Dep't of Correction v. Dixon

OATH Index No. 156/16 (Oct. 23, 2015), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2016-336 (Aug. 18, 2016), **appended**

Petitioner proved that correction officer used excessive force on two occasions and filed a false report. ALJ recommended that respondent be terminated from his employment.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
TERRENCE DIXON
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Correction ("DOC" or "Department") pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent Terrence Dixon, a correction officer, used excessive force on two occasions and filed a false report (ALJ Ex. 1).

A hearing was held on October 5, 2015. Petitioner presented documentary evidence and the testimony of four witnesses. Respondent presented documentary evidence and testified on his own behalf. Respondent admitted to one excessive force charge but denied the other force and false reporting charges.

For the reasons below, petitioner proved the charges and respondent should be terminated from his employment.

ANALYSIS

Respondent has been a correction officer since 2007. He is assigned to the George R. Vierno Center ("GRVC") which houses the most violent inmates (Tr. 60, 84). The charges arise out of two use of force incidents with inmates.

April 10, 2014, use of force charge

Petitioner alleges that respondent used excessive and unauthorized force by punching an inmate with mechanical restraints in his closed fist. Respondent denies engaging in misconduct. This charge should be sustained.

The incident occurred in the presence of five correction officers and a captain. Except where noted, the essential facts are not in dispute and are set forth in the investigative file, the video of the incident, the parties' stipulation, and the testimony of the relevant witnesses (Pet. Exs. 1, 2; ALJ Ex. 3).

On April 10, 2014, an inmate walked into a vestibule without permission and was ordered by DOC staff to return to his housing area. The inmate refused and became verbally aggressive. He fell to the floor, rolled onto his back, and started shaking in what appeared to be a seizure. A captain called for a medical team and the housing area officers, including respondent, stood by. At one point the inmate sat up, looked around, and fell back to the floor shaking. The captain, believing that the inmate was faking a seizure, ordered the officers to restrain him. Respondent, who was holding metal handcuffs, straddled the inmate's lower body facing the inmate's head and two other officers grabbed the inmate's arms. The officers tried to turn the inmate on to his stomach so that he could be handcuffed by respondent. The inmate began cursing and resisting the officers by twisting and flailing his arms and legs. Another officer grabbed the inmate's legs leaving the inmate surrounded by four correction officers: three on the upper torso and one on the legs.

During the struggle, the inmate struck respondent once or twice in the chest while respondent was standing over him. As shown on the video, respondent punched the inmate in the upper torso area while holding the handcuffs in his closed fist. The captain immediately told respondent to cease his actions. Respondent stopped after striking the inmate four times in rapid succession. The inmate continued to resist and was sprayed with a chemical agent. The inmate was subsequently restrained and removed from the area by a probe team without further incident.

The inmate sustained a contusion above his eye but did not appear to have any injuries relating to the blows applied by respondent. Also, the inmate, who has a history of infractions, was infracted for the incident.

Petitioner argues that respondent's conduct was in violation of Department policy in that respondent struck the inmate four times with handcuffs. Respondent asserts that he did not violate the DOC policy because he was acting in self-defense and struck the inmate while holding the handcuffs as opposed to striking the inmate with the handcuffs.

Directive Number 5006R-C ("Directive") sets forth the policy concerning use of force and provides guidelines to minimize injuries to staff and inmates. Directive No. 5006R-C (eff. Jan. 31, 2008) (ALJ Ex. 2). The Directive prohibits more force than necessary to restrain an inmate and control the situation. Force may not be used to punish, discipline, assault, or retaliate against an inmate or when an inmate has ceased to offer resistance. Directive 5006R-C § III, IV(B). Force may be used against an inmate to defend oneself or another person from physical or imminent physical attack. Directive 5006R-C § IV(A)(1).

Whenever a use of force is anticipated and the inmate does not pose an immediate threat, a supervisor shall be notified and all actions taken under supervision unless circumstances change and force is required before the supervisor arrives. Directive 5006R-C § IV(C)(1). The Directive further provides that prior to force, alternative methods such as verbal orders should be used. Directive 5006R-C § V(A)(1). When force becomes necessary, the amount of force should be proportional to the threat posed by the inmate. Directive 5006R-C § V(B)(1). Force should start with "control holds" such as "grasping or pushing the inmate to gain compliance." Directive 5006R-C § V(B)(2)(d). If greater force becomes necessary, "blows should be directed away from the head" Directive 5006R-B § V(B)(2)(e). Striking an inmate with institutional equipment, such as handcuffs, or employing a choke hold, is permitted only pursuant to the section concerning deadly physical force. Directive 5006R-C § V(B)(2)(g), (h). "Deadly physical force" is "capable of causing death or serious physical injury." Directive 5006R-C § V(C). Such force is authorized only "as a last resort" to defend against deadly force by an inmate. Directive 5006R-C § V(C)(1), (2).

Here, the record supports a finding that respondent used unnecessary force by striking the inmate four times while holding handcuffs. Even though the inmate hit respondent in the chest, the inmate did not pose any real physical threat to the officers. The inmate was lying on the ground on his back and was surrounded by four officers who were in the process of restraining him with control holds. Even if an allowance is made for a spontaneous response, it was

unnecessary for respondent to strike the inmate four times to control the resisting inmate. Indeed, the captain had to tell respondent to stop. Moreover, on the video, it appears that respondent hit the inmate with the handcuffs that were protruding from his hand. Even if the handcuffs never made contact with the inmate as claimed by respondent, this conduct was in direct violation of the Directive that prohibits striking an inmate with institutional equipment except when the inmate is using deadly force. *Dep't of Correction v. Andino*, OATH Index Nos. 731/13 & 1000/13 at 10-11 (May 14, 2013), *aff'd* NYC Civ. Serv. Comm'n Case No. 35462 (Jan. 27, 2014) (striking an inmate while holding a radio when inmate was being subdued by other officers a violation of Directive).

September 24, 2014, use of force and false reporting charges

Petitioner alleges that respondent used excessive and unauthorized force by throwing an inmate to the ground and punching him in the face while he was secured with restraints. Petitioner further alleges that respondent filed a false report with regard to this incident. Respondent admits that his actions towards the inmate violated the Directive but denies filing a false report. These charges should also be sustained.

Present during the incident were respondent, Officer Bullard, and the inmate. Except where noted, the essential facts are not in dispute and are set forth in the investigative file, the video of the incident, and the testimony of the relevant witnesses (Pet. Exs. 3, 4).

At the time of the incident Officer Bullard was escorting an inmate to the intake area at GRVC where respondent was assigned. Officer Bullard had never met respondent. The inmate was in enhanced restraints, which included leg shackles, a waist shackle to which the inmate's arms were cuffed, and mittens on the inmate's hands. Respondent and Officer Bullard ordered the inmate inside a cell so that the restraints could be removed. The inmate refused saying he wanted to go back to his housing area. The inmate threatened to assault respondent. According to Officer Bullard, the inmate threatened to punch respondent and was cursing at him (Tr. 96-97, 104). Respondent claimed that the inmate threatened to spit on him (Tr. 119). Officer Bullard placed himself between the inmate and respondent, guided the inmate away, and spoke to the inmate. Respondent walked away and returned moments later. On the video, respondent is shown rushing up to the inmate and pushing him against a wall. Respondent is also shown

throwing the inmate to the floor, grabbing the inmate by the throat, and punched him multiple times in the facial area with a closed fist. Officer Bullard told respondent to stop and grabbed respondent's shoulder. After several prompts by Officer Bullard, respondent ceased his actions. The inmate was placed on his feet and escorted into the cell by Officer Bullard. At some point during the incident, respondent called for a probe team.

Officer Bullard testified that once he got the inmate into the cell, he removed the inmate's restraints but kept his body between respondent and the inmate because respondent was still behaving aggressively (Tr. 101-02). The probe team arrived and removed the inmate without further incident. The inmate had minor injuries including two scrapes on his right elbow and redness around his throat.

Respondent testified that he was having a bad day and that he just "blacked out" and lost his temper. Respondent explained that he became emotionally enraged and asked the inmate: "all the times I try to help you guys out and this is how you repay me?" (Tr. 119-21, 135).

Respondent filed a use of force report stating that he used force "to prevent harm from staff" (Pet. Ex. 3 at 13). Respondent explained that force was initiated because the inmate was refusing to go into a cell as ordered and stated that he "is going to spit in my face and hope I catch his disease that's contagious." With regard to the force used, respondent wrote:

> At this time without hesitation put said inmate on the ground and called for a probe team. After a brief struggle with said inmate maintaining a upper body control hold, inmate [ ] then attempted to spit towards this writer. Reacting spontaneously, this writer punched said inmate. Moments after this writer assisted said inmate to his feet and guided said inmate into cell #5 in 1A and secured him on the bed.

(Pet. Ex. 3 at 12). Respondent testified that he could not recall the incident at the time he wrote the report (Tr. 132-35).

The undisputed facts demonstrate that respondent violated the Directive when he used unnecessary force against a restrained inmate who posed no threat. Respondent's force was also excessive and unauthorized in that he pushed the inmate against the wall, threw the inmate to the floor, grabbed him around the neck, and punched him multiple times in the head area in order to punish him for threatening respondent. Respondent only ceased his aggression after Officer

Bullard stopped him. Officer Bullard's assertion that the inmate threatened to physically assault respondent was more credible than respondent's assertion that the inmate tried to spit on him.

Staff that engages in a use of force must file a report with a precise description of the event. Directive 5006R-C § V(F)(3)(b). In reviewing a false report claim, the first consideration is whether the underlying incident in question did in fact occur. The second is whether respondent made material deviations from the actual incident or intentionally misrepresented the actual events in question. *Dep't of Correction v. Rodriguez*, OATH Index No. 277/06 (Mar. 29, 2006).

Respondent's report is false in that he claimed force was necessary because the inmate posed a threat to staff and that the inmate threatened to spit on him. Moreover, respondent falsely claimed that he spontaneously punched the inmate once when the inmate tried to spit on him. Respondent's report also omitted that the inmate was in restraints and that he pushed the inmate against the wall, threw the inmate to the floor, grabbed him around the neck, and punched him multiple times in the head area. Finally, respondent's claim that he, not Officer Bullard, guided the inmate into the cell was false.

FINDINGS AND CONCLUSIONS

1. Petitioner demonstrated that respondent used excessive force on April 10, 2014, as charged.

2. Petitioner demonstrated that respondent used excessive force on September 24, 2014, as charged.

3. Petitioner demonstrated that on September 24, 2014, respondent filed a false report as charged.

RECOMMENDATION

Upon making these findings, I reviewed an abstract of respondent's disciplinary history for purposes of recommending an appropriate penalty. Respondent was appointed as a correction officer in 2007 and has no formal disciplinary record. Respondent has been found guilty of two instances of excessive force and filing a false report. Following the September incident, respondent was given a ten-day pre-hearing suspension and was placed on modified duty with no inmate contact.

Penalties for officers found to have used excessive force and made false statements have ranged from 15 days to termination, depending on the employee's disciplinary record, the extent of force, the degree of provocation, if any, the severity of the injuries to the inmate, and the extent of any subsequent deception. *See e.g. Dep't of Correction v. Bravo*, OATH Index No. 424/15 & 426/15 (May 14, 2015) (60-day suspension and termination recommended for two officers who engaged in excessive force based on officers' disciplinary history and levels of culpability); *Dep't of Correction v. Davis*, OATH Index Nos. 2648/09 & 2649/09 at 12-15 (Feb. 12, 2010) (60-day suspension for officer with a six-year tenure and two prior disciplinary penalties, one involving use of force reporting, who used impermissible and unnecessary force and made false statements about the incident); *Dep't of Correction v. Patterson*, OATH Index No. 2164/09 (Oct. 1, 2009) (termination recommended for captain with a prior 30-day suspension for conduct unbecoming who used excessive force towards an inmate and made multiple false statements about the incident); *Dep't 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); *Dep't of Correction v. Johnson*, OATH Index No. 1639/05 at 11-12 (Aug. 18, 2005), *modified*, Comm'r Dec. (Oct. 27, 2005), *modified*, NYC Civ. Serv. Comm'n Item No. CD 07-29-M (Mar. 14, 2007) (15-day penalty where officer, with a spotless record, pushed an inmate without causing injury and submitted a misleading report).

Moreover, termination of an employee with little or no disciplinary history is appropriate when 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. 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), *aff'd*, Sup. Ct. Index No. 101083/2014 (Mar. 27, 2015) (termination for officer with brief tenure and no prior discipline who stomped on an inmate's head, who posed no threat, because the inmate had been disruptive and respondent was upset about recent news of a friend's murder); *Dep't of Correction v. Andino,* OATH Index Nos. 731/13 & 1000/13 (May 14, 2013) (termination 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).

Petitioner seeks termination of respondent's employment. It seems likely that had respondent been disciplined for the two incidents separately, he would have gotten a significant suspension for the April use of force and would be subject to termination for the September incident. Thus, the issue here is whether termination is warranted without the benefit of progressive discipline in order to change respondent's behavior. *Dep't of Housing Preservation and Development v. Ray*, OATH Index Nos. 1460/00 & 2135/00 at 33 (Sept. 14, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-84-SA (Dec. 28, 2001) ("The critical question . . . is whether a penalty short of termination will change the respondent's behavior.").

Petitioner notes that respondent has engaged in two other recent uses of force that resulted in minor penalties at the command. The first occurred on November 23, 2013, and involved respondent not having his chemical agent, pulling an inmate across the floor, and securing the inmate to a holding pen (Tr. 139, 161-63). The second occurred on April 23, 2014, and involved respondent not using a proper escort hold and placing his knee in the back of an inmate who was handcuffed (Tr. 140, 163). Petitioner argues that despite being given an opportunity to correct his behavior, respondent has continued to engage in improper uses of force and that each incident is progressively more egregious.

Respondent testified that after the September incident he sought anger management and has continued with this counseling to the present (Resp. Ex. A; Tr. 122-23). Respondent seeks a recommendation that he be suspended for no more than 45 days, and points to mitigating factors including his lack of a disciplinary record, his decision to seek treatment for his anger, the lack of serious inmate injuries, and that his supervisors think well of him (Tr. 29-30, 62, Resp. Ex. B).

There can be no doubt that caring for and controlling inmates is difficult and challenging work. Except for respondent's self-serving testimony (Tr. 157), there is no evidence that the

anger respondent displayed towards the two inmates is under control. Indeed, in a recent counseling session on June 9, 2015, respondent stated that he "likes no inmate contact" (Resp. Ex. A). DOC is not obligated to keep an officer who is unable to control his responses to inmates who are verbally abusive, routinely misbehave, and push the limits of authority. Moreover, DOC should not be expected to risk that respondent will not be able to control himself with difficult inmates and that something more serious will happen.

A review of the two videos shows that respondent is ill-suited to the job of correction officer. In the first instance, respondent struck an inmate four times who posed no serious threat. In the second instance, respondent assaulted a shackled inmate because he was verbally harassing respondent. In both instances another officer had to tell respondent to cease his inappropriate actions. While neither use of force caused any serious injuries to the inmates, each involved an unnecessary form of deadly force including punches to the inmate's head, grabbing the inmate's throat, and striking an inmate with institutional equipment.

Equally worthy of consideration are the false statements respondent made in his report. Respondent's testimony that he could not recall the September incident when he filed his report was not credible. It seems more likely that respondent intentionally sought to justify and minimize his actions to avoid discipline. Such dishonesty calls into question respondent's character and further erodes the trust between an employer and an employee.

Respondent has been with the Department for a relatively short period of time. The use of force in September and his false statements about the incident, standing alone, are deserving of termination from employment. When respondent's pattern of escalating violence is viewed as a whole, it demonstrates that respondent is a liability in a paramilitary organization designed to uphold the law and maintain order among inmates. Under the circumstances, termination from employment would not be disproportionate to the sustained misconduct as to be shocking to one's sense of fairness. *See Pell v. Bd. of Education*, 34 N.Y.2d 222 (1974).

Accordingly, respondent should be terminated from his employment.

Alessandra F. Zorgniotti
Administrative Law Judge

October 23, 2015

SUBMITTED TO:

JOSPEH PONTE
Commissioner

APPEARANCES:

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THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of
TERRENCE DIXON
Appellant
-against-
DEPARTMENT OF CORRECTION - DOC
Respondent
Pursuant to Section 76 of the New York State Civil Service Law
CSC Index No: 2016-0336

DECISION

TERRENCE DIXON ("Appellant") appealed from a determination of the Department of Correction ("DOC") finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of Termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("Commission") heard arguments from the parties on 08/04/2016.

The Commission has considered the arguments presented on this appeal, and reviewed the record of the disciplinary proceeding. Based on this review, the Commission concludes that there is sufficient evidence in the record to support the findings of fact and the conclusions of law, and that the penalty is appropriate.

Therefore, the final decision and penalty imposed are hereby affirmed.

SO ORDERED

Dated: Aug. 18, 2016