

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

OATH Index No. 0005/18 (Jan. 12, 2018)

Department failed to prove that correction officer abandoned his post, failed to anticipate a use of force, used excessive force, or filed a false report. Charges should be dismissed.

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

*In the Matter of*  
**DEPARTMENT OF CORRECTION**  
*Petitioner*  
*- against -*  
**FERMIN ECHEVARRIA**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**ALESSANDRA F. ZORNIOTTI**, *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 Fermin Echevarria, a correction officer, abandoned his post by entering a vestibule area to confront an inmate, failed to anticipate a use of force with the inmate who refused to provide his pedigree information, used excessive force by striking the inmate in the head and spraying him with a chemical agent (“CA”), and filed a false report (ALJ Ex. 1).

A hearing was held on December 11 and 15, 2017. Petitioner presented documentary evidence including a video of the incident. Petitioner also called the inmate, Officer Peteroy who was present during the incident, and Investigator David who investigated and recommended the filing of the charges. Officer Echevarria testified on his own behalf, denied the charges, and presented documentary evidence.

For the reasons below, petitioner failed to prove the charges. Accordingly, the petition should be dismissed.

## **BACKGROUND**

Officer Echevarria has been a correction officer since September 6, 2012. He is currently assigned to the Special Operation Division (“SOD”) and works directly with the warden as a chauffeur and performing security work on Rikers Island.

On May 25, 2016, during the 2300 to 730 tour, Officer Echevarria was working overtime on his steady post, the first floor control room for housing area 1 South in the Otis Bantum Correctional Center (“OBCC”).

The OBCC first floor control room, also known as the bubble, control station, or A post, is a secure windowed-room that has a telephone, logbooks, radios, fire extinguishers, and other safety equipment. The room overlooks a large vestibule that has doors to the housing area for the general inmate population, a bathroom, a pantry, the hallway to the main in-take area, a mini clinic, several small holding cells, and the CPSU housing area which was closed at the relevant time. The A post officer is responsible for, *inter alia*, monitoring all areas visible from the bubble including the vestibule and housing areas, unlocking the doors to the housing areas as well as the individual cells inside them, checking an inmate’s pedigree information before letting them into the housing areas, conducting security inspections of all doors and windows in the vestibule, and maintaining the keys for the mini clinic and small holding cells. The door to the control room is adjacent to the general inmate population housing area door and opposite the pantry and bathroom. On the other side of the control room, is a glass window with a slot where papers can be slipped underneath the window. The window and slot are similar to a ticket window at a movie theater but do not have a speaker to amplify the voices, making it difficult to hear what is being said through the window or slot.

The following facts are compiled primarily from the eye witness testimony, reports, and interviews of Inmate Butler, and Officers Peteroy and Echevarria as well as the video of the incident. The essential facts are not in dispute.

At approximately 1:50 a.m. Officer Peteroy escorted Inmate Butler, who had been in court all day, to the vestibule of the control room. Officer Echevarria unlocked the door to the vestibule to permit the two to enter. Officer Peteroy slipped Inmate Butler’s floor card through the slot so that Officer Echevarria could pedigree him and verify that he belonged in the general inmate housing area. Officer Echevarria, who stated that he had never seen Inmate Butler before, asked him for the necessary identifying information. Inmate Butler was tired and defiant.

Instead of answering the questions, Inmate Butler cut-off Officer Echevarria and gave only his name, partial birth date, cell number and said, "You know the rest" (Pet Exs. 1, 17; Tr. 36, 209).

Inmate Butler walked away to the general inmate population housing door. On the video, Inmate Butler is seen walking slowing around the area and making hand gestures while Officer Peteroy is leaning against the wall. According to Officers Peteroy and Echevarria, the inmate was cursing and complaining that he was being asking for "extra" information. Inmate Butler also knocked on the locked housing room door. A new officer to the housing area post came to the door and looked out at the vestibule area. During this one minute period, Officer Echevarria called Inmate Butler back to the window through the slot and Officer Peteroy told the inmate to calm down and provide his pedigree information so that he could go to the housing area.

Officers Peteroy and Echevarria testified that at this point they did not feel threatened by Inmate Butler and that it was unnecessary to call a supervisor. Both stated that inmates often get irate about being asked pedigree information and that they are usually able to get them to comply by talking and using their interpersonal communication ("IPC") skills. Officer Echevarria also added that it was the middle of the night when the facility is short-staffed. He only calls for a supervisor when there is a situation that he cannot handle such as when an inmate recently asked for his cell to be dead-bolted. In that case, the inmate had testified against another inmate, other inmates were surrounding the inmate in a menacing manner, and it was apparent that a security breach would occur (Tr. 211-13, 240-42).

Officer Echevarria stated that he decided to talk to Inmate Butler face to face in order to calm the inmate down and gain compliance because: he had more time on the job than Officer Peteroy or the new officer in the housing area; it was his duty to get the pedigree information; and he was unable to communicate with the inmate through the slot (Tr. 210).

Officer Echevarria exited the bubble and stood in front of the control room door, which closed securely behind him. Inmate Butler was standing just outside the door. According to Officers Echevarria and Peteroy, and as corroborated by the video, Officer Echevarria calmly explained to Inmate Butler that because he did not know him, he needed to get his pedigree information to allow him into the housing area. Inmate Butler continued to curse and complain and also made threats against Officer Echevarria. During this exchange, Officer Echevarria repeatedly stretched out his arm towards Inmate Butler and told him to step back because he was

standing too close. Officers Peteroy and Echevarria maintained that they believed they could get the inmate to comply, that a supervisor was not needed, and that force was not anticipated.

Because Inmate Butler did not step back and remained agitated, Officer Echevarria lightly touched the inmate's chest with his outstretched hand to create more space between them. Inmate Butler immediately struck Officer Echevarria's hand away using a swiping motion. The inmate stepped back, took a fighting stance, clenched his fists, yelled profanities about Officer Echevarria touching him, and threatened to hit him. Officer Echevarria testified that he gave the inmate a verbal command to turn and face the wall (Tr. 217). Instead, the inmate moved towards the officer in an aggressive manner. Officer Echevarria was up against the door to the bubble and could not retreat. He testified that he considered using CA spray but that the inmate was too close and he was concerned the inmate could grab it. As the inmate approached, Officer Echevarria struck him with his right fist in the left jaw. Officer Echevarria credibly testified that he was aiming for the inmate's upper torso and did not know that he had struck the inmate in the jaw until he saw the video at his MEO-16 interview (Tr. 219-20, 257-58).

Inmate Butler tried to punch Officer Echevarria and missed. Officer Peteroy intervened and put the inmate against the wall between the pantry and bathroom doors. The inmate continued to curse and threaten Officer Echevarria and was moving in an effort to push past Officer Peteroy. Officer Echevarria was standing behind them, facing Inmate Butler. Every time he moved, the inmate tried to follow. Officer Echevarria told the inmate to turn and face the wall. Officer Peteroy gave Inmate Butler verbal commands to stop resisting and to calm down. Even though he had the inmate against the wall, Officer Peteroy stated that he did not feel that Inmate Butler was under control because he continued to resist and yell at Officer Echevarria. Officer Echevarria stated that because the inmate was noncompliant, he needed to make a decision on how to get him under control. Officer Echevarria told Inmate Butler to cease his aggression and warned that he would be sprayed with CA (Tr. 219-21). Officer Echevarria walked about seven feet away, to the housing area door, reached for his CA spray, and turned back towards Inmate Butler. Officer Peteroy stated that he saw Officer Echevarria in his peripheral vision reach for the CA spray and Officer Echevarria testified that he told Officer Peteroy to step away. When Officer Peteroy released the inmate, he came off the wall towards Officer Echevarria. Officer Echevarria stepped towards Inmate Butler with his arm outstretched and sprayed him from less than three feet away. The inmate tried to punch Officer Echevarria

and missed. Officer Peteroy used a control hold and brought the inmate to the ground where he was secured. The CA spray took the desired effect and the incident was terminated.

Officer Echevarria told the officer in the housing area to press the alarm but he just stood there. Officer Echevarria went into the control room and called for a probe team then returned to check on Officer Peteroy, who had also been affected by the CA spray, and to make sure the inmate was still secure. Officer Echevarria testified that because the CA was sprayed into the air and drifted down, both he and Officer Peteroy were affected (Tr. 231). A captain arrived about two minutes later and the inmate was removed.

Neither the officers involved nor the inmate suffered any injuries (Pet. Exs. 1, 10). Inmate Butler was given an infraction and was found guilty of refusing to obey an order, disorderly conduct, and assaulting a staff member (Pet. Exs. 15, 16; Tr. 33-34).

Following the incident, Officer Echevarria provided a use-of-force report (Pet. Ex. 5). Subsequently, a captain asked him to answer five questions about the incident (Tr. 224). The questions were not made part of the record. On May 30, 2016, Officer Echevarria provided written answers to the questions (Pet. Ex. 6). He also gave statements about the incident in an MEO-16 interview on September 28, 2016 (Pet. Ex. 20).

Following an investigation, Investigator David issued a report finding that Officer Echevarria left the control post without notifying a supervisor to confront the inmate, that he failed to anticipate a use of force, used excessive force, and sprayed the inmate with CA from less than three feet. The investigator did not find that Officer Echevarria had made any false statements in his reports or MEO-16 interview (Pet. Ex. 1).

### **ANALYSIS**

In a disciplinary proceeding, the Department “has the burden of proving its case by a fair preponderance of the credible evidence.” *Dep’t of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD/O8-33-5A (May 30, 2008). In order to sanction civil service employees for misconduct, there must be some showing of fault on the employee’s part, either that he acted intentionally or negligently. Civil Service employees cannot be held to a strict liability standard in a disciplinary proceeding. *See Dep’t of Sanitation v. Richards*, OATH Index No. 529/06 at 3 (Feb. 3, 2006).

Where an officer exercises reasonable and prudent judgment under the circumstances, no misconduct is found. *Dep't of Correction v. Dominguez*, OATH Index Nos. 550/10 & 551/10 at 4-5 (Jan. 8, 2010); *Dep't of Correction v. Allen*, OATH Index Nos. 510/04 & 624/04 (Oct. 13, 2004); *Dep't of Correction v. Nickless*, OATH Index No. 1658/95 (Dec. 4, 1995); *see also Dep't of Correction v. Messina*, OATH Index No. 738/92 at 15-16 (July 9, 1992) (officer cannot be penalized for a discretionary decision simply because in hindsight, it turned out to have been mistaken; the issue is whether respondent acted reasonably). In evaluating the reasonableness of an officer's judgment, due deference must be given to the officer's experience, knowledge of persons involved, and the assessment of the situation as it unfolded before him. *Dep't of Correction v. Rivera*, OATH Index No. 1249/96 at 11-12 (Oct. 4, 1996).

Petitioner alleges that respondent abandoned his post by entering the vestibule to confront an inmate, failed to anticipate a use of force with an inmate who refused to provide his pedigree information, used excessive force by striking the inmate in the head and spraying him with CA from less than three feet, and filed a false report on May 30, 2016. Petitioner did not allege that either the initial report or the MEO-statements contained any false statements.

To the extent this determination requires an evaluation of witness credibility, this tribunal has looked to witness demeanor, the consistency of a witness' testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness' testimony comports with common sense and human experience in determining credibility. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). The statements of respondent were generally consistent with Officer Peteroy, Inmate Butler, and the video.

During the trial, respondent presented himself in a professional manner. It was readily apparent that he has a keen interest in the criminal justice system. Prior to becoming a correction officer, respondent worked in Family Court and obtained an associate's degree in criminal justice with honors, *summa cum laude*. Moreover, it was evident that respondent takes great pride in his work. He demonstrated knowledge of DOC's rules and regulations DOC and a genuine concern for the safety of inmates and the other officers around him. In short, respondent seems to have the makings of an excellent officer. The fact that respondent now holds a position of trust working with the SOD warden on security matters further suggests that respondent is regarded as

a reliable and accomplished officer. Notably, respondent has no prior disciplinary history and has been involved in approximately 30 use of force incidents without any disciplinary charges.

A careful review of the totality of the circumstances establishes that respondent's actions were reasonable under the circumstances. Penalizing respondent for judgment calls that resulted in a use of force that had no injuries would not be in the best interests of the Department or respondent, who is capable of improving without the imposition of discipline.

*Abandonment of post charge*

Petitioner alleged that when respondent stepped out of the bubble to confront an inmate, he abandoned his post. Respondent argued that it is common practice at OBCC to leave the bubble to pedigree an inmate, that the vestibule was part of his post, and that he was trying to gain the inmate's compliance, not confront him.

In support petitioner submitted DOC Operations Order 10/08 "Standardized Post Descriptions" (ALJ Ex. 2). Petitioner pointed to the following language: "in the event of an emergency" . . . . Do not abandon the control post, you must remain on post to ensure access to the housing area for the response team." Investigator David, who never worked at OBCC during his less than two years as a correction officer (Tr. 55, 84), relied on this section to assert that there are no circumstances where an A post officer may exit the control room without supervisor approval (Tr. 68, 87-88, 99). This assertion was not plausible.

Officer Peteroy, petitioner's main eyewitness, corroborated respondent's claim that it is common practice at OBCC to exit the control room to pedigree inmates before they go into the housing area (Tr. 159, 206-07). This makes sense because some of the control rooms do not have windows to speak to inmates (Tr. 159) and the one on first floor has just a small slot for papers that is difficult to communicate through. Respondent credibly added that he sometimes left the bubble to pat frisk inmates before allowing them into the housing area. Petitioner did not call any witnesses who are familiar with OBCC to rebut this testimony.

Similarly, Investigator David's claim that the vestibule is not part of the A post because it is a "pass-through" area was not accurate (Tr. 85-86, 121). The A officer is assigned to monitor the vestibule, is responsible for securing and opening the doors therein including maintaining the keys for the mini clinic and small holding cells, and performs several security checks of the vestibule during each tour. Obviously, the use of keys to open doors and the security checks

involve going out of the control room into the vestibule. Investigator David did not review the post order binder that is kept on the A post nor was it provided at trial (Tr. 100-01). It seems unlikely that there would be an order on site that precludes the post officer from ever entering the vestibule to pedigree an inmate.

Contrary to petitioner's claim that respondent left the bubble to confront an inmate, the undisputed, credible testimony of Officer Peteroy and respondent, as corroborated by the video, demonstrate that respondent left the bubble to calmly speak to the inmate about why he needed the pedigree information in an effort to gain the inmate's compliance.

Assuming that Operations Order 10/08 forbids an A post officer from leaving the control room without supervisor approval to pedigree an inmate, the abandonment charge must be dismissed under the doctrine of waiver and condonation. Under this principle, an agency may not lead an employee into believing that his conduct will not be considered a rule violation and then reverse its policy and seek to have the employee disciplined. *See Dep't of Environmental Protection v. Critchlow*, OATH Index No. 709/07 at 12 (Mar. 5, 2007); *Dep't of Correction v. Calligaro*, OATH Index No. 925/95 at 8 (Apr. 25, 1995); *see also Dep't of Environmental Protection v. Berlyavsky*, OATH Index No. 362/13 at 5-7 (June 14, 2013) (charge that respondent violated order not to speak to certain employees dismissed where agency condoned such communications); *Dep't of Environmental Protection v. Hewlett*, OATH Index No. 644/07 at 6-7 (Mar. 9, 2007) (charges dismissed where petitioner condoned practice of submitting forms in violation of agency policy); *Dep't of Correction v. Johnson*, OATH Index No. 514/02 at 13-14 (May 30, 2002), *modified on penalty*, Comm'r Dec. (July 17, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-39-SA (Apr. 11, 2003) (charges dismissed where employee told or lead to believe that he could not report to work pending processing of retirement application). Here, the common practice at OBCC was to leave control room to pedigree inmates.

#### *Anticipation of use of force charge*

Petitioner argued that respondent violated DOC Operations Order 10/08 and the Use of Force Directive, Directive Number 5006R-C ("Directive"), when he failed to call a supervisor and anticipate that he would be involved in a use of force incident with an inmate. Respondent argued that there was nothing about the inmate's conduct to suggest that a use of force would occur prior to the inmate striking him.

The relevant section of DOC Operations Order 10/08 states: “Notify your supervisor of any anticipated problems that you cannot resolve” (ALJ Ex. 2). Similarly, the Directive concerning the anticipated use of force provides:

Whenever the use of force is anticipated and the inmate does not pose an immediate threat, a supervisor shall be notified. All actions shall be under his/her direction unless circumstances change and the use of force is required before the supervisor arrives. In an emergency or situation where it is not possible or practical to notify a supervisor, staff may use appropriate force consistent with the procedures contained herein.

5006R-C § IV(C)(1) (ALJ Ex. 4). The Directive allows officers considerable discretion in assessing a situation which may involve physical contact with an inmate. *Dominguez*, OATH 550/10 & 551/10 at 5; *see also* Directive 5006R-C § V(A)(1)(a) (officer should “act and speak in a deliberate manner, and attempt to verbally persuade the inmate to comply.”). “The fact that force is used does not necessarily establish that it should have been anticipated.” Directive No. 5006 IV(C)(3).

Generally, when it has been found that an officer failed to anticipate force, the circumstances were such that the officer *clearly* should have known that force would be required. *See, e.g., Dep’t of Correction v. Andino*, OATH Index Nos. 731/13 & 1000/13 (May 14, 2013) (respondent failed to anticipate force with an inmate who was acting unruly and was refusing to enter his cell); *Dep’t of Correction v. Belgrave*, OATH Index Nos. 124/04 & 657/04 (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. CD02-74-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 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 inmate from attacking an officer after the inmate threatened to attack the officer); *Dep’t of Correction v. Harrington*, OATH Index No. 666/93 (July 20, 1993) (officer should have anticipated force when he called an inmate into corridor after an argument with inmate).

Petitioner argued that because the inmate was angry and had refused to provide his pedigree information, a supervisor should have been called (Tr. 299-301). Similarly, Investigator David stated that respondent should have anticipated force before he exited the bubble because the inmate was agitated (Tr. 75).

However, in his report, the investigator stated that the inmate “did not appear to be a threat” when respondent left the bubble (Pet. Ex. 1 at 9). Moreover, Investigator David agreed with respondent that when an inmate refuses an order it is appropriate to first use IPC skills to try and obtain the inmate’s compliance (Tr. 117). This is what respondent did. When respondent’s communication through the slot failed, he stepped into the vestibule and calmly spoke to the inmate about the need to verify his pedigree information before letting him into the housing area.

Officer Peteroy’s and respondent’s testimony that when respondent exited the bubble, there was nothing to suggest that force was imminent was consistent with the video. Except for the inmate’s initial failure to provide his pedigree information and his grumbling that he was not being allowed into the housing area there were no clear signs that the inmate was going to assault respondent. Both officers credibly stated that it is common for inmates to be irate about being asked pedigree information but that they are usually able to get inmates to comply by talking to them. According to the video, respondent spent about 25 seconds talking to the inmate before the inmate assaulted him.

Investigator David acknowledged that it was proper for respondent to put out his hand while speaking and to make contact with an inmate to maintain a safe distance (Tr. 103-04). It was not until the inmate struck respondent that a use-of-force situation quickly developed. According to the video, the time between the inmate’s initial assault until he was taken to the floor was approximately 60 seconds. Where events unfold spontaneously with little time for the officer to react, it is not possible for an officer to anticipate the use of force and notify a supervisor. *Belgrave*, OATH 124/04 & 657/04 at 9; *Nickless*, OATH 1658/95 at 10.

While the decision to enter the vestibule led to a use of force, petitioner failed to show that prior to the inmate assaulting respondent, respondent failed to anticipate a use of force or acted unreasonably when he did not call a supervisor. *See Dominguez*, OATH Nos. 550/10 & 551/10 at 6-7 (officers exercised reasonable judgment when they went into a pantry to speak to unruly inmate and therefore did fail to anticipate a use of force); *Dep’t of Correction v. Allen*,

OATH Index No. 510/04 & 624/04 (Oct. 13, 2004) (officers exercised reasonable judgment and, therefore, did not act in violation of force directive).

*Use of excessive force charges*

Petitioner alleged that respondent used excessive force when he struck the inmate in the jaw and sprayed him with CA from less than three feet away.

The Directive sets forth the policy concerning use of force and provides guidelines to minimize injuries to staff and inmates. 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).

The Directive provides that 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).

Investigator Davis conceded that it was appropriate for respondent to use force after the inmate struck his hand, including hitting the inmate in the torso (Tr. 74-75, 104). At issue is whether respondent’s strike to the inmate’s jaw violated the Directive.

I credit respondent’s testimony that he gave the inmate a verbal order to face the wall. The video shows that respondent did not immediately react to the inmate’s assault. When the inmate moved forward to strike again, respondent responded by punching the inmate. The strike was a glancing blow that landed on the inmate’s left jaw and caused no injuries. I further credit respondent’s assertion that he took aim at the inmate’s upper torso and did not realize that he had struck the inmate’s jaw until he saw the video. Under the circumstances it cannot be said, by a preponderance of the evidence, that respondent intentionally or negligently directed his blow to the inmate’s head. This was not a situation where an officer gratuitously punched an inmate who has ceased to offer resistance in order to punish, discipline, assault, or retaliate against him. *See e.g. Dep’t of Correction v. Dixon*, OATH Index No. 156/16 (Oct. 23, 2015) (officer used excessive force when he pushed an inmate who posed no threat against the wall, threw him to the

floor, grabbed him around the neck, and punched him multiple times in the head to punish him for threatening an officer). Rather, respondent was justified in using force to defend himself.

The use of the word “should” from Directive section V(B)(2)(e) rather than “shall” suggests that even when there is a blow to the head it is not an automatic violation. This is one of those cases where a blow to the head should not be deemed misconduct.

Turning to the charge that respondent used CA from less than three feet away, there is no dispute that he dispersed his spray from less than three feet from the inmate.

Department Directive No. 4510R-G concerning “Chemical Agents” (eff. Feb. 24, 2015) (“Directive 4510R-F”) states that the “use of chemical agents has proven to be an effective method in controlling certain situations” and that its use “would minimize physical confrontations between staff and inmates thereby reducing physical injuries to both parties.” Directive 4510R-G § I(a). There are several permissible reasons for officers to disperse CA, including defending oneself or others, to maintain the safety and security of the facility, to enforce Department rules where necessary to promote good order and safety of the facility, and to take an inmate into custody. Directive 4510R-G § V(a)(2). Prior to using CA the inmate “shall be warned” that it will be utilized if the inmate continues his misconduct. Directive 4510R-G § V(A)(1)(b), (4)(a). The Department’s safety guidelines further provide that CAs “should not be used at a distance of less than three (3) feet.” Directive 4510R-G § V(A)(4)(d).

Investigator David’s claim that there was no need to use CA because the incident had ended when Officer Peteroy had the inmate against the wall was not accurate. Both Officer Peteroy and respondent credibly stated that the inmate was resisting, was noncompliant to their verbal commands, and was still a threat. While petitioner claimed that Officer Peteroy was biased in favor of respondent (Tr. 300, 309), the video shows that every time respondent moved the inmate moved in the same direction and that he was still combative and noncompliant. Thus, it was reasonable for respondent to use CA to secure the area and take the inmate into custody.

The next question is whether the dispersal of the CA from less than three feet was misconduct. The video shows that respondent walked as far away as possible and created more than three feet between him and the inmate. Respondent also warned the inmate that he would use CA if the inmate did not cease his resistance. The inmate refused to comply and Officer Peteroy released him to minimize his own exposure to the spray. As soon as the inmate was released, he stepped forward towards respondent in an aggressive manner. Simultaneously,

respondent stepped towards the inmate with his arm outstretched to avoid being sprayed himself. When the spray was dispersed, the gap between respondent and the inmate had closed to less than three feet.

The record supports a finding that respondent used CA on an aggressive inmate who was not yet under full control, he moved more than three feet away and warned the inmate before using the spray, and the inmate stepped towards him in an aggressive manner while he aimed the spray towards the inmate. *Cf. Dep't of Correction v. Smith*, OATH Index No. 617/17 (May 4, 2017) (officer violated three-foot rule when he twice sprayed an inmate who was backing away and was not making evasive actions).

The use of the word "should" in Directive 4510R-G section V(A)(4)(d) again suggests that even when CA is sprayed from less than three feet it is not an automatic violation. Under the circumstances, it cannot be said that respondent intentionally or negligently sprayed the inmate from less than three feet distance. Consistent with the intent of Directive 4510R-G, the CA spray effectively concluded the incident without any injury to the inmate or staff. Thus, respondent's use of CA was not misconduct. *Dep't of Correction v. Angrum*, OATH Index Nos. 933/05 & 934/05 at 36-40 (July 13, 2006).

#### *False report charge*

Petitioner alleged that respondent's May 30, 2016 report was false. 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 at 15-16 (Mar. 29, 2006).

Petitioner failed to provide the questions that respondent was answering in the May 30 report and failed to identify what particular section was false. There was nothing apparently false in the report. Based on the lack of a complete record and any guidance on what is problematic with the May 30 report, this charge must be dismissed.

**FINDINGS AND CONCLUSIONS**

1. Petitioner failed to demonstrate that respondent abandoned his post as charged in specification 1.
2. Petitioner failed to demonstrate that respondent used excessive force as charged in specification 2.
3. Petitioner failed to demonstrate that respondent used excessive force as charged in specification 3.
4. Petitioner failed to demonstrate that respondent filed a false report as charged in specification 4.

**RECOMMENDATION**

The charges should be dismissed.

Alessandra F. Zoragniotti  
Administrative Law Judge

January 12, 2018

SUBMITTED TO:

**CYNTHIA BRANN**  
*Commissioner*

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