

Dep't of Correction v. Andino

OATH Index Nos. 731/13 & 1000/13 (May 14, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 35462 (Jan. 27, 2014), **appended**

Charges of excessive force and false statements by correction officer sustained. Termination from employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
JOHN ANDINO
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORNIOTTI, *Administrative Law Judge*

This consolidated employee disciplinary proceeding was referred by the Department of Correction (“DOC” or “Department”) pursuant to section 75 of the Civil Service Law. Petitioner alleged that Correction Officer John Andino engaged in improper uses of force on four occasions and made false reports and/or statements regarding these events (ALJ Ex. 1A-D). Petitioner argued that respondent should be terminated from his employment because his actions constitute jailhouse violence in that respondent initiated violence or aggravated it (Tr. 20-21). Respondent admitted the allegations regarding the most recent incident, denied the remaining charges, and asked for leniency in his penalty.

A three-day hearing started on March 22, 2013, and concluded on April 9, 2013. Petitioner submitted extensive documentary evidence and the testimony of the four investigators who investigated the force incidents and Captain Lomas, a training instructor at the DOC academy who is familiar with the Department’s use of force policy. Respondent submitted documentary evidence, testified on his own behalf, and called his wife to testify about circumstances related to the most recent incident. The record was held open until April 12, 2013, for the filing of several original exhibits (Pet. Exs. 20, 21; Resp. Ex. C).

For the reasons below, I find that the charges should be sustained in whole or in part and recommend that respondent be terminated from his employment.

ANALYSIS

At all times relevant respondent was a correction officer assigned to the Robert N. Davoren Center (“RNDC”). RNDC houses male inmates including juveniles. The charges arise out of four force incidents that occurred between October 2011 and March 2012.

Directive Number 5006R-C (“Directive”) sets forth the policy concerning use of force and provides guidelines to minimize injuries to staff and inmates. Directive No. 5006RC (eff. Jan. 31, 2008). The Directive prohibits more force than necessary to restrain an inmate and control the situation. Force may not be used to punish, discipline, assault, or retaliate against an inmate or when an inmate has ceased to offer resistance. Directive 5006R-C § III, IV(B).

Whenever a use of force is anticipated and the inmate does not pose an immediate threat, a supervisor shall be notified and all actions taken under supervision unless circumstances change and force is required before the supervisor arrives. Directive 5006R-C § IV(C)(1). The Directive further provides that prior to force, alternative methods such as verbal orders should be used. Directive 5006R-C § V(A)(1). When force becomes necessary, it should be limited to “control holds” such as “grasping or pushing the inmate to gain compliance.” Directive 2006R-C § 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 Section V. C (DEADLY PHYSICAL FORCE)” of the Directive. Directive 5006R-C § V(B)(2)(h). “Deadly physical force” is “capable of causing death or serious physical injury.” Directive 5006R-C § V(C). Such force is authorized only “as a last resort” to defend against deadly force by an inmate. Directive 5006R-C § V(C)(1), (2).

Staff that engages in or witnesses a use of force must notify a supervisor and file a report regarding the incident as directed. The report must contain a precise description of the event. Directive 2006R-C § V(F). Staff members are also subject to an interview under oath pursuant to Mayor’s Executive Order Number 16 (“MEO-16”).

In reviewing false statement claims, the first consideration is whether the underlying incident in question did in fact occur. The second is whether a respondent made material

deviations from the actual incident or intentionally misrepresented the actual events in question. See *Dep't of Correction v. Rodriguez*, OATH Index No. 277/06 at 11 (Mar. 29, 2006).

The Department “has the burden of proving its case by a fair preponderance of the credible evidence.” *Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD O8-33-5A (May 30, 2008). Preponderance has been defined as “the burden of persuading the trier of fact that the existence of a fact is more probable than its non-existence.” Prince, *Richardson on Evidence*, 3-206 (11th ed. 1995); see also *Dep't of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010). Here, petitioner sustained its burden on most of the charges and specifications.

To the extent resolution of the charges rests on a determination of witness credibility, this tribunal has looked to witness demeanor, the consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience in determining credibility. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). For the reasons below, I find respondent's version of the disputed events to be less credible than other evidence in the record.

Charge No. 32/2013

Petitioner alleged that on October 4, 2011, respondent engaged in excessive force by kicking inmate Velez's legs out from under him while slamming him into the wall and pushing him to the ground, even though Velez was not offering any physical resistance. Respondent was also charged with filing a false report. These charges should be sustained.

The salient facts leading up to this incident are as follows. At 11:35 a.m. respondent was in the north corridor of modular two with other officers, captains, and a group of juvenile inmates. The juveniles had been ordered by Captain Holmes to face the wall and to get on their knees. In the video (Pet. Ex. 2), inmate Velez was on one end of the line sitting with his legs crossed in front of him in a lotus position with his back against the wall. Respondent was standing in a doorway next to Velez watching the inmates (Tr. 75-76). A group of adult inmates walked by; some shouted that the juveniles should not be on their knees and to get up (Tr. 43; Pet. Ex. 5). After the adults passed, some juveniles stood up. Velez also stood and faced the

wall. The inmates were told to get on their knees. Some complied and others, including Velez, remained standing. Respondent walked towards the far end of the group and, along with other officers, walked down the line and verbally ordered and/or physically guided the standing juveniles to their knees. Velez was turned slightly away from the wall looking left towards the officers; he shouted at them (Pet. Ex. 2).

The video shows that respondent approached Velez and paused briefly next to him. The two were speaking. Within one to two seconds of arriving, respondent placed his hand on the back of Velez's neck and put his right foot against the front of Velez's feet/lower shins. In one quick motion respondent swept Velez off his feet and pushed him forward into the wall. Respondent then pulled the inmate towards the ground. Velez regained his footing and respondent pushed him against the wall two more times. Respondent tried to rear cuff Velez who was resisting. Two officers responded. Respondent twisted Velez's right arm and brought him to the ground as Captain Parker arrived. Velez stopped resisting, was handcuffed, and was escorted out of the area (Pet. Ex. 2). At the clinic, Velez reported minor injuries to his wrist (Tr. 34; Pet. Exs. 1, 7).

In his use of force report (Pet. Ex. 4), respondent stated that he ordered the inmates to face the wall and kneel and that all of them complied. He was "about to pat frisk them inmate [sic] Velez . . . rose to his feet," cursed, and stated he was not going to face the wall and be searched. Respondent "ordered him to turn around, face the wall, and get" on his knees. Velez cursed and refused to comply. Respondent gave "a second command" and again the inmate cursed and refused. According to respondent the inmate "sucked his teeth" and stated "make a move bitch and we all gonna spank you." Respondent wrote that he "ordered him to turn around put your hands behind your back" but "he continued to refuse." Respondent stated that he "attempted to guide him with my hand by turning him towards the wall." The inmate "began to resist by swinging his hands." Respondent claimed that he "applied an upper body control hold and brought inmate Velez to the ground." Captain Parker came to his "aid and applied handcuffs." Respondent stated force was necessary because "an attack was imminent."

According to inmate Velez's statement (Pet. Ex. 3), he was with other inmates when they were ordered to face the wall and get on their knees. Initially, he complied but told Captain Holmes and respondent that he had problems with his knees and could not kneel. He sat in an

“Indian position” and then got up. Respondent approached him and told him to get back on his knees but he refused. Respondent used force even though he was not resisting and twisted his arm which caused pain. He was handcuffed and removed from the area.

In his MEO-16 interview on June 29, 2012 (Pet. Ex. 5), respondent testified that when Velez refused his order to kneel, respondent got into a “verbal” with the inmate and “guided” him to his knees by applying force to his shoulder. Respondent was shown the video and asked if he wished to amend his testimony. Respondent stated he did not recall every detail but that the video showed him giving verbal orders and that Velez did not comply and resisted when respondent attempted to guide him to the floor.

Investigator Arnold and Captain Lomas testified that when Velez refused respondent’s order to kneel, respondent should have notified a supervisor who was in the area. The inmate did not appear to be posing a threat; he was just not following instructions and force was unnecessary. The technique of kicking-out an inmate’s leg is not taught in the academy because it can cause serious injury (Tr. 50-59, 370-76).

At the hearing respondent testified that when he approached Velez there was a brief back and forth where he stated he was not going to comply with the order to kneel. Respondent employed his interpersonal communication (“IPC”) skills and put his arms on Velez’s shoulder to guide him to the floor. Velez started pushing back up. There was a captain about 10 feet away who knew what was going on so there was no need to advise her. As Velez pushed up, respondent pushed down and a struggle occurred. Respondent put his leg in front of the inmate’s leg in hopes that he would go down. After a “small struggle,” the captain came to assist him, and the inmate was handcuffed (Tr. 470-74). Regarding his report, respondent testified that he wrote what he recalled occurred. After seeing the video, respondent admitted that the inmate did not swing his hands (Tr. 476-77).

On cross-examination respondent testified that once an inmate starts employing force, an officer does not need to call a supervisor before using force. By pushing back on respondent, Velez was engaging in an assault on staff. Respondent stated it was his duty to have the inmate, who was being disruptive, comply with staff orders (Tr. 556-58).

The use of force charge should be sustained. Velez’s statement as corroborated by the video supports a finding that the inmate verbally refused to comply with respondent’s verbal

order to kneel. Although respondent claimed that he used IPC skills to talk Velez into complying, the video showed that little, if any, dialogue occurred and that respondent used force within seconds of approaching Velez. Even assuming that there were sufficient verbal orders from respondent as he approached, force was not warranted because Velez was not aggressive or threatening. Under the Directive, upon the inmate's refusal to kneel, respondent should have called a captain. Respondent's claim that a nearby captain knew what was going on was speculative.

Instead of calling a supervisor, respondent grabbed the inmate behind the neck, swept him off his feet, and shoved him into the wall three times. The amount of force was far in excess of the soft hand techniques, such as grasping or pushing, permitted by the Directive to gain compliance of an inmate following a refusal of a verbal directive. I credited Investigator Arnold's and Captain Lomas' testimony that this technique is not authorized by DOC because it can cause serious injury to an inmate. Contrary to respondent's assertions, there was no evidence that the inmate was physically resisting until after respondent pushed him into the wall and pulled him towards the floor. Even though no serious injuries occurred, this force constituted misconduct because it was unnecessary and was intended to punish the inmate for his failure to comply with respondent's order.

The record also supports a finding that respondent's use of force report was false. First, there was no evidence that respondent was directed to pat frisk the inmates or that he had a conversation with Velez about a frisk. While there was no audio, it seems more likely that respondent approached Velez to have him kneel and that their conversation was limited to Velez's failure to do so. Second, while the record supports a finding that respondent gave verbal commands as he approached Velez, the report inaccurately suggests that respondent had a verbal exchange with the inmate while they were standing together. Third, the report incorrectly states that an attack by Velez was imminent, that respondent tried to "guide" Velez to the wall with his hand, and that Velez resisted by swinging his hands. The video shows that within seconds of approaching Velez, respondent grabbed and tripped him, then threw him into the wall. Nothing on the video showed Velez making aggressive gestures or respondent "guiding" the inmate. The only time Velez was resisting was when he was trying to gain his footing after being pushed to the floor and while respondent was twisting his arm.

All of the specifications in Charge Number 32/2013 should be sustained.

Charge No. 268/2012

Petitioner alleged that on November 1, 2011, respondent engaged in excessive force by striking inmates Corbett and Thomas with departmental equipment and stomping on them even though they were on the floor and offering no resistance. Respondent was also charged with filing a false report and making false statements during an MEO-16 interview by stating that he did not hit the inmates with departmental equipment or stomp on them. The charges and specifications should be sustained in part and dismissed in part.

This incident occurred at approximately 8:00 a.m. in 2 Central North (an adult facility) during an institutional search. Respondent was searching Thomas in his cell when a dispute arose about the inmate's footwear that resulted in a physical altercation between them. Inmate Corbett pushed past Officer Miller, entered Thomas' cell, and joined the physical altercation. Several officers including Captain Singletary and Officers Glenn, Daly, Hurt, and Miller also entered the cell. Captain Singletary, Officer Glenn and respondent were fighting with the inmates. A probe team and other officers responded and stood outside the cell while the officers gained control of the inmates. The inmates and some officers sustained injuries, including respondent who had right hand contusions and bruised knees (Pet. Ex. 8).

At issue is whether respondent struck one or both inmates with the radio he was holding and stomped on them while they were on the floor and offering no resistance. Resolution of these charges is complicated by a number of factors. First, there were many people inside and outside the small cell who gave varying accounts. The officers' statements were summarized in Investigator Jarvis' report (Pet. Ex. 8) and only the relevant ones are described here.

According to Captain Singletary's use of force report, he engaged in an altercation with inmate Corbett inside the cell and was assisted by an unnamed officer. Officer Glenn wrote in his report that he grabbed Corbett while he was assaulting respondent. Corbett turned his aggression on Glenn and Singletary assisted him in subduing the inmate. Captain Holmes wrote that he saw Singletary and Corbett engaged in an altercation and that Glenn assisted respondent in handcuffing inmate Thomas. Officer Hurt's report also stated that Singletary was engaged with Corbett and that Glenn was assisting respondent with Thomas (Pet. Ex. 8 at 2-4). None of the reports mention respondent stomping on or hitting an inmate with a radio (Tr. 144-45).

According to respondent's use of force report (Pet. Ex. 10), after the initial altercation with Thomas they both fell on the bed frame (the mattress was outside the cell for the institutional search). When Corbett joined the fight, respondent was assisted by Officer Glenn. Thomas grabbed respondent's left leg and tried to pull him down. Respondent tried to free his leg by striking Thomas several times with his closed fist. Thomas then grabbed respondent's right leg and tried to pull him off the bed and respondent jerked his leg away. Thomas was handcuffed by respondent with Officer Hurt's assistance.

Inmate Corbett provided a statement (Resp. Ex. E) that he intervened when Thomas was arguing with a male Hispanic officer outside their cells. The officer suddenly punched him and Captain Singletary joined the officer in hitting Corbett 20 times. Corbett was also hit two times with a baton. Corbett lost consciousness and did not know who hit him with the baton.

Inmate Thomas provided a statement on February 24, 2012 (Resp. Ex. G), that following a disagreement over his shoes, respondent pushed him and struck him in the face numerous times. Thomas fell to the bed and onto the floor. As he fell he grabbed respondent's legs. Respondent stood on the bed and Thomas tried to get under it in a curled position. Thomas heard someone jumping on the bed and believed it was respondent's attempt to intimidate him. Thomas heard Captain Singletary speaking to him but could not recall being hit again.

A handheld video (Pet. Ex. 9) was taken from outside the cell behind the probe team, leaving much of the activity inside and, in particular, the lower views of the cell obscured. With regard to the charges, respondent was seen on the video in the back of the cell near the bed stepping on and off the bed frame several times. While he was on the bed, respondent swung his right hand downwards twice with a radio. The radio had an antenna and the body of the radio was larger than respondent's palm. It appeared that the radio, not respondent's hand, made contact with something or someone below the view of the camera. Respondent straightened up and switched the radio to his left hand. Several seconds later, the camera moved to a view of Captain Singletary and inmate Corbett. Respondent came back into view while standing on the bed facing the camera. To the right of respondent was an officer who was leaning down. Respondent lifted his arms and right leg then stomped his foot down in a hard, fast motion but it was unclear what he was stomping on. The camera moved away from respondent.

Inconsistent testimony given in the MEO-16 interviews further complicates resolution of these charges. Both Captain Singletary and Officer Glenn testified that they assisted respondent and that they focused on gaining control of inmate Corbett. Officer Hurt testified that he knew respondent did not strike inmate Thomas with departmental property because Hurt was on the floor next to the inmate (Pet. Exs. 8, 11, 13). None of the officers testified that respondent stomped on or hit an inmate with institutional equipment (Tr. 144-45).

On December 23, 2011, respondent testified in his MEO-16 interview (Pet. Ex. 11) that after the initial altercation with inmate Thomas they fell on the bed. Thomas tried to pull respondent down by his feet. Officer Hurt tried to handcuff Thomas. Inmate Corbett came into the cell while respondent was struggling with Thomas and Officer Glenn restrained Corbett. Respondent tried to restrain Thomas who had his upper body under the bed. He was finally able to restrain Thomas with the help of Hurt. Respondent admitted hitting Thomas in the torso but denied striking him with departmental equipment; respondent stated that he had his radio in his left hand to call for help. Respondent denied stomping on Thomas or using any force on Corbett.

During the interview, respondent was shown the video. Respondent identified himself standing on the bed and stated that Thomas was in front of him on the floor on his back. Respondent claimed that Thomas tried to pull him down but the testimony was unclear whether the inmate was using his legs or his hands. Respondent stated that he was holding his radio and tried to get the inmate to release his legs with his hands. Respondent admitted striking the inmate with the hand that was holding the radio but stated that he did not hit the inmate with the radio but hit him with his hand only. Respondent also denied stomping on an inmate and said that he was trying to jerk his foot away from Thomas.

Investigator Jarvis and Captain Lomas testified that a radio is a dangerous weapon that can cause serious physical injury. Equipment can only be utilized when there are no alternatives available. Here, the situation did not warrant swinging the radio at the inmate (deadly force) because the inmate was not posing a deadly physical threat. Moreover, stomping on an inmate is not taught in the academy because it can cause serious injury (Tr. 151-54, 380-84).

At the hearing respondent testified that where the video shows him stomping, he was striking the bed with his foot while standing on it. Respondent denied hitting Thomas with the radio and claimed that while it was in his hand, he was hitting Thomas with his fists (Tr. 481-87, 491).

I find that the video and statements from various officers and inmates support a finding that respondent was swinging his hands with the radio and stomping his foot while other officers were on the floor with the inmates trying to gain control over them. Since the video does not depict a clear picture of the floor and the statements suggest that the inmates had not been fully subdued, there was insufficient proof to find that the inmates had ceased to offer resistance. Moreover, while the video does not show what respondent was swinging at, respondent's admission is sufficient to conclude that he struck inmate Thomas with his right hand while holding a radio. Although inmate Corbett stated that he was hit with a baton, the evidence demonstrated that respondent was engaged with Thomas while other officers were struggling with Corbett. Officer Hurt's MEO-16 statement that respondent never struck an inmate with equipment was also unreliable. Hurt admitted that his report was false because he was trying to avoid being involved in a force incident (Tr. 165-67, 170-72; Pet. Exs. 8, 11).

Moreover, respondent's assertion that he was hitting Thomas with his hand, not the radio, was incredible because the radio was larger than respondent's hand. Also, in the video it looks like respondent is making contact with the radio, not his hand. Since there were officers closer to Thomas employing control holds, it was unnecessary for respondent to strike the inmate. I further agreed with Investigator Jarvis and Captain Lomas that striking the inmate with a radio constituted impermissible use of deadly force since it could have caused serious injury.

The record, and in particular the video, is insufficient to support a finding that respondent stomped on an inmate who was on the floor. None of the officer or inmate statements reference this act. While respondent's leg motion seems suspicious, it is unclear what or who respondent was stomping on. It is possible that respondent was stomping on the bed he was standing on which would be consistent with inmate Thomas' belief that respondent was jumping on the bed while he was underneath it to intimidate him.

With regard to the false report and MEO-16 charges, they should be sustained to the extent that respondent failed to mention he hit Thomas with a radio while the inmate was on the

floor. However, since the record is inconclusive on the remaining portion of the excessive force charge, the claim that respondent omitted from his report that he stomped on an inmate who was not offering resistance should be dismissed.

The specifications in Charge Number 268/2012 should be sustained to the extent that respondent engaged in excessive force by striking inmate Thomas with a radio while other officers were employing control holds on the inmate and made a false report and statements regarding this conduct. The specifications that respondent stomped on an inmate who was not offering resistance and made false statements regarding this conduct should be dismissed.

Charge No. 142/2012

Petitioner alleged that on November 24, 2011, respondent failed to anticipate force with inmate Arline and engaged in excessive force by improperly using a pepper spray called Oleoresin Capsicum (“OC”) and/or striking the inmate. Respondent was also charged with making false statements in an MEO-16 interview in that he stated: (1) he initially sprayed the inmate with OC instead of striking him; (2) the use of force report submitted on the day of the incident was not the report he submitted; and (3) the force could not have been anticipated. These charges should be sustained.

This incident occurred in a juvenile housing area after some inmates had been released from their cells. According to the video (Pet. Ex. 18), at approximately 10:34 a.m. an inmate was using the telephone when inmate Arline approached him and began a verbal altercation over the use of the phone. Respondent ordered all inmates to lock into their cells and removed the phone. Arline failed to comply and went to the dayroom. At approximately 10:35 a.m. respondent entered Arline’s cell and searched it. Arline came out of the dayroom and saw respondent in his cell and returned to the dayroom. After the search, respondent walked around the housing area. At approximately 10:36 a.m. respondent entered the dayroom and found four inmates including Arline. Respondent repeated the order to lock-in. Everyone except Arline complied. Respondent spoke to Arline then left the room (Pet. Exs. 17, 18, 22; Tr. 250-51).

The video shows that at approximately 10:38 a.m. respondent approached Arline in the telephone area and stood in front of him almost toe to toe. Within two or three seconds, respondent placed his left hand on Arline’s right bicep and Arline moved his arm outwards in a

circular motion to throw respondent's hand off him. Respondent then put his right hand on Arline's left bicep and Arline made the same gesture as before. Respondent spoke briefly to Arline, reached for him, and Arline backed away. Respondent grabbed hold of Arline who resisted. Respondent pushed Arline against the wall and grabbed him in the throat area. Arline struggled and respondent punched Arline in the head with his left fist which caused Arline to fall forward. Arline regained his footing and punched respondent. The two fought in a heated manner, moved down the hall, and separated. Respondent ran towards Arline who backed away with his fists in front of his face. The two grabbed each other and respondent punched Arline several times. Officer Mora ran towards them (Pet Ex. 18).

In a different camera view (Pet. Ex. 18) Arline backed away from Officer Mora and respondent. Mora advanced towards Arline and knocked him to the ground by tripping him while respondent removed his OC from his belt holster. As Mora was applying control holds on the inmate, respondent leaned down and stretched his hand with the OC towards the inmate's face. It was unclear whether any spray, which is orange, discharged. Respondent made a striking motion with his right hand towards the right side of Arline's head. Respondent then stood with his right foot on Arline's back while the inmate was on his stomach. Mora walked away. Respondent kneeled and placed his knee between Arline's shoulder blades. Arline struggled and respondent jerked Arline's right arm behind his back. Mora returned, walked briefly away coughing, and returned again. Arline was rear cuffed, brought to his feet, and escorted out of the area.

On the day of the incident an inmate infraction and a use of force report were prepared that identify respondent as the writer and have respondent's signature (Pet. Exs. 19, 20). The documents contain similar language and state that respondent ordered inmates to lock into their cells and that Arline refused. After respondent gave Arline several orders, he attempted to guide the inmate to his cell but that the inmate pushed his hand away and advanced towards him with his fist clenched. Respondent defended himself by utilizing OC which did not take the desired affect. The inmate continued his aggression by throwing punches and respondent defended himself by throwing several strikes to the inmate's upper torso. Officer Mora assisted in handcuffing the inmate.

Inmate Arline provided statements that are summarized in Investigator Bond's report (Pet. Ex. 17 at 2). Arline stated that he got into an argument with an inmate over the phone. Respondent ordered everyone to lock into their cells but Arline refused and went to the dayroom. Respondent searched Arline's cell and then came after him because respondent wanted a fight. Respondent hit him several times and Arline backed away but respondent continued to hit him. Arline tried to hit back but was unsure whether he made contact with respondent. Officer Mora pushed him to the floor by kicking him in the knee. Arline got on his stomach and put his hands behind his back. He was kicked twice on the right side of the head. Respondent stood on his back with his foot, put his knee in his back, bent his arms back, and sprayed OC in his face.

Investigator Bond, who responded to the facility to investigate the incident, testified that use of OC was reported to the Central Operations Desk and was noted in the call-in page (Tr. 302). Bond also stated that he vouchered Arline's shirt because it showed the orange that comes from the spray but that it did not show up in the photograph (Tr. 286-88; Resp. Ex. C).

Respondent sought medical attention at 11:00 a.m. (Resp. Ex. K). He fractured a finger and returned to duty on November 28, 2011. Officer Mora sprained his wrist and returned to duty two days later. Arline had mild tenderness in his wrist and a knee abrasion (Pet. Ex. 17).

Even though there is a use of force report from November 24 that identified respondent as the author, Correction Officer Allen submitted a report that same day stating that at 3:50 p.m. respondent reported to Allen that he "was unable to write or give a verbal report due to the fact that he was in severe pain and heavily medicated" (Resp. Ex. J).

In his MEO-16 interview on December 21, 2011, with Investigator Bond (Pet. Ex. 22), respondent reviewed his November 24 use of force report (Pet. Ex. 20) and stated that it contained his signature and was an accurate report. Respondent initially stated that he wrote it on the date of the incident and then asked to consult with his attorney. He then claimed that he wrote the report on Monday, November 28, when he returned to duty. He did not write a report on the day of the incident because he was injured and gave his report verbally to Officer Allen.

Respondent stated that he searched the inmate's cell because Arline did not lock-in as ordered and there might have been a weapon in the cell. He did not notify a supervisor about the search. With regard to the force used, respondent stated that he told Arline "four or five" times to lock-in but that the inmate kept asking why and refused to do so. When he approached Arline

by the telephone area and went to guide him to his cell, Arline “squared-off” and “advanced” towards him. Respondent sprayed Arline with OC but it did not have the desired effect. Respondent “backed” away and they started fighting. Arline threw punches and respondent punched him in the “upper torso.” Officer Mora responded and helped bring the inmate to the ground (Pet. Ex. 22).

During the interview, respondent was shown the video. When asked whether he utilized OC first as initially claimed, respondent acknowledged that he had not. When shown the other camera angle where respondent removed his OC from its holster while Officer Mora had Arline on the ground, respondent testified he was not sure whether the OC accidentally discharged. Respondent also stated that he placed his knee on the inmate’s back because he was resisting.

Investigator Bond asked respondent about his use of force report and his statement that after giving several orders to lock into their cells the inmate refused. Respondent stated that the incident was “spontaneous” and that he did not have time to use his personal body radio to notify a supervisor. When asked about his statement about dispensing OC because the inmate was menacing him, respondent was non-responsive. When shown the inmate infraction that identified respondent as the reporting official, he denied it was his and stated that he could not recall typing it but that the signature “looked like” his and that someone may have typed it for him. Respondent was again asked to identify his signature on the November 24 use of force report but asked for a recess with his counsel. When respondent returned, he stated that the signature “could be” his but that he could not recall typing the report and was evasive about whether it was his (Pet. Ex. 22).

When pressed further about whether he wrote the infraction and report, respondent repeated that he gave a verbal report to Officer Allen when he came back to the facility because of the pain medication. He claimed that when he returned to work on Monday, a copy of the use of force package was on the copier and he saw the November 24 report stapled to the package. At the captain’s direction, he typed his report on November 28 and turned it in. Respondent also mentioned his report being in his car and that he spoke to someone, maybe his lawyer, about what had really happened. Respondent stated that he had “an issue” with the November 24 report because “they” had written he had dispensed OC which was not on the video, although he had not seen the video prior to the interview. Respondent further stated that he wrote on his

November 28 report that his OC was accidentally discharged while the inmate was on the floor. Respondent thought that there was a copy of this report in his computer (Pet. Ex. 22).

At Investigator Bond's direction, respondent subsequently provided the use of force report dated November 28, 2011 (Pet. Ex. 21; Tr. 279-80). The report had identical wording and type setting as the November 24 report. The only difference was that on the November 28 report there was no mention of respondent defending himself with OC at the start of the incident but instead stated that respondent struck the inmate with his fists.

At the hearing respondent testified that after the inmates complied with his initial order to lock into their cells, he gave Arline several more orders but that he continued to refuse. Respondent did not notify a supervisor because he did not feel it was warranted. When he approached the inmate, respondent used his IPC skills and felt that he was standing at a safe distance from him. Even after Arline pushed his hand away, respondent continued to talk to him and did not think a supervisor was needed. When the inmate pushed respondent's hand a second time more forcefully and took a swing at him, they got into a physical confrontation. Officer Mora responded and brought the inmate to the ground. Arline continued to struggle and they were eventually able to cuff him. Respondent put his knee on the inmate's back because he was out of breath and wanted to keep the inmate under control (Tr. 501-11).

Respondent also testified that he went to the clinic because he hurt several fingers in the incident. He was given pain medication that made him groggy. When he returned to the facility he was told by his delegate that he was not in the right state of mind to write a force report. Instead, he dictated a report to Officer Allen and it was given to the captain. When he returned to work several days later he wrote his force report in the security office (Tr. 511-15).

Respondent testified that at his MEO-16 interview he initially stated that the November 24 report was his but then saw that it mentioned OC which did not happen. He had no idea where that information came from and got scared because he did not want to get anyone in trouble. Respondent testified that he took out his OC while the inmate was resisting Officer Mora and that he warned the inmate that he would be sprayed if he kept resisting. Respondent could not recall using his OC and testified that it affects people by causing coughing, redness, and pain. He denied writing a report or infraction on November 24 (Tr. 515-22, 530).

Investigator Bond and Captain Lomas testified that respondent's search of the inmate's cell did not comport with DOC policy and that if respondent thought there was a weapon he should have locked the cell and notified a supervisor (Tr. 235-36, 384-85). Bond also testified that officers are trained to keep at least an arms length away from an inmate for safety reasons since inmates do not want officers "in their face" (Tr. 238-39). He determined that when they were by the telephone area, respondent was trying to have Arline lock into his cell and that the inmate was refusing. At this point respondent should have notified a supervisor. Captain Lomas also testified that when the inmate refused to return to his cell respondent should have notified a supervisor to minimize the force and avoid injuries. However, the initial punch to Arline's head might have been reasonable. Moreover, the placement of respondent's knee on the inmate's back is not taught at the academy because it can cause the inmate to suffocate (Tr. 384-90, 396).

The first charge concerns respondent's failure to anticipate a use of force with inmate Arline. Generally, when it has been found that an officer failed to anticipate force, the circumstances were such that the officer clearly should have known that force would be required. *See, e.g., Dep't of Correction v. Belgrave*, OATH Index Nos. 124/04 & 657/04 at 15 (Sept. 1, 2004) (respondent failed to anticipate force with an inmate who was cursing and disobeying orders to exit the vestibule); *Dep't of Correction v. Morgan*, OATH Index No. 1228/01 at 6-7 (Sept. 24, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 02-74-SA (Sept. 11, 2002) (inmate's unruly actions should have led respondent to anticipate the need for force if he opened inmate's cell); *Dep't of Correction v. Henry*, OATH Index No. 2101/96 (Jan. 3, 1997) (respondent's failure to notify captain of his recent argument with an inmate over telephone use prior to searching inmate's cell constituted a failure to anticipate force); *Dep't of Correction v. Deravin*, OATH Index No. 627/93 (Jan. 13, 1994) (captain should have maintained a heightened alertness to prevent an inmate from attacking an officer after the inmate threatened to attack the officer); *see also Dep't of Correction v. Dominguez*, OATH Index Nos. 550/10 & 551/10 at 6 (Jan. 8, 2010) (no reason to anticipate a use of force where, except for the inmates' initial failure to follow an order, there were no other signs that they were angry or might be violent).

Here, respondent observed Arline being unruly by engaging another inmate in a verbal altercation over the phone. He ordered all inmates to lock into their cells and everyone in the group except Arline complied. Arline continued to act out by ignoring the order and by going to

the dayroom. At this point, respondent should have called a supervisor because the inmate was openly defying his order. Instead, without notifying a supervisor, respondent searched Arline's cell. When the search was completed, respondent went to the dayroom and repeated his order to lock-in to the cells. Everyone in the group complied except Arline. According to respondent, he gave several orders that Arline refused. Again, respondent should have called a supervisor because Arline was defying his order.

When respondent approached Arline outside the dayroom, the inmate continued to refuse respondent's verbal orders to return to his cell. Instead of calling a captain in an effort to avoid a force incident, respondent became more assertive. He got very close to the inmate and placed his hands on him. Contrary to respondent's claim, his actions appeared to be more in the nature of intimidation than IPC skills. While Arline threw respondent's hands off of him and was unwilling to obey respondent's order, there was no evidence that Arline was threatening or menacing respondent. Indeed, the video showed that the inmate backed away. Since respondent's verbal orders and attempts to physically guide the inmate back to his cell failed, under the force guidelines respondent was required to call supervisor. Instead, respondent grabbed Arline and a fight ensued. Inmate Arline admitted that he refused respondent's orders to lock-in and, with the exception of being kicked twice in the head, his statement was fairly consistent with the video. I credit Arline's statement that respondent was looking for a fight and conclude that respondent initiated unnecessary force. All of the evidence indicated that had respondent called a supervisor before the situation escalated, the force and injuries to the inmate, Officer Mora, and respondent would have been avoided.

Since respondent failed to anticipate the use of force and escalated the situation when there was no threat posed by the inmate, his MEO-16 testimony that this was a "spontaneous" use of force in response to aggression by Arline was false. Indeed, respondent's claim that there was no time to notify a supervisor was incredible given that he was wearing a body radio and over four minutes passed from the time respondent gave the first order to lock into the cell and the use of force occurred. During this period respondent had sufficient time to have other inmates lock into their cells, to give three distinct orders to Arline to lock-in, to search Arline's cell, and to walk around the housing area.

The record also supports a finding that respondent engaged in excessive force under the Directive by punching the inmate in the face at the start of the encounter and by spraying him with OC while he was on the ground under Officer Mora's control.

The video shows that after the inmate backed away, respondent grabbed Arline and a struggle ensued. Respondent pushed Arline against the wall, gripped him in the throat area with his right hand, and punched him with his left fist. The inmate did not start to fight back until after respondent punched him. Although Captain Lomas indicated that it may have been reasonable, there is nothing evident that would justify a blow to the inmate's head.

The evidence also shows that respondent used OC on the inmate without justification. The video showed that while Officer Mora was applying control holds to Arline on the ground, respondent removed the OC from his holster, leaned over the inmate, and stretched his hand with the OC towards the inmate's face. Although the officers in the area, including Mora, stated in their MEO-16 interviews that there was no sign OC was sprayed and none is seen on the video, Mora walked away coughing following respondent's actions. I credit Arline's statement that respondent sprayed him in the face. Indeed, the use of OC was corroborated by respondent's statement in his MEO-16 interview that his OC may have been accidentally discharged and that he noted it was discharged in his November 28 report. Moreover, even though the orange coloring did not appear in the photo of Arline's shirt, I credited Investigator Bond's testimony that he observed orange on Arline's shirt and that use of OC was reported in various facility logs.

The record also supports a finding that respondent gave false MEO-16 testimony about his use of force report and spraying the inmate with OC. Although charged separately, these false statements are inextricably intertwined and will be discussed together.

Respondent initially testified that he prepared the November 24 report on the day of the incident, it contained his signature, and it was an accurate report. After consulting with counsel, respondent changed his MEO-16 testimony and stated that he did not write a report on the day of the incident but gave a verbal report to another officer because he was medicated. When asked about the force, respondent testified that after he gave Arline several orders to lock-in, he tried to guide Arline to his cell but that the inmate "squared-off" and advanced towards him. Respondent sprayed Arline with OC but that it did not have the desired effect, respondent backed away, and a fight ensued. This statement was consistent with the November 24 report and

infraction. When respondent was shown the video, he admitted that he did not spray the inmate as claimed. Thus, his initial testimony that he sprayed the inmate before punching him was false.

When respondent saw the video segment where he held the OC near the inmate's face while Officer Mora had him on the ground, respondent testified that he was not sure whether he accidentally discharged it. When pressed about his November 24 report that he initially sprayed OC because the inmate was menacing him, respondent denied writing the report. He claimed that the signature "could be" his but that he could not recall typing the document. After respondent consulted again with his counsel, Investigator Bond pointed out that the signatures on the report and infraction were similar to his signature on his driver's license. Respondent denied writing both documents and gave confusing statements about writing and submitting a report on Monday, November 28. However, the November 28 report was not in the use-of-force package compiled by the facility (Tr. 212-13, 218-21). Moreover, the November 28 and 24 reports were identical except that the November 28 report made no mention of respondent defending himself with OC at the start of the incident but instead stated that respondent struck the inmate.

I find that the November 24 and 28 reports were prepared by respondent and that he gave false testimony regarding these documents. While no handwriting expert testified, respondent's signatures on these reports are similar to each other and to those on respondent's identification card and "Notice to Appear" (Resp. Exs. B, L). The "J" in John and the "A" in Andino are the same size and shape. In some of the documents the name John is written-out but otherwise the signatures appear to be by the same person. *Thomas v. Coughlin*, 145 A.D.2d 695, 696 (3d Dep't 1988) ("The trier of fact may make comparisons of handwriting samples . . . there is no authority which prohibits a Hearing Officer from evaluating handwriting in the absence of expert testimony") (citations omitted) (citing C.P.L.R. 4536); *see also Orix Credit Alliance, Inc. v Pasta Tree Cafe, Inc.*, 2008 N.Y. Misc. LEXIS 8266 (Sup. Ct. New York Co. Feb. 29, 2008) (the trier of fact may compare handwriting samples). It seems unlikely that someone would write a report and infraction then forge respondent's signature for no reason and that respondent would subsequently write an identical report except for one small section.

The most telling statement respondent made during the interview was that he had an issue with the November 24 report when he returned to work on Monday because "they" had written that he dispensed OC which was not on the video. This statement suggests that someone told

respondent what was on the video which he admitted he had not seen prior to the interview. It seems likely that respondent wrote the November 24 report and infraction before he went to the clinic at 11:00 a.m. When he returned later to the facility someone tipped him off that his report was inconsistent with the video. In an effort to justify retracting his initial report, respondent told Officer Allen before leaving that day that he was too medicated to write a report and then came in Monday and wrote a new report on the same computer and changed the section with the OC spray. His testimony about who asked for the report on Monday and who he gave it to was very confusing and uncorroborated. Moreover, when confronted with the inmate infraction, respondent was unable to explain its existence and gave nonsensical testimony.

The specifications in Charge Number 142/2012 should be sustained.

Charge No. 122/2012

Petitioner alleged that on March 16, 2012, respondent engaged in excessive force when he struck inmate Felder in the head/facial area without cause and filed a false report. Respondent admitted the charges and they should be sustained.

This incident occurred in 3 Upper North at the end of an institutional feeding when the juveniles were getting ready to return to school. The video (Pet. Ex. 25) shows that inmate Felder entered the vestibule between the A and B gates with a food cart and was locked inside. While he was waiting for the door to be opened, Felder did some push-ups on the food cart, knocked on the windows, waved his arms, looked into the housing areas, and waited. Several times he knocked on a window then bent down to disappear below the window or made funny gestures. About five minutes later respondent appeared and Felder waved his arms in an apparent attempt to get respondent's attention. Respondent approached the window and hit the glass which caused Felder to quickly lean back. Felder hit the glass several times with his fists. Several seconds later the lock on the B door was buzzed open.

Felder opened the door inward with his right hand and the door swung towards the left side of his body. Felder turned left so that his right side was next to the door edge and he was facing the window with the food cart behind him. When respondent entered the vestibule he appeared to be shouting. Respondent grabbed Felder's right arm with his left hand and punched Felder in the face/neck area with his right hand. Respondent pushed Felder up against the wall

and grabbed him around the neck with both hands. Felder struggled to get free. An officer entered the vestibule and tried to separate the two. With his hands still around Felder's neck, respondent pulled Felder away from the wall, pushed him against the wall, and punched him. Based on Felder's facial expressions, it appeared that respondent was choking him. Felder turned to the wall and got on his knees. Respondent left the vestibule. When respondent returned several minutes later, he spoke to Felder and put his arm around Felder's shoulder. The two shook hands and both went into the housing area (Pet. Exs. 24, 25, 30).

Respondent filed a report (Pet. Ex. 28) stating that Felder was, "banging on the B gate" and "yelling" saying, "why did you let the fucking door close I should spit at you." Felder was "instructed to face the wall with his hands up to be pat frisked." The A officer buzzed the B gate open. Respondent "attempted to guide the inmate to the wall to be pat frisked" and when Felder "pulled away he became verbally abusive" and "spit landed on" respondent's face. In "fear that the inmate would become assaultive," respondent "threw a punch striking him in the facial area." A "tussle ensued" and respondent "attempted to pin him against the wall." Respondent gave "verbal commands to get on his knees" at which time the inmate complied. Respondent wrote that "force was necessary because inmate became physically assaultive."

Felder gave a statement (Pet. Ex. 27) that he was playing around and hitting the glass. Respondent punched the glass. Felder thought respondent was playing and he hit the glass back. Respondent asked an officer to buzz him into the vestibule. Respondent came in and asked Felder why he was hitting the glass. Then respondent punched him behind his right ear. Respondent ordered Felder to turn around and place his hands on the wall. Felder complied and respondent punched him again. Felder denied spitting on respondent or fighting him. Felder stated that after respondent gave him a "high five," he thought that they were not going to speak about the incident. Felder did not report any injuries (Tr. 348).

On April 17, 2012, respondent was interviewed pursuant to MEO-16 (Pet. Ex. 29) and admitted that he used excessive force. Respondent claimed that when the door opened, Felder opened his mouth to speak and respondent felt spit hit his face. Respondent did not think it was intentional but stated that he overreacted and punched Felder in the upper torso area. Respondent admitted grabbing Felder's neck but denied choking him. Respondent explained that he had recently witnessed three attempted suicides and that he cut one inmate down who had

hung himself. Moreover, his mother-in-law had been murdered and his wife was in counseling. He was stressed out and should have visited "CARE" for help.

Investigator Fonseca testified that respondent used force that did not comport with the Directive because Felder was not posing a threat. Fonseca stated that he was concerned that this could happen again if respondent has a stressful period in his life (Tr. 249). Captain Lomas also viewed the video and testified that respondent did not need to punch Felder to avoid being spit upon. Moreover, he indicated that the chokehold used by respondent could have caused serious injury or death to the inmate and that DOC does not teach this technique (Tr. 264-68).

At the hearing, respondent testified that Felder was getting the juveniles wound up by yelling, cursing, and throwing gang signs. When he opened the door to ask Felder to stop, he felt saliva hit his face. Respondent overreacted and punched the inmate who became combative. Respondent grabbed the inmate's neck and pulled him to the wall. Respondent denied choking the inmate. After a while the inmate complied and got to his knees but before that the inmate had been resisting (Tr. 533-34, 602-05).

Consistent with his MEO-16 interview, respondent testified that shortly before this incident, three inmates had tried to commit suicide and that he cut one down who had hung himself. Respondent stated that he could not get the image of the blue-faced inmate out of his mind. Respondent testified that he spoke to his wife about these incidents because other officers told him to handle it and that this would not be the only time a suicide would happen. While he never sought counseling, respondent used his wife as a conduit: she asked her therapist questions and relayed answers back to him (Tr. 540-44).

Mrs. Andino testified that respondent, is a calm, quiet, non-confrontational person. In 2012, Mrs. Andino became concerned about her husband. Respondent had gotten hurt several times at work and knew that his job had the potential for conflict and could be dangerous. Mrs. Andino testified that in March 2012, respondent returned from work very upset because he had cut down a kid who had hung himself. She was dealing with her own personal issues with a therapist but focused her sessions on respondent because no one at DOC was helping him. Mrs. Andino was very angry when DOC suspended respondent because DOC had not sought to help him. She stated that since respondent has been on modified duty and not working with inmates

he has been fine. Mrs. Andino testified that if given the chance, respondent would go forward working as a correction officer (Tr. 609-27).

Here, it was undisputed that respondent engaged in excessive force when he struck inmate Felder in the head/facial area without cause. Contrary to respondent's assertion, there was no evidence that Felder spat on him. When respondent entered the vestibule, Felder was in the process of turning away from him and there was no indication that respondent reacted to being spit upon. Rather, the record supports a finding that respondent assaulted Felder because he was playing around while locked in the vestibule. Moreover, there was no evidence that Felder resisted respondent at any time. Even though no injuries were sustained, the blows to the inmate's head and the chokehold constituted unnecessary deadly force under the Directive.

Respondent's use of force report was also false. There was no evidence that Felder was yelling or that respondent instructed the inmate to face the wall to be pat frisked. Nor was there any evidence that respondent attempted to guide the inmate to the wall, that Felder pulled away and became verbally abusive, or that spit landed on respondent's face.

The specifications in Charge Number 122/2012 should be sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner demonstrated that respondent used excessive force as alleged in charge 32/2013.
2. Petitioner demonstrated that respondent filed a false report as alleged in charge 32/2013.
3. Petitioner demonstrated that respondent used excessive force in that he struck an inmate but failed to show that respondent stomped on an inmate as alleged in charge 268/2012.
4. Petitioner demonstrated that respondent filed a false report in that he omitted he struck an inmate with a radio but failed to show that respondent omitted from his report that he stomped on an inmate as alleged in charge 268/2012.
5. Petitioner demonstrated that respondent made false statements in an MEO-16 interview in that he denied hitting an inmate with his radio but failed to show that respondent omitted that he stomped on an inmate as alleged in charge 268/2012.

6. Petitioner demonstrated that respondent failed to anticipate a use of force as alleged in charge 142/2012.
7. Petitioner demonstrated that respondent used excessive force as alleged in charge 142/2012.
8. Petitioner demonstrated that respondent made false statements during an MEO-16 interview as alleged in charge 142/2012.
9. Petitioner demonstrated that, respondent used excessive force as alleged in charge 122/2012.
10. Petitioner demonstrated that, respondent filed a false report as alleged in charge 122/2012.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent's disciplinary history for purposes of recommending an appropriate penalty. Respondent was appointed as a correction officer in November 2008. In December 2011 respondent was DOC employee of the month and received a letter of appreciation from RNDC (Resp. Ex. I). Respondent has no prior disciplinary record. Following the March 16, 2012, incident, respondent was suspended for 30 days and placed on modified duty (Tr. 537-39).

Respondent has been found guilty of four instances of improper uses of force and five instances of false reporting and/or statements. Petitioner seeks respondent's termination from employment citing *Dep't of Correction v. Debblay*, OATH Index Nos. 2008/04, 2009/04, 2011/04 & 2012/04 (Dec. 3, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-02-SA (Jan. 9, 2006) (Debblay 2008/04 and Echevarria 2011/04). There, Judge John Spooner recommended termination for four correction officers found to have used excessive force against an inmate and then lied about the incident in reports and MEO-16 statements. He noted that all four officers "concurred in the creation of an elaborate fiction" concerning the inmate attacking one of the officers, and held that "as a general rule, correction officers who conspire to conceal a use of improper force by making false statements should be terminated." *Debblay*, OATH 2008/09 at 17. Two of the four officers had no prior disciplinary record, and a third officer had only a command discipline. *Compare Dep't of Correction v. Patterson*, OATH Index No. 2164/09

(Oct. 1, 2009) (termination recommended for captain with a prior 30-day suspension for conduct unbecoming who used excessive force towards an inmate and made multiple false statements about the incident); *with Dep't of Correction v. Johnson*, OATH Index No. 1639/05 at 11-12 (Aug. 18, 2005), *modified*, Comm'r Dec. (Oct. 27, 2005), *modified*, NYC Civ. Serv. Comm'n Item No. CD 07-29-M (Mar. 14, 2007) (15-day penalty where officer, with a spotless record, pushed an inmate without causing injury and submitted a misleading report).

In most cases where termination from employment was recommended, the officer had a prior disciplinary record. *See e.g., Dep't of Correction v. Negron*, OATH Index No. 1844/11 (Sept. 16, 2011) (termination for officer with a significant disciplinary history who engaged in three separate incidents of excessive and unnecessary use of force, submitted two false reports and failed to report one of these instances); *Dep't of Correction v. Holder*, OATH Index No. 2208/07 (Sept. 14, 2007) (termination for officer who was previously disciplined for violating force directive and struck an inmate who had stopped resisting and was handcuffed); *Dep't of Correction v. Woodson*, OATH Index Nos. 603/04 & 597/04 (July 1, 2004) (termination for a 20-year veteran with a significant disciplinary history who 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 for officer with an extensive disciplinary history who 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 argued that terminating him from his employment is inappropriate. He asserted that this disciplinary process has been a learning experience and that he was never put on notice there were issues with his work performance. Respondent further stated that he was never retrained after his initial academy training and that given another chance he would improve. Respondent also asserted that he always wanted to be in law enforcement and believes that he has a good rapport with the inmates (Tr. 460-61).

There can be no doubt that had respondent been disciplined after each force instance, he would have been subject to termination by the second or third use of force. The issue here is whether termination is warranted without the benefit of progressive discipline. *Dep't of Housing Preservation and Development v. Ray*, OATH Index Nos. 1460/00 & 2135/00 at 32 (Sept. 14,

2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-84-SA (Dec. 28, 2001) ("The critical question . . . is whether a penalty short of termination will change the respondent's behavior.").

There can be no doubt that caring for and controlling inmates is difficult and challenging work. A review of the four videos shows that respondent is ill-suited to the job of correction officer. In the instances involving the juveniles, respondent initiated force that was completely unnecessary. Each time, respondent overpowered these adolescents with his size and strength. In the case of Velez and Arline, respondent used force to punish them for not following his orders. Most egregious was the case with Felder. There, respondent assaulted Felder because he was being an annoying kid. While the force did not cause any serious physical injuries, each instance involved forms of deadly force such as punches to the inmates' heads, slamming them against the wall, choking, or other tactics not taught in the academy. In the fourth instance, respondent aggravated a bad situation by hitting an adult inmate with a radio.

Respondent's inability to appreciate the seriousness of his misconduct, his continued misperception that the inmates were resisting and/or being aggressive, his belief that he can handle these situations without the help of a supervisor, and his incredible excuses to justify some of his actions, such as inmate Felder spit on him, indicate that respondent will not benefit from retraining and progressive discipline. Indeed, respondent acknowledged that he has trouble in the jail setting. Respondent's wife corroborated this sentiment and stated that respondent does better when not dealing directly with inmates. However, DOC is not obligated to keep respondent on modified duty where he has little to no contact with inmates. If returned to full duty, as would be expected, respondent would be faced with inmates who are defiant, dangerous, mentally unstable, and prone to suicide attempts. Respondent's method of having his wife act as a conduit for his counseling concerning difficult work situations is dubious. Petitioner is justified in its concern that respondent will not be able to handle inmates who routinely misbehave and push the limits of authority.

Equally worthy of consideration in this penalty recommendation are the false statements respondent made in his reports and MEO-16 interviews. Respondent's versions of the events involved more than mere omissions or minor modifications of the facts. Respondent's statements that he "guided the inmate" with his hands, that he gave multiple verbal orders, and that the inmates "menaced" him or that the "attacks were imminent" were distortions of the truth.

Even when confronted with the videos, respondent continued to maintain that his conduct was justified or somehow it should be excused. These false statements were intentionally uttered to show that respondent was using verbal commands and soft hand techniques required by the Directive and that the inmates caused the force by attacking him. Thus, respondent's assertion that he did not understand the Directive at the time of the incidents (Tr. 566-68) was incredible. Most troubling was respondent's fabrication that the November 24 report was created and forged by an unknown person and that his report was the one prepared on November 28. Such dishonesty calls into question respondent's character and erodes the trust between an employer and an employee.

Respondent has been with the Department for a short period of time. The use of force with inmate Felder and respondent's false statements regarding the November 24 report, standing alone, are deserving of termination from employment. When the misconduct is viewed as a whole, it demonstrates that respondent is untrustworthy and a liability in a paramilitary organization designed to uphold the law and maintain order among inmates. The Department should not be expected to take the risk that respondent will not be able to control himself with inmates and that something more serious will happen. Under the circumstances, termination from employment would not be disproportionate to the sustained misconduct as to be shocking to one's sense of fairness. *See Pell v. Bd. of Education*, 34 N.Y.2d 222 (1974).

Accordingly, I recommend that respondent be terminated from his employment.

Alessandra F. Zorghiotti
Administrative Law Judge

May 14, 2013

SUBMITTED TO:

DORA B. SCHIRO
Commissioner

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

In the Matter of the Appeal of

JOHN ANDINO
Appellant

-against-

NEW YORK CITY DEPARTMENT OF CORRECTION
Respondent

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

DECISION

PRESENT:

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL
COMMISSIONER

JOHN ANDINO ("Appellant") appealed from a determination of the New York City Department of Correction ("DOC") finding him guilty of incompetency and misconduct and imposing a penalty of termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("The Commission") conducted a hearing on December 19, 2013.

This Commission has carefully reviewed the record in this case and the testimony adduced at the departmental hearing. Based upon this review, the Civil Service Commission finds no reversible error and affirms the decision and penalty imposed by the DOC.

**NANCY G. CHAFFETZ, COMMISSIONER
CHAIR**

**RUDY WASHINGTON, COMMISSIONER
VICE CHAIR**

**CHARLES D. MCFAUL
COMMISSIONER**

Dated: 1/27/14