

Dep't of Correction v. Fulton, OATH Index No. 513/02 (Mar. 13, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD03-92-SA (Sept. 18, 2003).

Topic: 1. Use of force

2. False/misleading statements

3. Penalty

Judge: RF

Disposition: Charges sustained; twenty-day suspension recommended

Discussion of Listed Topic:

1. Videotape makes apparent that respondent employed force in assisting fellow officers to subdue unruly inmate. Respondent claimed she used no force and filed a witness to a use of force report instead of a use of force report.
2. In addition to failing to file a use of force report, the respondent belatedly filed the witness to a use of force report. At an MEO 16 interview, the respondent tendered false/misleading statements.
3. Failures to acknowledge or timely and accurately report uses of force upon inmates are serious acts of misconduct. ALJ recommends a suspension without pay for twenty days.

CITY OF NEW YORK
OFFICE OF ADMINISTRATIVE TRIALS
AND HEARINGS

In the Matter of

DEPARTMENT OF CORRECTION,

Petitioner,

- against -

JOY FULTON,

Respondent.

**REPORT AND
RECOMMENDATION**

Index No.
513/02

P R E S E N T :

RAY FLEISCHHACKER
Administrative Law Judge

T O :

WILLIAM FRASER
Commissioner
Department of Correction

A P P E A R A N C E S :

ANGIE MARTELL, Esq.
Attorney for Petitioner

KOEHLER & ISAACS
Attorneys for Respondent
By: **ARTHUR N. PEEPLES, Esq.**

This is the trial of a disciplinary proceeding brought by the Department of Correction pursuant to section 75 of the Civil Service Law. Correction Officer Fulton is charged with having failed to disclose that she employed force in an incident with an inmate, and having failed to submit a timely use of force report. She is further charged with having made false and/or misleading statements in an interview held pursuant to Mayoral Executive Order No. 16.

The hearing was conducted before me on February 19, 2002. Based upon the record of the proceeding, I recommend that the charges be sustained and that a penalty of a twenty-day suspension without pay be imposed.

THE EVIDENCE

Milagros Smith testified that she is a Correction Officer/Investigator assigned to the Investigations Division, and specifically, matters arising at the Otis Bantum Correctional Center (“OBCC”) - Central Punitive Segregation Unit (“CPSU”). Investigator Smith stated that she was assigned to investigate a use of force against Inmate Jose Cruz, which occurred on August 3, 2001. In connection therewith, she was provided with a pre-investigation package of documents, including use of force forms, witness reports and inmate reports, which she received from CPSU (Pet. Ex. 3; Tr. 7-10).

According to the investigator, when she received the package, she noted that there was no report from Correction Officer Fulton. Accordingly, in writing (Pet. Ex. 4), on August 21, she requested a report through the investigations captain, Captain Stukes. He called and told her he had received it. Captain Stukes was the vacation relief investigations captain from August 20 through August 31 (Tr. 11-13).

Investigator Smith identified Petitioner Exhibit 5 as a video she reviewed as part of her investigation. The video shows Officer Anavitarte escorting Inmate Cruz. Captain Santiago and Officer Fulton were also present. Officer Fulton is shown speaking with the inmate about a problem he had concerning visitation with his son. When the inmate resists being brought upstairs, Captain Santiago is heard to say, "Bring him back down." Thereafter, the captain applies an upper torso hold.

Investigator Smith testified that when she received Officer Fulton's report (Pet. Ex. 6), it was a witness report, although the video showed that the respondent had employed force in assisting to bring the inmate down. Therefore, she called Officer Fulton down for an MEO 16 interview. The officer maintained both before and after she viewed the video that she had not used force against Inmate Cruz. The respondent also claimed that, at home, she had a copy of the use of force report which she had submitted on August 3. However, the officer has not produced it to date (Tr. 13-18, 42-43, 47, 53-55; Pet. Ex. 7).

Investigator Smith was asked what statements made at the interview were false. She stated: the date on which the respondent claimed she submitted her report to Captain Stukes; that the respondent did not use force; that Captain Santiago told her to submit a witness report, which is something the captain denied at his MEO 16 interview. The respondent did concede that she placed her hand on the inmate but removed it when told to do so by Captain Santiago (Pet. Ex. 8; Tr. 20-22, 41).

Investigator Smith testified that she also conducted an MEO 16 interview of Officer Anavitarte (Pet. Ex. 9). At the interview, after viewing the videotape, the officer stated that it looked like the respondent had assisted him by using force. Before viewing the tape, the officer denied that

Officer Fulton employed force, stating that she had been a witness to it. He also stated that he had asked the respondent to back away while they were on the stairs with the inmate (“I got him, back away.”). Captain Santiago, at his interview, before viewing the videotape, stated that he and the escort officer had used force. He did recall the respondent grabbing for his radio. After viewing the videotape, Captain Santiago stated that the respondent had employed force, but that he was not paying attention because he was concentrating on the inmate. The investigator found that explanation plausible. The witness identified Petitioner Exhibit 10 as the report of her investigation and Petitioner Exhibits 12, 13 and 14 as the use of force reports submitted by Captain Santiago, Officer Anavitarte and an Officer Cort, respectively (Tr. 23-25, 28-29, 34-38).

Referring to those reports, Investigator Smith indicated that Officer Cort had checked a box signifying that Officer Fulton had used force. However, the body of the report does not refer to her involvement in the takedown, but only to the fact that the inmate resisted her and Officer Anavitarte. Captain Santiago’s report noted the respondent’s presence during the use of force but did not state that she employed force. Officer Anavitarte’s report does not refer to the respondent having used force. A report submitted by a Captain Graham and the log entry of the tour commander, Assistant Deputy Warden Copeland, do not indicate that the respondent used force (Tr. 29-33, 36, 39-40).

Investigator Smith testified that she also interviewed Inmate Cruz (Resp. Ex. A). The inmate too does not refer to Officer Fulton as having been involved in the incident (Tr. 48-50). The investigator confirmed that there is a drop box at the facility to leave keys, O.C. spray and items of that nature. A report could be placed inside (Tr. 53).

Kenneth Stukes testified that he has been employed by the Department for fourteen and one-half years. He currently holds the rank of captain and is assigned to OBCC-CPSU. The captain

stated that he was involved in the collection of a report from Officer Fulton regarding a use of force incident on August 3, 2001, which involved Inmate Cruz (Tr. 58-59).

The witness was shown Petitioner Exhibit 4, *i.e.*, Investigator Smith's memo. He stated that he had not seen it before. He did speak with Investigator Smith during August 2001 while he was doing relief in the investigations office for Captain Miller. His assignment commenced on August 19 and lasted for approximately two weeks, so their conversation must have occurred on the 19th or 20th. The investigator asked if he had received a report from Officer Fulton, which he had not. The investigator further stated that if he did receive one, he should call her. After their conversation, he met the respondent in a hallway and told her that Investigator Smith was requesting a report from her. He did not tell Officer Fulton what date to put on the report or what to say in the report. They had no other conversations. She did submit a report to him (Tr. 59-62).

Maximo Santiago testified that he has been employed by the Department for fifteen years. He is assigned as a captain to CPSU. The captain stated that, on August 3, 2001, he was involved in a use of force upon Inmate Cruz. On that date, he submitted a use of force report, which he characterized as true and accurate. Captain Santiago recalled being interviewed subsequently about the use of force incident and being shown a videotape (Tr. 64-66).

The captain testified that the videotape showed that Officer Fulton "was trying to – she reached in and helped me and Officer Anavitarte bring the inmate down to the floor." While he had acknowledged the respondent's presence in his report, "my main objective was concentrating on the inmate to prevent any injury to staff, the inmate or myself." Before viewing the tape he did not recall her using any force and he still does not recall that. He does recall that his radio fell prior to the use of force and that the respondent grabbed it. Captain Santiago testified that his report mentions other

people whom he believed had been on the scene and it mentions that he and Officer Anavitarte employed force. He did not tell Officer Fulton what kind of report to write or advise her that she had not been involved in a use of force (Tr. 66-71; *see also* Tr. 78).

Silvio Anavitarte testified that he has been employed by the Department for approximately four years. His current assignment is as a CPSU escort. The witness was shown his report concerning the use of force which occurred on August 3, 2001. He prepared the report that day. He considered the report accurate and truthful when he prepared it. It does not mention that Officer Fulton employed force (Tr. 71-72, 75).

Officer Anavitarte testified that he was shown a videotape at his MEO 16 interview on September 12, 2001. He recalls telling Officer Fulton to let go of the inmate because he had control. After viewing the videotape "it appeared that she [Officer Fulton] was attempting to assist us." He can not tell precisely what she was doing. Prior to viewing the videotape, he stated that the respondent had not used force (Tr. 72-74, 76-79).

The incident began as the officer was escorting an inmate back to his cell. The inmate was not complying because he had an issue regarding a visit from his son which he wanted to resolve. He was given an opportunity to express his problem to the captain, but then had to go back to his cell because while one inmate is out of his cell on the floor, no other inmates are allowed out of their cells. The incident took at least five minutes (Tr. 74-75).

The respondent, **Joy Fulton**, testified that she was appointed in April 1999. She is a college graduate. Prior to August 3, 2001, she had been involved in approximately eleven use of force incidents, whether as a witness or as a participant. In each case, she wrote a report and indicated her role (Tr. 81-83).

On August 3, 2001, she was assigned to do meal reliefs in CPSU, where she had been working since January 2000. Inmate Cruz came into the 1 South desk area, escorted by Officer Anavitarte, complaining that he was not permitted a visit with his infant son. Captain Santiago, the area captain, and a couple of other officers, were also present. The problem was the lack of a birth certificate or an acknowledgment of paternity, particularly since the inmate was in jail under an assumed name. She was having a conversation with the inmate, who claimed that he had already provided all of the necessary paperwork (Tr. 83-84).

According to the respondent, the captain told Inmate Cruz that the matter would be looked into, but that, in the meantime, the inmate had to lock into his cell area. The inmate was not thrilled, because he wanted the issue addressed at that time. Officer Anavitarte, the steady escort officer, was trying to reassure the inmate that the matter would not be forgotten. The inmate began walking up the stairs with the officer, but then resisted going up (Tr. 84-87).

Officer Fulton testified that she was walking with the officer and inmate, as was Captain Santiago, trying to reassure the inmate and anticipating the need for a use of force. When it became obvious that the inmate was not going to cooperate, the captain directed that Officer Anavitarte bring the inmate back down the stairs. She assisted Officer Anavitarte to ensure that the inmate did not fall. The radio she was holding is used to open the inmates' cells (Tr. 87-89).

At one point, while she had her hand on the inmate's forearm, Officer Anavitarte told her to let go because he had the inmate under control. The captain and Officer Anavitarte began to take the inmate down. The captain's radio, which was in his hand, fell, at which point she leaned in to retrieve it. She was readying herself because the men did not have a secure grip on the inmate. After the inmate was taken down, she got on her radio while holding the captain's radio in her other hand,

and called the control room, stating that leg irons were needed because the inmate was still resisting (Tr. 89-91).

Officer Fulton testified that, at approximately 12:15 p.m., the inmate was taken to the clinic by a probe team. Captain Santiago took the names of the officers in the area and told them to prepare reports. After the person she was relieving came back from meal, she left. She prepared a witness use of force report on August 3 before she left the facility. She prepared that kind of report because she did not use force against the inmate. In cross-examination, the respondent re-affirmed her MEO 16 testimony that Captain Santiago told her to submit a witness report. At approximately 7:30 p.m., as she was leaving, she put the report in the drop box together with her OC spray. She placed the word "investigations" on the document. The investigations office is only open from seven to three and she could not provide the report to Captain Santiago because he had been involved in the use of force and therefore could not investigate the incident (Tr. 91-93, 106).

Officer Fulton testified that she worked for two more days and then was off two days. When she came back she worked a midnight tour and got stuck for an overtime tour. The next day the same thing happened. Thereafter, she called in sick. A request for a report had been placed in her mailbox on both August 7 and August 9. She was not able to check her box until four days later. She spoke with Captain Stukes around August 20. He stated that she had to turn in a report. She replied that she had been trying to "give it to somebody in their hand." Thereafter, she provided the report to the captain. The reason the date of August 5 appears on her report is that that is the day she rewrote it for her own records. It was a copy of that report that she provided to Captain Stukes. He told her to make all the dates the same because August 3 was in the body of her report (Tr. 93-94, 103-05, 108-10).

On September 4, 2001, she appeared for an MEO 16 interview. She was asked questions about the report she had submitted. When asked if she had been involved in a use of force on August 3, she replied that she had not, that she had been a witness to it. After being shown the videotape, she maintained that she had not employed force (Tr. 94-97).

On cross-examination, the respondent maintained that the report she ultimately submitted (Pet. Ex. 6) was the same report she placed in the drop box on August 3 (Tr. 99-100). She further testified that on September 24, 2001, she was contacted by Captain Miller who claimed that she had still not submitted a report. She provided him with another copy on the 25th and the matter was clarified (Tr. 108).

ANALYSIS

Use of Force Directive 5006 defines the use of force as follows:

Force is any physical contact deliberately made by an employee with an inmate in a confrontational situation to maintain or regain control over an intractable, disorderly, assaultive or fleeing inmate. For physical contact between an employee and an inmate to qualify as a use of force, the physical contact must be made deliberately by staff, as opposed to accidentally, and employed to control the inmate's conduct.

The Directive goes on to provide that “staff who employ or witness force or are present at the scene shall prepare a written report concerning the incident before leaving the facility unless medically unable to do so.” The respondent concedes that she witnessed a use of force, but denies that she participated in it. Further, she asserts that she submitted a witness to a use of force report before leaving the facility on the date of the incident.

The use of force by Correction personnel, in this instance, is not being questioned, because it was necessary to bring a recalcitrant inmate under control. However, the videotape clearly reveals that the respondent deliberately leaned in and employed force to assist Officer Anavitarte and Captain Santiago in regaining control over Inmate Cruz by bringing him to the ground. Contrary to her claim that she leaned in to pick up the captain's fallen radio, the tape shows the radio by the respondent's foot while she is employing the force. Only after the use of force did she retrieve the radio.

It is clear that the respondent failed to submit a timely report of the incident. Her testimony as to her filing a witness report before her tour ended and as to the report's contents was confusing and incredible. Although she claimed to have a copy of her original report, she never produced it (Tr. 100-01). On August 9, six days after the incident, she was informed by Captain Miller that the OBCC/CPSU investigations office had not received a report from her (Pet. Ex. 1). Even if, as she claimed, she did not receive the notification until August 13, she did not submit a report, and then only a witness report, until August 20th at the earliest when one was again requested, this time by Captain Stukes. For a reason which she could not credibly articulate, she dated the report August 5. Captain Stukes did not support her claim that he told her to so date the report. I found his testimony on this point entirely credible. Indeed, Captain Stukes relieved the regular investigations captain on August 19, so he could not have advised the respondent on August 5 to place that date on her report. Further, the respondent was untruthful in claiming that Captain Santiago advised her to submit a witness report. He credibly denied that he did so.

At the MEO 16 interview conducted on September 4, 2001 (Pet. Ex. 7), the respondent was untruthful in claiming she only witnessed a use of force. Further, she was untruthful in asserting that

she placed her original report in the control room slot on August 3, and she was untruthful in claiming that she provided a copy of her original report to Captain Stukes on August 5 and wrote that date as the date of the report based upon Captain Stukes' advice.

Whether or not Officer Anavitarte and Captain Santiago were less than truthful in not reporting that the respondent used force, upon viewing the video, they both conceded that she had assisted in bringing the inmate under control and should have filed a use of force report.

Accordingly, the Department has established each of the three Specifications.

FINDINGS AND CONCLUSIONS

1. On August 3, 2001, the respondent, Correction Officer Joy Fulton, engaged in the use of force against Inmate Jose Cruz.
2. The respondent made a false statement at her September 4, 2001 MEO 16 interview in denying that she employed force against the inmate.
3. The respondent failed to timely submit a use of force report. She untimely filed a witness report.
4. At the MEO 16 interview, the respondent made false statements regarding the submission of her report.

RECOMMENDATION

Upon making the above findings, I obtained and reviewed an abstract of the respondent's personnel record. Joy Fulton was appointed as a correction officer in April 1999. She has no prior disciplinary findings and an excellent attendance record.

In this case, the respondent has been found to have failed to report her use of minimal force on an inmate who was resisting returning to his cell. Further, she delayed providing any report of the incident and she made untruthful statements at an investigatory interview.

The failure to acknowledge a use of force and to file an appropriate report is considered a serious breach of Department rules. *See Dep't of Correction v. Butler*, OATH Index Nos. 876-78/92 (Dec. 2, 1992), *aff'd sub. nom. Butler v. Dep't of Correction*, 254 A.D.2d 86, 678 N.Y.S.2d 617 (1st Dep't 1998) (20-day suspensions); *Dep't of Correction v. Mansfield*, OATH Index Nos. 571-73/89 (May 30, 1990), *aff'd, Mansfield v. Sielaff*, 184 A.D.2d 477, 585 N.Y.S.2d 425 (1st Dep't 1992) (Captain demoted for failure to report the use of force by others, failure to investigate and making false statements); *Dep't of Correction v. Gildon*, OATH Index Nos. 1906-07/00 (Apr. 30, 2001), *modified on penalty*, Comm'r Decision (July 5, 2001)(15-day suspension recommended for false statements regarding use of force increased to 30-day suspension by Commissioner). The respondent, in her testimony (Tr. 98-99), acknowledged the importance of providing accurate reports, yet, nonetheless failed to do so.

I find the Department advocate's request for a sixty-day suspension to be excessive. Considering the nature of the respondent's misconduct, the minimal amount of force employed, the lack of injury to the inmate, and the respondent's prior record of employment, I recommend that Correction Officer Joy Fulton be suspended without pay for twenty days.

Ray Fleischhacker
Administrative Law Judge

March 13, 2002