

Dep't of Correction v. Negrón

OATH Index No. 1844/11 (Sept. 16, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-04-SA (Jan. 20, 2012), **appended**

Correction officer charged with three separate incidents of excessive and unnecessary use of force, submitting false and inaccurate reports for two of the incidents and failing to report one of the incidents. All of the charges, with the exception of failing to submit a report, were sustained. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
-against-
ALFREDO NEGRÓN
Respondent

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Correction pursuant to section 75 of the Civil Service Law. Respondent, Alfredo Negrón, a correction officer, is charged with three separate incidents of excessive and unnecessary use of force, submitting a false and inaccurate report regarding two of the use of force incidents, and failing to submit a report for the third incident.

Following a three-day hearing on the charges, I find that all of the charges, with the exception of failing to submit a report for one of the incidents, have been sustained and recommend termination of his employment as a correction officer.

ANALYSIS

Inmate Capers

Respondent was charged with using excessive and unnecessary force against inmate John Capers on December 17, 2010, at approximately 2055 hours in the North Corridor area near the

MOD 2 magnetometer in the Robert N. Davoren Complex (“RNDC”) (ALJ Ex. 1). At the time, RNDC housed both adult and adolescent inmates in separate housing areas.

A review of the video shows approximately ten adolescent inmates waiting on line on the right side of the corridor outside the medical clinic. On the opposite side of the corridor is a magnetometer. Respondent was posted at the magnetometer monitoring inmates returning from the clinic on their way back to their housing areas. The inmates coming through the magnetometer were walking towards the camera. Inmate Capers, who was walking with the assistance of a wooden cane, was a high classification inmate and was being escorted by a correction officer. Although there is no audio on the video, it is apparent that the magnetometer rang as he passed through because respondent immediately stopped inmate Capers and directed him to assume a pat-frisk position against the wall (Pet. Ex. 1 at 20:12:47).

Inmate Capers propped his cane against the wall to his left side and emptied his pockets. Initially the inmate’s body was turned towards the wall but he was looking over his left shoulder at respondent, while he was saying something (Pet. Ex. 1 at 20:12:59). Inmate Capers then placed his right hand on the wall but continued speaking to respondent over his shoulder while he gestured with his left hand (Pet. Ex. 1 at 20:13:04 – 20:13:15). A captain entered the frame and spoke with the adolescent inmates waiting on line across from the magnetometer (Pet. Ex. 1 at 20:13:05). The captain approached closer to respondent and the inmate, and stood nearby to observe (Pet. Ex. 1 at 20:13:11). Meanwhile, respondent took a step closer to inmate Capers, who ultimately assumed a proper pat-frisk position by placing both hands up against the wall and faced forward (Pet. Ex. 1 at 20:13:16).

The video shows respondent at this point speaking and gesturing forcefully with his right hand behind inmate Capers, who was still facing the wall (Pet. Ex. 1 at 20:13:17 – 20:13:39). The captain and the escort officer remained nearby observing. Respondent stopped speaking and placed his left hand on the middle of the inmate’s back and then pat-frisked him with his right hand (20:13:40). After the pat-frisk was completed, the inmate turned away from the wall and started putting his possessions back in his pockets while speaking to respondent (Pet. Ex. 1 at 20:13:52). Respondent remained directly behind inmate Capers as he observed him putting his possessions away and retrieving his cane. As he began to walk away, the inmate turned his head back towards respondent and said something, then continued to walk away. Respondent appeared very angry. Just as the inmate turned his back to walk away, respondent stepped

forward and shoved the inmate forcefully with both hands causing inmate Capers to lose his balance slightly (Pet. Ex. 1 at 20:13:58). The inmate walked backwards away from respondent and said something else, which further angered respondent who, from what appears on the video, started yelling and cursing (Pet. Ex. 1 at 20:14:00). Respondent took several steps towards the inmate, who was backed up against the wall, and shoved the inmate forcefully in the chest with two hands (Pet. Ex. 1 at 20:14:04). The captain intervened by putting herself between respondent and the inmate while she pushed respondent away. The captain then guided the inmate back into a pat-frisk position against the wall (Pet. Ex. 1 at 20:14:15). Meanwhile, respondent, who appeared in the video to be still agitated, continued to yell at inmate Capers. The escort officer then stepped in to separate respondent from the captain and the inmate (Pet. Ex. 1 at 20:14:20). Another captain reported to the scene with an additional correction officer, who ultimately placed the inmate in flex cuffs (Pet. Ex. 1 at 20:14:23 - 20:14:53).

Respondent testified that he ordered inmate Capers to put his hands on the wall for a pat-frisk when he came through the magnetometer because it had rung. Respondent maintained that the inmate became belligerent and, initially, was not compliant. Respondent explained that Corridor 6 is a half mile long and has several magnetometers. He postulated that inmate Capers was tired of being stopped and searched each time he went through one of the magnetometers and tried to give an excuse for it ringing. Nevertheless, respondent told him that he had to clear the magnetometer each time that he went through or he had to be searched (Tr. 425-27, 433-34, 436). Although respondent had no history with inmate Capers, he maintained that he is used to dealing with inmates in general. He testified that, "these inmates will come up with any excuse just not to get searched" (Tr. 426).

Ultimately, inmate Capers complied and respondent was able to complete the pat-frisk, but recovered nothing. Inmate Capers again tried to explain why the magnetometer rang and respondent told him to keep walking. Respondent testified that inmate Capers stated "that's why I read about officers like yourself in the paper," grabbed his cane and said, "don't worry, I'll be getting out soon" (Tr. 437, 443, 445-46). Respondent believed that inmate Capers was referring to a recent incident in which a captain had been severely injured by some inmates in one of the housing areas. Respondent concluded that the inmate was going to hit him with the cane and decided to push the inmate away to prevent being hit. Respondent testified that he did not wait for inmate Capers to actually raise his cane or advance on him because, based on his years of

experience, if he waited to react it would have been too late to prevent the inmate from assaulting him (Tr. 428-30, 437, 439, 443).

After reviewing the video, respondent reluctantly acknowledged that he was behind inmate Capers as he walked away from respondent. He further admitted that he was very angry and advanced a few steps towards the inmate and pushed him a second time (Tr. 439, 450-51). Respondent explained that, "I just felt like I wanted him to get out of my space" (Tr. 430). Respondent argued that the use of force was minimal and an appropriate response to de-escalate the situation. Inmate Capers is a high classification inmate, who set off the magnetometer. He made verbal threats against respondent and grabbed his cane, which could have been used as a weapon. Based on the exigency of the circumstances, respondent argued, pushing the inmate twice was necessary minimal force. Furthermore, the inmate never sustained any injuries (Resp. Ex. D).

Warden Emmanuel Bailey, Assistant Deputy Warden Charlton Lemon, Captain Carlyle Hopkin, the assigned investigator, and Captain Danny Lomas, an instructor at the Department's training academy, watched the video and reviewed the reports submitted regarding this incident. The consensus amongst them was that respondent's use of force was inappropriate and unnecessary (Pet. Exs. 3, 4, 5; Tr. 26, 183, 186, 264-65, 349). Each of them concluded that inmate Capers had his back turned and was walking away when respondent used two hands to shove him. In addition, they noted that respondent took several steps away from his post at the magnetometer towards inmate Capers to push him a second time (Tr. 25-26, 182, 184, 186, 209, 217, 264-65).

Captain Hopkin testified that inmate Capers no longer presented a threat when respondent pushed him (Tr. 182). Warden Bailey testified similarly that the inmate was not in respondent's "space" (Tr. 265). Captain Lomas, in turn, stressed that the inmate had his back to respondent and was walking away when respondent used force (Tr. 25-26). Some of the witnesses acknowledged that inmate Capers had made a verbal threat and was initially non-compliant with the pat-frisk by looking over his shoulder at respondent. Nevertheless, all of the witnesses agreed that while it is quite common for an inmate to make a verbal threat towards a correction officer, this is insufficient justification for the use of force (Tr. 28, 185, 211, 216-18, 256, 266, 268, 359).

The witnesses further agreed that a cane may be used as a weapon and that a correction officer should be cautious when an inmate has one in his possession (Tr. 65, 68, 188-89, 203, 303). Warden Bailey maintained that respondent did not have to wait to be hit by the cane before using force, explaining that so long as respondent perceived that inmate Capers was going to hit him with the cane, he could use force to defend himself (Tr. 310). Captain Hopkin conceded that respondent could have perceived that the inmate was trying to get enough space between him and respondent, to raise the cane to strike respondent (Tr. 208). ADW Lemon testified that a verbal threat alone would not generally warrant a use of force, but if the inmate simultaneously grabbed a cane while making the threat a use of force may be appropriate. ADW Lemon clarified, however, that having a cane would not be enough to warrant a use of force without some visible sign that a physical threat was imminent (Tr. 359, 370). Regardless of the acknowledged potential for a physical assault, all of the witnesses concluded that inmate Capers in this instance was not using the cane as a weapon and was merely using it for its intended purpose to assist him in walking (Tr. 68, 188, 267).

ADW Lemon described respondent as an excellent officer and stressed that the corridor post is very difficult because of the high volume of inmates moving back and forth. ADW Lemon appeared to vacillate somewhat during his testimony whether the force was necessary or not. Instead, he focused on respondent's failure to secure and search the inmate's cane (Tr. 348-49, 358-59, 363, 370). Yet, he concluded in his tour commander's report that respondent's use of force was unnecessary, describing the force as "not minimal" (Pet. Ex. 4; Tr. 361).

I found Warden Bailey, ADW Lemon, and Captains Hopkin and Lomas, to be very professional and candid. Their analysis of the video was consistent. It is uncontroverted that respondent pushed inmate Capers twice. The video clearly showed respondent losing his temper and reacting to something that the inmate said. I agree with the witnesses' assessment that inmate Capers had his back turned and was walking away when respondent shoved him. After the inmate recovered his balance and backed away, respondent stepped away from his post and walked towards the inmate, who was backed against the wall, and shoved him again. Inmate Capers never lifted his cane or even gestured with it. Indeed, the verbal "threat," which was ambiguous and could have had multiple meanings, was uttered while the inmate was walking away. Even if respondent felt that he was being verbally threatened there was no need for him to use force. Moreover, I find respondent's testimony that he believed inmate Capers was going to

strike him with a cane to be disingenuous. Respondent walked towards inmate Capers to push him. If he legitimately felt that the inmate was positioning himself to take a swing with his cane, the reasonable response would be to step back to create distance, not step closer into striking range.

The Department's Use of Force Directive 5006R-C sets the parameters for when force may and may not be used. The Directive prohibits the use of force "to punish, discipline, assault or retaliate against an inmate." Directive No. 5006R-C § IV(B)(1) (eff. Jan. 31, 2008). Respondent was angered by inmate Capers' comments and reacted or retaliated by pushing him not once, but twice. Respondent was not in control of himself or the situation and a captain and another officer had to intervene by stepping between them.

The Use of Force Directive also addresses anticipated uses of force, stating that "whenever the use of force is anticipated and the inmate does not pose an immediate threat, a supervisor shall be notified." Directive No. 5006R-C §IV(C)(1). Respondent claimed that he felt physically threatened and believed that inmate Capers was going to strike him with the cane. A captain, however, was standing a few feet away from respondent observing the situation. She apparently did not anticipate a use of force because she did not get involved until after respondent became aggressive. Furthermore, if respondent legitimately thought he was in danger, he could have enlisted the captain's assistance before the situation escalated into a use of force. Instead, he let his anger get the better of him and reacted by forcefully shoving the inmate two times.

I agree with Warden Bailey, ADW Lemon, and Captains Hopkin and Lomas that respondent could have employed other tactics rather than resorting to force (Tr. 26, 217-18, 267-68, 350). In the absence of an immediate physical threat, the Use of Force Directive states that alternative methods to resolving a conflict should be exhausted before force is used, including: attempting to verbally persuade the inmate to comply, keeping a safe distance, listening to the inmate and asking for cooperation, explaining the consequences of the inmate's behavior, and requesting the assistance of a supervisor or additional staff. Directive No. 5006R-C §V(A)(1). In addition, respondent could have placed inmate Capers in flex cuffs and had him taken to Intake where he would have been issued an infraction for making a verbal threat against a correction officer (Tr. 267-68). Respondent chose not to employ any of the alternative methods to resolving conflict and elected instead to use gratuitous force. Accordingly, I find that the

Department established by a preponderance of the credible evidence that respondent used inappropriate, unnecessary, and excessive force by shoving inmate Capers twice in response to a perceived verbal threat on December 17, 2010.

In addition, respondent is charged with submitting a false and inaccurate report regarding the use of force incident against inmate Capers (ALJ Ex. 1). Respondent submitted his report on the same day as the incident. Respondent's report states that inmate Capers "quickly turned around towards [respondent]" and said, "that's why I read about people like you in the paper; don't worry I'll be out very soon." Respondent further wrote in his report that he "immediately pushed [inmate Capers] away from [respondent's] area" (Pet. Ex. 2).

Respondent acknowledged that he did not mention the second push in his report and testified that he must have overlooked it because he did not have an opportunity to review the video before he wrote his report. Respondent testified that his report was accurate in stating that the use of force was precipitated by the inmate turning towards him quickly and verbally threatening him. Although respondent agreed that a verbal threat alone would not justify a use of force, he emphasized that in this instance it was appropriate because the inmate had also grabbed his cane when he made the threat (Tr. 440, 444-47).

Although the video showed respondent had pushed inmate Capers twice, his report indicates otherwise. Respondent's explanation that he overlooked the second push is incredible. This was not a brawl involving multiple parties. Nor was it a physical altercation where punches were flying, making it difficult to keep track of what occurred. The only person to use force was respondent, who shoved the inmate twice. This should have been fairly easy to remember. It is more likely than not that respondent was attempting to minimize what occurred by limiting the incident to one push. Moreover, respondent's characterization that he "immediately" pushed inmate Capers in an effort to create some distance between him and the inmate was undermined by the video evidence. Respondent did not immediately push the inmate, nor was he trying to create some distance to keep the inmate out of his area. Indeed, inmate Capers was already walking away when respondent pushed him the first time and respondent actually followed the inmate to push him a second time.

I agree with Captain Hopkin's and ADW Lemon's conclusions that respondent's report is false and inaccurate (Pet. Ex. 4; Tr. 183, 361). Accordingly, I find that the Department

established by a preponderance of the credible evidence that respondent submitted a false and inaccurate report regarding the use of force incident with inmate Capers.

Inmate Robinson

Respondent was further charged with using excessive and unnecessary force against inmate Traevon Robinson on January 2, 2011, at approximately 0948 hours in the Quadrant #4 vestibule area in RNDC (ALJ Ex. 1). The video shows a corridor which has a gated wall on the left side and a solid concrete wall on the right side. At the end of the corridor is a locked door that leads to an adolescent housing area. Inmate Robinson, a tall, lanky adolescent, is seen walking towards the door to the adolescent housing area (Pet. Ex. 6 at 09:48:42). As he is walking he turned his head to look over his right shoulder and appeared to be saying something as he looks behind him (Pet. Ex. 6 at 09:48:44). He continued, however, walking to the door without pausing. As the inmate was knocking on the door to gain entry into the housing unit, respondent appears in the frame (Pet. Ex. 6 at 09:48:46).

Respondent walked up behind the inmate and threw him with one hand against the gated wall (Pet. Ex. 6 at 09:48:52). The inmate had his back to the wall and was facing respondent. They were discussing something immediately before respondent grabbed inmate Robinson off the gated wall and shoved him into a pat-frisk position in the corner by the door (Pet. Ex. 6 at 09:48:55). Although the inmate had both hands against the wall, he was looking over his right shoulder at respondent and another correction officer who appeared on the scene. Respondent proceeded to pull and push the inmate by the back of his sweatshirt, jerking him around, in an effort to get him to face the wall (Pet. Ex. 6 at 09:48:57). The inmate was protesting and tried to turn towards the officers. Respondent pulled him out of the corner and pushed him against the gated wall again. The entire time respondent was pushing and pulling inmate Robinson by his sweatshirt and the waistband of his sweatpants. The inmate was not compliant and kept trying to turn to face the officers. Respondent appeared to be yelling at the inmate while pushing him up against the gated wall (Pet. Ex. 6 at 09:48:12).

The second correction officer attempted unsuccessfully to conduct a pat-frisk of the inmate because the inmate was still trying to turn his body (Pet. Ex. 6 at 09:49:17). Respondent, who was standing behind inmate Robinson, grabbed the inmate by the back of the neck with his left hand and pushed his face against the gated wall. The second officer attempted to pat the

inmate down on his left side but respondent continued to yank the inmate back and forth by the back of his neck, preventing the other officer from completing the pat-frisk (Pet. Ex. 6 at 09:49:33).

Respondent, while still holding the inmate by the back of his neck, pulled him off of the gated wall and once again pushed him back into the corner by the door. Respondent placed his left hand on the back of inmate Robinson's head and kept pushing his head towards the wall (Pet. Ex. 6 at 09:49:57). Respondent kicked the inmate's legs apart to get him into the pat-frisk position and started to frisk him. As inmate Robinson turned his head to look at respondent, respondent grabbed him and threw him on the ground (Pet. Ex. 6 at 09:50:10). The inmate landed on his left side, facing up. Respondent reached down and attempted to turn the inmate over onto his back by grabbing him around the neck (Pet. Ex. 6 at 09:50:13).

The inmate struggled and resisted turning, so respondent pressed the palm of his left hand against the side of the inmate's face to push his head to the floor to restrain him (Pet. Ex. 6 at 09:50:15). While respondent was pushing the inmate's head down, the inmate managed to turn his body completely onto his back and was facing up again. Respondent grabbed inmate Robinson around his throat with both hands and appeared to be choking him (Pet. Ex. 6 at 09:50:18). Inmate Robinson was flailing around and trying to get respondent's hands off his neck. Respondent removed his right hand and pulled the inmate's left hand down towards his chest (Pet. Ex. 6 at 09:50:23). The inmate continued to struggle and respondent placed both hands around the inmate's neck again (Pet. Ex. 6 at 09:50:25).

The other correction officer tried to assist or intervene and came around in front of respondent and inmate Robinson. The other officer pushed respondent back and off of the inmate, while he, himself tried to turn the inmate over onto his stomach (Pet. Ex. 6 at 09:50:31). Together the two officers finally managed to flip the inmate over onto his stomach and respondent placed his left knee on the inmate's back and then took his right hand and shoved the inmate's face into the floor (Pet. Ex. 6 at 09:50:34).

The inmate continued to resist and was squirming around on his stomach while the officers struggled to place him in flex cuffs. The other officer, who had straddled the inmate in an effort to hold him down, pulled out his radio and spoke into it (Pet. Ex. 6 at 09:50:42). Meanwhile, respondent had his left hand on the back of the inmate's head and was trying to hold him down (Pet. Ex. 6 at 09:50:45). The inmate continued to struggle as the other officer

attempted to cuff him, so respondent placed his left knee on the inmate's face, pressing his head into the floor (Pet. Ex. 6 at 09:51:08). A captain appeared on the scene (Pet. Ex. 6 at 09:51:11) and assisted the officers in ultimately restraining the inmate and placing him in flex cuffs (Pet. Ex. 6 at 09:51:44).

Respondent testified that he observed inmate Robinson in Corridor 4 coming from the adult housing area in 4 Upper and walking to the adolescent housing area in 4 Central South. He gave him a direct order to place his hands on the wall for a pat-frisk approximately four times, each time saying it in a louder voice. The inmate ignored respondent and continued to walk. He looked back over his shoulder and told respondent that he just went to get something from upstairs. Respondent was concerned that inmate Robinson had contraband on him because he came from an unauthorized housing area and was ignoring respondent's order to stop and be searched (Tr. 500-03, 509-10, 525).

Respondent testified that as a consequence he "aggressively placed [the inmate] on the wall" (Tr. 503). The inmate was verbally harassing respondent and resisted by physically pushing away from the wall. The more the inmate resisted, the more force respondent applied because he believed that the inmate had contraband on him. Respondent explained to the inmate why he was using force, but the inmate continued to resist. Respondent testified that he "grabbed him and threw him to the ground" with the intention of restraining the inmate. He tried to get the inmate to lie on the ground face down, but he rolled onto his back. Respondent attempted to turn inmate Robinson over onto his stomach while he struggled to get off the ground. Respondent indicated that he was trying to prevent the inmate from getting up, but the inmate was very strong (Tr. 503-06, 510-15). Respondent testified, "I placed my hands on the upper part of his body towards the neck area to hold him down . . . I didn't choke him. I placed my hands around his neck area, but then I slowly took off one of the other hands and just restrained him" (Tr. 505).

Respondent denied using a chokehold, stating, "if you look at my hands [in the video], I never make a claw to actually choke him. I'm placing it on his neck" (Tr. 521). He contended that he was completely in control of himself during the incident. He did not use his chemical agent or call a supervisor to the scene even though he had his radio because he never anticipated a use of force (Tr. 525-26, 528). Respondent noted that inmate Robinson was not injured during

the struggle (Pet. Ex. 8; Resp. Ex. F). No contraband was recovered from the inmate even after he was taken away by the probe team and strip searched (Tr. 506, 508).

It is undisputed that correction officers have the right to conduct a pat-frisk of an inmate whenever they deem it necessary. Moreover, no one disagreed with respondent's contention that it is necessary to ensure that an inmate coming from an unauthorized housing area is searched for contraband (Tr. 56, 58-59, 101, 109, 144, 146, 234, 245, 270-71, 288, 380, 382). As noted above, both adult and adolescent inmates were housed at RNDC at the time of this incident. Inmate Robinson was coming from an unauthorized, high-classification adult housing area in 4 Upper North and attempting to return to his adolescent housing area in 4 Central South (Tr. 115). Adolescent inmates were consistently described by the witnesses as the most difficult inmates to control because they require more monitoring. They are headstrong, spontaneous, do not think before acting, and like to fight (Tr. 107-08, 260, 296).

Regardless of how difficult an inmate is, adolescent or adult, the Department's Use of Force Directive only permits officers to employ force that is proportionate to the force being used by the inmate. Officers should follow a continuum of force approach by starting with tactical communication or verbal judo, graduating to hand-held chemical agents, then a combination of control holds or a take-down technique, including soft-hand techniques. When necessary, a correction officer may apply a combination of blocks and/or strike the inmate with one or more blows to the body until the inmate discontinues his attack and is under control (Tr. 21-23, 127, 132, 227-28, 269, 271, 277, 280, 283-84, 380-81, 383). The Directive states that employing a choke hold or intentionally striking an inmate's head against the wall or floor is considered deadly physical force and may only be utilized as a last resort to defend against deadly physical force by an inmate or to prevent an escape. Directive No. 5006R-C §§ V(B)(2), V(C).

While the witnesses agreed that it was appropriate for respondent to have stopped inmate Robinson to perform a pat-frisk, no one condoned his flagrant violations of the Use of Force Directive. All of the witnesses agreed that the force was inappropriate, excessive, and avoidable. Warden Bailey testified that "the whole [incident] was wrong" (Tr. 269). Both he and Captain Lomas stressed that Inmate Robinson was standing at the end of the corridor in front of a locked door. He was not going anywhere. He was a captive. Although respondent properly gave a verbal directive to assume a pat-frisk position, once the inmate was resistant and non-compliant,

there were several ways to deal with him, other than resorting to excessive force. Respondent could have used his chemical agent, pressed his personal body alarm, or contacted a supervisor with his radio (Pet. Exs. 8, 9; Tr. 37, 39, 118-19, 138, 147, 150, 157, 271, 274, 280, 282, 312).

Captain Willie Perry, the assigned investigator, concluded in his report that respondent's use of force was inappropriate, unnecessary, and preventable (Pet. Exs. 8, 9; Tr. 120-22, 124, 127). Warden Bailey and Captain Lomas concurred (Tr. 32, 269). In particular, they were troubled by respondent shoving inmate Robinson against the wall, pushing and pulling the inmate while trying to get him into a pat-frisk position, and grabbing him by the back of the neck to push his face against the gated wall (Tr. 32-33, 35-36, 276-278).

Warden Bailey and Captains Lomas and Perry further testified that they did not see an imminent physical threat to respondent (Tr. 35, 96, 269). They were particularly concerned about respondent grabbing inmate Robinson by the neck to take him down to the floor (Tr. 38, 41, 277). Warden Bailey testified that an imminent threat must be present in order to do a take down, explaining that merely verbalizing and walking away or ignoring orders are not enough to justify force, let alone a take down (Tr. 274, 312). Captain Perry agreed that inmate Robinson's resistance to being searched was insufficient justification to take him down to the floor (Tr. 127, 150-51, 157).

Warden Bailey and Captain Lomas were also critical of respondent placing his hands around inmate Robinson's throat in a chokehold. Warden Bailey actually described it as a "double chokehold on the inmate" and considered it to be deadly physical force (Tr. 283). Captain Perry's assessment differed, stating that he did not necessarily view it as a chokehold. Captain Perry testified that correction officers are not superheroes. Sometimes when an officer struggles with an inmate, there may be a momentary touching of the inmate's neck or head. He stressed that it is not as simple as one would think. He described the placement of respondent's hands around inmate Robinson's neck as a momentary grasp around the shoulder and neck portion of the inmate's body while the officers were trying to flip the inmate over (Tr. 130-31).

Nevertheless, the incident as a whole concerned Captain Perry and in his supervisor's complaint report he stated that "momentarily grabbing said Inmate by the neck was excessive and unnecessary" (Pet. Ex. 9). He further testified that the entire struggle on the floor was unwarranted and turned into a wrestling match (Tr. 128-29). The witnesses also concurred that once the inmate was on the floor, it was inappropriate for respondent to put his hand on the back

of inmate Robinson's head to push his face into the floor and for respondent to put his knee on the inmate's head to restrain him (Tr. 42, 46, 135-37, 284-86).

Warden Bailey and Captains Perry and Lomas testified quite convincingly that respondent violated the use of force directive several times during this incident. The video is quite damning. It was disturbing to watch the amount of rage exhibited by respondent towards this inmate. I agree with the witnesses' assessment that inmate Robinson did not pose an imminent threat that would have warranted a use of force. Respondent escalated the situation by yanking the inmate around by his neck and shoving him into the wall. Inmate Robinson's initial level of resistance was minimal. Respondent lost control of himself and the situation. Indeed, at one point during the incident, the other correction officer was compelled to push respondent off of inmate Robinson.

After watching the video several times during the course of the hearing, respondent even acknowledged that he was rough with inmate Robinson. He admitted that he "aggressively" placed the inmate against the wall and that he "grabbed the inmate and threw him to the ground" (Tr. 503-04). Respondent's assertion that he was not applying a chokehold because his hands were not "making a claw" was unconvincing. While it did not look like he was actually cutting off inmate Robinson's air supply, he did have both hands around the inmate's neck in an effort to restrain him. Inmate Robinson looked panicked and was trying to remove respondent's hands from his throat.

It is noteworthy that during at least half of the incident respondent had either one or both hands around the back of the inmate's neck or his throat. He pushed inmate Robinson's head into the wall and then into the floor by grabbing the back of his head. Respondent also improperly placed his knee on the inmate's head to restrain him. The Department's use of force directive prohibits employing a chokehold or intentionally striking an inmate's head against the wall or floor, classifying such acts as deadly force. Respondent is only permitted to utilize deadly physical force when confronted with deadly physical force from an inmate or to prevent an escape. This was not the case with inmate Robinson. It is true that inmate Robinson was ignoring respondent's orders, was not compliant, and resistant. Nevertheless, the inmate did not present an imminent physical threat. While it is possible that he may have had contraband on his person, there was never an instance where respondent or the other correction officer appeared to be in danger.

Inmate Robinson was cornered at the end of the corridor in front of a locked door. Respondent could have employed a number of other measures to get the inmate to comply, rather than escalating the situation and turning the confrontation into a wrestling match. I agree with the witnesses that the entire incident could have been avoided. Accordingly, I find that the Department established by a preponderance of the credible evidence that respondent used excessive and unnecessary force against inmate Robinson on January 2, 2011.

Respondent was additionally charged with submitting a false and inaccurate report regarding the use of force incident against inmate Robinson (ALJ Ex. 1). Respondent submitted a report on the same day as the incident. In the section requiring details as to why the force was necessary, respondent wrote, “[inmate Robinson] failed to comply to the order of stop resisting and coming off the walls, while attempting to pat frisk him. [Inmate Robinson] came off the wall aggressively and turned towards [respondent]” (Pet Ex. 7). Respondent’s report further indicated that inmate Robinson was resisting and non-compliant while respondent attempted the pat-frisk. When the inmate turned “aggressively towards” respondent, he put the inmate in an “upper body hold” and “brought [the inmate] to the ground” (Pet. Ex. 7).

Respondent testified that the reason he used force was because the inmate did not comply with his orders to stop and assume a pat-frisk position. The inmate kept resisting. Respondent further testified that the report was correct that he brought the inmate to the ground because he came towards respondent in an aggressive manner (Tr. 518-19, 528).

I disagree with respondent’s assessment of the accuracy of his report. The report fails to mention that respondent had grabbed inmate Robinson by the back of the neck when he “aggressively” put him against the wall. Nor did he mention that he brought him down to the floor by the neck, placed both hands around the inmate’s neck, pushed his head into the floor and against the wall and placed his knee on the inmate’s head to restrain him. *See Dep’t of Correction v. Patterson*, OATH Index Nos. 2080/08, 2081/08, 2082/08, 2083/08, 2084/08, 2085/08, & 2088/08 at 16 (April 9, 2009) (correction officer’s failure to note in use of force report that he used force by pushing two inmates into the pen is “a material omission which could not have been inadvertent as it goes to the heart of what the author of the report is required to include and describe”); *Dep’t of Correction v. Cooper*, OATH Index Nos. 2585/08 & 2586/08 at 4 (Nov. 12, 2008) (finding the intentional omission of a material fact in a report to be false or misleading).

Moreover, his characterization that inmate Robinson aggressively turned towards him is not supported by the video. The aggressive party during this incident was respondent. The inmate may have been uncooperative and resistant but he was never aggressive. As Warden Bailey and Captains Perry and Lomas noted, inmate Robinson did not present an imminent physical threat towards respondent.

The Department's Use of Force Directive mandates that an officer's use of force report to include "a precise description of the incident... and the type of force the writer employed." Directive No. 5006R-C § V(F)(3)(b). Respondent failed to provide a precise description of the incident and the type of force he employed. Indeed, respondent downplayed his part in the struggle, while exaggerating the inmate's actions. Accordingly, I find that the Department established by a preponderance of the credible evidence that respondent's report regarding the use of force against inmate Robinson is false and inaccurate.

Inmate Banks

Respondent was additionally charged with using excessive and unnecessary force against inmate Tyquan Banks on January 2, 2011, at approximately 0946 hours in the Quadrant #4 vestibule area in RNDC (ALJ Ex. 1). This use of force occurred about two minutes before the incident discussed above with inmate Robinson. The Department maintained that it never received a use of force report regarding this incident. It only discovered a use of force against inmate Banks while reviewing the video of the corridor for the Robinson investigation because both occurred in the same location (Pet. Ex. 14).

A review of the video shows, inmate Banks, a small adolescent inmate, entered the corridor and walked towards the door of the adolescent housing unit (Pet. Ex. 10 at 09:46:31). Before he reached the door, respondent entered the frame and walked up behind the inmate (Pet. Ex. 10 at 09:46:33). Inmate Banks glanced over his left shoulder to look at respondent, but continued to walk. A foot or so before reaching the door, respondent caught up with the inmate (Pet. Ex. 10 at 09:46:35). As a second officer approached, respondent grabbed inmate Banks and threw him against the gated wall (Pet. Ex. 10 at 09:46:37). Inmate Banks is approximately 5'4" tall and weighs approximately 130 pounds (Tr. 416), in contrast to respondent who is 5'10" with a muscular build and weighs a solid 250 pounds (Tr. 458). The inmate was pressed with the front of his body flat against the wall but had his head turned to the right to look at respondent.

As a second officer approached, respondent grabbed the inmate by the back of the neck and pulled him off of the gated wall and shook him by the neck, actually lifting the inmate off the ground (Pet. Ex. 10 at 09:46:38). The second officer tried to intervene by placing his hand on respondent's shoulder but respondent continued to yank the inmate back and forth by the scruff of his neck (Pet. Ex. 10 at 09:46:40).

A third officer appeared at the end of the corridor and observed respondent pressing the inmate's body and face into the gated wall, but did not intervene (Pet. Ex. 10 at 09:46:43). Respondent pushed inmate Banks into the corner to the left of the door and the second officer stepped forward and pushed respondent out of the way (Pet. Ex. 10 at 09:46:47). The second officer guided the inmate back to the gated wall and placed him in a pat-frisk position (Pet. Ex. 10 at 09:46:51). The inmate was fully compliant. The second officer conducted the pat-frisk without incident while respondent signaled for someone in the housing area to open the door (Pet. Ex. 10 at 09:46:52). Respondent opened the door and the second officer escorted the inmate inside (Pet. Ex. 10 at 09:46:57).

Respondent testified that he observed inmate Banks walking towards the adolescent housing area. He directed him to stop and assume a pat-frisk position in a "loud," "assertive" voice (Tr. 462-63, 466, 472). Nevertheless, the inmate disregarded respondent's order and continued walking, glancing back towards respondent and saying, "that's my house, I'm going to my house" (Tr. 463). Respondent further testified that he "assisted" the inmate getting into the position by "pushing" him into the wall while grabbing him by "the lower neck area" (Tr. 464).

Respondent was concerned that the inmate could possibly have contraband on his person. He questioned inmate Banks about being in an unauthorized adult housing area, but the inmate was evasive. Respondent testified that another correction officer approached and assisted him by performing the pat-frisk. Respondent denied the he was so volatile that the other officer had to step in and take over the pat-frisk. Respondent further denied using a chokehold on inmate Banks. When asked why he did not call a supervisor to the scene, respondent testified that it was an urgent situation because the inmate could have had contraband (Tr. 465-68, 473, 475-76, 478). In addition, respondent stated that as a corridor officer, he is a "supervisor to the inmates" and at the time he believed that he could handle the situation on his own (Tr. 466).

Respondent argued that inmate Banks was not listening to an order to stop and be frisked. He came from an unauthorized area and posed a level of resistance and defiance toward the

officer that led respondent to believe that he had contraband. The use of force was minimal and appropriate. Furthermore, the inmate never sustained any injuries (Resp. Ex. G).

Warden Bailey, Assistant Deputy Warden Marvin Butler, Captain Lomas, and Captain Sylvia Hernandez, the assigned investigator, agreed that a correction officer has the right to detain an inmate and question him regarding his presence in an unauthorized area. Moreover, the consensus was that an officer should be concerned that an inmate may have contraband and that it is appropriate to search the inmate. If the inmate refuses to be searched, then the officer should contact a supervisor, use a chemical agent or use his personal body alarm to call for a probe team. The witnesses agreed that respondent failed to follow this protocol. They concurred that respondent's use of force against inmate Banks was unnecessary, inappropriate, and excessive because the inmate did not pose an imminent physical threat (Tr. 49-50, 101, 233-35, 289-90, 380-82, 393).

Warden Bailey and Captain Lomas testified that force was unwarranted even though the inmate was disregarding respondent's orders (Tr. 97, 100, 289). Warden Bailey reiterated that inmates are captives and this particular inmate was in a confined location in front of a locked door (Tr. 289). Captain Hernandez testified and concluded in her report that respondent should not have grabbed inmate Banks by the back of the neck and forcibly thrown the inmate against the wall (Tr. 236-37). Warden Bailey, ADW Butler, and Captain Lomas agreed with Captain Hernandez's findings and were especially concerned about respondent picking inmate Banks up in the air by his neck and shaking him back and forth (Tr. 52, 237, 291, 393, 404). Indeed, Warden Bailey testified that respondent "was very dangerous to the institution, the state he was in," because his actions could have potentially led to retaliation against him or other officers (Tr. 292).

I agree with the witnesses' assessment that inmate Banks did not pose a threat and that respondent used deadly physical force by grabbing the inmate's neck and lifting him off the ground while he shook him. I found this incident to be the most disturbing of the three, even though inmate Capers was disabled and using a cane when respondent pushed him and inmate Robinson was placed in a double chokehold and wrestled to the ground. There was a tremendous disparity in size between inmate Banks and respondent. When respondent lifted inmate Banks off the ground and shook him, inmate Banks looked like a rag doll being tossed around. Respondent acted like a bully who was using his size to take advantage of a much

smaller person. While inmate Banks may have been disrespectful by ignoring respondent, he was stuck in front of a locked door. There were several other ways that respondent could have handled the situation that would not have required him to hold the inmate in the air by his neck. Accordingly, I find that the Department established by a preponderance of the credible evidence that respondent used excessive and unnecessary force against inmate Banks on January 2, 2011.

Finally, respondent is charged with failing to submit a report regarding the use of force incident against inmate Banks (ALJ Ex. 1). Captain Hernandez testified that she never received a report from respondent, but did receive reports from the two other officers who observed the incident (Pet. Exs. 11, 12; Tr. 230). Respondent testified that although no one had asked for a use of force report, he wrote one after the incident. Prior to leaving at the end of his tour, respondent brought the report to the control room, time stamped it, made a copy and asked a female correction officer working in the control room to put it in the security box. Respondent testified that he can not remember anything about the female correction officer, including her name (Tr. 468-69, 479, 490).

At the hearing, respondent produced a copy of this use of force report which was time stamped January 2, 2011 at 15:10 (Resp. Ex. H). The report indicates that he submitted it at the end of his tour on the day of the incident. Respondent's report states that the inmate was not complying with his order "to stop and place his hands on the wall" so he "grabbed the [inmate's] upper body and bused [him] on the wall" (Resp. Ex. H). When describing which part of the inmate's body to which force was applied, respondent wrote that he "pushed [inmate Banks] to the wall and continued to hold [him] by the lower neck area" (Resp. Ex. H).

The Department considered amending this charge to a false and inaccurate report but declined to do so. Instead, the Department argued that respondent was served with the charges regarding this incident, which included failing to submit a report, on February 17, 2011. Yet, respondent never mentioned at that time that he had submitted a report. Indeed, respondent did not provide the report to his attorney until June 23, 2011, three days after the commencement of this disciplinary hearing. When asked why he waited to produce it, respondent maintained that he had lost it and that his sister had just found it in his house. Respondent further testified that he did not bother to inquire who was working in the control room that day because he did not think he needed to since he had a copy of the report (Tr. 481-82, 487-88, 490-92).

Captain Hernandez testified and wrote in her investigative report that respondent failed to submit a report regarding the incident (Pet. Ex. 11; Tr. 230). ADW Butler equivocated on whether or not he saw respondent's report when he initially reviewed the investigative paperwork on the incident (Tr. 385-86, 390, 406, 411). Regardless, I am inclined to give respondent the benefit of the doubt that he submitted it and somehow it got misplaced in light of the date and time stamp on his report. Despite the Department's complaint that respondent did not mention the existence of the report until after the hearing started, it did not dispute the accuracy of the time stamp. Therefore, the evidence submitted by respondent is sufficient to establish that he submitted the report. Since the Department did not charge respondent with submitting a false and inaccurate report it is unnecessary to discuss the accuracy of respondent's submission. Accordingly, I find that the Department failed to establish by a preponderance of the credible evidence that respondent failed to submit a report regarding the use of force incident with inmate Banks on January 2, 2011.

FINDINGS AND CONCLUSIONS

1. The Department established by a preponderance of the credible evidence that respondent used excessive and unnecessary force against inmate Capers on December 17, 2010.
2. The Department established by a preponderance of the credible evidence that respondent submitted a false and inaccurate report regarding the use of force incident against inmate Capers on December 17, 2010.
3. The Department established by a preponderance of the credible evidence that respondent used excessive and unnecessary force against inmate Robinson on January 2, 2011.
4. The Department established by a preponderance of the credible evidence that respondent submitted a false and inaccurate report regarding the use of force incident against inmate Robinson on January 2, 2011.
5. The Department established by a preponderance of the credible evidence that respondent used excessive and

unnecessary force against inmate Banks on January 2, 2011.

6. The Department failed to establish by a preponderance of the credible evidence that respondent failed to submit a report regarding the use of force incident against inmate Banks on January 2, 2011

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record provided to me by the Department. Respondent was appointed to his position as a correction officer on September 14, 1995. During his 16-year tenure with the Department, he has been formally disciplined on four prior occasions. Respondent lost 40 vacation days in 2005 for four disciplinary complaints comprising a failure to log in and out, an arrest, and two absences without authorization. In 2007, respondent was suspended for 50 days and received a one-year limited probation for violating the Department's use of force reporting requirement. Respondent was also suspended in 2008, for ten days for being out of residence while on sick leave. Respondent was awarded a unit citation in 1996, 1998, and 2001.

Petitioner has requested that respondent be terminated from his position as a correction officer if any of the excessive use of force charges were sustained. Respondent has been found guilty of using excessive and unnecessary force on three occasions and submitting a false and inaccurate report regarding two of the use of force incidents.

In similar cases where a correction officer used excessive and unnecessary force termination was recommended. *See Dep't of Correction v. Holder*, OATH Index No. 2208/07 (Sept. 14, 2007) (termination recommended for a correction officer who was previously disciplined for violating the use of force directive and was found to have struck an inmate who had stopped resisting and was already rear-handcuffed); *Dep't of Correction v. Woodson*, OATH Index Nos. 603/04 & 597/04 (July 1, 2004) (termination recommended for a 20-year veteran with a significant disciplinary history who was found to have pushed an inmate to the wall, choked him with one hand, punched him in the chest, and slapped him in the face in response to a wisecrack); *Dep't of Correction v. Winslow*, OATH Index No. 615/91 (June 12, 1991) (termination recommended for a correction officer with an extensive disciplinary history

who was found to have poked an inmate with his baton, forced him to the floor, pounced on him, and hit him over the head with a baton after restraining him in response to verbal abuse).

Respondent is an experienced correction officer who has garnered the respect and admiration of his superiors. Warden Bailey testified that in most instances, respondent is level headed, in charge, and fully respected (Tr. 314). ADW Lemon testified that respondent's work performance was excellent, commenting that he takes ownership of his post and ensures that everything is under control. He further testified that if respondent receives an assignment, he will get it done. According to ADW Lemon, respondent does not need to be micromanaged (Tr. 346-47). ADW Butler similarly characterized respondent's work as exemplary. He testified that respondent is an excellent officer who does his job and does not require supervision. Indeed, he wished he had 100 officers like respondent (Tr. 379). In a very unusual tour commander's report, ADW Butler found that respondent used excessive and inappropriate force against inmate Banks, but qualified his findings by emphasizing the corridor post is a very stressful post. He wrote that respondent could be relied upon in any facility emergency without question and is an asset to the Department (Pet. Ex. 13). ADW Butler recommended in the report that respondent's summary suspension serve as his entire penalty regarding the Banks incident and that he not lose his job (Pet. Ex. 13).

Despite the high praise from a warden and two assistant deputy wardens, respondent has been found guilty of not one, but three excessive uses of force, all of which were captured on video. The three uses of force, two of which occurred within minutes, demonstrate a pattern of rage that is extremely troubling. Moreover, respondent has a significant disciplinary history, including a 50-day penalty for violating the Department's use of force reporting requirements.

I found the praiseworthy comments by respondent's supervisors to be surprising in light of the disturbing video evidence of each of these incidents. It is ironic that ADW Butler believes that respondent does not need to be supervised and ADW Lemon thinks that respondent does not need to be micromanaged. The videos demonstrate otherwise. The Department's evidence is overwhelming and demonstrates that respondent has an anger management problem. He is quick to employ force when he believes he is being disrespected by the inmates. No one would question how stressful and difficult it is to be a correction officer, especially while working a corridor post. This does not, however, give an officer license to use deadly physical force when an inmate disregards an order. The Department has created a continuum of force protocol and

provides officers with annual use of force training to assist them in coping with difficult, combative, and non-compliant inmates. I also find it problematic that respondent failed to take responsibility for his actions. He rationalized his use of excessive force in each incident. Furthermore, he was untruthful and tried to minimize his conduct by misleadingly stating that he held the inmates either by the lower neck area or the upper back. Respondent may have been an excellent officer and an asset to the Department at one point, but it is evident that he can no longer be trusted to control himself. His continued employment with the Department puts not only himself but others at risk.

Accordingly, I recommend termination of respondent's employment.

Kara J. Miller
Administrative Law Judge

September 16, 2011

SUBMITTED TO:

DORA B. SCHIRO
Commissioner

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NYC Civ. Serv. Comm'n Decision, Item No. CD 12-04-SA (Jan. 20, 2012)

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

In the Matter of the Appeal of:

ALFREDO NEGRON
Appellant

-against-

NYC DEPARTMENT OF CORRECTION
Respondent

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

PRESENT:

RUDY WASHINGTON, *Commissioner, Acting Chair*

CHARLES D. MCFAUL, *Commissioner*

PETER TROXLER, ESQ.
REPRESENTATIVE FOR APPELLANT

ADRIAN LAURIELLO, ESQ.
REPRESENTATIVE FOR APPELLANT

AMANDA M. WISMAN, ESQ.
AGENCY ATTORNEY

APPELLANT PRESENT

STATEMENT

On Thursday, January 12, 2012 the City Civil Service Commission heard oral argument in the appeal of **ALFREDO NEGRON**, Correction Officer, NYC Department of Correction from a determination by the NYC Department of Correction, finding him guilty of charges of incompetency or misconduct and imposing a penalty of TERMINATION following an administrative hearing conducted pursuant to Civil Service Law Section 75.

COMMISSIONERS' FINDINGS:

After a careful review of the testimony adduced at the departmental hearing and based on the record in this case, the Civil Service Commission finds no reversible error and affirms the decision and penalty imposed by the New York City Department of Correction.

NANCY G. CHAFFETZ, *Commissioner/Acting Chair*, Civil Service Commission

RUDY WASHINGTON, *Commissioner/Vice Chair*, Civil Service Commission

CHARLES D. McFAUL, *Commissioner*, Civil Service Commission