate had a weapon and he feared for his life. Respondent further contends that the alleged stomps were in the nature of "leg strikes" aimed at the inmate's hands and that any contact to the chin or lip was accidental, because the inmate had his hands near his face (Tr. 250-51). Petitioner rejects respondent's contention that he believed the inmate had a weapon and asserts that the stomps were targeted toward and landed on the inmate's head. When the vestibule was searched after the use of force, a weapon was never found (Tr. 67-68).

On the day in question, Inmate Humphrey was being transferred from his housing area in One Central to a housing area in Modular One where he could be monitored and evaluated by mental health staff. The inmate had been placed on a suicide watch upon reporting that he had swallowed a battery (Tr. 60; Pet. Ex. 2). Respondent was assigned to escort the inmate during the transfer. When inmates are transferred, it is the general practice that their property goes with them to the new housing area (Tr. 62).

Respondent and, to a lesser degree, Captain Miller, testified about the circumstances leading to the use of force during the escort. Respondent testified that Inmate Humphrey became "very agitated" during the escort because he realized that not all of his clothes had been

transported to the Modular One housing area (Tr. 177). Respondent gave inconsistent testimony about whether the inmate transported his own property and when he first realized that his property was missing. Respondent initially testified that the inmate retrieved his property from CPSU and became upset on the walk to Modular One (Tr. 171). On cross-examination, respondent testified that, rather than the inmate retrieving his own property, an officer in One Central gathered the inmate's property into a bundle, wrapped in a blanket, and gave it to the inmate (Tr. 207, 208). Respondent then revised his testimony to indicate that the inmate did not transport his property during the escort. Rather, his property had been transported and was sitting on the floor in the vestibule to Modular One. Respondent said that he did not know who put the property in the vestibule (Tr. 233).

According to respondent, upon discovering that some of his property was missing, Inmate Humphrey stated, in substance, "I'm going to fuck up one of, one of you CO's is going to get fucked up today if I don't get my property back" (Tr. 177). Respondent testified that he returned to One Central with the inmate, where an officer retrieved the rest of the inmate's property, which had been secured in a locker (Tr. 177, 206). After that, respondent and Inmate Humphrey began walking back to Modular One. Respondent told Inmate Humphrey that he was going to be housed in Modular One on suicide watch. The inmate became irate and said the captain had told him he was going to the One Upper housing area, not Modular One (Tr. 178). They passed Captain Miller in the corridor, who confirmed that Inmate Humphrey was on suicide watch and had to go to Modular One, but also said that she would return soon to talk to the inmate. Respondent testified that when Captain Miller spoke to the inmate, this seemed to "pacify him for a little bit," but only temporarily (Tr. 178).

Captain Miller confirmed that Inmate Humphrey was "very resistant" to going into Modular One (Tr. 60). She recalled passing the inmate and respondent as she was on her way to another area. Inmate Humphrey told her that he did not want to be moved. She replied that he had to go to Modular One, and that she would return and check on the situation (Tr. 61). She testified that she knew Inmate Humphrey because she was steadily assigned to the areas where he was housed, and he felt comfortable enough to talk to her directly rather than through an officer (Tr. 90).

Captain Miller did not see Inmate Humphrey or respondent again until after the use of force incident in the Modular One vestibule.

Respondent and Officer Wiggins were the only witnesses to testify about the use of force. Officer Wiggins was the A officer and was assigned to the A station, adjacent to the Modular One vestibule. Officer Wiggins was responsible for opening the door to the stairwell that descends into Modular One, which is at a lower level than the rest of the building. There are somewhere between 10 and 17 steps in the staircase. Officer Wiggins opened the door to the stairwell and let respondent and Inmate Humphrey in. Then she locked the door behind her and remained momentarily at the top of the stairs, securing the A corridor door (Tr. 126, 127, 170, 180, 223).

Respondent testified that he and Inmate Humphrey went downstairs while Officer Wiggins secured the door. Inmate Humphrey was slightly in front of respondent. When they were about two steps from the end of the staircase, Inmate Humphrey turned and struck respondent in the right side of his face, without warning (Tr. 179, 180, 218). The blow “stung” respondent and caught him “off guard” (Tr. 216). Inmate Humphrey continued walking into the vestibule (Tr. 218). Respondent “prepared to defend [himself],” (Tr. 180), which caused the inmate to become “even more agitated” (Tr. 189). The inmate then “turned” and “started digging into his property” (Tr. 181).

Respondent maintained that at this juncture he intended to go into the A station, which is visible on the videotape by a gray door on the left side of the video frame (Pet. Ex. 1). However, when he passed the inmate, he “distinctly” heard Inmate Humphrey say, “I’m going to get my shit and I’m going to fuck you up” (Tr. 181, 236). He thought the inmate was going for some type of weapon and might attack him or possibly hurt himself (Tr. 181, 182, 197, 236). However, he did not see a weapon in Inmate Humphrey’s hand (Tr. 231). He turned to stop the inmate from getting a weapon, while telling him to stop and step back from his property. His intent was “to push [the inmate] away from his property” (Tr. 198, 182). But, because the inmate was “leaning over,” respondent’s hands hit him on the shoulder (Tr. 182). Inmate Humphrey then rose up in “a boxing like stance,” with his fists balled (Tr. 182). Respondent testified that he defended himself by punching the inmate twice (Tr. 182).

After that, according to respondent, Inmate Humphrey kept “coming toward” him (Tr. 183). In the course of the physical struggle, he wound up grabbing Inmate Humphrey, who grabbed him back. During the struggle, respondent “could sense a burning sensation” on his right hand, which was around the inmate (Tr. 184). This confirmed his earlier suspicion that

Inmate Humphrey had retrieved a weapon (Tr. 199, 237). Respondent testified that officers are taught to use blows to “distract” an inmate, so he “did that,” and then he tried to get the inmate away from him by turning and pushing him away (Tr. 199). At this juncture the inmate fell to the floor, lying with his arms bent at the elbow and his hands “clenched” in front of him, near his chin (Tr. 200, 185).

Respondent continued:

When he fall away from me on the floor, I, I still had a sense of a threat there because it wasn't like he was secured, he was still, it was one motion, he fell on the floor and still, like, kept his hands, like, if he still intended, he got something in his hand still. I, thinking that he had something and not wanting to get that close to Mr. Humphrey in case he, he was going to use it on me, I had, and I couldn't leave because he's right there. I just, I used my foot in a kicking motion to hit whatever he might have had in his hands at the time.

(Tr. 184). Respondent stressed that he administered a kick “only because I was afraid for my life,” and “the farthest, safest thing to do was try to use my foot in a kicking motion to get whatever Mr. Humphrey had in his hands” (Tr. 185).

Respondent acknowledged that he administered two additional leg kicks, all directed to Inmate Humphrey's hand, while telling the inmate “to drop it” (Tr. 187). The kicks hit the inmate's hands (Tr. 187). After this, Officer Wiggins and Officer Omowale Semple, who had entered the area, “pushed [respondent and the inmate] apart” (Tr. 187). Officer Semple restrained the inmate while Officer Wiggins was “in between,” and then respondent left the vestibule and went into the A station (Tr. 188). Respondent went to the clinic for medical attention. He had a scratch on his hand that was bleeding. The doctor cleaned his hands and gave him an icepack for his jaw (Tr. 188). When the doctor asked if he wanted to go to the hospital, respondent demurred, indicating that his tour was almost over and he would prefer to go to his own doctor (Tr. 189).

Respondent submitted a use of force report about the incident (Pet. Ex. 3), written the same day, which was substantially similar to his trial testimony.

Officer Wiggins provided a different account of what transpired after she entered the vestibule. Most notably, she testified that after she entered the vestibule, upon hearing a “commotion” from downstairs (Tr. 128), she saw the inmate lying on the floor and saw

respondent kick him in the facial area (Tr. 131, 136). She testified that she separated respondent from the inmate because she felt the inmate was “still being resistant” (Tr. 132). Officer Wiggins provided more detail in her use of force witness report, written by the end of her tour, within an hour and 15 minutes of the incident (Tr. 130):

This writer . . . observed C.O. Semple . . . giving verbal orders to the said inmate to stay on the floor and used hand/arm technique to restraint Inmate Humphrey . . . in order to prevent further struggle. Then, this writer aided C.O. Victor . . . by guiding him away from the inmate and observe as what appears to be a swollen fists from C.O. Victor . . . . **For unknown reasons this writer observed C.O. Victor . . . kick blows to inmate’s facial area.** This writer attempted to separate and cease the situation by re-guiding Victor . . . the opposite way [sic].

(Pet. Ex. 4) (emphasis added).

Officer Semple did not mention respondent in his use of force report, other than to say that he saw respondent “attempting to restrain an irate and combative inmate” (identified as Inmate Humphrey). He wrote that the inmate fell to the floor due to attempts to restrain him, and that when the inmate tried to get up, “enraged and yelling obscenities,” he “intervened” by administering control holds such as grasping the inmate’s hands in order to gain compliance, and gave the inmate several direct orders to cease his aggression, with which the inmate complied (Pet. Ex. 5). A review of the videotape (Pet. Ex. 1) indicates that Officer Semple mainly described his role in the incident after respondent was separated from the inmate. Officer Semple did not describe the force which respondent used, other than the take-down to the floor.

Inmate Humphrey did not testify in this proceeding, but he wrote a statement on the date of the incident in which he alleged that respondent hit him coming down the steps to the vestibule, as part of an argument about his clothes. He wrote that he did not react and that he has a “busted lip” and “hurting head” (Resp. Ex. B).

The injury to inmate report relating to this incident shows that Inmate Humphrey was examined in the clinic on April 1, 2011, shortly after midnight. The clinical findings included a slightly swollen and bruised upper and lower lip and right cheek, a nosebleed of the left nasal passage, slight pain on palpitation of the right side of the neck, and contusions of the lip and right cheek (Pet. Ex. 7).

Directive 5006R-C (Pet. Ex. 8) provides that force may be used against an inmate “to defend oneself or another from a physical attack or from an imminent physical attack.” Directive 5006R-C at IV.A.1. Force may not be used to “punish, discipline, assault or retaliate against an inmate,” or “[a]fter an inmate has ceased to offer resistance.” *Id.* at IV.B.1, IV.B.2. Moreover, force is to be used “as a last alternative after all other reasonable efforts to resolve a situation have failed,” and the amount of force used “should always be proportional to the threat posed by the inmate at that time.” *Id.* at V.B.1. The directive lists uses of force in order of least to greatest degree of force and states that staff should first try to “defuse the situation by talking to the inmate.” *Id.* at V.B.2.a. Further, where appropriate, staff “should seek intervention by mental health staff.” *Id.* at V.B.2.b. If possible, staff should use “non-contact control techniques,” including hand-held chemical agents. *Id.* at V.B.2.c. When necessary, staff can apply a combination of blocks and or blows to the body until the inmate is under control. However, except when “unavoidable,” blows “should be directed away from the head.” *Id.* at V.B.2.e.

Deadly physical force is forbidden under the use of force directive except “as a last resort,” after “reasonable alternatives” to deadly physical force have been “exhausted.” *Id.* at V.C.1. The directive provides that deadly physical force is permissible either when an officer needs to defend himself or herself from what he or she “reasonably believes to be the use or imminent use of Deadly Physical Force by the inmate,” or when there is no other reasonable alternative to prevent or terminate an escape from custody. *Id.* at V.C.2.a., V.C.2.b. Deadly physical force is defined as “force which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury.” Serious physical injury is defined to include physical injury “which creates a substantial risk of death” or causes “protracted impairment of health or protracted loss or impairment of the function of any bodily organ.” *Id.* at V. C.

Captain Danny Lomas, a 28-year veteran of the Department and an instructor at the training academy for 14 years, testified that a kick to the head is considered deadly force (Tr. 138-39, 144). Captain Lomas was not asked for, and did not proffer, an opinion about whether blows to the head from the hands are also considered deadly force under the directive. However, this tribunal has held in several cases that such blows to the head constitute deadly force. *See Dep’t of Correction v. Andino*, OATH Index Nos. 731/13 & 1000/13 at 23 (May 14, 2013), *aff’d*, NYC Civ. Serv. Comm’n Case No. 35462 (Jan. 27, 2014) (“Even though no injuries were

sustained, the blows to the inmate's head and the chokehold constituted unnecessary deadly force under the Directive."); *Dep't of Correction v. Wingate*, OATH Index Nos. 1490/12 & 1491/12 (Nov. 15, 2012) ("Based upon the language of the force directive a blow to an inmate's head constitutes deadly force, only justified where an officer is himself threatened with deadly physical force . . ."). Moreover, whether or not punches or slaps to the head are deadly force, the Directive emphasizes that such blows should be directed away from the head whenever possible and used only when other alternatives are not available.

In evaluating whether respondent used excessive force under the Directive, a review of the video of the incident is essential. There is no audio on the video, so it neither corroborates nor negates respondent's testimony that Inmate Humphrey made threats while digging through his property. However, particularly when played in slow motion and using a zoom focus, the video depicts the sequence of events in the confrontation between respondent and the inmate. The first frame of the video is of the inmate, who is bending over with his hands down, consistent with respondent's testimony that the inmate was reaching into his property. Respondent is shown coming around the side of Inmate Humphrey and standing very close in front of him, while using his right hand to backhand the inmate across the face. Almost instantaneously, respondent uses his left hand to punch the inmate on the left side of his face (10:30:27:350).

Having been punched, Inmate Humphrey balls up his fists and assumes a fighting stance. At this juncture, respondent and the inmate are not touching, although they are in close proximity. Respondent then punches the inmate twice, once with his left hand and once with his right. The blows land on the left side of the inmate's face and near the top of the inmate's head (10:30:29.247, 10:30:29.547). Inmate Humphrey tries to grab respondent, who positions his knee as if to throw the inmate off balance and bring him down to the floor (10:30:30.046). The inmate and respondent grapple with each other over small plastic chairs, the inmate falling into one of the chairs (10:30:32.043), and respondent punching him once during the struggle (10:30:33.641).

Officer Wiggins and Officer Semple then arrive (10:30:36.237). Several seconds later, respondent, who has Inmate Humphrey in a hold, brings him to the ground and turns him on his side (10:30:38.233). At this juncture, the inmate is lying on his right side with his left leg outstretched and his right leg bent at the knee towards his head. The upper part of his body is

curled up, almost in a fetal position. The right side of the inmate's face is on the ground; the left side of his face is facing up. The inmate does not appear to be aggressive. At approximately 10:30:37.835, respondent raises his leg and, at 10:30:39.433, stomps on what appears to be the inmate's head. The inmate's hands are not visible but it seems as if the inmate moves his arm closer to his head after the first stomp (10:30:39.632). Officer Wiggins intervenes, putting her right arm against respondent's left arm as if to push him away (10:30:39.832), but respondent raises his leg and appears to again stomp on the inmate's head (10:30:40.232, 10:30:40.531).

Seconds later, respondent raises his foot as if to kick Inmate Humphrey, but Officer Wiggins moves respondent away. It is not clear whether the kick makes contact with the inmate, although one of his legs moves slightly (10:30:42.229). Officer Wiggins and Officer Semple continue to push respondent away from the inmate (10:30:42.329). Respondent re-approaches the inmate, leaning forward, with his face down, as the inmate remains on the ground. Respondent has his right leg drawn back as Officers Wiggins and Semple again push him away from the inmate (10:30:44.321-10:30:47.720). Officer Semple attends to Inmate Humphrey, while Officer Wiggins stands between respondent and the inmate. Then, as Officer Wiggins moves away from respondent, respondent moves slightly forward towards the inmate, picks up his tie clip, which is lying on the floor, and leaves the vestibule (10:31:42.460).

Captain Miller, who prepared the use of force investigation report, testified that she believed the leg strikes at the end of the video were excessive because by that point, Inmate Humphrey was already subdued (Tr. 118; Pet. Ex. 2). She stated, however, that she could not see the inmate's hands on the video (Tr. 103). By contrast, she felt that the initial force was appropriate because the inmate was resistant to going into the housing area and appeared to be going to retrieve something from his bundle of property (Tr. 95-96). Additionally, she believed there was an "inadvertent bump" between respondent and the inmate, which "initiated the actual physical fight" (Tr. 97). She acknowledged that the infraction against the inmate for engaging in the fight was dismissed, in light of her conclusion that the "leg strikes" by respondent were excessive (Tr. 92-93; Resp. Ex. C).

Conversely, Captain Lomas concluded that the initial blows to the inmate's face were excessive. He testified that even if respondent thought that the inmate had a weapon, he should have used alternatives to force. Specifically, he should have directed the inmate to take his hands out of the bundle of property and put them on the wall, while simultaneously reaching for

his chemical agent. If the inmate did not comply, he should have sprayed the inmate with the chemical spray (Tr. 152, 157, 158). Regarding the force at the end of the video, Captain Lomas testified that he saw a “foot strike towards the upper torso of the inmate,” which is an area where “you can possibly cause serious physical injury or death” (Tr. 149). Captain Lomas testified that such “leg strikes” should only be used if respondent thought the inmate had a weapon in his hand (Tr. 149). However, he believed that in order to use such deadly force, an officer must first “identify” a weapon (Tr. 161).

Respondent testified that he did not use the chemical spray, as Captain Miller asserted he should have, because he did not feel that there was adequate space or time to withdraw. He needed at least three feet in front of him to spray, which he did not have (Tr. 190). He did not retreat and go back up the steps to where Officer Wiggins was because he had heard the door slam shut. Officer Wiggins would have had to open the door, which would have given Inmate Humphrey time to retrieve his weapon (Tr. 191). Respondent believed his safest course was to go into the A station, the door to which is visible on the left side of the video (Tr. 235; Pet. Ex. 1). Respondent maintained that the force which petitioner characterized as stomps to the head were really leg kicks to the hands, intended to dislodge what he believed might be a weapon in the inmate’s hands.

Petitioner has alleged that respondent used excessive force, first by striking the inmate in the face and then by stomping on his head.

With regard to the initial blows, respondent testified that he believed his initial strike to the inmate hit the inmate’s shoulder. However, the video shows a backhand strike to the inmate’s face, followed almost instantaneously by a punch to his face. The video shows respondent punched the inmate several other times as their struggle continued, before respondent brought the inmate to the ground. There is no question that respondent struck the inmate in the face several times.

I find, as alleged, that such strikes to the head were excessive. Respondent testified that he thought the inmate was reaching for a weapon because the inmate said he was going to get his “shit” and would “fuck [him] up.” However, respondent acknowledged that he did not see a weapon in the inmate’s hands. Moreover, the directive makes clear, as Captain Lomas testified, that head blows are to be used only as a last resort and when no other alternatives are available. Here, there were other alternatives available. Respondent could have ordered the inmate to

desist and pulled out his chemical spray, as Captain Lomas testified. If respondent thought he was too close in proximity to Inmate Humphrey to spray safely, he could have retreated up the stairs he had just come from and pulled out his chemical agent. Respondent could also have walked past the inmate, over to the door to the A station, and taken out his chemical spray from that location. Instead, respondent walked right up to the inmate and slapped him across the face.

Respondent's testimony that he wanted to "grab" or "push" Inmate Humphrey away from his property (Tr. 198), but wound up striking him because he was "leaning over" (Tr. 182), was controverted by the video evidence. The video shows that the inmate was bending over, but was starting to straighten up when respondent crossed his right arm in front of his body and then slapped the inmate across the face with a backhanded motion. This was a very deliberate movement, not consistent with trying to grab the respondent or push him away from his property. Captain Miller's testimony that an inadvertent bumping preceded the initial confrontation is not supported by the video.

Moreover, I do not credit respondent's testimony that he believed that Inmate Humphrey was reaching into his property to get a weapon. This appeared to be an after the fact embellishment rather than an accurate statement of what respondent perceived at the time. Respondent's testimony about whether or not the inmate had carried his property into the vestibule was convoluted and contradictory. Respondent initially testified that Inmate Humphrey carried the bundle of property into the vestibule from his former housing area in One Central. This would make it more plausible for the inmate to have hidden a weapon within the bundle. Yet respondent later testified that an officer gave respondent the bundle of property to carry, and his final testimony on the matter was that the bundle of property was already on the vestibule floor when he and the inmate arrived. This would make it far less likely that the inmate had hidden a weapon in the bundle of property.

Thus, that portion of the charge which alleges that respondent used excessive and unnecessary force by striking Inmate Humphrey in the face is sustained.

I further find that respondent used excessive force by stomping on Inmate Humphrey's facial area. The inmate sustained an injury to his lip, consistent with a kick or stomp to the head. Moreover, although respondent's counsel contended that any injury to the face was accidental, and that respondent was really aiming for the inmate's hands (Tr. 251), Officer Wiggins wrote in her use of force report that, "for unknown reasons," she saw respondent "kick blows to the

inmate's **facial area**" (Pet. Ex. 4) (emphasis added). She did not say that respondent kicked toward the inmate's hands. Indeed, she made no mention of the inmate's hands. It is unlikely that Officer Wiggins was mistaken. She was right there when the force occurred, and she wrote her report within an hour and a quarter after the incident. Moreover, Officer Wiggins testified, consistently with her report, that the force was to the facial area (Tr. 131, 136). Officer Wiggins had no discernible motive to falsely accuse a fellow officer of kicking an inmate in the head. Her credible testimony, coupled with the video evidence and the medical injuries, establish that respondent stomped on the inmate's head twice with his foot and tried after that to kick him. It is not clear from the video, however, whether the final kick made contact with the inmate.

I find respondent's testimony that he kicked at Inmate Humphrey because he believed the inmate had a weapon to be incredible. Respondent testified that he had a burning sensation in his right hand after the inmate grabbed him, but he acknowledged that he never saw a weapon in the inmate's hands (Tr. 244). Although respondent also testified that he never saw the content of Inmate Humphrey's hands (Tr. 203), the video evidence is to the contrary. The video shows there were multiple times when the inmate held his hands in an open position, visible to respondent. After respondent initially punched Inmate Humphrey, the inmate put his right hand on the top of his head and held his left hand out in front of him, bent at the elbow, with the forearm up. The hand appeared to be empty (10:30:27.749). At 10:30:27.949, just before Inmate Humphrey balled up both his hands, his left hand was again in an open position and empty. After the inmate assumed a fighting stance, and respondent punched him on the left side of his face, the inmate's right hand was open (10:30:29.247). When respondent punched Inmate Humphrey on the top of his head seconds later, the inmate's left hand was open (10:30:29.547). It defies belief that respondent did not see that the inmate's hands were open and empty.

Just as critical, respondent's actions after Officers Semple and Wiggins pushed him away from Inmate Humphrey are at odds with his claim that he thought the inmate had a weapon. Respondent could not testify credibly about why, if he thought the inmate was holding a weapon, he re-approached the inmate leaning forward, with his head down. Respondent first testified that he did so because of "the safety of the . . . officers giving me, helping me to go closer to investigate what it was in his hand at the time" (Tr. 239). This explanation does not make sense, given respondent's acknowledgment that the inmate was still not secure and his assertion that he was afraid the inmate had a weapon (Tr. 239).

Respondent's other explanation for coming into close proximity with Inmate Humphrey was that he did not intend to take an unsafe position, but "because the officers [were] probably pushing me around, my body probably went all the way than I intended to go" (Tr. 240). Yet the video shows that the officers were not pushing him towards the inmate; rather, they were pushing him away from the inmate.

Respondent also acknowledged that he never warned Officer Semple or Officer Wiggins that he thought the inmate had a weapon (Tr. 241, 244). He testified that he did not "really have time" to say anything to them about a weapon, that his "primary concern" was his safety and making sure that the inmate did not start a use of force again, and that he had "no communication" with the other officers (Tr. 201). Respondent's explanation is belied by the video, which shows Officer Wiggins focusing on respondent while Officer Semple attended to the inmate. Officer Wiggins is shown on the video continuing to push respondent away from the inmate (10:30:45.519-10:30:47.616). After that, she stands facing respondent, at one point touching his arm and seemingly restraining him from going forward until she lets go and he retrieves his tie clip (10:31:06.932). The video dispels any notion that respondent did not have an opportunity to tell Officer Wiggins that he thought the inmate might have a weapon.

More startling, given Officer Semple's close proximity to the inmate, is respondent's explanation that he did not tell Officer Semple that he thought the inmate had a weapon because "calling it to his attention" would have been "distracting" (Tr. 244). Instead, he "just stayed away from . . . the inmate and Officer Semple" (Tr. 244). Respondent stressed that he did not think the inmate posed a danger to Officer Semple, because the inmate was lying on his stomach "in full compliance" (Tr. 241). However, this is not an accurate description of the inmate's position when Officer Semple first approached him and it ignores that throughout Officer Semple's interactions with the inmate, the inmate's hands were not secure.

The video shows that after helping Officer Wiggins push respondent away from the inmate, Officer Semple closed the door to the housing area and bent over the inmate, who was not lying flat on his stomach, but was curled up, and moving his left arm (10:30:49.813-10:30:51.244). This was approximately ten seconds after respondent had kicked the inmate (10:30:39.433), testifying that he did so because he feared for his life. Surely, if respondent sincerely feared for his life, he would have alerted Officer Semple that he thought the inmate had a weapon. His testimony to the contrary makes no sense.

Moreover, although at one point the inmate lay flat on his stomach (10:30:52.143), he did not remain in that position, but moved partially onto his side less than a minute later (10:31:08.530), while Officer Semple continued to attend to him. Respondent moved toward Officer Semple and the inmate to pick up his tie clip (10:31:07.332-10:31:12.325), but did not say anything to Officer Semple at that time about a weapon. After that, respondent remained in the vestibule area for about half a minute, during which time Officer Semple continued to bend over the inmate, who at times was touching his face and gesturing with both hands. When respondent left the vestibule (10:31:42.640), the inmate appeared to have his left hand on his face and his right hand tucked near his chest. Under no stretch of the imagination can it be said that the inmate's hands were secured.

Respondent's failure to alert either Officer Semple or Officer Wiggins that the inmate had a weapon is compelling evidence that respondent did not believe the inmate had a weapon. It appeared instead that respondent acted out of anger and in retaliation for the inmate having punched him in the stairwell. Without a reasonable belief that Inmate Humphrey had a weapon, respondent's use of his foot to stomp on the inmate's facial area was an act of deadly force which was excessive and unjustified.

Accordingly, the charge against respondent is sustained, as amended to the proof that respondent stomped on the inmate's head two times.

### **FINDINGS AND CONCLUSIONS**

Respondent used excessive, unnecessary, and impermissible force against Inmate Humphrey by striking the inmate in the face without provocation and by stomping on the inmate's head two times as the inmate was lying on the floor, causing physical injury.

### **RECOMMENDATION**

Having made this finding, I received and reviewed respondent's disciplinary abstract. It indicates that respondent was appointed to the Department in 1999. Since then he has had two unit citations, in 2001 and 2011. In 2004, following a trial at this tribunal, respondent received a 30-day suspension for kicking an inmate in the back while the inmate was complying with his orders and not offering any resistance. The incident also occurred at RNDC, although at the time it was known as the Adolescent Reception Detention Center. *Dep't of Correction v. Victor,*

OATH Index No. 185/04 (Apr. 14, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-48-SA (Aug. 11 2005).

I also reviewed three letters of reference that respondent's counsel had asked to submit if liability were found. The letters were written by mental health clinicians at RNDC, including a psychiatrist. They uniformly praise respondent for his professional demeanor, patience with adolescents, and skill in de-escalating confrontation between patients, as well as between patients and other correction officers. Two of the letter writers noted that they had never seen respondent engage in a use of force other than in a professional and appropriate manner. Mr. Kent, one of the clinicians, characterized respondent as an outstanding officer who is "an asset to the mental health team at RNDC."<sup>2</sup>

Petitioner has requested that I recommend that respondent's employment be terminated. In so doing, petitioner acknowledges that the injuries to the inmate were minor, but contends that the lack of serious injury was fortuitous and that stomps or kicks to the head constitute force capable of causing serious bodily injury or even death (Tr. 257). Conversely, although contending that the charge should be dismissed, respondent asserts that if liability is found, any penalty recommendation should be at the lower range for use of force violations, because respondent had a legitimate and good faith, if perhaps mistaken, belief that he was being confronted with deadly physical force (Tr. 251).

The weakness in respondent's argument is my finding that respondent lacked a reasonable belief that the inmate had a weapon in one of his hands. Instead, respondent's entire use of force, from his initial slaps to the foot stomps, appears to be retaliatory. Respondent testified that the inmate had punched him without warning in the stairwell. The video shows that as soon as respondent descended into the vestibule, he administered a backhanded slap to the inmate's face and punched him. The deliberate nature of the force dispels any notion that respondent was simply trying to grab the inmate or push him away from his property. Rather, the force was punitive. After the inmate began to fight back, the situation escalated. Respondent wound up throwing additional punches, grappling with the inmate, and then taking him to the floor. The video shows that respondent was out of control as he administered "leg strikes" or stomps to the inmate. He stomped towards the inmate's face as Officers Wiggins and Semple were entering the area, and he stomped a second time after Officer Wiggins tried to hold him

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<sup>2</sup> I marked the letters of reference as ALJ Ex. 2.

back. Then he raised his foot as if to kick the inmate, was pushed away by Officers Wiggins and Semple, but re-approached again, only to be pushed away again by the other two officers.

The Department's Use of Force directive emphasizes that deadly force is to be used only when necessary to counter deadly force, or to prevent an escape, and that blows to the head, in particular, are to be avoided whenever possible. Stomps on the head fall within the definition of deadly force. Moreover, while slaps or strikes to the head might also be considered deadly force, foot stomps are of a different, inherently more dangerous nature, and merit a different penalty assessment. *See Dep't of Correction v. Agbai*, OATH Index No. 156/14 at 8 (Nov. 25, 2013), *adopted*, Comm'r Dec. (Jan. 2, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2014-0064 (June 3, 2014) (finding stomps on the head, when an inmate was lying on the ground and subdued, to be particularly grievous, and recommending termination of employment).

Here, as opposed to *Agbai*, the inmate did not suffer significant injuries. However, that fortuitous difference does not change the fundamental, inherently dangerous nature of the foot stomps which respondent administered to the inmate's head. As Judge Addison noted in *Agbai*, "there is a reason why blows to the head are prohibited, even in situations where force is necessary. They are especially dangerous and may cause serious physical injury or even death." *Id.* at 8-9.

The reference letters written on respondent's behalf are notable, as they describe him as an asset to the unit and a responsible professional. However, the letters are not consistent with the evidence that respondent stomped on an inmate's head after he had stopped resisting. Thus, they do not serve to mitigate his reprehensible behavior in this instance. *See Dep't of Correction v. Behari*, OATH Index Nos. 781-86/14 at 66 (Sept. 25, 2014) (awards to respondents "do not mitigate [their] substantial breach of conduct"); *Dep't of Correction v. Andino*, OATH Index Nos. 731/13 & 1000/13 (May 14, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 35462 (Jan. 27, 2014) (correction officer's employment was terminated for improper uses of force even though he received a letter of appreciation and employee of the month); *Dep't of Correction v. Negron*, OATH Index No. 1844/11 at 21 (Sept. 16, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-04-SA (Jan. 20, 2012) (termination of employment recommended for correction officer who used excessive force on three occasions notwithstanding that a warden and two deputy wardens testified that his work was excellent); *Dep't of Correction v. Connell*, OATH Index No. 1598/11 (May 24, 2011) (termination of employment recommended for correction

officer who allowed inmates to assault another inmate, even though he received unit citation and certificate of appreciation).

Moreover, this is not the first time that respondent has been disciplined for using excessive force. Indeed, respondent's prior case also involved the use of force in retaliation for a physical assault upon him. It is not unreasonable that respondent would be upset or even angry in both instances, but he is not permitted to retaliate with physical force. In *Department of Correction v. Holder*, OATH Index No. 2208/07 at 6 (Sept. 14, 2007), Judge Spooner recommended termination of employment for a correction officer who struck an inmate, who had stopped resisting, in the head. He noted that the officer had been previously disciplined for excessive force and concluded that the prior discipline "confirms that termination is the only possible outcome in this case." This reasoning is analogous. Hence, considering both the nature of the force and respondent's prior disciplinary history, I find termination of his employment to be the only appropriate outcome and I so recommend.

Faye Lewis  
Administrative Law Judge

April 2, 2015

SUBMITTED TO:

**JOSEPH PONTE**  
*Commissioner*

APPEARANCES:

**ADRIAN LAURIELLO, ESQ.**  
*Attorney for Petitioner*

**KOEHLER & ISAACS, LLP**  
*Attorneys for Respondent*  
**BY: PETER TROXLER, ESQ.**

June 04, 2015

RE: DISMISSAL  
DR#197/11

Dear Officer Victor:

After a complete review of the record and the report and recommendation of the Honorable Faye Lewis, Administrative Law Judge, duly designated to conduct a disciplinary hearing on the charges and specifications listed above, I find you guilty as reflected in the report and recommendation. A copy of the report and recommendation is enclosed.

The sanction imposed upon is:

**DISMISSAL FROM THE DEPARTMENT OF CORRECTION EFFECTIVE FORTHWITH.**

Under the provision of Section 76 of the Civil Service Law, you are entitled to appeal from this determination by application either to the Civil Service Commission or to a court in accordance with the provisions of Article 78 of the Civil Practice Law and Rules. If you elect to appeal to the Commission such appeal must be filed in writing within twenty (20) days of receipt of this determination. A decision of the Commission is final and conclusive.

Sincerely,

Joseph Ponte, Commissioner

**THE CITY OF NEW YORK  
CITY CIVIL SERVICE COMMISSION**

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*In the Matter of the Appeal of*

**AUBREY VICTOR**

*Appellant*

*-against-*

**NYC DEPARTMENT OF CORRECTION**

*Respondent*

*Pursuant to Section 76 of the New York  
State Civil Service Law*

CSC Index No: 2015-0794

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**DECISION**

PRESENT:

**NANCY G. CHAFFETZ**, COMMISSIONER  
CHAIR

**RUDY WASHINGTON**, COMMISSIONER  
VICE CHAIR

**CHARLES D. MCFAUL**  
COMMISSIONER

**AUBREY VICTOR** (“Appellant”) appealed from a determination of the New York City Department of Correction (“DOC”) finding him guilty of incompetency and misconduct and imposing a penalty of Termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission (“Commission”) conducted a hearing on August 6, 2015. The Commission has carefully reviewed the record in this case and the testimony adduced at the

departmental hearing. Based upon this review, the Commission finds no reversible error and affirms the decision and penalty imposed by DOC.

Rudy Washington, Commissioner  
Vice Chair

Charles D. McFaul, Commissioner

**Concurring:**

Nancy G. Chaffetz, Commissioner  
Chair

Dated: 8/20/15