

## ***Dep't of Correction v. Lozada***

OATH Index No. 1619/16 (June 23, 2016), *modified on penalty*, Comm'r Dec. (Sept. 29, 2017),  
**appended**

Correction officer charged with making false and misleading statements in a written report and during an investigative interview concerning force used by another officer. Administrative law judge found the officer's report failed to provide a "precise description" of the force used, although some of the omissions alleged were not proven. The judge found that none of the officer's interview statements were shown to be false. A penalty of 15 days' suspension recommended. Based on agreement between former Commissioner and respondent, penalty is amended to loss of 15 compensation/vacation days.

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### **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF CORRECTION**  
*Petitioner*  
*- against -*  
**LUIS LOZADA**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**JOHN B. SPOONER**, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Petitioner, the Department of Correction, charged that respondent Luis Lozada, a correction officer, made false and misleading statements in a written report and during an investigative interview concerning force used by another officer against an inmate.

A hearing on the charges was conducted on May 16, 2016. Petitioner presented the testimony of an investigator and a video of the incident. Respondent testified on his own behalf, denying that his report or statements were false.

For the reasons provided below, I find that the evidence was sufficient to sustain specification 3 alleging that respondent filed an inadequately specific report, but insufficient to sustain the other two specifications, which should be dismissed.

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### ANALYSIS

The charges concern an incident which occurred at around 11:30 a.m. on May 21, 2014, in the punitive segregation housing area at Robert N. Davoren Complex (RNDC) on Riker's Island. Certain background facts were undisputed. Respondent, who was born in Peru and whose first language is Spanish, came to the United States in 1981 and attended high school here (Tr. 52). After serving in the Marines, he was appointed as a correction officer in 2013. In 2014, he was working the "wheel," without a steady tour and with intermittent day and night tours. On May 21, respondent was assigned to the day tour to relieve the floor officer in the 1 central north housing area for a meal. At around 11:30 a.m., Officer Waites arrived in the area to escort an inmate to a legal meeting. Respondent accompanied Officer Waites to the inmate's cell, where the inmate was handcuffed and escorted down the corridor to the front of the tier, with Officer Waites walking in front, followed by the inmate and then by respondent. As Officer Waites and the inmate passed the cell of an inmate named Farrell, Mr. Farrell threw a small amount of liquid out of his food flap and hit Officer Waites.

The subsequent interactions between Officer Waites and Mr. Farrell were captured by a video surveillance camera. The video footage (Pet. Ex. 2), taken by a camera at the rear of the tier, shows that at 11:39:40, Officer Waites was hit with liquid from one of the cells. At 11:39:44, Officer Waites pulls the inmate's arm through the food slot with considerable force and then pushes the arm back in and tries to close the food flap. As this occurs, respondent is just behind and facing Officer Waites. Respondent continues to walk toward the front of the tier, turning to watch Officer Waites as he goes by the cell. At 11:39:54, after respondent has passed the cell, Officer Waites backs up and rushes forward, kicking the food flap, apparently in an effort to make the inmate withdraw his arm. Respondent does not turn around and continues walking to the end of the corridor.

The video shows that Officer Waites continues to try to close the food flap, with the inmate holding his arm in the slot. At 11:40:06, Officer Waites pushes the inmate's hand and arm back inside the cell, as respondent walks back toward the cell. At 11:40:18, respondent walks past Officer Waites and goes to the cell where they removed the first inmate a few minutes before and locks the food flap, turning away from Officer Waites. At the same time, Officer Waites pushes again against Mr. Farrell's food flap. At 11:40:25, respondent looks in the

direction of Officer Waites, as Officer Waites cracks open the door to the cell. At 11:40:29, as respondent walks toward Officer Waites, Officer Waites pulls again with considerable force on the inmate's arm and bends it back against the food flap. At around 11:40:34, respondent continues to turn toward Officer Waites as he pushes at the inmate's arm with his right hand and reaches through the door with his left hand. At 11:40:33 to 11:40:35, Officer Waites makes two rapid motions through the door with his left hand, with his palm flat, as if trying to push the inmate away from the slot. As this occurs, respondent is seen walking by Officer Waites with his head facing straight forward toward the other inmate waiting at the end of the corridor. As respondent draws even with Officer Waites, he turns his head slightly downward. At 11:40:35, respondent walks to the front of the corridor and passes by Officer Waites, who is standing in the cell doorway. At 11:40:52, respondent reaches the front of the corridor and stands with his back to Officer Waites. At 11:40:54, Mr. Farrell's cell door closes and Officer Waites walks toward the front of the corridor.

Mr. Farrell was interviewed by Investigator Carper later on May 21. According to the investigator's interview summary (Pet. Ex. 1 at 37-39), Mr. Farrell admitted that he held his slot open in order to force the officers to let him use the telephone. He also admitted throwing water at the inmate who he believed had broken the telephone, and perhaps hitting Officer Waites. He claimed that Officer Waites "yanked" on his arm and falsely told the A officer to open the cell door because Mr. Farrell was hurting himself. Once the cell door was open, Officer Waites punched Mr. Farrell four times in the back of his head and once on his lip. Officer Waites bent Mr. Farrell's arm against the slot, causing a cut. Officer Waites next pulled on Mr. Farrell's arm again, causing Mr. Farrell's face to hit the door and chip a front tooth. Officer Waites kicked the slot door several times, attempting to close it.

In the injury to inmate report (Pet. Ex. 1 at 106-07), an officer indicated that a captain was notified at 12:00 p.m. that Mr. Farrell was involved in a use of force. When seen in the clinic at 2:40 p.m., the inmate complained of pain on his left arm and bruises on his arm and his lower lip. The medical officer observed "tiny" bruises on the arm and on the lower lip. He also observed tenderness of the left elbow. Mr. Farrell was referred for X-rays to his elbow but no fractures were found. Following the clinic exam, Mr. Farrell was returned to the housing area.

In respondent's report (Pet. Ex. 1 at 87-88), written later that same day, respondent wrote that Officer Waites "proceeded to secure the open slot to avoid further splashing from the inmate" and that "an altercation started." Respondent wrote that Officer Waites asked the A officer to open the cell because the inmate was "hurting himself." The inmate was then "secured in his cell" and the incident was terminated. In the portion of the report asking for the parts of the inmate's body where force was applied, respondent wrote, "inmate's arms."

Respondent was interviewed about the incident on November 5, 2014. In the interview, respondent stated that he heard Officer Waites stop at cell 5 and say, "Stop, stop, the inmate was hurting himself" (Pet. Ex. 3 at 11). Respondent stated that, as he walked back to the cell, "an altercation occur [sic]" (Pet. Ex. 3 at 12). When asked why Officer Waites was asking the inmate to stop, respondent stated, "the inmate was having a, a – how do you say? An altercation with him" because the officer "tried to close the slot" and the "inmate was refusing" (Pet. Ex. 3 at 17-18). When asked if he saw the altercation, respondent stated that he saw "the inmate's arms" and Officer Waites "trying to close the slot" (Pet. Ex. 3 at 19). He stated that he did not see the cell door open because he was at the front of the corridor (Pet. Ex. 3 at 20). He denied seeing Officer Waites pull the inmate's arms "all the way out of the slot" or "strike" or "punch" the inmate (Pet. Ex. 3 at 20, 28).

After watching the video, respondent continued to deny seeing Officer Waites "strike" the inmate (Pet. Ex. 3 at 28).

In respondent's testimony at the trial, he admitted that he witnessed Officer Waites use force on Mr. Farrell (Tr. 64-65) and that Officer Waites's pulling on Mr. Farrell's arm constituted force (Tr. 81). He stated that, after Officer Waites "got splashed" through the food slot, the officer had an "altercation with the inmate through food slot" and "tried to close the slot" (Tr. 59). Respondent testified that he understood the word "altercation" to mean "a physical struggle with the inmate through the . . . food slot" (Tr. 60). He stated that he was aware that there were cameras on the housing corridor (Tr. 61).

Respondent stated that, after submitting his report, he heard no more about the incident until six months later, when he was interviewed by investigators. He stated that he understood "most" of the questions, but asked the examiner to repeat some of them (Tr. 62). He denied that he was trying to conceal Officer Waites's use of force or was attempting to lie to anyone (Tr.

63). He also indicated that, while he understood the meaning of the words “pull” and “strike,” he did not understand what the word “yank” meant.

The Department use-of-force directive imposes a somewhat rigorous reporting responsibility on officers using or witnessing any use of force on an inmate. According to the directive, force reports must include:

- a. A complete account of the events leading to the use of force and whether the use of force was anticipated and a supervisor notified prior to the use of force;
- b. 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, e.g. control holds, blows, etc. . . .;
- d. A description of any injuries sustained by inmates or staff that they observed, and any medical treatment that they received; and
- e. A list of all participants, witnesses and persons the writer observed present at the incident and their actions.

Dir. 5006R-C (V)(F)(3).

Specification 1 alleges that respondent’s written report failed to meet the requirements of the Department rules because it failed to indicate that Officer Waites “struck” Mr. Farrell. Specification 3 alleges that respondent violated the directive because he “failed to observe and report events of the use of force,” including that Officer Waites grabbed Mr. Farrell’s arm “through” the food slot, that the cell door opened, and that a “physical confrontation” occurred between Officer Waites and Mr. Farrell. As to the omitted details, past cases indicate that only omissions of material facts constitute violations of the force reporting requirement. *See, e.g., Dep’t of Correction v. Hall*, OATH Index Nos. 155/05 & 156/05 at 15 (Aug. 11, 2005).

First of all, respondent’s report did, in fact, include information on one of the alleged omissions. Respondent wrote in his report that Officer Waites called out, “[O]pen cell 5, he’s hurting himself.” While respondent did not write that the cell door actually opened, I find that commemorating the request by Officer Waites that the cell door be opened was sufficient to satisfy his duty to convey the detail that the cell door was opened.

As to specification 1, petitioner needed to establish two facts: that Officer Waites did, in fact, “strike” Mr. Farrell and that respondent observed this action and failed to report it.

The evidence supported the conclusion that Officer Waites hit Mr. Farrell with his left hand. The video shows that Officer Waites made the two rapid arm movements with his left arm

through the open cell door while Mr. Farrell was standing near the door with his hands in the food slot. While the video does not capture Officer Waites's hands making contact with Mr. Farrell, other evidence supports a finding that at least one blow was struck. Mr. Farrell himself stated that he was struck by Officer Waites, although Mr. Farrell's assertion of five blows appears to have been exaggerated. The video clearly shows that Officer Waites made only two arm motions toward Mr. Farrell. In addition, the clinic records show that Mr. Farrell had a cut on his lower lip. Further, the video shows that, at the end of the second arm movement, Officer Waites's hand is flexed upwards, with his palm open. This suggests that the second arm movement was more likely a push than an actual blow. Based upon this evidence, I find that Officer Farrell hit Mr. Farrell once in the face.

The evidence was insufficient, however, to demonstrate that respondent observed Officer Waites "strike" Mr. Farrell, such that his failure to report it constituted misconduct. Respondent himself denied that he saw Officer Waites hit the inmate. The video, petitioner's only evidence in support of its contention that respondent witnessed Mr. Farrell being hit, does not show that respondent was in such a position that he likely saw the blow. The video shows that, as Officer Waites's two rapid arm movements occurred, respondent was walking down the middle of the corridor facing straight ahead. In front of respondent, at the far end of the corridor, was the other inmate whom respondent had the responsibility to escort. When Officer Waites made the first movement with his left arm, respondent was several feet behind. Officer Waites was in front of the open cell door with his right side toward respondent and his left hand on the side away from respondent, hindering respondent from viewing either the inmate or Officer Waites's left arm. At the time of the second arm movement, respondent had drawn even with Officer Waites, but continued to face straight ahead and did not turn to look at Officer Waites.

Even though respondent was close by Officer Waites when this use of force occurred, I found it plausible that he did not observe it. The arm movements by Officer Waites were extremely rapid. The movements were made with Officer Waites's left arm, which was partially obscured from respondent's view by Officer Waites's body. In addition, respondent was likely focused on monitoring the second inmate at the end of the corridor, while Officer Waites dealt with Mr. Farrell. Under these circumstances, it seemed probable that respondent failed to notice

Officer Waites's blow to Mr. Farrell. Respondent's failure to mention the "strikes" by Officer Waites to Mr. Farrell was therefore not misconduct and specification 1 should be dismissed.

Specification 3 alleges that respondent violated the force directive because he failed to report that Officer Waites "grabbed inmate Farrell's arm through the food slot" and that there was a "physical confrontation" between Officer Waites and the inmate. As to the first fact, while respondent's report mentioned "securing" the food slot, it failed to state that Officer Waites's primary use of force was on Mr. Farrell's hands as they were in the food slot, a material detail essential to understand the nature of the force employed.

As to the failure to mention a "confrontation," respondent testified that, due to his imperfect understanding of English, he mistakenly used the word "altercation" to describe a physical struggle between Officer Waites and Mr. Farrell. Clearly, respondent's definition of the word was incorrect. The Merriam-Webster Dictionary defines "altercation" as "a noisy or angry argument." None of the synonyms or alternative definitions include the word "struggle." Moreover, there was some reason to question whether respondent's English proficiency was as limited as he suggested. Respondent was a generally fluent English speaker, who admitted that he has been in the United States since high school, served in the U.S. Marines, and, during his employment as a correction officer, has consistently spoken English without the need of a Spanish translator (Tr. 76).

Nonetheless, I found respondent's suggestion that he was uncertain as to the definition of the English word "altercation" plausible. In his interview, respondent uttered the word altercation preceded by "how do you say," as if he was unfamiliar with its usage (Pet. Ex. 3 at 17-18). The word "altercation" is not frequently used in daily conversation. It is somewhat similar to the word "confrontation," a more widely familiar term which, according to the charges, would have been found to be sufficient to convey the physical nature of the struggle between Officer Waites and respondent which was captured on the video. Respondent testified that, in his report, he used the word "altercation," not to suggest that no force was used, but to describe a physical struggle between Officer Waites and Mr. Farrell. This testimony was consistent with the indication in the report that Officer Waites used force on Mr. Farrell's arm.

Nonetheless, respondent's report, as conceded by respondent's counsel in his closing, was far from "perfect" (Tr. 86). Even assuming that respondent was mistaken as to the definition of the word "altercation," he made little effort to describe the force used by Officer Waites. The only references in the narrative of the report to any actions by Officer Waites were that the officer "proceeded to secure the open slot," had an "altercation," and then "secured" the inmate in his cell. As noted in counsel for petitioner's closing, the report was "completely devoid of any description of the force used" (Tr. 88). Had it not been for the reply of "inmate's arms" in the section requiring the identification of where on the inmate's body force was applied, there would have been no way to know that any force whatsoever was used. The report provided no basis to determine what degree of force was employed, whether the inmate might have been injured, or whether the force directive might have been violated. Due to these failings, I find that specification 3 should be sustained in that respondent's report failed to describe the "events of the use of force incident" required by Directive 5006R-C, which requires a "precise description" of the "type of force" used.

While respondent's report was deficient, I do not find that it was intentionally false. Respondent's use of the word "altercation" combined with the indication that force was used to the "inmate's arm," demonstrate that respondent's report was acknowledging that Officer Waites used some force on Mr. Farrell's arm.

Specification 2 alleges that, in respondent's interview, he inaccurately denied seeing Officer Waites strike the inmate and indicated that he was in the front of the housing area when the cell door was opened. As discussed above, I found it plausible that respondent did not observe the swift arm motion which likely constituted a blow to Mr. Farrell. As to where respondent was when the cell door was opened, it is true that the video shows that, when the cell door opened, respondent was walking back down the corridor. However, respondent's recollection as to where he was at the moment the cell door opened, some six months before, was likely to be hazy. This detail was immaterial to the use of the force itself and was not mentioned in his report. Respondent also made this statement as to his location prior to looking at the video. Based upon all of these factors, I did not find that either of respondent's statements concerning the alleged "strikes" to Mr. Farrell or respondent's location when the cell door was opened were shown to be false.



Finally, at the commencement of the trial, counsel for respondent requested that the OATH report not be published “in any way, shape, or form” based upon Civil Rights Law section 50-a. This law provides that “personnel records . . . under the control of . . . a department of correction of individuals employed as correction officers” cannot be disclosed without an officer’s consent or a court order. Civ. Rights Law § 50-a (Lexis 2016). This tribunal has held that section 50-a does not apply to OATH reports, which are regularly uploaded to both a legal research website maintained by New York Law School and to Lexis. *See Dep’t of Correction v. Victor*, OATH Index No. 388/15, mem. dec. (Feb. 3, 2015) (OATH reports held not to be “under the control” of the City Department of Correction and thus not within the confidentiality provisions of section 50-a of the Civil Rights Law). Respondent’s request not to publish this OATH report is denied.

In sum, specification 3 should be sustained and specifications 1 and 2 should be dismissed because the evidence failed to show the violations alleged.

### **FINDINGS AND CONCLUSIONS**

1. Specification 1 of DR No. B0102/2015 should be dismissed in that petitioner failed to establish that respondent witnessed an officer strike an inmate.
2. Specification 2 of DR No. B0102/2015 must be dismissed in that petitioner failed to establish that respondent made false interview statements.
3. Specification 3 of DR No. B0102/2015 must be sustained in that, on May 21, 2014, respondent failed to include a “precise description” in his report of the force used on an inmate in violation of Dir 5006R-C (V)(F)(3).

### **RECOMMENDATION**

Upon making the above findings, I requested and received a copy of respondent’s personnel history in order to make an appropriate penalty recommendation. Respondent was appointed in 2013 and has no prior disciplinary record. Respondent’s good work record provides grounds for mitigation of penalty, despite his relatively brief employment history.

In this case, respondent was found to have failed in his duty to report the details of a use of force by another officer, producing only a brief description using the word “altercation.” Accurate and complete use-of-force reports are essential for the Department to complete its mandate of monitoring all staff uses of force upon inmates. Reporting failures such as respondent’s can severely undermine this essential function. At the same time, as discussed above, there are some grounds for mitigation in that respondent’s deficient report was not deliberately misleading and may have been based in part upon his confusion as to the meaning of the word “altercation.”

Counsel for petitioner requested a penalty of 40 days’ suspension for all three of the specifications (Tr. 90). Since only one of the specifications can be sustained and since there are mitigating factors, the penalty should be considerably lower. In past cases, officers who submitted incomplete but not false reports were given penalties of 15 to 20 days’ suspension. *Dep’t of Correction v. Bunch*, OATH Index No. 1264/13 (June 6, 2013), *aff’d*, NYC Civ. Serv. Comm’n Case No. 35785 (Apr. 25, 2014) (20-day suspension for officer who repeatedly attempted to punch an inmate but described only “control holds” by other staff in his force report); *Dep’t of Correction v. Crichlow*, OATH Index No. 577-78/03 (June 11, 2003) (15-day suspension for officer who failed to report the presence of a captain and another officer at a force incident); *Dep’t of Correction v. Boyce & Rata*, OATH Index Nos. 505 & 510/89 (Oct. 25, 1989), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 90-88 (Oct. 16, 1990) (15-day suspension for officer who witnessed force by another officer and failed to report it).

Accordingly, I recommend that respondent be suspended for 15 days for the misconduct which was found to have occurred here.

John B. Spooner  
Administrative Law Judge

June 23, 2016

SUBMITTED TO:

**JOSEPH PONTE**  
*Commissioner*

APPEARANCES:

**YVETTE CHENG, ESQ.**  
*Attorney for Petitioner*

**KOHLER & ISAACS, LLP**  
*Attorneys for Respondent*  
**BY: STEVEN ISAACS, ESQ.**

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In the Matter of  
Department of Correction,

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-against-

OATH Index No. 1619/16

CO Luis Lozada,

Respondent.

\_\_\_\_\_ X

### **ACTION OF THE COMMISSIONER**

In case DR #102/2015, C.O. Luis Lozada was charged with, *inter alia*, false/misleading, incomplete Use of Force Witness Report by failing to report the force he observed CO Waites utilize against Inmate Farrell.

On May 21, 2014, C.O. Luis Lozada was assigned as a meal relief officer in the punitive segregation housing area at RNDC.

At approximately 1130 hours, C.O. Benjamin Waites #3987 arrived in the area to escort Inmate Ken Bell to a legal visit. Respondent accompanied C.O. Waites to Inmate Bell's cell, where Inmate Bell was handcuffed and escorted down the corridor to the front of the tier by C.O. Waites. Respondent followed behind C.O. Waites and the inmate. As C.O. Waites and Inmate Bell passed Inmate Kadeem Farrell's cell, Inmate Farrell threw an unknown liquid substance out of his food slot and C.O. Waites was hit with the unknown liquid. C.O. Waites then pulled Inmate Farrell's arm through the food slot then pushed the arm back in and tried to close the food slot door.

As this occurred, Respondent was a few feet away from the cell and was looking in the direction of C.O. Waites. After Respondent had passed Inmate Farrell's cell, C.O. Waites took a few steps back and then rushed forward and kicked the food slot, while Inmate Farrell's arm was still sticking out of the slot. Respondent walked back to Inmate Bell's cell to secure the door. As Respondent walked back toward the front of the tier, he looked in C.O. Waites' direction while C.O. Waites was pulling Inmate Farrell's arm out

of the food slot again and bent it back against the food slot. Seconds later, Respondent walked by C.O. Waites, who was making striking motions through the open cell door toward Inmate Farrell. Once Respondent reached the front of the tier, Inmate Farrell's cell door closed and C.O. Waites walked toward the front of the tier to meet Inmate Bell.

On or about June 23, 2016, ALJ Spooner found Respondent guilty of failing to provide a "precise description" of the force used, and recommended a penalty of a fifteen (15) day suspension. ALJ Spooner specifically noted that some of the omissions alleged were not proven, and that none of the Respondent's ME0-16 interview statements were shown to be false.

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Based upon former Commissioner Ponte's conversations with Respondent's representatives, it was agreed that the Commissioner would accept the penalty as vacation/compensation days, in lieu of suspension days. As such it is recommended that Respondent 15 suspension days be amended to compensation/vacation days.

Date: 9/29/17

Cynthia Brann  
Acting Commissioner