

Dep't of Correction v. Agbai

OATH Index No. 156/14 (Nov. 25, 2013), *adopted*, Comm'r Dec. (Jan. 2, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2014-0064 (June 3, 2014), **appended**

Correction officer admitted to using excessive force on inmate. ALJ found no mitigation for respondent's conduct and recommended his termination from employment.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
RICHARD AGBAI
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Department of Correction, pursuant to section 75 of the Civil Service Law. The Department charged that on June 16, 2012, correction officer Richard Agbai used unnecessary and excessive force on an inmate, in violation of Department rules (ALJ Ex. 1).

At a hearing before me on October 22, 2013, respondent admitted to the use of excessive force, but offered reasons for his conduct, in an attempt to mitigate the penalty. Petitioner presented a video recording of the use of force incident, and audio recordings of investigatory interviews of respondent, correction officer ("CO") Kirk Hylton, and correction captain ("Captain") Jerzy Skupien, who were present during the incident. CO Hylton, Captain Skupien, Captain Roxane Davis, and Department investigator Bruce Arnold also testified. In addition, petitioner submitted documentary evidence, including photos of the inmate displaying the injuries that he sustained as a result of respondent's conduct.

On October 25, 2013, I reopened the record for petitioner to provide me with a chart pinpointing significant times and events on its exhibits 6 through 9, its video recording of the incident, and audio recordings of related interviews. The record closed on November 8, 2013.

For the following reasons, I recommend that respondent be terminated from his employment.

RECOMMENDATION

Because respondent admitted that he used excessive force, the only issue is what penalty to impose.

Respondent is 33 years old and has been a correction officer for the past five years. Although not particularly tall, he is of stocky build. Initially, he was trained at the Department's Academy for about four months on a variety of topics, including interpersonal communication and use of force, and has since received annual training (Tr. 131-34). He testified that he has one prior disciplinary penalty consisting of an 18-day suspension from work for failing to obtain medical attention for an inmate (Tr. 134-35). A personnel abstract of respondent's work history which I requested and obtained from the Department confirms that he was appointed as a correction officer on November 20, 2008, and has one prior instance of discipline in July 2011, as respondent testified. But the abstract lists the disposition as "pending." In order to recommend an appropriate penalty, some discussion of the testimony and the evidence that led to the charge against respondent is warranted.

Respondent testified that on June 16, 2012, his original tour of duty was 7:00 a.m. to 3:00 p.m., but he "was stuck for overtime" and assigned to the day room when the use of force incident with inmate Tamel Dixon ("inmate" or "Dixon") occurred, some time after 9:30 p.m. Day room officers ensure that inmates are not fighting in the room or engaging in conduct that would cause harm to themselves or others (Tr. 135-36). That evening, Dixon was being "disruptive," and respondent's attempts to calm him were fruitless, so respondent ordered Dixon to remain in the day room. As respondent went to update his log book, Dixon left the day room and went into the vestibule. Respondent pursued him and ordered him back to the day room. But Dixon began to threaten respondent and CO Kirk Hylton, who regularly works in that housing unit (Agbai: Tr. 136; Hylton: Tr. 71). Respondent ordered him to place his hands against the wall, but Dixon balled his fists in a threatening manner. Respondent grabbed Dixon's hands and tried to place them against the wall. A struggle ensued involving Dixon, CO Hylton, and respondent, during which Dixon elbowed respondent in the face and threw punches towards his midsection. Respondent grabbed Dixon's hands, and when the inmate was on the ground,

grabbed his legs. Flex cuffs were applied to restrain Dixon. Respondent stated that “[a]t the end of the struggle, I allowed the situation to get the best of me and lost my composure and made contact with my, with his head with my foot” (Tr. 136-37, 140-42).

After the incident, respondent wrote a use of force report in which he added that inmate Dixon cursed at him and CO Hylton on multiple occasions and ignored their directives (Tr. 142; Pet. Ex. 2). He also wrote that Dixon struck him in his facial area with an elbow, and he responded by striking the inmate in his facial area with a closed fist. Respondent further wrote that when he and CO Hylton forcibly took Dixon to the floor in an effort to secure him, it caused “said inmate to hit [his] facial and mouth area on the floor,” and that subsequently, respondent lost his balance while getting up. However, in an addendum to his report, which he prefaced with “Herein is an ordered report to a continuation [of] use of force report,” respondent indicated that his foot “momentarily and inadvertently made contact with said inmate[’s] head” and that he “quickly repositioned his foot and moved it away from said inmate[’s] head.”

Video footage of respondent’s interaction with the inmate which culminated in his use of force failed to corroborate that respondent’s contact with Dixon’s head was inadvertent (Pet. Ex. 6). Rather, it demonstrated that he purposefully stomped on inmate Dixon’s head. The following is a tabulation of times and interaction between respondent, CO Hylton, and inmate Dixon, as depicted in the video footage recorded on one of petitioner’s cameras:

CAMERA 23:15-RNDC3MNVEST2 (Pet. Ex. 6)

Times (p.m.)	Activity
9:44:33	Inmate Tamel Dixon ¹ enters the vestibule with a bag which he tosses in the corner. He is immediately followed by respondent, who is holding flex cuffs in his right hand. Dixon stands with his back against the mesh partition.
9:44:50	CO Hylton enters the vestibule.
9:44:59	CO Hylton takes Dixon’s bag and places it on the other side of the room.
9:45:06	Dixon still has his back against the mesh partition and his palms are down against the wall.
9:45:14	Respondent grabs Dixon by the right hand while CO Hylton approaches the inmate from the left side and grabs his left arm. Both officers struggle to gain control of Dixon’s arms and hands in order to handcuff him.

¹ At trial, CO Hylton identified the inmate in the video.

Times (p.m.)	Activity
9:45:58	During the struggle, Dixon's elbow comes close to striking respondent's face. Respondent reacts by slamming Dixon against the mesh partition.
9:46:00	The officers continue to struggle with Dixon.
9:47:25	Respondent bends and grabs Dixon's right leg and attempts to lift him off the ground. CO Hylton assists respondent by grabbing a hold of Dixon's legs from behind.
9:47:39	The officers put Dixon on the ground and continue their struggle to gain control of his arms and hands.
9:47:56	With both officers above him, respondent seems to strike Dixon in the head.
9:48:06	Respondent appears to strike or forcefully push down against Dixon's head.
9:48:18	Respondent appears to strike or punch Dixon in the head while he is on the floor and the officers are on top of him.
9:48:37	Dixon manages to raise himself onto his knees and the officers continue their struggle with him.
9:48:46	Respondent places one hand on Dixon's lower back and appears to have his other hand on the inmate's head which is close to the floor. Respondent then forcefully pushes on Dixon.
9:49:20	Respondent comes to his feet and continues his struggle to restrain Dixon.
9:50:06	Respondent appears to strike Dixon in his head or face with his right hand.
9:50:17	Respondent grabs Dixon's legs while CO Hylton continues to try to gain control of the inmate's arms and upper body.
9:50:21	Respondent folds the inmate's right leg over his left leg and puts his knee on top of Dixon's legs.
9:50:23	Respondent presses Dixon's left leg on top of his folded right leg by forcefully pushing his left foot. Simultaneously, CO Hylton is on top of Dixon's back.
9:50:32	Captain Jerzy Skupien enters the vestibule, picks up the flex cuffs from the ground, and moves towards Dixon.
9:51:18	Captain Skupien secures the inmate's hands and steps away.
9:51:20	Respondent releases Dixon's legs and steps around to the left of the vestibule and approaches the area where Dixon's head is on the floor.
9:51:26	Respondent stomps on Dixon's head with his right foot. The view is partially obstructed by Captain Skupien.
9:51:35	Both officers pull the inmate to his feet. Respondent places Dixon against the mesh partition. Drops of blood can be seen on the floor.
9:51:45	Respondent picks up his radio off the floor while holding Dixon by his collar.
9:51:51	Dixon collapses to the floor while respondent holds him by the back of his collar.

Times (p.m.)	Activity
9:52:21	Respondent releases the inmate who is still on the floor.
9:52:24	At the left of the frame, Captain Skupien appears to leave the vestibule.
9:52:33	Dixon maneuvers himself to his previous location on the floor and attempts to retrieve something with his mouth. The view is partially obstructed by CO Hylton.
9:52:50	Respondent lifts Dixon to his feet and CO Hylton grabs the inmate. The officers place the inmate to face the mesh partition and hold him there with their hands on his back.
9:54:15	Captain Skupien reenters the vestibule and leaves, while the officers continue to hold Dixon against the mesh partition.
9:58:22	Captain Skupien reenters the vestibule and respondent steps away from Dixon.
9:58:41	Captain Skupien and respondent exit the vestibule and CO Hylton continues to hold Dixon against the mesh partition.
9:59:34	Captain Skupien and respondent reenter the vestibule. Respondent talks and points, appearing to explain something to the captain, while CO Hylton continues to hold Dixon.
10:00:30	Captain Skupien looks to the area on the floor where Dixon's blood spots could be seen.
10:00:38	Dixon is removed from the area.

Petitioner conducted an extensive investigation, and its investigator, Bruce Arnold, who testified at the hearing, submitted a 29-page report on December 21, 2012 (Pet. Ex. 1), after: 1) viewing the video footage of the incidents leading up to respondent's use of force against the inmate; 2) reviewing use of force reports completed by respondent, CO Hylton, and Captain Skupien (Pet. Exs. 2-4); and 3) interviewing the staff involved in the incident, witnesses (including Department staff and inmates), and inmate Dixon. Investigator Arnold recommended that respondent be charged with the use of unnecessary and excessive force.

The video footage of the incident was also reviewed by Captain Roxane Davis, a 25-year Department employee, who is currently an instructor at the Department's Academy and teaches, among other things, use of force techniques (Tr. 120-22). Captain Davis testified that officers are taught that the force used must be proportionate to the circumstances encountered. Accordingly, officers are trained in technique, from the least to the greatest degree of force that may be used. In that vein, an officer may use lethal force to prevent himself or another officer from being the subject of lethal force by an inmate (Tr. 123-28). According to Captain Davis,

the Department's directives "specifically says (sic) that kicks are allowed, but only as a last resort when you're preventing serious physical injury from occurring," but it prohibits "any blows to the head." Thus, punches, kicks, and even the use of the baton, should be aimed "away from the head, not towards it" (Tr. 128). She concluded that the force used on inmate Dixon after he had been restrained on the floor was unjustified (Tr. 128-29).

In an audio recording of the investigator's interview of respondent on September 14, 2012, conducted pursuant to Mayoral Executive Order No. 16 ("MEO 16"), respondent admitted that he "stomped the inmate's head" (Pet. Ex. 8, counter: 08:26-08:36) and that he "kicked [the inmate's] head into the floor" (Pet. Ex. 8, counter: 08:38-08:46). He stated that he lifted his foot and pushed down on the back of Dixon's head, causing the inmate's face to hit the floor. CO Hylton provided a similar description which he captured peripherally (Tr. 85). He added that he heard the inmate scream and when he looked, Dixon's face was bloody and he was missing a tooth (Tr. 86-87). Photographs of the inmate taken after he had obtained treatment show a big gap at the front of his mouth with his front tooth missing. A photograph of the tooth that broke out of his mouth as a result of respondent's actions was also provided. In addition, the photographs also showed that the inmate sustained injuries to his chin, which required sutures (Tr. 28, 54; Pet. Exs. 5A-D).

During the MEO 16 interview, respondent also admitted to the investigator that he struck Dixon several times in his face and facial area while the inmate was on the floor, in reaction to Dixon's attempt to bite his (respondent's) wrist (Pet. Ex. 8, counters: 11:35-11:51, 12:49-13:45, 35:20-36:25). But such an allegation was neither noted in his use of force report nor raised at trial. Further, even though he noted that his addendum to the use of force report had been ordered, respondent claimed that it was written on his own initiative after he had calmed down and realized that he had made a mistake (Pet. Ex. 8, counter: 45:23-45:46). At trial, he insisted that when he wrote the initial report, everything was "blurry" (Tr. 143-44).

Respondent expressed remorse for his actions, both during his MEO 16 interview, and at trial, but nevertheless attempted to justify them. He maintained that while on his way to work on the day of the incident, he learned that his best friend had been murdered the night before. He was "in a fog for the whole day" and did not know what to do. As the day progressed, he felt more upset, hurt, and confused, and he wanted to go home and be with family and friends. The unexpected loss of his friend "and then being assaulted and everything," caused him to lose his

composure and resulted in his use of excessive force against the inmate (Tr. 137-39, 142, 145; Pet. Ex. 8, counters: 08:16-08:23, 17:53-18:45).

Immediately following the incident, respondent was suspended for 30 days. He is currently on modified duties, which he describes as “frustrating” because he sits in a room all day and does nothing (Tr. 146). Respondent testified that for about five months preceding the trial, he has been meeting with a therapist to try to work through his issues, and it has been helpful. Thus, he entreats this tribunal to give him a second chance (Tr. 147).

Petitioner seeks a recommendation of termination of respondent’s employment.

Penalties for excessive force range from a 15-day suspension to termination of employment, based on the force used and the employee’s disciplinary record. *Compare Dep’t of Correction v. Johnson*, OATH Index No. 1639/05 (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 suspension imposed where officer, with an unblemished disciplinary record, pushed an inmate’s head into a cell door and submitted a misleading report) *with Dep’t of Correction v. Monclova*, OATH Index No. 1206/13 at 18-20 (June 20, 2013) (termination recommended where respondent, who had received a 50-day suspension for prior misconduct that included excessive use of force and false reporting, punched an inmate in the face and grabbed a visitor by the neck, and lied about it).

However, termination of an employee with little or no disciplinary history is not precluded where the proven conduct is so egregious that a lesser penalty is inadequate. *See Keith v. NYS Thruway Auth.*, 132 A.D.2d 785 (3d Dep’t 1987) (upholding termination for first offense where incident was egregious); *Dep’t of Correction v. Andino*, OATH Index Nos. 731/13 & 1000/13 (May 14, 2013) (termination recommended for officer with brief tenure and no prior discipline where he was found guilty of using excessive force against inmates and making false statements on multiple occasions); *Dep’t of Correction v. Debblay*, OATH Index Nos. 2008/04, 2009/04, 2011/04 & 2012/04 (Dec. 3, 2004) (four officers with little or no prior discipline terminated where one used excessive force against inmate resulting in multiple injuries to the inmate, including fractured ribs, a cut on his eye, and damage to his ear drum, and all officers collaborated to create a false account of the incident and altered the shower log book); *Latimer v. Dep’t of Health*, NYC Civ. Serv. Comm’n Item No. CD 84-77 (Oct. 5, 1984) (in spite of policy

of progressive discipline, penalty of termination for first offense upheld where proved misconduct was intentional and obstinate).

Respondent relies on this tribunal's recommendation in a number of cases where a penalty short of termination was recommended. In particular, respondent cites to *Department of Correction v. Ford*, OATH Index Nos. 734/13, 735/13, 736/13, 737/13, & 738/13 (May 23, 2013) (60-day and 25-day suspensions recommended for two officers who participated in a use of excessive force that caused minor injuries to an inmate. Lighter penalties recommended for one officer who made false statements and misleading statements during an MEO 16 interview and submitted a false and misleading use of force report, and two other officers who submitted false and misleading use of force reports). In that case, CO Ford, the main perpetrator of the use of force, had received a prior recommended 30-day suspension for similar misconduct which was still pending, and before that, a 15-day suspension for failure to safeguard his weapon. Administrative Law Judge Astrid B. Gloade found mitigation in the following facts: the inmate, who was "disruptive, provocative, and admittedly aggressive" and caused heightened tension among the officers immediately before the incident, set in motion his encounter with respondent Ford; the inmate was struck in the face and sustained relatively minor injuries requiring no serious medical attention; and it was impossible to determine from the record, how much of the inmate's injury was attributable to CO Ford. *Id.* at 26-27.

I find the force used against the inmate in *Ford* incomparable to that employed by respondent here. There, the inmate was on his feet when he was punched by the respondent. And the force was not directed at the inmate's head. Here, the inmate had been subdued from behind. His hands were cuffed by Captain Skupien who then stepped away, and his face was on the floor. Therefore, no force was needed. Notwithstanding, respondent savagely and intentionally stomped on the inmate's head causing disfigurement to the inmate through the loss of a permanent front tooth, as well as sutures beneath his chin. Further, I find no mitigation in respondent's claims that the inmate had been disruptive, or that news of the murder of his best friend had so upset his equilibrium that it caused his extreme reaction. An inmate being disruptive is not an anomaly and correction officers receive extensive training on how to handle such inmates. Second, respondent provided no proof that his friend had been murdered. But even if true, that does not justify his evident rage against Dixon, which he demonstrated in the presence of his captain. Moreover, there is a reason why blows to the head are prohibited, even

in situations where force is necessary. They are especially dangerous and may cause serious physical injury or even death.

Finally, I did not believe respondent's testimony that he had initially written his use of force report in a blur and added to it when he had calmed down. His initial report contained much detail suggesting clarity of mind. It was therefore apparent that he consciously distorted the truth with his claim that he lost his balance while getting up, and when the report was reviewed, he was directed to add to it. In the addendum, he sought to dilute the impact of what he had done. There was no momentary and inadvertent contact between respondent's foot and the inmate's head, as respondent claimed. In fact, realizing the futility of that claim, he came clean during the MEO 16 interview, by admitting to Investigator Arnold that he "kicked [the inmate's] head into the floor" (Pet. Ex. 8, counter: 08:38-08:46).

While respondent's decision to see a therapist is laudable, his testimony indicates that he opted to do so only after he had been served with the charge in June 2013. I therefore find it questionable that he even fully appreciated the gravity of his conduct prior to the preference of charges.

In sum, I find respondent's conduct to be deliberate, savage, and reprehensible, for which the only appropriate penalty is termination of his employment, and I so recommend.

Ingrid M. Addison
Administrative Law Judge

November 25, 2013

SUBMITTED TO:

DORA B. SCHIRO
Commissioner

APPEARANCES:

ORBIEN DeARMAS, ESQ.
Attorney for Petitioner

KOEHLER & ISAACS LLP
Attorneys for Respondent
BY: PETER TROXLER, ESQ.

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

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IN THE MATTER OF THE APPEAL OF:

AGBAI, RICHARD

DATE: 06/03/14

Appellant:

-against

NYC DEPARTMENT OF CORRECTION,

Respondent:

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

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PRESENT:

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

CHARLES D. MCFAUL, COMMISSIONER

PETER C. TROXLER, ESQ.
REPRESENTATIVE FOR APPELLANT

ORBEIN ANGEL DeARMAS, ESQ.
REPRESENTATIVE FOR RESPONDENT

APPELLANT PRESENT

STATEMENT

On Thursday, May 22, 2014, the City Civil Service Commission heard oral argument in the appeal of **RICHARD AGBAI**, Correction Officer, NYC Department of Correction ("DOC"), from a determination by the DOC, finding him guilty of charges of incompetency or misconduct and imposing a penalty of **Termination** following an administrative hearing conducted pursuant to Civil Service Law Section 75.

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

In the Matter of the Appeal of
RICHARD AGBAI
Appellant
-against-
NEW YORK CITY DEPARTMENT OF CORRECTION
Respondent
Pursuant to Section 76 of the New York
State Civil Service Law
CSC INDEX NO.: 2014-0064

DECISION

PRESENT:

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASHINGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL
COMMISSIONER

RICHARD AGBAI ("Appellant") appealed from a determination of the New York City Department of Correction ("DOC") finding him guilty of incompetency or 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 May 22, 2014.

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: June 3, 2014