

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

OATH Index Nos. 1490/12 & 1491/12 (Nov. 15, 2012)

Two correction officers charged with using excessive force, failing to obtain medical attention for inmates, and making false reports. Administrative law judge found the admissions of the officers sufficient to sustain one charge of excessive force, but testimony from one inmate and written statements from eight other inmates insufficient to sustain the charges of failing to obtain medical attention and making false statements.

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

*In the Matter of*  
**DEPARTMENT OF CORRECTION**  
*Petitioner*  
*- against -*  
**CHARLES WINGATE AND LARRY SANDERS**  
*Respondents*

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### **REPORT AND RECOMMENDATION**

**JOHN B. SPOONER**, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Petitioner, the Department of Correction, charged that respondent Charles Wingate, a correction officer, used excessive force against two inmates and that he, along with respondent Officer Larry Sanders, submitted false reports about the incidents and failed to obtain medical attention for the inmates. A hearing on the charges was conducted on August 13, 14, 28, and 30 and September 6, 2012. Petitioner presented the testimony of an inmate, an investigator, and a captain, as well as multiple inmate statements and medical records. Respondents testified on their own behalf, admitting that force was used against one inmate but otherwise denying any misconduct.

For the reasons provided below, I find that the evidence was sufficient to sustain the charge that Officer Wingate used excessive force on one inmate but insufficient to sustain the remainder of the charges, which should be dismissed.

### ANALYSIS

The charges concern a series of events which occurred around 10:00 a.m. on January 15, 2008, at the 2/3 Main wing of Eric M. Taylor Center (E. M. T. C.). This housing area contained inmates classified as violent. The charges allege that Officer Wingate used excessive force against two inmates named Juan Ortiz and Jerome Green and that he, along with Officer Sanders failed to get medical attention for the inmates and made false written and interview statements about the incident.

It was undisputed that, on January 15, 2008, for the 7:00 a.m. to 3:00 p.m. tour, Officer Wingate was assigned to the A post inside the control room, while Officer Sanders was assigned to the C post, monitoring the inmates on the tier. The two had been working together for approximately a year (Sanders: Tr. 340). At around 8:30 a.m., a team of correction officers conducted an institutional search of all cells in the 2/3 Main tier, searching to determine the quantity of mattresses and other bedding each inmate had. If a cell had more than one mattress, the inmate was required to have a medical note identifying a health need for an additional mattress. According to the interview statements of Captain Gunn (Pet. Ex. 34), the captain in charge of the institutional search, when he and his team left the tier at 8:30 a.m. there were several mattresses in the corridor outside the cells, where the inmates had placed them upon orders of the search team (Pet. Ex. 34 at 12-13). Photos (Pet. Ex. 27) show the layout of the tier corridor, where the inmate cells were located, and the A station, a separate room at one end of the corridor with controls for locking and unlocking individual cell doors.

It was further agreed that, at around 10:25 a.m., Officer Sanders activated his body alarm and, within minutes, a probe team reported to the 2/3 main area. The probe team found Mr. Ortiz facing a wall in the A station with Officer Wingate holding him. Both Mr. Ortiz and Officer Wingate displayed effects of chemical spray. When Mr. Ortiz was seen at 12:15 p.m. by a clinic doctor, the injury report (Pet. Ex. 17) indicated that he had bruising behind the left ear, pain to the left jaw, bleeding from the left eardrum, and redness of the eyes. Several days later, another doctor found that Mr. Ortiz had a ruptured eardrum (Pet. Ex. 18).

As to what occurred to Mr. Ortiz and Mr. Green before Officer Sanders's alarm was sounded, the inmates and the two respondents offered very different accounts, as more fully discussed below. Three eyewitnesses testified at the hearing: Mr. Ortiz, Officer Wingate, and

Officer Sanders. In addition, petitioner presented written statements from Mr. Green and eight other inmates, generally supporting Mr. Ortiz's and Mr. Green's accounts. According to Mr. Ortiz's testimony and Mr. Green's written statement, Officer Wingate struck Mr. Ortiz several times on his head on two different occasions and pushed Mr. Green into his cell. According to the two officers, Officer Wingate never used force on Mr. Green and struck Mr. Ortiz only because he "charged" at Officer Wingate, carrying a mattress.

Mr. Ortiz testified via a live video link from the Manhattan House of Detention, using the assistance of a Spanish interpreter present with him at the jail. Mr. Ortiz testified that, at around 10:00 a.m. on January 15, 2008, he returned to his cell from the day room and found his mattress thrown on the floor. He went out into the corridor and loudly asked who had been in his cell. Officer Wingate approached and accused Mr. Ortiz of having two mattresses. Mr. Ortiz replied that he had never had two mattresses. Officer Wingate then punched Mr. Ortiz in his left ear some four to five times (Tr. 22-24). Mr. Ortiz felt "a lot of pain" and asked for help. Officer Wingate went back to the A station for several minutes and then called to Mr. Ortiz to come to the A station. Officer Wingate asked if Mr. Ortiz wanted to go to the clinic (Tr. 26-27). Officer Wingate then pulled Mr. Ortiz up by his shirt and "threw" him to the floor. According to Mr. Ortiz, both Officer Wingate and Officer Sanders "began to hit me between both of them" (Tr. 27). Mr. Ortiz recalled that they hit him "very hard" in the head, stomach, and body (Tr. 29).

Mr. Ortiz stated that the officers then stood him up with his hands and face against the wall. They tried to hit his face while it was against the wall. They placed him in handcuffs. Officer Wingate called out Mr. Ortiz's name and sprayed him with a chemical over his ear and head. The officers again threw him to the floor (Tr. 29-30). Mr. Ortiz stated that he was then taken to a bathroom in the intake area for a shower and then to the clinic (Tr. 30), where he was seen at around 12:40 p.m. (Pet. Ex. 18). He was apparently returned to his cell at 2/3 Main that night or early the following morning, since he was present there on January 16 at 8:00 a.m. when he signed a written statement (Pet. Ex. 6) indicating he was punched and hit by Officer Wingate. He went to the clinic again on January 16 and it was there, at around 1:45 p.m., that Mr. Ortiz gave another more detailed statement (Pet. Ex. 5) to a Department investigator (Tr. 133). Sometime later, he was sent to Bellevue for further treatment (Tr. 32). Mr. Ortiz stated that he has hearing loss in his left ear and that it still "hurts a lot many times" (Tr. 33).

In an affidavit (Pet. Ex. 23), a Department doctor, having reviewed the medical records and the photographs taken of Mr. Ortiz on January 16, concluded that he received “several blows to different parts of the head, neck, and facial area” and that these had caused “a perforated left eardrum” and were responsible for the “tinnitus,” or ringing, complained of by Mr. Ortiz. The doctor also saw bruising in the neck area and an abrasion to the upper left back which were indicative of “blunt force trauma.”

As to the allegation of force against inmate Green, only hearsay proof was offered. In his January 16 written statement (Pet. Ex. 3), Mr. Green wrote that, after the A officer went into Mr. Ortiz’s cell and punched him, the officer then came to Mr. Green’s cell and asked if he had two mattresses. Mr. Green said that he did not but asked, “What’s up with the heat in my cell?” The officer angrily asked if Mr. Green thought he could “fix some fucking heat,” pushed Mr. Green back into his cell, and slammed the cell door. Another inmate, Mr. Figueroa, wrote a statement (Pet. Ex. 4) on January 16 indicating that he saw an officer “confront” Mr. Green, push him in his cell, and lock the door. Inmate Anthony Galarza wrote in a statement (Pet. Ex. 42) that Officer Wingate “grabbed inmate Green by the neck and threw him into the cell.”

In their testimony, both correction officers denied any force was used against Mr. Green and asserted that the incident with Mr. Ortiz was initiated by Mr. Ortiz, when he charged toward Officer Wingate. Officer Sanders testified that, following the completion of the search conducted by a search team, he conducted a tour of the tier and observed that some inmates still had a second mattress in their cells (Tr. 346-47). Officer Sanders told Officer Wingate about the problem (Tr. 347, 409).

Officer Wingate called Captain Gunn and the captain told him to “straighten it out” or “get it straight” (Wingate: Tr. 551; Sanders: Tr. 411). After this call, at Officer Wingate’s suggestion, Officer Sanders and Officer Wingate switched posts, with Officer Sanders going into the control room as the A officer and Officer Wingate going into the corridor to assume the duties of the C officer (Sanders: Tr. 413-15; Wingate: Tr. 551, 596). Between 9:00 a.m. and 10:00 a.m., Officer Wingate conducted a tour of the cells searching for extra mattresses (Sanders: Tr. 418; Wingate: 552-53). Officer Wingate recalled speaking with two inmates named Nour and Green and taking a spray bottle out of Mr. Green’s cell, but denied that he

pushed or had any other physical interaction with Mr. Green (Tr. 553). Officer Sanders did not recall whether Officer Wingate spoke with Mr. Green at all (Sanders: Tr. 422-23).

Officer Sanders indicated that, after Officer Wingate's tour of the cells, the officers returned to their original posts, with Officer Wingate on the A post in the control room and Officer Sanders back in the corridor on the C post (Tr. 429-30).

According to Officer Wingate, after completing his tour as the C officer, he told the inmates with extra mattresses to "start running them to the front" (Tr. 554). Officer Sanders testified that he went to cell 24, occupied by Mr. Ortiz, and asked him if he had a medical note for an extra mattress. When Mr. Ortiz indicated he had no note, Officer Sanders instructed him to take the mattress down the tier to the C gate where Officer Wingate was standing (Tr. 348, 351).

The two officers testified that Mr. Ortiz put the mattress over his arms and walked down the tier toward the A station. As he approached Officer Wingate, Mr. Ortiz "mumbled something" (Wingate: Tr. 554) and "charged at" Officer Wingate (Sanders: Tr. 334) "as if he was going to either run through me or push me down" (Wingate: Tr. 557). Officer Wingate heard Mr. Ortiz use the word "dog" but otherwise could not understand anything he was mumbling (Tr. 558).

Officer Wingate testified that, as Mr. Ortiz pushed against him with the mattress, the officer "swung" at Mr. Ortiz and Mr. Ortiz stepped back (Tr. 559). Afraid that Mr. Ortiz would come at him again, Officer Wingate used his chemical spray on Mr. Ortiz (Tr. 559). Officer Wingate placed Mr. Ortiz against a wall until the probe team arrived (Tr. 560).

Officer Sanders's account varied somewhat from that of Officer Wingate. According to Officer Sanders, from down the tier, he saw Officer Wingate "slap" Mr. Ortiz on the left side of his head, without giving Mr. Ortiz any verbal command (Sanders: Tr. 457). Officer Sanders shouted orders for Mr. Ortiz to stop and pressed his body alarm (Sanders: Tr. 352). He saw Officer Wingate take a step back and then smelled chemical spray. Mr. Ortiz began rubbing his eyes and fell to the floor (Sanders: Tr. 355). Officer Sanders testified that he helped Officer Wingate pick Mr. Ortiz up (Sanders: Tr. 474). Shortly afterwards the probe team arrived, handcuffed the inmate, and took him to the intake area for a shower (Sanders: Tr. 357).

Officer Wingate went to the clinic and was treated for exposure to the chemical spray (Tr. 560-61).

Officer Wingate and Officer Sanders denied that Officer Wingate used force on Mr. Green (Wingate: Tr. 553; Sanders: Tr. 363). They also denied that Officer Wingate pulled Mr. Ortiz to the gate (Wingate: Tr. 567; Sanders: Tr. 366). For his part, Mr. Ortiz denied having a mattress in his arms or using a mattress to butt either of the officers (Tr. 30).

As to the charges concerning inmate Green, I find that the three hearsay statements that Officer Wingate “pushed” or “grabbed” Mr. Green, without more, are insufficient to establish misconduct. The force directive in effect on the date of the incident<sup>1</sup> generally permitted physical contact with an inmate “to enforce Department/facility rules.” Directive 2006R-B § IV (A) (4). Furthermore, “physical contact between an inmate and employee used in a non-confrontational manner to . . . guide the inmate shall not be reported as a use of force.” Directive 2006R-B § V (E) (1). Other than using the words “pushed” and “grabbed”, Mr. Green, Mr. Figueroa, and Mr. Galarza provided no further details to explain what occurred. While their statements indicate that Officer Wingate may have been angry, their statements also suggest that the physical contact may have been intended, in part, to compel Mr. Green to return to his cell. The inmates’ statements mentioned no fall and no injury as a result of Officer Wingate’s action. Based upon their statements, it seemed possible that Officer Wingate used no more than a minimum amount of pressure to guide Mr. Green back into his cell. Due to the lack of detail of the hearsay statements and the failure of the hearsay to establish the amount of pressure used, I find that this evidence, which could not be tested by cross-examination, was insufficient to prove that Officer Wingate used excessive force against Mr. Green or that Mr. Green was injured. *See Depar’t of Correction v. Vasquez*, OATH Index Nos. 362/99, 363/99, 364/99, & 365/99 (Sept. 20, 1999) (inmate hearsay statement found insufficient to sustain charges of excessive force). Specification 2, alleging unnecessary force against Mr. Green, specification 4, alleging failure to obtain medical attention for Mr. Green, and specification 6, alleging a false report about using force on Mr. Green, must all be dismissed.

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<sup>1</sup> Although the charges against Officer Wingate refer to Directive No. 5005R, a 1999 version of the force directive, and the charges against Officer Sanders refer to Directive No. 5006R-C, the revised force directive which became effective on January 31, 2008, it was agreed by the parties during the hearing that the force guidelines in effect at the time of the incident were those contained in Directive No. 5006R-B.

The proof of the factual allegations concerning Mr. Ortiz rested on a different footing. These allegations were supported by Mr. Ortiz's testimony, by admissions of respondents themselves and by hearsay statements of other inmates.

Petitioner's counsel contended that Officer Wingate's admissions that he twice struck Mr. Ortiz in the side of the head were sufficient to establish a violation of the force directive, even if Mr. Ortiz's account were not fully credited. The force directive provides that, prior to a use of force, alternative methods such as verbal orders should be used. Directive 5006R-B § V (A) (1). When force becomes necessary, force should be limited to "control holds" such as "grasping or pushing the inmate to gain compliance." Directive 2006R-B § V (B) (2) (d). If greater force becomes necessary, "blows should be directed away from the head," Directive 2006R-B § V (B) (2) (e), and "striking an inmate's head against the wall, floor or other object is permitted only pursuant to V. C, deadly physical force." Directive 5006R-B § V (B) (2) (h). "Deadly physical force" is authorized only "as a last resort," if necessary to defend against deadly physical force from an inmate or to prevent an escape.

Captain Lomas, an instructor at the Department of Corrections Training Academy for ten years, provided further support for finding that Officer Wingate's actions were improper. On the date of the incident, Officer Wingate stood about six feet two inches and weighed around 300 pounds (Tr. 748). Mr. Ortiz was five feet four inches and weighed around 160 pounds (Tr. 749). As explained by Captain Lomas in his testimony, assuming that Mr. Ortiz was moving rapidly toward Officer Wingate carrying a heavy bulky mattress, as described by the officers, Officer Wingate had a number of alternatives available to him other than striking Mr. Ortiz. He could have ordered Mr. Ortiz to stop, stepped aside, grabbed Mr. Ortiz by the arm, or used his heavier body weight to push the inmate back or to the floor. Captain Lomas stated that, pursuant to Department Directives 5006R-B, assuming Mr. Ortiz charged at Officer Wingate with a mattress, it was a violation of the directive to strike the inmate in the head because head blows could cause serious injury (Tr. 294). Captain Lomas testified that Officer Wingate could have avoided hitting Mr. Ortiz at all, by pushing Mr. Ortiz back, or stepping to the right or left and then using chemical spray. He believed that Officer Wingate should also have employed force alternatives such as verbal orders to stop Mr. Ortiz (Tr. 298).

Officer Wingate's and Officer Sanders's admissions, combined with the undisputed medical evidence that Mr. Ortiz's eardrum was perforated, support a finding that Officer Wingate struck Mr. Ortiz hard on the left side of his head close to his ear, without giving verbal commands and without trying alternative physical holds. 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, as well as Captain Lomas's testimony that alternatives to deadly force existed, I find that Officer Wingate's blow to the left side of Mr. Ortiz's head violated the force directive.

Furthermore, although respondents insisted in their testimony that Officer Wingate used an open hand to slap Mr. Ortiz, the more credible proof supported a finding that Officer Wingate struck Mr. Ortiz hard with a closed or partially closed fist. In his use of force report (Pet. Ex. 29), completed soon after the incident, Officer Wingate wrote, in describing the force used, that he "struck" Mr. Ortiz and in a later section, describing where he used force on Mr. Ortiz, wrote that he "punched" him in the "facial area." When confronted with this inconsistency at the hearing, Officer Wingate stated that the use of the word "punch" was a "mistake" and that, in fact, he slapped Mr. Ortiz with an open not a closed hand (Tr. 564). Other evidence, including the severity of the eardrum injury and the testimony of Mr. Ortiz, confirm that the blows from Officer Wingate were more likely punches than slaps, as admitted in Officer Wingate's report.

The medical evidence and photographs taken of Mr. Ortiz also support a finding that, in addition to the blow directed to Mr. Ortiz's left ear, Officer Wingate also struck him in the upper back. The photographs (Pet. Ex. 16) taken of Mr. Ortiz on January 16 shows reddish abrasions on Mr. Ortiz's left neck just below his ear and on his left shoulder. Based upon this evidence, I find that Officer Wingate punched Mr. Ortiz at least twice on the left side of the head and upper back, perforating Mr. Ortiz's left eardrum and causing a half-inch abrasion to his left shoulder. To punch Mr. Ortiz in the side of his head under these circumstances was an even more blatant violation of the force directive.

Specification 1 of the charges against Officer Wingate, alleging that he used excessive force against Mr. Ortiz, must be sustained.

The more difficult issue is whether the testimony of Mr. Ortiz was sufficient to prove that Officer Wingate struck Mr. Ortiz several times in his cell and again a few minutes later in the A

station. Making an affirmative finding as to this assertion would make Officer Wingate's violation of the force directive yet more egregious and would also sustain the remainder of the charges that the two officers falsely claimed, in their reports and interviews, that Mr. Ortiz charged toward Officer Wingate with a mattress and also denied Mr. Ortiz medical assistance. The credibility analysis depends upon an array of factors supporting and undermining the testimony of Mr. Ortiz, Officer Wingate, and Officer Sanders, the three eyewitnesses to the incident.

Turning first to Mr. Ortiz, his statements were corroborated, to some degree, by admissions from Officer Wingate and Officer Sanders. Both officers admitted that, although Officer Sanders was the assigned C officer responsible for guarding the tier and the inmate cells, Officer Wingate left his assigned A post and walked the tier to try to confiscate unauthorized mattresses. The officers also admitted that Officer Wingate struck Mr. Ortiz on the left side of his head.

On the other hand, Mr. Ortiz's testimony was weakened by four verbal and written statements he made to facility staff soon after the incident. First, he told the doctor at the clinic immediately following the incident that he was "hit four times on left side of face" and "sprayed in right face" (Pet. Ex. 17). Second, in a written statement (Pet. Ex. 7) made at around 1:20 p.m. on January 15, he wrote that, after he asked the officers "who messed up my cell," "the officer hit me." Third, in a written statement (Pet. Ex. 6) made at 8:00 a.m. on January 16 to an assistant deputy warden, he wrote in Spanish that he returned to his cell and found his mattress was turned over. He loudly demanded, "Who came into my cell?" An officer asked him why he had two mattresses and then punched him three times. About 10 to 15 minutes later, the officer called him "outside the dormitory" and "started hitting me with his knees." The officer put something in his eyes and handcuffed him.

Department records show that an initial facility investigation was conducted by Captain Gunn based primarily upon Mr. Ortiz's second statement. Captain Gunn reviewed two statements by Mr. Ortiz, the written reports of Officers Wingate and Sanders, and also the written statements of six inmates, all of whom indicated that they saw nothing concerning any use of force by the officers. In his investigation report (Resp. Ex. C) dated January 18, 2008, Captain Gunn discredited Mr. Ortiz's second written statement because "if in fact inmate had

been struck several times by C. O. Wingate's knees inmate Ortiz would of alerted medical staff to this fact, which he did not do, and the injuries to inmate Ortiz would have been more substantial then [sic] a bruise to his left ear." Captain Gunn further concluded that that statement was inaccurate because Mr. Ortiz "was not handcuffed until after the use of force was terminated and the probe team was in the area."

Mr. Ortiz's fourth statement (Pet. Ex. 5) was given five hours later, at around 1:45 p.m., to an investigator from the Department Investigation Division. In this statement, Mr. Ortiz wrote that, after he demanded to know who messed up his cell, the "A officer," who was "black, heavy, tall, no hair," came to his cell and told Mr. Ortiz he had two mattresses. Mr. Ortiz denied having a second mattress. The officer then punched Mr. Ortiz four to five times in his left ear area, saying he was lying. About five minutes later, Mr. Ortiz went to the A gate and asked the same officer about his clinic appointment and the officer said the appointment was cancelled. Around 10:30 a.m., the officer pulled Mr. Ortiz by his jumpsuit to the "bathroom door in the corridor" and "punched" him on his face and head, trying to hit his head against the wall. The officer tripped Mr. Ortiz and Mr. Ortiz fell to the floor. The officer then handcuffed Mr. Ortiz and placed him on his knees. The second officer, who was "white, male, tall, heavy," was "watching." A captain came and told the "A officer" to spray Mr. Ortiz in the eyes. Mr. Ortiz was then taken to intake for a shower.

The four statements, which provide a gradually increasing quantity of details, are consistent as to Officer Wingate striking Mr. Ortiz, but vary as to many other details. The first two statements indicate that Mr. Ortiz was hit several times, while the last two longer statements indicate that the blows from Officer Wingate were delivered in two encounters several minutes apart. The number of blows varied slightly from four in the first statement, to more than five in the last statement, a relatively minor difference. The last statement, which reflected questioning by the investigator to elicit as much detail as possible, corroborated some of the testimony Mr. Ortiz gave at the hearing as to the sequence of events involving accusations of having a second mattress and then being struck by Officer Wingate at two different times a few minutes apart.

There were two notable inconsistencies, however, between the statements and Mr. Ortiz's trial testimony. In his testimony, Mr. Ortiz contended that both Officer Wingate and Officer Sanders struck him. In all four of his previous statements, Mr. Ortiz indicated that only Officer

Wingate had used force against him. Second, in his testimony Mr. Ortiz did not mention a captain being present. In his statement to the investigator, Mr. Ortiz wrote that a captain was present during a portion of the incident and ordered Officer Wingate to use chemical spray. These inconsistencies as to details that implicated additional facility staff in the incident suggested that that Mr. Ortiz might be exaggerating his account in the hope of compensation for his injuries, a suggestion further supported by the indications that Mr. Ortiz may have solicited supporting statements from his fellow inmates, as discussed below. While Mr. Ortiz indicated that he did not have a lawsuit pending at the time of the hearing, he did admit that, around the time of the incident, he contemplated a lawsuit. He stated that he consulted with the Prisoner's Rights staff and spoke with an attorney about suing the City for his injuries, although the lawsuit did not proceed because Mr. Ortiz could not find his documents (Tr. 86). The possibility that, at the time the incident was being investigated and he made his statements, Mr. Ortiz was considering a lawsuit and may have wished to maximize a monetary recovery for damages by exaggerating the extent of the force used severely undercut the reliability of both his contemporaneous statements and his hearing testimony.

Mr. Ortiz's overall credibility was further diminished by his conviction history. He admitted that he had been convicted of forgery and sentenced to two to four years' imprisonment for illegally selling Metro cards (Tr. 47, 51). The dishonesty shown by these past crimes suggested that Mr. Ortiz was deceitful and untruthful. His prison records (Resp. Ex. A) further indicated that he has a history of being assaultive, for, since 2001, he has received eight infractions for fighting with other inmates or with staff. He also was found guilty of an infraction with regard to the January 15, 2008 incident and sent to solitary confinement for 35 days (Resp. Ex. B).

Petitioner contended that Mr. Ortiz's testimony should be found credible because it was corroborated by the written statements of eight inmates, taken on January 16 in the 2/3 Main housing area. Inmates Nour, Green, Figueroa, Marquez, Cooper, Galarza, and Wimbley all heard Officer Wingate ask Mr. Ortiz about a second mattress and then strike Mr. Ortiz several times on the head (Pet. Exs. 12, 3, 4, 11, 10, 13, and 8). Inmates Nour, Green, Marquez, Galarza, Filipakis (Pet. Ex. 9), and Wimbley also stated that Officer Wingate took Mr. Ortiz down the tier corridor a few minutes later and used further force.

Due to their hearsay nature, the inmate statements raised serious questions as to reliability. In assessing the reliability of hearsay, this tribunal has relied on several factors, including “the identity of the hearsay declarant, the availability of the declarant to testify, the declarant’s personal knowledge of the facts, the independence or bias of the declarant, the detail and range of the hearsay, whether the statements were oral or written, signed and sworn or unsworn, the degree to which the hearsay is corroborated, the centrality of the hearsay evidence to the agency’s case, and the magnitude of the administrative burden should the hearsay be excluded.” *Police Dep’t v. Rhodes*, OATH Index No. 736/10, mem. dec. at 5 (Oct. 21, 2009).

When evaluated under these criteria, the ten inmate statements seem marginally reliable. On the one hand, the inmates are all identified by name, they were all housed in cells on the tier where the incident occurred, all of the statements were signed, and the hearsay was not the primary evidence offered. On the other hand, three of the declarants, Mr. Marquez, Mr. Filipakis and Mr. Wimbley, had given previous statements (Pet. Exs. 39 and 37 and Resp. Ex. C) on January 15 indicating that they did not see anything happen with Mr. Ortiz.

It was also argued by respondent’s attorney that the eight inmate statements taken by the investigator on January 16 were suspect because they were taken at a time after Mr. Ortiz had returned from the clinic when he could have encouraged the inmates to support his account. There was support for such a conclusion. Three of the January 16 statements, those of Mr. Cooper, Mr. Galarza, and Mr. Figueroa, used the same word “smacked” and the number “four” to describe how Officer Wingate dealt with Mr. Ortiz, a similarity that seemed more than mere coincidence. Indeed, out of the eight statements taken on January 16, four statements specified that Mr. Ortiz was struck four times and two indicated that he was struck five times in his cell, details that seemed remarkably similar to Mr. Ortiz’s written statement of January 16 (Pet. Ex. 5) that he was struck “four to five times.” Two of the declarants, Mr. Filipakis and Mr. Wimbley, while admitting that they could not actually see what occurred inside the A station, nonetheless stated that they heard sounds indicating that Mr. Ortiz’s head hit a wall, details similar to Mr. Ortiz’s January 16 statement that Officer Wingate “tried to hit my head against the wall.” It seemed highly implausible that either inmate could discern, from a noise alone, that Mr. Ortiz’s head hit a wall. It was far more likely that the detail was supplied to the inmates by someone

else, probably Mr. Ortiz. In fact, virtually all of the details contained in the eight inmate statements were included in Mr. Ortiz's written statements using similar words.

There were indications that at least some of the inmates had a motive to falsely accuse Officer Wingate of misconduct. One of the declarants, Mr. Cooper, prefaced his statement by stating that Officer Wingate of "assaulted" him and was responsible for Mr. Cooper's being housed in 2/3 Main. For all of these reasons, the inmate written statements could not be fully credited or be accorded any weight in corroborating Mr. Ortiz's testimony.

The accounts of Officer Wingate and Officer Sanders raised a number of credibility concerns as well. As to three salient facts, the two officers gave conflicting testimony. Officer Sanders testified that, at the time Officer Wingate struck Mr. Ortiz, the C gate door was unlocked and open (Tr. 452), while Officer Wingate testified, in both his MEO 16 interview and in his hearing testimony, that the C gate was closed and locked (Tr. 704). Later on redirect, in explaining the threat posed by Mr. Ortiz charging him, Officer Wingate contradicted his earlier statements and indicated that the door was open (Tr. 756). Officer Sanders indicated that he helped restrain Mr. Ortiz after the chemical spray was used (Tr. 475), while Officer Wingate denied that Officer Sanders had any contact with the inmate (Tr. 742). Officer Sanders stated that Officer Wingate made only one tour of the tier, while Officer Wingate indicated, in both his interview statement and in his testimony, that he made two tours.

Officer Wingate and Officer Sanders admitted that, without obtaining authorization from a supervisor, they switched posts, with Officer Wingate assuming the C post and Officer Sanders assuming the A post. The officers' explanations as to why this unauthorized swap was done seemed thin. In his interview and again in his testimony, Officer Wingate indicated that the officers switched posts because Officer Wingate wanted to "verify" the information provided by Officer Sanders (Tr. 610). He insisted that, because he and Officer Sanders were both officers, Officer Wingate could not tell Officer Sanders to do (Tr. 763). He had no explanation as to why he did not obtain permission from a supervisor for the exchange of posts or why the switching of posts was not recorded in the post log book, as would normally be required (Tr. 779). For his part, Officer Sanders stated, in his interview, that Officer Wingate assumed the C post because he was the "senior officer" and had been on the post longer (Pet. Ex. 33 at 24), although Officer Sanders had, in fact, been working at 2/3 Main since 2007 (Tr. 340).

It was striking that neither Officer Wingate nor Officer Sanders could provide a motive for Mr. Ortiz to rush toward Officer Wingate with a heavy mattress in his arms. In his testimony, Officer Wingate indicated that he feared, when Mr. Ortiz rushed at him with the mattress, that the inmate would take the control room keys and escape (Tr. 722), although if this was, indeed, Mr. Ortiz's plan it seemed unlikely he would attack a much heavier correction officer carrying a thirty-pound mattress in his arms. On the other hand, if Officer Wingate did in fact strike Mr. Ortiz on two occasions, first in a cell and then at the A station, claiming that Mr. Ortiz attacked the officer would provide justification for using force against him.

There were a few similarities in the written reports the officers wrote on the date of the incident. In Officer Wingate's report (Pet. Ex. 29), written on January 15, he wrote as follows in the section for describing the incident:

[Mr. Ortiz] pushed this writer charging towards this writer aggressively with his mattress. This writer employed one strike to subject's facial [sic] area. Inmate Ortiz continued advancing toward me trying to push me backwards. I then was able to unholster my O.C. and administer (1) two second burst towards subject.

In a later section, asking for an explanation why force was necessary, he wrote, "Inmate Ortiz . . . assaulted this writer by charging at me with a mattress." In describing the force used, he wrote, "one punch to subject's facial area / O.C."

In his report (Pet. Ex. 31), Officer Sanders wrote that he "saw inmate Ortiz . . . assault C.O. Wingate . . . with his mattress" and activated his alarm. He wrote that Officer Wingate "appeared to strike inmate Ortiz . . . in the facial area" and Officer Sanders "ordered" Mr. Ortiz to "stop and put his hands on the wall" but Mr. Ortiz "kept advancing towards C.O. Wingate." The use of similar words, such as "assault" and "facial area," in both of the officers' reports could have resulted from collaboration, although the similarities are not so striking, standing by themselves, to prove that collaboration occurred.

By contrast, the two officers' admissions as to a number of potential violations suggested that they were telling the truth. Both officers stated in their reports that Officer Wingate struck Mr. Ortiz in the head, even before the medical records revealed the extent of Mr. Ortiz's injuries. They repeated these statements in their interviews and in their testimony. They also admitted that they exchanged posts without authority in violation of Department rules. This latter admission seemed particularly notable because it tended to corroborate Mr. Ortiz's account that

Officer Wingate struck him inside his cell and was not supportive of the officers' insistence that the force was used while Officer Wingate was on the A post.

Ultimately, I found that the weaknesses in Mr. Ortiz's credibility, unsupported by any other reliable proof, made it insufficient to prove by a preponderance of the evidence that the contradictory account given by Officer Wingate and Officer Sanders was false. *See Dep't of Correction v. Harris*, OATH Index Nos. 525/12 & 526/12 (Apr. 4, 2012) (uncorroborated and implausible accounts offered by two inmates found insufficient to sustain allegations of beating the inmates, failing to report a use of force, or providing false reports); *Dep't of Correction v. Angrum*, OATH Index Nos. 2066/04, 2067/04, 2252/04, 2253/04, 2255/04, 2256/04, 2257/04 (Feb. 7, 2005) (uncorroborated inmate statements found insufficient to sustain charges of excessive force and making false statements). The false statements charges against the two officers should be dismissed.

In addition, because I could not credit Mr. Ortiz's testimony that Officer Wingate struck him at an earlier time or that the officers refused him medical attention, there is no reliable support for the charge that Officer Wingate failed to ensure that Mr. Ortiz received medical attention. The requirement for dealing with an injured inmate is contained in Directive 4516,<sup>2</sup> which provides that "any inmate suspected of being injured or who claims to be injured" must be "referred to the clinic for examination and treatment . . . , accompanied by an Injury to Inmate Report" (Pet. Ex. 43). Here the reliable evidence supported a finding that, after Officer Wingate struck Mr. Ortiz in the head and used his chemical spray, a captain reported to the area within minutes and had the inmate taken away for treatment. There was no reliable proof that, prior to the captain's arrival, the inmate complained of an injury. While it may be argued that Officer Wingate's hard blow to Mr. Ortiz's head should have made him suspect that Mr. Ortiz was injured, at the time the officer was in no condition to prepare a report, having just been exposed to his own chemical spray. Under these circumstances, it was reasonable for Officer Wingate to assume that the probe team captain or another staff member would prepare an appropriate injury

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<sup>2</sup> Although the charges cite to Directive 4516, at the hearing petitioner introduced into evidence a copy of Directive 4516R-A (Pet. Ex. 41), which took effect on January 31, 2008, some two weeks after the incident. Following the hearing, in reply to an inquiry from this tribunal, petitioner's attorney submitted a copy of Directive 4516 into the record, and it was admitted without objection as Petitioner's Exhibit 43. In fact, the language describing the requirement that inmates be referred for medical treatment and that an injury report be prepared is the same in both versions of the directive.

report. In fact, injury-to-inmate reports were filled out later that day by the clinic staff and by Captain Gunn, the investigating captain. For these reasons, specification 3 has not been proven and should be dismissed.

In sum, only specification 1 against Officer Wingate should be sustained and the remainder of the specifications against Officer Wingate and both specifications against Officer Sanders should be dismissed.

### **FINDINGS AND CONCLUSIONS**

1. Specification 1 of DR No. B0214/2009 against Officer Wingate should be sustained in that, on January 15, 2008, Officer Wingate used excessive force by punching inmate Ortiz on the left side of his head in violation of Directive 5006R-B section V (B) (2) (h).
2. Specification 2 of DR No. B0214/2009 against Officer Wingate should be dismissed in that petitioner failed to prove by a preponderance of the evidence that Officer Wingate used excessive force against inmate Green.
3. Specification 3 of DR No. B0214/2009 against Officer Wingate should be dismissed in that petitioner failed to prove by a preponderance of the evidence that Officer Wingate failed to ensure medical attention for inmate Ortiz.
4. Specification 4 of DR No. B0214/2009 against Officer Wingate should be dismissed in that petitioner failed to prove by a preponderance of the evidence that Officer Wingate failed to ensure medical attention for inmate Green.
5. Specifications 5, 6, and 7 of DR No. B0214/2009 against Officer Wingate should be dismissed in that petitioner failed to prove by a preponderance of the evidence that Officer Wingate submitted a false report or made false statements with regard to the incidents with inmates Ortiz and Green.

6. Specifications 1 and 2 of DR No. B0116/2009 against Officer Sanders should be dismissed in that petitioner failed to prove by a preponderance of the evidence that Officer Sanders submitted a false report or made false statements with regard to the incidents with inmates Ortiz and Green.

### **RECOMMENDATION**

Upon making the above findings, I requested and received a summary of Officer Wingate's personnel history in order to make an appropriate penalty recommendation. He was appointed in 2004 and has one prior disciplinary penalty. He accepted a penalty of five vacation days in 2009 for another incident on January 15, 2008, the same date as this incident. This prior penalty demands that any penalty for the current case be enhanced somewhat.

As noted above, the multiple credibility problems with all of the witnesses made precise fact-findings as to why or how many times Officer Wingate struck Mr. Ortiz impossible. The evidence supported only a finding that Officer Wingate struck Mr. Ortiz at least twice, once on left side of his head and once on his left shoulder. It was unclear whether these blows were provoked by aggression from Mr. Ortiz or by Officer Wingate's anger about something Mr. Ortiz told him.

Counsel for petitioner recommended that Officer Wingate be suspended for 60 days for all of the charged misconduct, a recommendation that must be much decreased where only one charge was sustained. Other officers who have used excessive force under somewhat similar circumstances have received penalties ranging from 10 to 60 days, depending upon their tenure and the severity of the force used. *See Dep't of Correction v. Davis*, OATH Index Nos. 2648/09 & 2649/09 (Feb. 12, 2010) (60 days for officer who punched an inmate in the head and made a false report about the incident); *Dep't of Correction v. Fernandez*, OATH Index No. 1356/06 (Sept. 21, 2006), *modified*, NYC Civ. Serv. Comm'n Item No. CD08-12-SA (Feb. 20, 2008) (10 day penalty for officer who used chemical spray without warning and at close range); *Dep't of Correction v. Richardson*, OATH Index No. 549/03 (Mar. 13, 2003), *aff'd*, Comm'r Dec. (May 5, 2003), *aff'd*, Civil Serv. Comm'n Item No. CD04-41-SA (July 9, 2004) (12 day penalty for officer with no prior penalties who lifted inmate off the floor and dropped him in a "slam"); *see also Dep't of Correction v. Johnson*, OATH Index No. 1639/05 at 15 (Aug. 18, 2005), *modified*,

Comm'r Dec. (Oct. 27, 2005), *modified*, NYC Civ. Serv. Comm'n Item No. CD07-29-M (Mar. 14, 2007) (finding that a penalty of up to 10 days is appropriate for a first excessive force offense with significant mitigation).

Due to the sparse fact-findings in this case as to how the incident occurred, and the distinct possibility that a lesser degree of force may have been justified, I recommend that Officer Wingate be suspended for 15 days for the misconduct in this case.

John B. Spooner  
Administrative Law Judge

November 15, 2012

SUBMITTED TO:

**DR. DORA B. SCHIRO**  
*Commissioner*

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