

Dep't of Correction v. Ford

OATH Index Nos. 734/13, 735/13, 736/13, 737/13, & 738/13 (May 23, 2013)

Petitioner proved that Officers Ford and Rolle used unnecessary and excessive force against an inmate, submitted false and misleading use of force reports, and made false and misleading statements in MEO 16 interviews. Petitioner proved that Officer Owens made false and misleading statements during his MEO 16 interview and that Officers Owens, Evans, and Spiotta submitted false and misleading use of force reports. Penalties of 60 and 25-day suspensions recommended for Officers Ford and Rolle, respectively; 20-day suspension recommended for Officer Owens; and suspension of 15 days each recommended for Officers Evans and Spiotta.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION

Petitioner
- against -

**JONATHAN FORD, ANTHONY SPIOTTA, FRED ROLLE,
TIMOTHY OWENS, AND CORNELL EVANS**

Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Correction (“Department”) under section 75 of the Civil Service Law. Petitioner alleges that Correction Officers Jonathan Ford and Fred Rolle used impermissible, unnecessary, and/or excessive force against an inmate; that Officers Ford, Rolle, Anthony Spiotta, Timothy Owens, and Cornell Evans submitted false or misleading use of force reports; and that Officers Ford, Rolle, and Owens made false or misleading statements during Mayoral Executive Order 16 (“MEO 16”) interviews regarding the incident (ALJ Exs. 1-5).

During a three-day hearing, the Department called five witnesses: Inmates Sequan Downing and Samuel Mills, Captain David Dueno and Investigator Weston Thompson of the

Department's Investigations Division, and Captain Dannie Lomas, an instructor at the Department's Training Academy. The Department also offered numerous items in evidence, including: a still image from a video (Pet. Ex. 1); surveillance video that captured the incident (Pet. Ex. 2); a Department rapid response review report (Pet. Ex. 3); an e-mail from Captain Dueno (Pet. Ex. 4); an injury to inmate report (Pet. Ex. 5); use of force reports (Pet. Exs. 6-11); photographs of Officer Ford (Pet. Ex. 12); an investigating supervisor's report (Pet. Ex. 13); Officer Ford's medical evaluation (Pet. Ex. 14); Investigator Thompson's report (Pet. Ex. 15); audio recordings and transcripts of the MEO 16 interviews of Officers Ford, Rolle, and Owens (Pet. Exs. 16-18, 16A-18A); audio recordings of the Department's interviews of inmates Sequan Downing and Samuel Mills (Pet. Exs. 19, 20); photographs (Pet. Ex. 21); and an inmate witness statement (Pet. Ex. 22). Respondents testified and offered into evidence a tour commander's report (Resp. Ex. A), as well as memoranda from wardens at the facility (Resp. Exs. B, C).

For the reasons set forth below, I find that the charges should be sustained.

PRELIMINARY MATTER

The hearing in this matter commenced on February 4, 2013, with inmates Sequan Downing and Samuel Mills testifying at the Manhattan Detention Complex. However, due to mechanical problems with the portable recording equipment, the testimony was not recorded. This did not become apparent until after the witnesses had been excused.

Respondents objected to retaking the witnesses' testimony as a method of reconstructing the record, asserting that it would be prejudicial. Specifically, respondents objected that to retake the testimony would give the witnesses a second opportunity to testify, after having already been subject to direct and cross-examination. In essence, respondents expressed concern that the witnesses would modify their testimony, having gained insight into the respondents' defensive case through the vigorous examination to which they had been subjected. Respondents' counsel stated that the respondents waived any objections to proceeding without retaking the testimony of inmates Downing and Mills (Tr. 22). Petitioner argued that the testimony should be retaken because there was a problem with relying on memory of the witnesses' testimony and respondents' counsel would have an opportunity to cross-examine the witnesses to address any inconsistencies between their first and second statements.

The parties were directed to submit to this tribunal affirmations reflecting their recollection of the inmates' testimony, which they did within one week of that testimony. Petitioner, in its affirmation, continued to note its objection to proceeding without retaking the inmates' testimony. Petitioner requested that if the matter was to proceed without retaking the testimony, that each respondent state on the record his consent to proceeding without retaking the testimony and waiver of appealable issues regarding proceeding in that manner. The parties had an opportunity to review each other's affirmations and agreed that the affirmations accurately reflected the testimony of inmates Downing and Mills, with one minor correction to the affirmation submitted by respondents' counsel (Tr. 201-02).¹ The respondents, on the record, each consented to proceeding via the reconstructed testimony and waived appealable issues regarding retaking the testimony of inmates Downing and Mills (Tr. 202-05).

As each respondent consented to proceeding without a transcript of the inmates' testimony and waived his right to appeal on that issue, and in light of the affirmations submitted by counsel and the notes and recollections of the ALJ, this matter proceeded and the testimony of the inmate witnesses was not taken a second time. *See Dep't of Buildings v. 1349 Clinton Avenue, Bronx*, OATH Index No. 634/01 at 1-2 (Jan 5, 2001) (where hearing was not properly recorded, ALJ issued a report and recommendation based on her recollection, notes, and the hearing exhibits); *Dep't of Correction v. Spencer*, OATH Index No. 1387/97 at 3 (Oct. 20, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD99-62-A (May 12, 1999) (where testimony was not recorded during a hearing and the respondent objected to having the witness recalled and refused to waive his right to a complete trial transcript, ALJ recalled the witness).

ANALYSIS

The incident giving rise to these charges occurred on October 17, 2011, at approximately 11:00 p.m., in the intake area of the Anna M. Kross Center. Petitioner alleges that Officer Ford struck inmate Sequan Downing in the face while the inmate was entering a cell. Officer Ford allegedly hit Downing after he complained to staff, including the supervisor who was present, that Officer Ford had taken away his medication (ALJ Ex. 1). It is further alleged that in the

¹ Respondents' counsel identified the facility at which the incident occurred as "MDC" instead of the Anna M. Kross Center, or "AMKC." Respondents' affirmation was entered into the record as ALJ Exhibit 7 and petitioner's affirmation as ALJ Exhibit 8. The ALJ notes reflecting the testimony of the inmates were provided to the parties and were included in the record as ALJ Exhibit 9.

ensuing struggle to restrain inmate Downing, Officer Rolle picked Downing up by his legs, causing Downing to fall and hit his face (ALJ Exs. 1-5).

Officers Ford and Rolle, as well as the other respondents, submitted reports regarding the incident (Pet. Exs. 6-10). The supervisors at the facility where the incident occurred conducted an investigation into the use of force, which determined that Officer Ford's use of force was necessary and appropriate to prevent harm to Officer Ford and to gain control of a noncompliant inmate (Pet. Ex. 13; Resp. Exs. A, B, C). A subsequent investigation by the Department's Investigations Division, during which Officers Ford, Rolle, and Owens were interviewed pursuant to MEO 16, reached the opposite conclusion (Pet. Ex. 15). It is alleged that the officers submitted false, misleading, and/or inaccurate reports and that those who underwent MEO 16 interviews made false, misleading, and/or inaccurate statements in the course of those interviews.

Use of Force by Officer Ford

Petitioner charged Officer Ford with using impermissible, unnecessary, or excessive force in that he punched Downing in the face without cause. Petitioner further charged that Downing did not pose an immediate threat towards Officer Ford, nor had he used force towards the Department's staff, and that Officer Ford's punch was in retaliation for Downing's complaints about his medication (ALJ Ex. 1).

On the evening of the incident, Officer Ford was in charge of conducting the institutional count, during which inmates are accounted for and their identifying information verified by the officers. (Ford: Tr. 217-18; Rolle: Tr. 289; Evans Tr. 380; Spiotta: Tr. 348-49). Downing was in the intake area during the institutional count, after returning from a court appearance. He admitted that he was loud, aggressive, and agitated because he had been in intake for several days and had not been assigned to a housing area, and also because he had had a bad day in court (ALJ Exs. 7-9; Pet. Ex. 19). According to Downing, he spoke to Officer Owens about being placed in a housing area and asked to speak to a captain. Downing, who was taking antibiotics, was also complaining because his medication was with his property in the hallway while he was in the cell, and he needed to take it (ALJ Exs. 8-9; Pet. Ex. 19).

Downing testified that when he was out of the cell during the count, he went to his bag and retrieved his medication, which Officer Ford confiscated from him, claiming it had expired (ALJ Exs. 8, 9). Downing complained to the supervisor on the scene, Captain Moore, who told him to calm down and enter the cell, and that the issue would be resolved. As Downing entered

the cell, Officer Ford struck him in the face. According to Downing, in the ensuing struggle with several of the respondents, he was beaten, called a racial epithet, and had his religion disparaged (ALJ Exs. 7- 9; Pet. Ex. 16).

Officer Ford testified that during the institutional count Downing banged on the walls, flailed his arms, and said that he would make things difficult if he was not transferred out of intake (Tr. 221-22). Officer Ford did not recall having removed medication from the inmate's hand before his use of force, but admitted he took something away from the inmate (Tr. 253-55).

According to Officer Ford, he was talking to inmates inside a cell when Downing, who was outside the cell putting his property against a wall, came up behind Officer Ford as the officer was turning and told him to "move the fuck out of my way" (Tr. 218, 223). Officer Ford testified that, "as I turned, he was there, and I struck him" (Tr. 218). He asserted that he did not think it was an officer approaching him because officers typically announce to each other when they are approaching to avoid startling their colleagues (Tr. 223-24). Officer Ford said he struck Downing in an effort to put some distance between them, stating, "he was in my proximity and . . . I turned around and I struck him to give me and him some distance" (Tr. 225). He maintained that he did not know exactly where he struck Downing, stating, "I still don't know, to this day, where I hit this guy," but that it was somewhere in the inmate's upper body (Tr. 226). Officer Ford acknowledged that during his MEO 16 interview he told the investigator that he hit Downing in the face (Tr. 226). He explained that he told the investigator that he was unaware if he struck the inmate in the chest or face, so he put upper body in his report because he was unsure (Tr. 227).

The parties agree that the video evidence is critical in this matter (Tr. 401, 416). Video surveillance cameras recorded events in the intake area (Pet. Ex. 2). The videos, which do not include sound, were taken from three different cameras within the area. Video from cameras 30.85 and 30.90 capture the same incident, but from different angles.² The video shows Downing exiting a cell into the hallway and going to his property bag on the floor. Downing bends over and removes an object from his property bag. He appears to be yelling and is approached in an aggressive manner by an officer, identified during testimony as Officer Owens. Officer Ford pulls Officer Owens away from Downing and, when Officer Owens returns to

² The time/date stamps on cameras 30.90 and 30.85 appear to reflect the same scene at the same time, but from different angles; therefore, references to time will encompass both cameras.

confront Downing, an unidentified officer restrains Officer Owens (Pet. Ex. 2 at 10:55:12–10:55:17; Tr. 340-43). As Downing continues to engage in what appears to be an argument with Officer Owens, an officer, identified as Captain Moore, walks down the hallway and points towards the wall behind Downing. Downing turns to face the wall and puts his hands up on the wall. Downing hits the wall with the palms of his hands and talks. An officer who appears to be Officer Spiotta physically directs Downing back towards the wall when Downing steps away from the wall to continue talking and gesturing (Pet. Ex. 2 at 10:55:30–10:56:00). Officer Ford approaches Downing and removes the object from his right hand, looks at the object and turns away from Downing. Downing turns away from the wall, talks to Officer Ford, then turns back to the wall and he again hits his hands on the wall. Officer Ford walks away from Downing with the object in his hand (Pet. Ex. 2 at 10:56:58–10:57:30).

This video sequence establishes that Downing was angry and disruptive during the count to such an extent that several of the respondents engaged with him in some manner. It also shows that Officer Ford had significant direct interaction with Downing before striking him in the face.

The video shows Downing continuing to hit the wall with his fists and talk in an agitated manner as other inmates who had been lined up facing the wall are sent back into a cell, until Downing is the only inmate in the hallway with the officers. Downing is directed into a cell. As he walks toward the cell, he talks to Captain Moore. Downing is standing at the entrance of the cell, facing outward towards Captain Moore and Officers Ford and Rolle. Downing is directed out of the cell towards his property, which he picks up. Officer Ford then directs him to stand against the wall opposite a different cell. Inmate Mills enters the cell ahead of Downing, who stands facing the cell, holding items in both hands. Officer Ford enters the cell and seems to direct Mills out with his property bag, which Mills places in the hallway against the wall and turns to re-enter the cell. Downing turns to enter the cell just before Mills, having dropped the items in his hand on the floor, except a book that he continues to hold. Captain Moore stops Downing and talks to him. When Downing turns away from Captain Moore to enter the cell, Officer Ford hits him in the face (Pet. Ex. 2 at 10:58:01–11:00:42).

The video shows that when Downing starts to enter the cell, Officer Ford's body is positioned almost completely inside the cell, with the back of his left arm visible outside the cell. As Downing walks into the cell, he passes in front of Officer Ford, whose left arm remains

visible as Downing walks by him, right shoulder first, suggesting Downing turned his upper body to walk by Officer Ford into the cell. Downing is noticeably smaller in stature than Officer Ford, which is consistent with testimony that Officer Ford, who is six feet, three inches tall, is about eight inches taller than Downing (Ford: Tr. 229; Rolle: Tr. 315). As Downing is partially inside the entrance of the cell, Officer Ford extends his left arm behind Downing and his right arm strikes him in the face. Downing then falls to the floor (Pet. Ex. 2 at 11:00:40–11:00:42).

After being struck by Officer Ford, Downing was restrained by several officers, including Officer Rolle, who took Downing's legs out from under him, causing him to fall face forward to the ground. A still photograph, date and time stamped October 17, 2011, 11:04:44 p.m., shows a rear-handcuffed Downing being escorted by several officers with a bloody mouth (Pet. Ex. 1). Downing was examined by a member of the Department's medical staff, who noted the inmate sustained multiple contusions to the upper and lower lips, left ankle, and wrist. No significant swelling was noted and the recommended treatment was ibuprofen, cold compresses, gauze, and a mouthwash (Pet. Ex. 5). On this record, it is not possible to disaggregate Downing's injuries and identify which resulted from Officer Ford striking him in the face and which were caused by the subsequent events.

Officer Ford does not dispute that he used force on Downing; he maintains that he struck him in the upper body and that it was necessary to do so in order to defend himself and others.

In making credibility determinations, this tribunal may consider such factors as witness demeanor; consistency of 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. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2 (Feb. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n, Item No. CD 98-101-A (Sept. 9, 1998).

Here, Downing's credibility is enhanced by his admission that his conduct on the evening of the incident was provocative. He readily acknowledged that he was agitated and aggressive in complaining about being in the intake area and not having access to his medicine. He also admitted that he was upset after a bad day in court.

Moreover, Downing's account of what transpired is, in large measure, corroborated by video evidence. However, he appears to have exaggerated the extent of the force used and his injuries. Downing stated that after Officer Ford struck him in the face, the other officers beat him up, gouged his eyes, twisted his legs and arms, and pulled his testicles, and that Officer Ford

punched him several more times in the chest. The video of the incident does not show the extensive and seemingly protracted beating that Downing testified occurred. Nor do the notes of his examination by the Department's medical staff, conducted approximately two-and-a-half hours after the incident, show that Downing made any complaints about alleged injuries to his eyes, testicles, or chest (Pet. Ex. 5).

Inmate Mills' testimony was of limited value. While he corroborated some aspects of Downing's testimony and the video, the weight given to Mills' testimony must be assessed in light of his claims that Officer Ford struck him immediately after the incident with Downing and he sustained injuries from that encounter. Moreover, Mills claimed that he suffers long and short-term memory deficits from those injuries (ALJ Exs. 7-9; Pet. Ex. 20).

Officer Ford's inconsistent and disingenuous statements diminish his credibility. For example, Officer Ford maintained that he and Downing did not have any significant interaction before he struck Downing, other than that relating to verifying the inmate's identity (Tr. 257, 261; Pet. Exs. 16, 16A). Yet the evidence established that in the minutes preceding his use of force, Officer Ford took medication away from Downing's hand and Downing vigorously protested Officer Ford's actions (Pet. Ex. 2; Tr: 378-79; Pet. Ex. 10). While there is no audio on the video, it shows some discussion between Officer Ford and Downing after he took the medication from Downing, which undermines the officer's claim that he did not have significant interaction with Downing.

Officer Ford offered multiple accounts of whether the inmate made physical contact with him when the inmate entered the cell: he reported that Downing attempted to push past him, pushed past him, and grabbed him. Officer Ford testified that Downing told him to "move the fuck out of my way" and attempted to push past him as Downing entered the cell (Tr. 225). He also maintained that Downing "pushed," "brushed," or "pressed" against him and he did not know who it was, so he answered the purported contact with a punch (Tr. 244-45; Pet. Ex. 6). He told a different version of the encounter to the Department's medical staff when he was examined less than an hour after the incident. According to doctor's notes of an examination of Officer Ford, he told the medical staff that the inmate "grabbed" him from behind and he punched inmate with his right fist (Pet. Ex. 14). Officer Ford's inconsistent statements regarding the nature of the purported physical contact that caused him to strike Downing significantly undermine his credibility. Moreover, Officer Ford's testimony that Downing told him to "move

the fuck out of my way,” coupled with the video evidence, suggests the inmate sought to avoid contact with Officer Ford, albeit in a profane, disrespectful, and aggressive manner.

Similarly, Officer Ford’s assertion that he hit Downing in the upper body is not credible. Officer Ford testified that he hit the inmate in the upper body, but also stated during an MEO 16 interview that he struck Downing in the face (Tr. 226-27; Pet. Exs. 16, 16A). When pressed during cross-examination, Officer Ford explained that he assumed the head is part of the upper body (Tr. 246). This flies in the face of the Department’s training, its use of force guidelines, and common sense.

Captain Lomas, a Department employee for nearly 27 years who has served as an instructor at the Department’s Training Academy for the last 12 years (Tr. 168), testified that officers are trained to differentiate between the upper body and the head because of the risk of serious harm, even death, associated with blows to the head. According to Captain Lomas, officers are trained to avoid striking an inmate in the head because a blow to the head could be deadly (Tr. 172-73, 178, 182-83). In support of its contention that the Department trains officers to avoid striking inmates in the head, the Department produced a chart used in Academy training. The chart, captioned “Target Zones,” shows the head highlighted in red and a legend on the chart indicates a red area is a “no” zone, while the upper body, highlighted in yellow, is characterized as a “caution” zone (Pet Ex. 21; Tr. 172-74). Captain Lomas testified that the chart shows how the Department views the different parts of the body in terms of use of force (Tr. 171-73).

The Department’s guidelines governing use of force by its officers, Directive No. 5006R-C (“Directive”), prohibits using force to “punish, discipline, assault, or retaliate against an inmate.” The Directive requires not only that force be used as a last resort, but also that the force used is proportionate in light of the circumstances. This is clearly stated in section V(B)(1) of the Directive, which provides:

Force may be used . . . only as a last alternative after all other reasonable efforts to resolve a situation have failed. When force is necessary, the amount of force used at any time should always be proportional to the threat posed by the inmate at the time.

The Directive further provides that “blows should not be struck if control holds, grasping, or pushing would be adequate to restrain the inmate” (ALJ Ex. 6).

In keeping with its approach of proportionate use of force, the Directive instructs officers to start with the least amount of force necessary and to escalate force only as warranted by the

situation. The Directive describes a continuum of techniques that officers should use, starting with talking to the inmate, seeking mental health staff intervention if appropriate, moving on to non-contact techniques such as chemical agents, then applying a combination of control holds or take-down techniques, including soft hand techniques such as pushing or grasping the inmate to gain control and compliance. The permissible techniques escalate to application of blocks and strikes to the inmate, but clearly cautions that officers must aim blows at the body and, “[u]nless unavoidable, blows should be directed away from the head” (ALJ Ex. 6).

The Department’s training and Directive draw a clear distinction between the head and the body. Thus, Officer Ford’s assertion that he believed them to be the same is simply not credible.

Under the parameters set forth in the Directive, the force used by Officer Ford was unnecessary and excessive. Officer Ford acknowledged that Downing had not hit anyone or spit at anyone, nor was he engaged in conduct that was unusual in a jail (Tr. 222-23). He claimed that the catalyst for his use of force was the inmate brushing or pushing against him. Yet, on direct examination, Officer Ford did not say that Downing actually pushed or brushed against him as he entered the cell; instead, he said the inmate “attempted” to push him (Tr. 225). On cross-examination, however, Officer Ford testified that Downing physically pushed past him when he “brushed” by his left side. He described his use of force as necessary to defend himself and other Department staff (Tr. 245-46). Similarly, during his MEO 16 interview, in which he initially stated that he did not know whether Downing was going to push past him when he turned around and struck him, he also told the investigator that the inmate “touched” him. Officer Ford vacillates between stating that he struck Downing to prevent contact and claiming that he struck Downing to defend himself after contact.

Even if such contact did occur, however, under the Directive, a blow to the head, which should be used only if there is no other alternative, is grossly out of proportion to that level of contact.

Officer Ford had reason to be irritated with Downing: Downing had been loud, belligerent, and demanding during the inmate count that Officer Ford was overseeing. Officer Ford took away Downing’s medication, which further aggravated Downing, who complained to the captain on duty. It was after that complaint that Officer Ford struck the inmate in the face. This sequence of events makes it more likely than not that the inmate’s aggressive, persistent,

and loud complaints about his housing and medication, and his overall disruptive behavior during the count, engendered some frustration in Officer Ford. That frustration was apparently manifested by his actions in striking Downing in the face.

Respondents sought to make much of the conflicting investigative outcomes in this case: the facility determined that the use of force was warranted, while the Department's Investigations Division reached the opposite conclusion. Respondents sought to portray the Investigations Division's report as tainted, suggesting that Captain Dueno had determined the outcome before he assigned the matter to Investigator Thompson. Respondents also suggested that Investigator Thompson made a number of mistakes in conducting the investigation, which undermined the reliability of his entire investigation (Tr. 399, 402-04). These arguments do not, however, rebut the video and other evidence.

It is noteworthy that the facility investigative report, while concluding the use of force was appropriate, also recommended headshot counseling for Officer Ford (Resp. Ex. A). This is consistent with the facility having concluded that Officer Ford struck Downing in the head. The facility's conclusion that a blow to the face was an appropriate use of force seems to be at odds with its recommendation that Officer Ford undergo headshot counseling. It is also a recommendation with which Captain Dueno and Investigator Thompson testified they were not familiar (Tr. 45, 93-94). It is also interesting that the facility's investigative report noted that its investigator did not see the inmate push or brush against Officer Ford on the video, nor was such contact reported in Captain Moore's use of force report (Pet. Ex. 11),³ yet it concluded the use of force was appropriate based on the officers' reports. It would appear that the facility gave every favorable inference to its officers. The Department's Investigations Division provides an independent level of review that, in this instance, identified a use of force that merited further investigation by Department employees who are removed from the day-to-day functioning of the facility and bring a different perspective and expertise to a review of the evidence.

Therefore, the charge that Officer Ford used impermissible, unnecessary, and excessive force in that he struck the inmate in the face is sustained.

Use of Force by Officer Rolle

Officer Rolle is charged with using impermissible, unnecessary, and/or excessive force in that as officers struggled with Downing and were engaged with his upper body, Officer Rolle

³ Neither party called Captain Moore as a witness.

lifted Downing's legs off the ground, which caused the inmate to fall and strike his face, resulting in injury (ALJ Ex. 3).

Downing fell to the floor after Officer Ford struck him in the face. Officers Rolle, Owens, and Spiotta, supervised by Captain Moore, went to the floor to restrain Downing. According to Officer Rolle, during the course of their efforts to restrain him, Downing struggled to a standing position. Officer Rolle then grabbed Downing's legs and pulled them out from under him. Officer Rolle stated that he used this technique because the inmate was not being compliant and continued to be physically aggressive (Tr. 291-93). He further testified that he was never informed during his Academy training that it was an improper technique (Tr. 293-94). On cross-examination, Officer Rolle agreed that he had used any means possible to get Downing to the ground to stop his resistance (Tr. 311). He also admitted that the technique he used is not taught in the Academy (Tr. 313).

Camera 30.83 captured the events immediately after Officer Ford struck Downing in the face. Downing is seen falling backwards on to the floor with his hands covering his face. Officers Rolle, Spiotta, and Owens and Captain Moore try to restrain Downing. There is a struggle during which the inmate appears to clench his hands across his body. Officer Ford, who had stepped away from the initial efforts to restrain Downing, steps back into view of the camera and approaches the area in which the officers are struggling to restrain Downing. Downing eventually gets into an upright position, surrounded by the four officers. It is unclear from the video whether he was put into that position by the officers or if he struggled to a standing position. The officers place Downing against a wall so that his back is towards them and continue to restrain him, while attempting to move his hands from the front of his body to his back. At this time Officers Ford, Rolle, Owens, and Spiotta surround Downing and appear to be engaged in restraining his upper body. Officer Rolle bends down, grabs the inmate's right leg, and lifts the inmate's so that both his legs are elevated above Officer Rolle's waist, then the inmate falls, face first, to the floor. Officer Rolle kneels on the back of the inmate's legs as Officers Ford, Owens, and Spiotta continue to struggle with the inmate. (Pet. Ex. 2 at 11:00:41-11:03:01; Rolle: Tr. 311-12).

Captain Lomas testified that the technique used by Officer Rolle is one that is not taught at the Academy because it could cause serious harm, including head and neck injury. According to Captain Lomas, the Academy trains officers that in taking an inmate down to the floor, they

must stabilize the inmate's legs to minimize risk of falling (Tr. 181, 189). Captain Lomas acknowledged that inmate Downing was not being compliant and that the Directive is a guideline under which an officer's exercise of judgment is considered in reviewing compliance with the Directive (Tr. 183). He also agreed that the Directive does not explicitly prohibit the technique (Tr. 190).

Officer Rolle admitted that he pulled the inmate's legs out from under him, which caused him to fall to the ground. The question is whether Officer Rolle's actions constitute unnecessary or excessive force.

The Directive requires that correction officers use force that is reasonable and proportional to the threat posed by the inmate. Therefore, in assessing uses of force by correction officers, consideration must be given to the circumstances in which the use of force arose. It is not without significance that the officers were engaged in a struggle to restrain Downing, who was not being compliant. However, when Officer Rolle pulled the inmate's legs out from under him, three other officers were using upper body control holds to subdue the inmate. The height to which Officer Rolle lifted the inmate's legs appeared to be above Officer Rolle's waist and the inmate fell to the floor with some force. Downing did not appear to pose risk of imminent physical harm to the officers that merited the use of a technique that presented a risk of serious head and neck injury. Indeed, Officer Rolle's omission of his use of force from his otherwise detailed report suggests that he recognized he used improper force and he attempted to conceal it. *See Dep't of Correction v. Richardson*, OATH Index No. 549/03 at 5 (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) (officer's failure to include in his use of force report his use of an improper takedown technique on an unruly inmate appeared to be a deliberate attempt to hide the truth).

Moreover, Officer Rolle's testimony indicates that his departure from techniques sanctioned by the Department stemmed not from a concern about his safety or that of his colleagues, but from frustration and, in all likelihood, anger at the inmate. Officer Rolle wanted the encounter to end and, as he testified, he used any means possible to do so. Frustration is not the standard by which officers are to be guided in their use of force. Indeed, were it so, correction officers working under the conditions described by several respondents would have license to resort to force that poses a serious risk of injury or death in many interactions with inmates.

In sum, Officer Rolle used excessive force when he pulled the inmate's legs out from under him.

False or Misleading Use of Force Reports

The Department charged that respondents submitted false, misleading, and/or inaccurate reports concerning the use of force incident. Directive 5006R-C requires Department staff who use or witness force to write a report that includes a "complete account of the events leading to the use of force" and a "precise description of the incident based on the writer's own observations; the specific reasons, if known to the writer, why force was necessary, and the type of force the writer employed or observed being employed" (ALJ. Ex. 6).

In determining whether an officer has submitted false or misleading reports, this tribunal has held that not all inaccuracies can be found to be intentionally false and the use of imprecise language should not be sanctioned as a false statement absent intent to conceal or deceive. *Dep't of Correction v. Holder*, OATH Index No. 2208/07 at 4 (Sept. 14, 2007). Moreover, while an officer's statement in his or her report may not constitute an outright false statement, it may be misconduct if the statement serves to mislead. *See Dep't of Correction v. Johnson*, OATH Index No. 1639/05 at 10-11 (Aug. 18, 2005), *modified on penalty*, Comm'r Dec. (Oct. 27, 2005), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD07-29-M (Mar. 14, 2007) (officer's use of the term "upper body" in his use of force report failed to reflect that the officer struck inmate's head into a door and, while not outright false, was misleading).

Officer Ford

Petitioner alleged Officer Ford submitted a false, misleading, and/or inaccurate report of the incident, including his statements that in response to the inmate pushing past him he defended himself with one closed fist punch to the inmate's upper body and that his use of force was required to defend himself and other DOC staff from injury (ALJ Ex. 1).

As discussed above, the evidence does not support Officer Ford's claim that he hit Downing in the upper body area. Officer Ford struck Downing in the face and he admitted as much during his MEO 16 interview. His assertion that his report is accurate because the upper body includes the face is without merit; therefore, his use of the term upper body is misleading.

Similarly, Officer Ford's statement that his use of force was necessary to defend himself and other Department staff is false and misleading: the evidence failed to establish that Downing presented a threat to Officer Ford or other Department staff at the time Officer Ford struck him.

Indeed, the evidence shows that the inmate was entering into the cell, as he had been directed to do, when Officer Ford struck him in the face area (Tr. 307-08; Pet. Ex. 11).

Therefore, the charge that Officer Ford submitted a false and misleading use of force report is sustained.

Officer Rolle

Officer Rolle is charged with submitting a false, misleading, and/or inaccurate report of the incident, including statements that Downing pushed past Officer Ford, who responded with one punch to the inmate's upper body, and that the use of force was required to defend Officer Rolle and DOC staff from injury. Petitioner further charges that Officer Rolle failed to include in his report a description of his use of force when he lifted the inmate's leg off the ground, causing him to fall to the ground and strike his face (ALJ Ex. 3).

Officer Rolle's statements that Officer Ford punched Downing in the upper body and that his use of force was required to defend Officer Rolle and Department staff from injury is belied by the credible evidence. As discussed above, the video evidence shows that Officer Ford hit Downing in the face, not in the upper body. Moreover, there is scant evidence that Downing presented a threat to Officer Rolle or other Department staff when Officer Ford punched him.

Officer Rolle testified that the upper body is the same as the head, yet he also acknowledged that his instructors at the Academy drew a distinction between the head and the upper body (Tr. 300). There is an inherent inconsistency in Officer Rolle's statements: if the blows to the head are off limits, but those to the upper body are allowed, those parts of the body are clearly not viewed as the same by the Department. Officer Rolle's training emphasized a distinction that he chose to ignore in writing his report. The report is misleading.

Similarly, Officer Rolle's claim that Officer Ford's use of force was necessary to defend Officer Rolle and other Department staff from injury is belied by the evidence. The video evidence does not support Officer Rolle's contention that Downing presented a threat to Officer Rolle; it shows Downing entering the cell, as Officer Rolle conceded Captain Moore directed him to do (Tr. 307-08). While Downing may have been "ranting and raving" just before Officer Ford hit him (Tr. 290), there is no credible evidence that he presented an imminent threat. In fact, several respondents testified that his behavior was typical of inmates in the intake area (Ford: Tr. 211-13; Rolle: Tr. 290).

Officer Rolle's report is also false and misleading because it omitted reference to Officer Rolle's own use of force during the incident. Officer Rolle acknowledged that he should have included his actions in lifting Downing up by his legs and causing him to fall to the ground in his use of force report (Tr. 295-96). He maintained that his omission was unintentional; he simply forgot about pulling the inmate's legs out from under him when he wrote the report (Tr. 295-96, 309-10, 319).

It is not credible that Officer Rolle forgot his use of force. He wrote the report shortly after the incident took place (Tr. 301-02). He provided a detailed account of the incident, including Officer Owens's use of upper body control holds, Officer Spiotta's application of lower body control holds, and Officer Ford's application of mechanical restraints to Downing's wrists (Pet. Ex. 7). Yet, he somehow neglected to include his own critical action in getting the inmate to the ground by taking his legs out from under him. It is not plausible that he would recall the steps his colleagues took to restrain the inmate, but forget his own actions. The more likely explanation is that Officer Rolle realized that his actions contravened Department guidelines and he omitted them in an effort to minimize his liability.

This tribunal has held that an officer submits a false or misleading report when there is a material omission from the report "which could not have been inadvertent as it goes to the heart of what the author of the report is required to disclose and describe." *DOC v. Patterson*, OATH Index No. 2080/08, 2081/08, 2082/08, 2084/08, 2085/08& 2088/08 at 16 (Apr. 9, 2009). Here, Officer Rolle's failure to include in his use of force report the fact that he lifted the inmate by his legs and caused him to crash to the ground is a material omission.

In sum, Officer Rolle submitted a false and misleading use of force report.

Officer Evans

Petitioner charged that Officer Evans submitted a false, misleading, and/or inaccurate report of the use of force incident (ALJ Ex. 5). Specifically, the Department alleged that Officer Evans's report contained false, misleading, and/or inaccurate statements that: (1) Downing attacked Officer Ford without warning; (2) Officer Ford defended himself by striking the inmate in the upper torso area one time; and (3) force was used to the inmate's upper torso area (ALJ Ex. 5).

Officer Evans submitted a use of force witness report because he saw the incident, but was not involved in it (Tr. 375). In his report, Officer Evans wrote that after Officer Ford

confiscated Downing's medication, "Downing attacked C/O Ford without warning" (Pet. Ex. 10). Officer Evans testified that he wrote Downing attacked Ford because Downing was hostile and agitated, and "walked up onto" Officer Ford, which Officer Evans said he interpreted as an attack (Tr. 382). On cross-examination, Officer Evans maintained that if an inmate comes too close to an officer in an aggressive manner, he considers it an attack (Tr. 391).

Officer Evans's characterization of Downing's actions as an attack is inconsistent with the evidence. The video shows that Downing walked past Officer Ford into the cell, but fails to show any conduct that might constitute an attack on Officer Ford. Moreover, it is significant that in his use of force report, Officer Ford, the purported victim of the attack, said that Downing was physically pushing past Ford when he struck Downing (Pet. Ex. 6). Similarly, during his MEO 16 interview and his testimony before this tribunal, Officer Ford described Downing as having come up behind him and "touched," "brushed" or "pushed" against him (Tr. 223, 245, 279; Pet. Exs. 16, 16A). In his testimony, Officer Ford, who had no incentive to minimize Downing's actions, did not describe the encounter in language that indicates he was under attack by inmate Downing.

Similarly, Officer Evans's statements that Officer Ford used force to defend himself and that Ford struck Downing in the upper torso are inconsistent with the evidence. As discussed earlier, the evidence fails to show that Officer Ford was being attacked in a way that might warrant self-defense. Furthermore, the evidence establishes that Officer Ford struck Downing in the face rather than the upper torso, and that this distinction is one that is made not only in the Academy, but also in the Directive. Officer Evans's use of the term upper torso in his report was more likely than not intended to sanitize the use of force by describing it as within a permissible area of the body.

To his credit, Officer Evans is the only respondent who includes in his report that Officer Ford confiscated Downing's medication before the use of force occurred, which is consistent with the video and Downing's testimony. However, his candor in that regard does not excuse the inaccurate and misleading statements included in his report.

Therefore, Officer Evans submitted a false and misleading use of force report.

Officer Owens

Petitioner alleged that Officer Owens submitted a false, misleading, and/or inaccurate report of the incident, including his statements that: (1) Downing threatened to assault

Department staff before the use of force; (2) Officer Ford struck the inmate to his upper body; and (3) the inmate began threatening and assaulting Department staff.

In his incident report, Officer Owens wrote that Downing was belligerent during the inmate count, yelling obscenities while complaining about being in the intake area. According to Officer Owens's report, Captain Moore told Downing to stop interrupting the officers during the count, but Downing continued to yell obscenities and threatened the staff. Officer Owens reported that Captain Moore instructed Downing to stop yelling and threatening officers, and to put his hands on the wall, all of which he refused to do. Officer Owens wrote that Officer Ford stood with his back turned as Downing approached the cell, and that Downing told Officer Ford to move out of his way, at which point Officer Ford turned and struck the inmate "with a closed fist to the upper body" (Pet. Ex. 9). It is significant that Officer Owens's report does not indicate that Downing made any physical contact with Officer Ford as he entered the cell, since this purported contact is the proffered justification for Officer Ford's use of force.

Officer Owens testified that he perceived Downing as threatening to assault Department staff because he was cursing, acting in a belligerent manner, and banging his fists against the wall (Tr. 329-30). He also testified that Downing brushed against Officer Ford as he entered the cell, which he considered an assault (Tr. 330-31). As with Officer Evans's assertion in his report that Downing attacked Officer Ford, the evidence does not support Officer Owens's claim that the inmate assaulted Department staff. However, there is some corroboration that Downing made verbal threats before Officer Ford struck him. Specifically, Captain Moore's use of force report indicates that Downing had been threatening Department staff (Pet. Ex. 11). Thus, petitioner has not established that Officer Owens' statement that Downing threatened Department staff prior to Officer Ford's use of force was false or misleading.

With regard to Officer Owens's statement that Officer Ford struck the inmate in the upper body, his report is misleading. Officer Owens explained that because the inmate's back was turned to him, he could not see exactly where Officer Ford punched the inmate so he wrote that the blow was to the upper body (Tr. 327-28). While Officer Owens acknowledged that the Academy instructed officers to avoid blows to the head, he maintained that the head is part of the upper body (Tr. 331-32, 338-40). His contention that the head is part of the upper body is undermined by his admission that the Academy draws a distinction between the head and body for purposes of use of force training, and also by the distinction drawn between those areas in the

Department's Directive. As with the respondents discussed above, it is disingenuous and misleading for Officer Owens to assert that the head is the same as the upper body.

Moreover, Officer Owens's contention that he did not see exactly where Officer Ford struck the inmate is inconsistent with his testimony that he saw Downing brush against Officer Ford and the detail in his report that Officer Ford used a "closed fist" to strike the inmate (Tr. 331; Pet. Ex. 10). It strains credulity that Officer Owens was able to discern a closed fist, yet could not see where that fist landed.

In any event, if taken at face value, Officer Owens's admission that he did not see exactly where the blow landed supports the Department's contention that he made false or misleading statements in his report: if Officer Owens did not see where the blow landed, then his statement in the report that Officer Ford hit the inmate in the upper body is misleading.

Officer Owens's reliability as a witness is undermined by the inconsistency between his testimony, his report, and his MEO 16 interview. Officer Owens testified to having seen the inmate brush against Officer Ford prior to Officer Ford punching him. Yet, in his MEO 16 interview, Officer Owens told the investigator that he did not see the inmate touch Officer Ford and his report makes no mention of seeing the inmate brush or push against Officer Ford (Tr. 331; Pet. Exs. 9, 18, 18A). Moreover, prior to Officer Ford's use of force, Officer Owens had engaged in a verbal altercation with Downing that nearly escalated into a physical one (Pet. Ex. 2; Ford: Tr. 257-58; Owens: Tr. 340-43). Officer Owens's anger at the inmate similarly undermines his reliability.

Therefore, Officer Owens submitted a false and misleading use of force report.

Officer Spiotta

Petitioner charged that Officer Spiotta submitted false, misleading, and/or inaccurate report of the incident including his statements in the report that: (1) the inmate pushed Officer Ford prior to the use of force by Officer Ford; (2) Officer Ford defended himself with an upper body blow to the inmate; and (3) the force used was necessary because the inmate assaulted DOC staff (ALJ Ex. 2).

In describing the physical contact between Downing and Officer Ford immediately before the use of force, Officer Spiotta used the terms "brushed," "pushed," "nudged," or "shrugged" (Tr. 351-52). Officer Spiotta acknowledged that he did not have an unobstructed

view of what was occurring because another inmate was in his line of view (Tr. 353-54, 368). Yet he maintained that he saw what transpired during the use of force (Tr. 355).

Officer Spiotta's use of force report is largely consistent with those of the other respondents in this case, and suffers from the same deficiencies. There is no evidence that Downing pushed Officer Ford other than the testimony of the respondents. In fact, Captain Moore, who was the supervisor on site and was standing very close to the incident, did not say that the inmate pushed Officer Ford in her use of force report (Pet. Ex. 11). Furthermore, the evidence establishes that Officer Ford struck the inmate in the face, not in the upper body as is stated in Officer Spiotta's use of force report.

Therefore, Officer Spiotta is guilty of submitting a false and misleading use of force report.

False or Misleading Statements in MEO 16 Interviews

In determining whether an officer's responses at an MEO 16 interview subjects him or her to sanctions for false or misleading statements, this tribunal considers whether the statements are material and whether they show intentional deception or lack of concern for the truth, rather than inadvertent error. *Dep't of Correction v. Jackson*, OATH Index Nos. 2927/10, 2929/10, 2930/10, & 2931/10 at 16 (Apr. 7, 2011); *Patterson*, OATH 2080/08, 2081/08, 2082/08, 2084/08, 2085/08 & 2088/08 at 17.

Officer Ford

Petitioner alleges that Officer Ford gave false, misleading, and/or inaccurate statements during an interview pursuant to MEO 16 when he stated that the inmate pushed past him, causing him to use force; that the punch to the inmate's face was not intentional; that he could not have avoided hitting inmate in the face at that moment; and that the upper torso is part of the face (ALJ Ex. 1).

Investigator Thompson interviewed Officer Ford pursuant to MEO 16 (Pet. Exs. 16, 16A). In his initial version of his encounter with Downing, Officer Ford failed to describe any physical contact between him and the inmate before his use of force. Officer Ford stated that Downing "came from behind me . . . I don't know if he was going to push me past the pen [*sic*], that's when I turned around. I struck him" (Pet. Exs. 16, 16A). When prompted by the investigator, Officer Ford adds that Downing "pushed past him" and that there was physical contact between him and the inmate. Officer Ford described that contact as a "touch" (Pet Exs.

16, 16A). It is telling that when asked his version of the events during his MEO 16 interview and at the hearing, Officer Ford describes his action as preemptive rather than defensive: he struck the inmate because he thought the inmate was going to push past him, rather than in response to a push. It is only on further questioning that he adds that the inmate pushed him.

The video evidence does not support Officer Ford's claim that Downing pushed past him in a way that caused him to use force. The video does not show contact between Officer Ford and the inmate. Officer Ford's description of the contact as a "touch" supports this conclusion. Neither does the video show Downing pushing past Officer Ford into the cell, as he claims. The evidence establishes that the inmate had barely stepped across the threshold into the cell when Officer Ford's left arm reached out across the inmate's upper back as his right hand struck the inmate in the face. Officer Ford's MEO 16 statement that the inmate pushed past him is an attempt to justify an improper use of force. The statement is misleading.

Officer Ford's statement that he did not intend to strike the inmate in the face is similarly misleading. The circumstances in which Officer Ford struck the inmate did not involve a brawl or a fight in which it is hard to tell where blows are likely to land because the combatants are moving quickly as they engage in offensive and defensive acts; the inmate was walking into the cell when Officer Ford struck him. Given the height difference between Downing and Officer Ford, Officer Ford's physical location in the cell, and the fact that Officer Ford extended his left arm behind the inmate as he struck him, it seems the face was the most likely place that the blow would have landed. Officer Ford must have known to a substantial degree of certainty that the blow was likely to land in Downing's face. *See Johnson*, OATH 1639/05 at 8-9 (analogizing from tort law, this tribunal held that intent is satisfied not only by the desire to bring about a consequence, but also if the consequence is substantially certain to result; an officer was deemed to have intended the natural consequences of his action in a use of force context). Therefore, Officer Ford's statement that he did not intend to strike the inmate in the face is misleading.

Officer Ford's statement that he could not have avoided hitting Downing in the face at that moment is also false or misleading. Even if the inmate brushed or touched Officer Ford as he maintains, he could have taken less draconian actions proportionate to the inmate's contact, such as ordering Downing to move back or pushing Downing away from him to prevent further contact. That would be consistent with the Directive. Instead, Officer Ford resorted to striking the inmate.

Moreover, Officer Ford's claim that the term upper body includes the face is contrary to the officers' training, the Directive, and common sense. During his MEO 16 interview, Officer Ford confirmed his familiarity with the distinction between the headshots and the upper body blows that is reflected in the Directive. Yet he continued to maintain that he hit the inmate in his upper torso. It is clear that Officer Ford appreciates the danger associated with blows to the head and the Department's restrictions on their use, which led to his efforts to obfuscate the true nature of his use of force with a misleading claim that the term upper torso means the face.

Therefore, the charge that Officer Ford made false and misleading statements in his MEO 16 interview is sustained.

Officer Rolle

Petitioner charged that Officer Rolle gave false, misleading, and/or inaccurate statements during his MEO 16 interview when he stated that: (1) the inmate physically pushed Officer Ford before Officer Ford struck him; (2) Officer Ford struck the inmate in the chest area; (3) Officer Ford did not hit inmate in the face; (4) he saw Officer Ford fall after the inmate struck him; and (5) he failed to state that he lifted inmate's feet off the ground during the struggle, but stated the inmate was subdued and taken down to the ground (ALJ Ex. 3).

Officer Rolle asserted during his MEO 16 interview that Downing physically pushed Officer Ford in the chest and that he, Officer Rolle, saw Officer Ford fall (Pet Exs. 17, 17A). Yet, during his testimony, Officer Rolle claimed the inmate pushed Officer Ford in the upper body towards his back (Tr. 308). The inconsistency between the chest and back begs the question of whether Officer Rolle failed to tell the truth at the MEO 16 interview or during the hearing.

Moreover, in his MEO 16 interview, Officer Rolle repeatedly testified that Officer Ford fell after Downing pushed him. Specifically, he asserted that he saw Downing push Officer Ford in the chest and Officer Ford fall to the ground. The video evidence contradicts this testimony, and Officer Rolle conceded as much at the hearing (Tr. 305; Pet. Exs. 17, 17A). During his MEO 16 testimony, however, Officer Rolle was steadfast, even after viewing the video, in maintaining that Officer Ford fell after being pushed by the inmate. However, Officer Ford did not fall. Officer Rolle's statements go to material issues and reflect, at a minimum, a lack of concern for the truth.

Similarly, Officer Rolle's statement during the MEO 16 that Officer Ford struck the inmate in the upper body, not the face, is inconsistent with the evidence. The statement is also at odds with Officer Rolle's admission that he did not see where the officer struck inmate Downing (Tr. 291). Therefore, Officer Rolle made a false and misleading statement when he claimed Officer Ford struck the inmate in the upper body, not the face.

Finally, Officer Rolle is charged with making a false statement by omission. When asked to state the kind of force he used on the inmate, Officer Rolle responded that he used upper body holds on the resisting inmate. He also described the efforts of Officers Ford, Spiotta, and Owens, including Officer Spiotta's use of lower body controls after the inmate was on the ground. Yet he failed to include in the litany of techniques used to restrain the inmate his own action in grabbing the inmate's leg and pulling him so that he fell to the ground. This is a material fact as it constitutes a use of force and appears to have contributed to the inmate's injuries. Officer Rolle's omission of his own use of force cannot simply be attributed to a lapse in memory given the detail with which he described the force used by his colleagues. The more likely explanation is that he sought to minimize his role in the incident by omission of his use of force.

Therefore, the charge that Officer Rolle made false and misleading statements in his MEO 16 interview is sustained.

Officer Owens

Petitioner alleged that Officer Owens gave false, misleading, and/or inaccurate statements during his MEO 16 interview, including his statements that: (1) Officer Ford struck the inmate in chest or upper body area; (2) he could not tell where Officer Ford struck the inmate; and (3) the inmate passed behind Officer Ford before Officer Ford struck him (ALJ Ex. 4).

As discussed above, the evidence shows that Officer Ford struck the inmate in the face, not in the upper body or chest area as Officer Owens asserted during his MEO 16 interview. Officer Owens made inconsistent statements in his MEO 16 interview to the extent that he claimed that Officer Ford hit the inmate in the upper body or chest area, but also claimed not to have seen where the officer struck the inmate. Moreover, the credible evidence establishes that the inmate passed in front of Officer Ford on his way into the cell, not behind him as Officer Owens claimed in his interview.

These facts are material to the use of force charged here. In addition, Officer Owens's inconsistent statements support a finding that he sought to sanitize a colleague's use of force

against an inmate with whom Officer Owens had just had a verbal altercation, through false, misleading, and/or inaccurate statements. Therefore, the charge that Officer Owens made false and misleading statements in his MEO 16 interview is sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner established that on October 17, 2011, Officer Ford used unnecessary and excessive force against an inmate in that he struck the inmate in his face, submitted a false and misleading use of force report, and made false and misleading statements in his MEO 16 interview. Therefore, Specifications 1, 2, and 3 of DR 369/12 should be sustained.
2. Petitioner established that on October 17, 2011, Officer Rolle used unnecessary and excessive force against an inmate in that pulled the inmate's legs out from under him, causing him to fall to the ground, submitted a false and misleading use of force report, and made false and misleading statements in his MEO 16 interview. Therefore, Specifications 1, 2, and 3 of DR 371/12 should be sustained.
3. Officer Owens submitted a false and misleading use of force report and false and misleading statements in his MEO 16 interview. Therefore, Specifications 1 and 2 of DR 372/12 should be sustained, except that petitioner failed to prove that Officer Owens was false or misleading in his MEO 16 statement that the inmate threatened Department staff prior to the use of force.
4. Officer Spiotta submitted a false and misleading use of force report. Therefore, Specification 1 of DR 370/12 should be sustained.
5. Officer Evans submitted a false and misleading use of force report. Therefore, Specification 1 of DR 373/12 should be sustained.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed abstracts of the employee performance service report (Form 22R) of Officers Ford, Rolle, Owens, Evans, and Spiotta for purposes of recommending an appropriate penalty.

Officer Ford

Officer Ford has been employed by the Department since April 2007 and has a prior disciplinary history: in 2010 he forfeited 15 vacation days for failure to safeguard his weapon and in March 2012 this tribunal recommended a 30-day suspension without pay for Officer Ford's impermissible use of force, failure to report a use of force, failure to obtain prompt medical attention, submission of false use of force reports, and false or misleading statements during MEO 16 interviews. *See Dep't of Correction v. Ford*, OATH Index Nos. 691/12, 692/12, 693/12, 694/12, & 702/12 (Mar. 30, 2012).

In this matter, Officer Ford has been found guilty of using impermissible and unnecessary force against an inmate, filing a false and misleading use of force report, and making false and misleading statements during an MEO 16 interview regarding the use of force. Penalties for such misconduct have ranged from 15 days to termination. In setting penalties, this tribunal has considered factors such as the employee's disciplinary record, the extent of force and the nature of the injury, and the extent of the subsequent deception.

The Department argued that Officer Ford's employment should be terminated for his misconduct. Termination has been generally reserved for those cases where the inmate's injuries were serious, the force used was extreme, the officer had a significant disciplinary history, or the subsequent deception was extensive. *See, e.g., Dep't of Correction v. Negron*, OATH Index No. 1844/11 at 20-22 (Sept. 16, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-04-SA (Jan. 20, 2012) (termination recommended where officer used excessive force on several inmates, submitted false and inaccurate reports, and failed to report a use of force; officer had a significant disciplinary history that included a 50-day suspension for violating the use of force reporting requirements); *Dep't of Correction v. Patterson*, OATH Index No. 2164/09 at 22-23 (Oct. 1, 2009) (termination recommended for correction officer who punched an inmate in the face and created an elaborate cover-up that included creating false documents and incident reports claiming the inmate's wife caused his injury); *Dep't of Correction v. Williams*, OATH Index Nos. 2215/08 & 2216/08 at 12-13 (Jan. 22, 2009) (termination recommended for officers

with moderate disciplinary records who struck an inmate several times, causing the inmate to need eight stitches; officers later claimed they were not aware of any use of force); *Dep't of Correction v. Debblay*, OATH Index Nos. 2008/04, 2009/04, 2011/04, & 2012/04 at 17-18 (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), and *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-78-O (Sept. 30, 2005) (Turrisi, 2009/04 and Clark, 2012/04) (officers terminated for using excessive force where inmate sustained multiple serious injuries and for participating in a cover-up that included conspiracy to alter a logbook and make false statements).

In cases where those factors are not as compelling, this tribunal has recommended penalties ranging between 15 and 60 days suspension. *See, e.g., Dep't of Correction v. Stapleton*, OATH Index No. 369/13 at 11-13 (Jan. 31, 2013) (60-day suspension recommended for officer with a minor disciplinary history who angrily assaulted an inmate for five minutes, discouraged other officers from reporting the incident, failed to report his use of force, failed to obtain medical attention, and made false reports and statements); *Dep't of Correction v. Davis*, OATH Index Nos. 2648/09 & 2649/09 at 12-16 (Feb. 12, 2010) (60-day suspension recommended for officer with a six-year tenure and two prior disciplinary penalties, one involving use of force reporting, who used impermissible and unnecessary force, filed false and misleading use of force reports, and made false and misleading statements during MEO 16 interviews); *Johnson*, OATH 1639/05 at 11-15 (15-day suspension recommended where officer with a clean disciplinary record pushed an inmate's head into a cell door during a struggle and submitted a misleading report about the incident); *Dep't of Correction v. Hills*, OATH Index No. 632/04 at 11-12 (Apr. 26, 2004) (20-day suspension recommended for impermissible use of force and failure to report, noting respondent's 20-year tenure and lack of prior discipline), *modified on penalty*, Comm'r Dec. (Oct. 28, 2004) (penalty increased to 30-day suspension); *Dep't of Correction v. Romero*, OATH Index No. 388/04 at 8-9 (Apr. 23, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-46 SA (Aug. 1, 2005) (40-day suspension recommended for excessive force in which multiple blows were administered after inmate was subdued, where respondent had brief four-year tenure and no prior discipline).

There are some facts in mitigation. The force used by Officer Ford was a single event and the injuries to the inmate appear to have been relatively minor, requiring no serious medical treatment. The force appears to have been set in motion by the inmate's disruptive, provocative,

and admittedly aggressive conduct, which heightened tension among the officers immediately before the incident. Furthermore, it is impossible on the record here to determine how much of the injury is attributable to Officer Ford's actions and how much was due to subsequent events, which included the inmate's resistance to being restrained and Officer Rolle's use of force. In addition, Officer Ford admitted the use of force, albeit in a way designed to minimize his exposure to discipline.

Officer Ford's prior discipline for essentially the same type of misconduct is of concern. He has been with the Department for only six years, but has twice been found guilty of using excessive force and making misleading reports and statements. These incidents occurred within one year of each other: the first case arose out of an incident in December 2010, while the current incident occurred in October 2011. However, Officer Ford had not yet been disciplined for his first use of force when this one occurred. This tribunal has applied the doctrine of progressive discipline, which seeks "to modify employee behavior through increasing penalties for the same or similar misconduct, and to give employees full notice that if they do not modify their conduct, they risk termination." See *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Ford*, OATH Index No. 2383/09 at 11 (July 10, 2009); *Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Meyers*, OATH Index No. 1487/09 at 8 (Jan. 26, 2009), *aff'd*, NYC HHC Pers. Rev. Bd. Dec. No. 1349 (July 31, 2009). However, Officer Ford has not received the full benefit of progressive discipline because the present incident occurred before Officer Ford received a decision and penalty for the 2010 incident. See *Human Resources Admin. v. Green*, OATH Index No. 3347/09 at 19-20 (Nov. 18, 2009) (citing *Dep't of Correction v. Rice*, OATH Index No. 1467/97 (July 21, 1993)) (where penalty was administered after the acts of misconduct proved in the case, ALJ did not consider the penalty in making a recommendation).

Officer Ford's false and misleading statements during the investigative process are troubling. As this tribunal has recognized, misleading statements in use of force reports and MEO 16 interviews are a serious breach of an officer's obligations under the Directive. See *Davis*, OATH 2648/09 & 2649/09 at 15 (the Department has a great interest in receiving truthful and complete reports concerning use of force incidents since such reports provide a factual basis for determining whether disciplinary proceedings are appropriate); *Jackson*, OATH 2927/10, 2929/10, 2930/10, & 2931/10 at 22 (false statements about use of force raise questions about the

officer's integrity and thwart the Departments' efforts to investigate uses of force and enforce its regulations). However, Officer Ford did acknowledge some use of force.

Officer Ford is responsible for the care, custody, and control of an inmate population that can be angry, aggressive, combative, and disrespectful. The Department trains its officers to perform their duties so that risk of injury to both the inmates and the officers is minimized in situations where use of force is required. Officer Ford responded to a difficult inmate in a manner inconsistent with his training and the Department's guidelines. There are, however, some facts in mitigation, which warrant a significant penalty short of termination. Such a penalty should put Officer Ford on notice that he must modify his approach performing his duties or face termination.

Therefore, I recommend that Officer Ford be suspended for 60 days.

Officer Rolle

Officer Rolle has been employed by the Department since November 2007 and has no prior discipline history. Officer Rolle used excessive force against an inmate, omitted that use of force from his report and statement, and was misleading in his description of Officer Ford's use of force. This is serious misconduct.

The Department requested a 60-day suspension for Officer Rolle. There is some mitigation to be considered in determining an appropriate penalty. Officer Rolle has a clean disciplinary history. Moreover, the circumstances under which he pulled the inmate's legs out from under him were fraught with stress, as the inmate was resisting the officers' efforts to restrain him. Furthermore, while his actions caused the inmate to fall to the ground, it is not possible to tell how much of the inmate's injuries were due to Officer Rolle's use of force and how much was caused by Officer Ford striking the inmate and the inmate's noncompliance with efforts to restrain him.

In light of these mitigating circumstances, I recommend that Officer Rolle be suspended for 25 days.

Officer Owens

Officer Owens was hired in January 2008 and has no disciplinary history. In counterbalance to his clean disciplinary record, however, is the seriousness of Officer Owens's conduct in submitting misleading and inaccurate use of force report and making misleading statements during an MEO 16 interview. It is also of some significance that Officer Owens

committed this misconduct in an effort to minimize a colleague's use of force against an inmate with whom Officer Owens had a verbal altercation.

The Department requested that Officer Owens be suspended for 40 days. This tribunal has generally imposed penalties between 15 and 60 days for similar misconduct, taking into consideration the officer's disciplinary history, the severity of the use of force and the injury that was involved, and the degree of the officer's involvement in the deception. *See, e.g., Jackson*, OATH 2927/10, 2929/10, 2930/10, & 2931/10 at 24-25 (30-day suspension recommended for officer with no disciplinary history who copied someone else's report and lied in her MEO 16 interview); *Davis*, OATH 2648/09 & 2649/09 at 15-16 (30-day suspension recommended for officer who had no disciplinary history for misrepresentations and omissions in her use of force report and MEO 16 interview and for failing to secure her post; officer set deliberately set in motion the events that led to the use of force by opening an inmate's cell); *Dep't of Correction v. Butler*, OATH Index Nos. 876/92, 877/92 & 878/92 at 15-17 (Dec. 2, 1992) (20-day suspensions for two officers with minor or no disciplinary records for filing false reports in use of force incident); *Dep't of Correction v. Lopez*, OATH Index Nos. 493/90, 494/90, 495/90 & 496/90 at 17-21 (Oct. 10, 1990) (15 to 45-day suspensions recommended for four officers who failed to notify superiors of use of force incident, failed to seek medical attention for inmate, failed to assist in investigation and submitted false reports in use of force incident); *Dep't of Correction v. Davis*, OATH Index Nos. 299/88, 300/88 & 301/88 at 28-30 (Nov. 7, 1988) (60-day suspensions for officers with no prior records who filed false reports omitting their observations of serious use of force by colleague).

Here, the officer's unblemished record, the extent of the use of force, and the nature of the injury to the inmate weigh in Officer Owens's favor. Accordingly, I recommend that Officer Owens be suspended for 20 days.

Officers Evans and Spiotta

The Department hired Officer Spiotta in June 2008 and he has no prior disciplinary record. Officer Evans was appointed in February 2006 and has no prior disciplinary history. The Department sought penalties of 30-day suspensions for both officers.

Officers Spiotta and Evans did not use force, but they committed misconduct in submitting misleading use of force reports that mischaracterized the events surrounding Officer Ford's use of force. Although their disciplinary records are in mitigation, a penalty that is

commensurate with the serious nature of the misconduct is warranted. Accordingly, I recommend that Officer Spiotta and Officer Evans each serve a 15-day suspension. *See Patterson*, OATH 2164/09 at 22-23 (15-day suspension recommended where officer with an unblemished record submitted a false use of force report).

Astrid B. Gloade
Administrative Law Judge

May 23, 2013

SUBMITTED TO:

DORA B. SCHIRO
Commissioner

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