Dep't of Correction v. Stepney

OATH Index Nos. 390/13, 391/13, 392/13 (Mar. 4, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case Nos. 35373, 35459, 35374 (Dec. 20, 2013)

Correction officers guilty of failing to anticipate a use of force and submitting false reports. ALJ recommended penalties of 30 days' suspension. Motion for spoliation sanctions based on petitioner's failure to preserve video was denied where respondents failed to show they were prejudiced by unavailability of evidence.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
DERRICK STEPNEY, FREDDIE BRANTLEY, AND KAREEN SIMPSON
Respondents

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This disciplinary proceeding was referred by petitioner, the Department of Correction (the "Department"), pursuant to section 75 of the Civil Service Law, charging Officers Derrick Stepney, Freddie Brantley, and Kareen Simpson with failure to anticipate a use of force, conducting an improper use of force, and false reporting. Respondents deny the charges.

The hearing was conducted before me on January 14, 2013. Petitioner presented five Department witnesses: Warden Rivera, Deputy Warden Canty, Assistant Deputy Warden Johnson, and Captains Muniz and Thompson. Respondents testified on their own behalf.

I find that petitioner established the misconduct charged, as set forth below, and recommend respondents each receive a 30-day suspension.

PRELIMINARY MATTER

In a pre-trial motion, respondents moved for spoliation sanctions due to petitioner's destruction of surveillance video. I denied the motion at the commencement of trial having found no prejudice to respondents but indicated respondents could reassert the motion on the

basis of some prejudice revealed during trial (Tr. 5). In closing, counsel renewed the motion. Having found no evidence during trial that altered my analysis, respondents' motion is again denied.

Respondents made their motion on January 7, 2013, on the basis of surveillance video about which petitioner's witnesses would give testimony at trial. The video was destroyed, in violation of Department rules, before it could be produced to respondents in discovery; thus, respondents would have no ability to contradict petitioner's account of the video. Moreover, the trier of fact would have no ability to consider the veracity of petitioner's account without viewing the video herself. Respondents, therefore, argued for the imposition of a spoliation sanction encompassing an adverse inference or preclusion of witness testimony concerning what was seen on the video. Respondents failed, however, to prove they suffered any prejudice for their inability to view the video before its destruction, in that, they articulated no version of events different from petitioner's as to the matters seen on the video.

The relevant facts, which are undisputed, are as follows. Surveillance video is taken by stationary cameras installed at various locations throughout Anna M. Kross Center ("AMKC"). In particular, cameras are located in the Intake area outside of the pen where newly arrived inmates are held while being processed. These cameras are not positioned to view the interior of the Intake pen (Pet. Ex. 6; Tr. 19), where the use of force in dispute here occurred.

It was the responsibility of the Deputy Warden for Security, Yolanda Canty, to notify the Special Operations Division, where the Department's surveillance videos are centrally located and archived, to burn the relevant portion of the video to a DVD. She failed, however, to make a timely request for the relevant footage. She testified that she wrote up the request to have the video burned but failed to send it (Tr. 59). She was given a corrective interview for this failure (Tr. 18, 31). The Department's failure to preserve the video prevented the video from being produced to and viewed by respondents, their counsel, and by the tribunal. Several Department witnesses viewed the video shortly after the use of force occurred and gave testimony about what they saw at trial.

Under New York law, a party seeking sanctions based on spoliation, or the destruction of evidence, before the adversary has an opportunity to inspect them must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed, (2) that the records were destroyed with a "culpable state of mind," and (3) that the destroyed

evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. *VOOM HD Holdings, LLC v. EchoStar Satellite, LLC*, 93 A.D.3d 33, 45 (1st Dep't 2012) (adopting the spoliation analysis set forth in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)). Respondents have established only the first element.

As for the second element, respondents have not even alleged willful destruction of the video evidence or bad faith; nor was there any such proof. *See VOOM HD Holdings*, 93 A.D.3d at 45 (when the destruction of evidence is merely negligent, relevance – or prejudice – must be proven by the party seeking sanctions). Moreover, there was no hint that the Deputy Warden's error was the product of interest, bias or bad faith.

As for the third element, respondents failed to show prejudice to any claim or defense they sought to prove. As is set forth in the summary of trial testimony below, petitioner's witnesses observed the following on the video: as respondent Simpson walked outside the pen, he jerked his head and wiped something from his face, then left the pen area and returned with several other officers. None of these details were disputed by respondents. The actions occurring inside the Intake pen during the use of force were not captured by the video, therefore its absence did not prejudice respondents' assertions that the use of force was consistent with the Department's Directive.

Having found an insufficient basis for sanction, respondents' motion must be denied. *See also Dep't of Correction v. Archibald*, OATH Index No. 2214/08, mem. dec. at 2-3 (Aug. 15, 2008) (motion to dismiss for spoliation of evidence denied in the absence of evidence that log books were deliberately destroyed and where other evidence that might assist respondent in defending himself against charges was available); *Dep't of Correction v. Finch*, OATH Index No. 652/07 at 12 (Nov. 28, 2006), *modified on penalty*, Comm'r Dec. (May 24, 2007), *modified on appeal*, NYC Civ. Serv. Comm'n Item No. CD 08-19-M (Mar. 19, 2008) ("the taking of an adverse inference for one party's failure to provide evidence is an extreme remedy which requires a showing of bad faith, intentional destruction of the evidence, or its willful non-production.").

ANALYSIS

Respondents are correction officers regularly assigned to the Intake area at AMKC. Their regular tour of duty is the midnight tour. They are charged here with failure to notify a

supervisor of an anticipated use of force that occurred on March 30, 2012, use of impermissible and/or excessive force against an inmate, and false reporting. Respondents deny violating the Use of Force Directive and contend that they exercised their best judgment under the circumstances (Tr. 13).

The following facts are not in dispute. On March 30, 2012, at approximately 2:00 a.m., inmate Labasta spat on respondent Simpson as he walked past the Intake pen where the inmate was locked inside. There were eight to 12 other inmates inside the pen at the time (Tr. 34). The inmates and respondent Simpson were the only eyewitnesses to the spitting. Department witnesses testified, without dispute by respondents, that video surveillance of the area showed Officer Simpson react as he walked past the pen by jerking his head and wiping the side of his face; he immediately walked away to retrieve the keys and returned to the pen with several other officers (Tr. 18, 53-54, 71-72, 108-09, 156-57, 164; Pet. Ex. 10). The other inmates inside the pen were removed by two other officers before respondents entered the pen. The use of force occurred at that time, before respondents removed inmate Labasta in flexcuffs. Inmate Labasta refused to provide a written statement about what occurred and reportedly stated in brief that he was "tired of being in that pen all day" (Pet. Ex. 10 at 2).

The Department's investigation of the use of force determined that the inmate suffered a back abrasion during the use of force (Pet. Ex. 10 at 2).

Anticipated and Impermissible and/or Excessive Force

Warden Rivera, Deputy Warden Canty, and Captain Thompson, who was assigned to investigate the use of force, testified that spitting on an officer constitutes an assault on staff and, once Officer Simpson was spat on, he should have immediately notified his supervisor about the assault (Tr. 21, 64, 113).

The Use of Force Directive provides that a supervisor must be notified whenever there is an anticipated use of force and the inmate involved does not pose an immediate threat. Directive 5006R-C § IV(C)(1). The purpose of the Directive is to minimize the use of force in the jail where possible (Tr. 9, 31). Thus, the Directive recommends that "alternative methods" be used to resolve conflict before force is used, "[a]bsent circumstances requiring immediate physical

intervention." Directive 5006R-C § V(A)(1).[1] The Directive prohibits the use of retaliatory force "to punish an inmate." Directive 5006R-C § III.

AMKC Warden Luis Rivera testified that, because the inmate was locked inside the pen at the time he assaulted Officer Simpson, there was no further threat to the officer, who was in the position to walk away (Tr. 21-22). Since Officer Simpson was not trapped or cornered by the inmate, he had the time and opportunity to notify a supervisor. A supervisor would be expected to assemble a team to contain the situation, to decide how best to restrain the inmate, and to determine whether the inmate required mental assessment or a spit mask or should be relocated to an area where he could not harm others (Tr. 23, 30).

Deputy Warden Canty reviewed the videotape and saw no immediate threat to Officer Simpson or to the other inmates who were in the pen with him and no immediate need for him to enter the pen. She believed that a supervisor should have been contacted because going into the pen after being assaulted in that manner was likely to lead to a use of force (Tr. 55). As a neutral, a supervisor is in a better position to assess and apply alternatives to force. After reviewing the tape, Deputy Warden Canty concluded that the use of force was "both unnecessary and anticipated," the inmate "posed no immediate threat," and respondent had "ample opportunity" to notify the area supervisor before going into the pen (Pet. Ex. 6).

Respondents, who all concede that they did not notify a supervisor prior to the use of force, all denied that they anticipated the use of force in this situation.

Respondent Stepney testified that respondent Simpson told him that "the inmate was spitting," so he went with him to remove the inmate from the pen (Tr. 124). He said that Officer Simpson did not tell him the inmate had spat *on him* (Tr. 125, 137). Officer Stepney said he had no intention of using force, even though he had been told the inmate was "spitting outside the pen," according to his report (Tr. 139-40; Pet. Ex. 1). When the officers arrived and opened the door to the pen, the inmate "spit at Simpson again," in the face, from about eight feet away (Tr. 124, 131, 141). The officers then gave verbal orders to the inmate to stop spitting (Tr. 140).

Officer Stepney testified that, even though the inmate was inside the cell, he remained an "immediate threat" to other inmates in the pen and to anyone walking past the pen; thus, he

[1] The Directive offers alternative methods of conflict resolution, such as keeping a safe distance from the inmate and speaking in a deliberate manner. Directive 5006R-C § V(A)(1) (a) & (b). For inmates who require mental health intervention, the Directive instructs personnel on how to carry out an "extraction," which is conducted "in a controlled environment where alternatives to conflict have been exhausted." Directive 5006R-C § V(A)(2).

believed they were preventing harm to others by acting immediately, before contacting the captain (Tr. 126-27). Stepney said that the inmates sharing the pen with Labasta "ran out of there" as soon as they opened the door to the pen, apparently wanting "no parts of that guy" (Tr. 131). These inmates were put under the control of Officers Rivera and Wiley. Respondents applied upper body control holds to inmate Labasta, took him to the ground, cuffed him and moved him to the Plexiglas pen, where he would be unable to spit on anyone outside the pen (Tr. 131). When that pen was not available, the officers returned Labasta to the same pen they had taken him from (Tr. 132-33).

Respondent Brantley testified that respondent Simpson was retrieving the keys to the pen when Simpson told him that an inmate "was spitting" and "had spit on him" (Tr. 149). He conceded that his report fails to mention that Officer Simpson told him the inmate spat on him before they proceeded to the pen (Tr. 155). Officer Brantley's report states that force was necessary because the inmate "was spitting all over the area of pen #5 inside and outside and at officers" (Pet. Ex. 2). He stated that the inmate "was still spitting" when they entered the pen (Tr. 150), and his report states that their verbal orders to stop spitting prompted the inmate to spit in Officer Simpson's face (Pet. Ex. 2 ¶5). He said it was important to remove the inmate from the pen to stop him from spitting because of the risk of spreading disease and provoking the other inmates; so they brought him to the Plexiglas pen which was not available because it was being cleaned (Tr. 151-52).

He conceded they did not wait for the captain and said he "assumed" that Officer Rivera, who did not initially follow the group to the pen, was notifying the captain (Tr. 157). Officer Simpson, on the other hand, said he knew that no one was notifying the captain because all the other officers were following him into the pen (Tr. 172).

Respondent Simpson testified that he was spat on twice by inmate Labasta. He testified that, as he handed out property receipts to the new inmates in the Intake pen, he saw inmate Labasta spitting and ordered him to stop, and the inmate spat on his shirt (Tr. 177). When Simpson left the area to go get the keys to the pen, he saw Officer Brantley who asked what he was doing. He told Brantley that an inmate "was spitting" and Brantley and other officers followed him to the pen (Tr. 165, 174). He testified that it was important to remove the inmate "as soon as possible" to prevent the inmate from getting hurt, but he disagreed that the situation suggested that force might be necessary (Tr. 165-66). He stated that he would have moved the

inmate on his own had the other officers not followed him to the pen, that he had no intention of asking for help, and he intended to do "whatever [he] needed to do" to gain control of the situation (Tr. 169-70). He saw no need to call the captain before removing the inmate (Tr. 168).

Just as he opened the pen the inmate spat in his face from about three or four feet away (Tr. 166). Incredibly, he testified that he failed to issue any verbal orders to the inmate until after the officers entered the pen and the inmate had already spat on him a second time (Tr. 176). Simpson denied being angered by these assaults ("upset maybe") (Tr. 169). He also denied having told Officer Brantley, contrary to Brantley's testimony, that the inmate had earlier spat on him (Tr. 172, 174). He gave no credible explanation for his purported failure to inform his colleagues of so provocative an event. Although I credited Stepney's testimony that he was not told that Simpson had been spat on, I did so having no particular reason to disbelieve Stepney and knowing that individuals who act as a group often do so on the basis of less than perfect information. However, due to Brantley's admission, I did not credit Simpson's denial that he told any of the officers about being spat on. The likely reason for this false denial, I believe, was to avoid any claim that he returned to the pen in anger to retaliate against the inmate. Having observed Officer Simpson angered by questions posed to him on the witness stand (Tr. 171), I had no difficulty concluding that he was angered by being spat on by an inmate.

His anger was on display in his testimony about the decisions he made just after the first assault. His decision to confront the inmate alone and to do "whatever [he] needed to do" to gain control of the situation exhibited the type of rash thinking produced in the throes of anger. His impulsive immediate return to the pen without a supervisor led to the second assault upon him, which could have been avoided. The fact that no verbal orders were issued before the officers entered the pen, as Simpson and Stepney both admitted, is further evidence of rash decision making.

The tribunal has held that an officer should reasonably anticipate a use of force under circumstances where an inmate is acting out or where the officer has had recent conflict with an inmate. *See, e.g., Dep't of Correction v. Belgrave*, OATH Index Nos. 124/04 & 657/04 at 15 (Sept. 1, 2004) (respondent failed to anticipate force with an inmate who was cursing and disobeying orders to exit the vestibule); *Dep't of Correction v. Morgan*, OATH Index No. 1228/01 (Sept. 24, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 02-74-SA (Sept. 11, 2002) (inmate's unruly actions should have led respondent to anticipate the need for force if he

opened inmate's cell); *Dep't of Correction v. Henry*, OATH Index No. 2101/96 (Jan. 3, 1997) (respondent's failure to notify captain of his recent argument with an inmate over telephone use prior to searching inmate's cell constituted a failure to anticipate force); *Dep't of Correction v. Deravin*, OATH Index No. 627/93 (Jan. 13, 1994) (captain should have maintained a heightened alertness to prevent an inmate from attacking an officer after the inmate threatened to attack the officer); *see also Dep't of Correction v. Dominguez*, OATH Index Nos. 550/10 & 551/10 at 6 (Jan. 8, 2010) (no reason to anticipate a use of force where, except for the inmates' initial failure to follow an order, there were no other signs that they were angry or might be violent).

Here, all three officers knew the inmate was acting out by spitting in and around the Intake pen, as they all testified (Tr. 125, 149, 164). These facts are quite similar to an earlier case where the tribunal based its finding on the fact that the officer was aware that "the inmate was acting unruly in his pen" and should have expected that "by opening the door, respondent was creating the possibility that the inmate would attack him. Whereas, if the cell was left closed and a supervisor were called, assistance could have been on the scene, with a camera." *Morgan*, OATH 1228/01 at 3. The case for liability against Officers Simpson and Brantley is even stronger because they knew the inmate had already spat on Officer Simpson before they approached. Certainly, where an officer has just been spat on by an inmate, an officer must notify a supervisor of an anticipated use of force before approaching that inmate, not only because of the unruliness of the inmate but also because of the emotion that such an assault will visit upon the officer.

Officer Simpson testified, falsely I believe, that the inmate initially spat on his shirt, rather than his face, but I did not credit that portion of his testimony.[2] Perhaps he was searching for a way to diminish the first assault to explain why he would not have mentioned it to his colleagues, as he claimed. However, I credited the supervisors who saw the video and reported seeing him jerk his head and wipe his face, strongly suggesting he was spat upon in the face.

Directive 5006R-C requires that a supervisor be notified "[w]henever the use of force is anticipated and the inmate does not pose an immediate threat." Directive 5006R-C § IV(C)(1). I found no immediate threat posed by the inmate and that respondents should have notified their supervisor before entering the pen to subdue him.

[2] This testimony was surprising as it was the only indication in the record that the inmate spat anywhere other than Simpson's face. Despite the inconsistency with their testimony, Officer Simpson did not directly refute his supervisors who said they saw him on video wipe something from his face.

There was no evidence that "immediate physical intervention" was necessary, as respondents contend.[3] *See* Directive 5006R-C § V(A)(1). The events here did not unfold "spontaneously." *Dep't of Correction v. Major*, OATH Index Nos. 385/90 & 386/90 at 20 (Mar. 26, 1990) (events happened "quickly and spontaneously and with little time for the respondents to react"). Despite their claims of urgency, there was no report that inmate Labasta was spitting at other inmates (Tr. 59, 120),[4] and respondents waited for eight to 12 other inmates to be removed from the pen before they addressed the unruly inmate. Captain Muniz, the Intake supervisor, was stationed inside the Intake area at the time of the incident and she arrived on scene in a short amount of time (Tr. 20, 89, 153). And, when the Plexiglas pen proved unavailable, respondents returned Labasta to the same pen and did not implement alternatives such as the spit mask, further indication that claims of dangerousness and exigency were exaggerated.

Thus, petitioner's proof has sustained the charge that respondents failed to notify a supervisor prior to an anticipated use of force in violation of the Use of Force Directive, as alleged in specification 1 of the charges.

The evidence on this record demonstrates rash action, poor communication among these officers, and a lack of attention to alternative methods of managing this inmate, all of which contributed to the improper use of force here. However, the evidence does not establish an independent basis for misconduct for a premeditated or retaliatory use of force. Given the spitting the inmate was engaged in, it was reasonable to decide to move the inmate to another pen and force may have been needed to do so even after the captain arrived and calmed tempers, but that is a decision that should have been left to the captain. The evidence does not show that the amount of force used to move the inmate to another location, which resulted in an abrasion to his back, was excessive. I therefore find that specification 2 should be dismissed.

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[3] Captain Muniz testified that it would be dangerous if an inmate were hurling excretions and bodily fluids, such as feces, blood, urine or spit from a cell, or throwing them inside the cell at other inmates, and that such a situation should be handled "instantaneously" (Tr. 104), but those facts were not a part of this record.

[4] Oddly, Captain Muniz stated that respondents told her they had to get the inmate out of the pen because he was being assaultive to other inmates (Tr. 93), testimony that was corroborated by none of the respondents. Captain Thompson, who investigated this use of force and interviewed Officer Simpson days after the incident, did not recall him making any such statement (Tr. 109-10).

False Reporting

Respondents each submitted a Use of Force Report, entered in evidence as Petitioner's Exhibits 1, 2, and 3. Petitioner alleges that various statements set forth in the reports are materially false or misleading. As set forth below, I find that specification 3 is sustained.

Officer Simpson

Warden Rivera considered Officer Simpson's report to be false in that it led him to believe that the other officers were present with Officer Simpson at the time the inmate assault took place, when in fact Officer Simpson walked away after being spat on and returned with the other officers (Tr. 25; Pet. Ex. 3).

Officer Simpson testified that the inmate spat on him twice, once when he was alone, handing out the property receipts, and a second time as he entered the cell with Officers Stepney and Brantley, but his Use of Force Report does not mention that he was assaulted twice and none of his superiors reported knowledge of a second assault. His report states that he witnessed inmate Labasta "spitting," he gave the inmate several orders to stop spitting, and the inmate spat in his face (Pet. Ex. 3 ¶¶4, 5). It continues by stating that after the inmate spat in his face, he, Stepney and Brantley used upper body control holds to restrain the inmate and place flex cuffs on him (Pet. Ex. 3 ¶6). This appears to be a confluence of the two assaults that he testified about, as if they were a single event. Simpson's report does not indicate that he was alone and outside of the pen at the time he was first spat on, that Stepney and Brantley were not there at that time, and that he left the area to get keys to open the pen and only then returned with Officers Stepney and Brantley. Further, his report states that he issued verbal orders before the inmate spat on him (Pet. Ex. 3 ¶5), which is consistent with his testimony about the first assault but contradicts his testimony about the second assault, where he failed to issue any verbal orders until after the inmate spat on him (Tr. 176). These misstatements and omissions are material and constitute misconduct. *See Dep't of Correction v. Saint-Phard*, OATH Index No. 172/11 at 11-12 (Nov. 23, 2010), and cases cited therein.

Moreover, Simpson failed to report that several other inmates were inside the cell with Labasta when he spat on him, all of whom were potential witnesses to the assault. Nor did he report, as charged, that those inmates were all removed from the cell before he and the other officers entered the pen, which would have put his superiors on notice that there was time to

contact a supervisor before commencing a use of force. These are also material omissions of fact that constitute misconduct.

I did not find Simpson's justification for force, set forth in paragraph 7, to prevent the inmate from harming others, to be false or misleading. It was the justification given by Simpson at trial and, although I disagree that it was sufficient justification, it is not an intentionally false or misleading statement.

Officer Brantley

In paragraph 4 of his Use of Force report, which asks for a description of events leading up to the incident "based on your own observations," respondent Brantley states that Simpson was "handing the new admissions their property receipts," as if he observed Simpson doing so (Pet. Ex. 2). But Brantley did not observe this, and he fails to report any of his own observations in paragraph 4 of his report. Moreover, since Brantley admitted being told by Simpson that the inmate had spat on him earlier, it is material that his report fails to indicate he was aware of this fact when they approached the pen and that the assault he witnessed was the second assault on Officer Simpson by the inmate. These material omissions constitute misconduct.

Officer Brantley also fails to report in the sequence of events that several other inmates were inside the cell with inmate Labasta when he spat on Officer Simpson and they were removed from the pen before the officers approached inmate Labasta. These inmates would have been witnesses to the use of force. This is also a material omission of fact.

I also found to be false his statement in paragraph 5, that the inmate was given orders to stop spitting before the officers entered the pen, given Simpson's testimony that they did not issue orders until after the inmate spat on him. This is a materially false statement.

I did not find Brantley's justification for force, set forth in paragraph 7, to prevent the inmate from spitting in and around the pen, to be false or misleading. It was the justification given at trial and, although I disagree that it was sufficient justification, it is not an intentionally false or misleading statement.

Officer Stepney

Given Officer Stepney's testimony that he was unaware the inmate had already spat on Officer Simpson before he went to the pen with the officers, Stepney's description of the facts that led up to the use of force, in paragraph 4 of his Use of Force report, is not materially false (Pet. Ex. 1).

However, he failed to report that several inmates were removed from the pen before the use of force occurred, as charged. These omissions are material and constitute misconduct. I also found his statement in paragraph 5, that inmate Labasta was given orders to stop spitting before they entered the pen to be materially false, given Stepney's and Simpson's testimony that they did not issue orders until after the inmate spat on Simpson.

Stepney testified that he was unaware of the initial assault upon Officer Simpson, so he cannot be faulted for failing to clarify the difference between the first and second assaults by the inmate in his description of the incident, set forth in paragraph 6. Moreover, I did not find his justification for force, set forth in paragraph 7, to prevent the inmate from harming others, to be misconduct. It was the justification given at trial and, though I disagree that it was sufficient justification, I cannot find that it is a materially false or misleading statement.

FINDINGS AND CONCLUSIONS

1. Petitioner established that Officers Simpson, Brantley and Stepney failed to notify a supervisor before an anticipated use of force in violation of Directive 5006R-C.

2. Petitioner failed to establish a separate instance of misconduct, as alleged in specification 2, for premeditated or retaliatory force.

3. Officers Simpson, Brantley and Stepney are guilty of misconduct for the materially false and misleading statements, and omissions, contained in their Use of Force reports.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondents' employee performance service reports (Form 22R) for purposes of recommending appropriate penalties. Officer Simpson, who was appointed to the Department on June 26, 2008, has no prior discipline. Officer Stepney, who was appointed to the Department on August 7, 2008, has no prior formal discipline. Officer Brantley, who was appointed on December 16, 1985, has three prior disciplinary penalties seven days in 1989, 10 days in 1997, and 15 days in 2012. The misconduct included being out of residence, failure to safeguard a weapon and, most recently, an arrest for domestic violence.

Respondents have been found guilty of failing to notify a supervisor of an anticipated use of force and making materially false statements and omissions in their reports. Although the inmate was not seriously injured by their actions, violations of the Use of Force Directive are a serious matter. The Department seeks 30-day suspensions for each officer for the misconduct proven: 15 days for the anticipated use of force and 15 days for the false reporting.

Indeed, the request reflects the normal range for misconduct of this type. *See Morgan*, OATH 1228/01 (15-day suspension for failure to anticipate use of force); *Dep't of Correction v. Harrington*, OATH Index No. 666/93 (July 20, 1993) (15-day suspension for officer with unblemished record who failed to anticipate a use of force and left his post without permission); *Henry*, OATH 2101/96 (15-day suspension for the failure to anticipate force). *See also Dep't of Correction v. Cooper*, OATH Index Nos. 2585/08 & 2586/08 at 9 (Nov. 12, 2008) (penalties for false reporting fall into 15 to 20-day range).

I recommend that respondents each receive a suspension of 30 days, 15 days for the failure to notify a supervisor before an anticipated use of force and 15 days for making materially false statements in their reports.

Tynia D. Richard
Administrative Law Judge

March 4, 2013

SUBMITTED TO:

DORA B. SCHRIRO
Commissioner

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