

Dep't of Correction v. Hamil & Villodas

OATH Index Nos. 1213/18, 1215/18 (July 9, 2018), *aff'd*, NYC Civ. Serv. Comm'n
Case No. 2018-1174 (Mar. 14, 2019), **appended**

Correction officers wrote false and misleading use of force reports.
15-day suspension recommended for officer with no disciplinary
record; 45-day suspension recommended for officer with
substantial disciplinary record.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
-against-
JASON HAMIL & JOSE VILLODAS
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

Petitioner, the Department of Correction, brings this disciplinary proceeding pursuant to Section 75 of the Civil Service Law, against respondents, Correction Officers Hamil and Villodas,¹ who are assigned to the George R. Vierno Center (“GRVC”) on Riker’s Island. Respondents are charged with submitting false, misleading, incomplete and/or inaccurate reports about a use of force incident which occurred at GRVC on June 5, 2015 (charges, ALJ Ex. 1).

At a three-day trial, petitioner presented respondents’ reports as well as video recordings of the incident, taken from a hand-held camera as well as stationary cameras. Petitioner’s

¹ Respondents moved at the beginning of trial to “seal . . . these proceedings,” asserting that “any public dissemination” relating to the trial would violate section 50-a of the Civil Rights Law. Civ. Right Law § 50-a (Lexis 2018). Petitioner opposed the application (Tr. 6-7). I denied respondent’s application, for the reasons set forth in *Dep’t of Correction v. Victor*, OATH Index No. 388/15, mem. dec. (Feb. 3, 2015) (denying respondent’s motion to redact his name and any other identifying personal information, and holding that OATH is an independent adjudicatory tribunal whose decisions are not “under the control” of the Department of Correction and thus not subject to the confidentiality provisions of section 50-a). Justice Shlomo Hagler dismissed an Article 78 proceeding which challenged the memorandum decision, holding that it was not arbitrary and capricious and did not lack a rational basis. *Victor v. Office of Trials and Hearings*, Index No. 100890/15 (Sup. Ct. N.Y. Co. May 29, 2018) (Hagler, JSC). He noted OATH’s status as an independent tribunal established under the City Charter and found that *Prisoners’ Legal Services v. New York State Dep’t of Correctional Services*, 73 N.Y.2d 26 (1988), which dealt with internal disciplinary records, was “inapposite” (*Victor*, Index No. 100890/15 at 6).

primary evidence was the video, which showed the incident from different angles. Petitioner also presented the testimony of Department investigator Taneisha Lauture and submitted other documentary evidence including photographs and the investigator's closing report (Pet. Ex. 5). Respondents testified on their own behalf and also submitted documentary evidence.

As set forth below, I find that the charges are sustained, except for a portion of the charge against Officer Hamil. I recommend a penalty of 15 days suspension for Officer Villodas and 45 days suspension for Officer Hamil.

ANALYSIS

It is undisputed that on June 5, 2015, at about 10 a.m., the Emergency Services Unit ("ESU") dispatched a "rapid response" team of correction officers to a housing area in building 9B in GRVC. The team included Officers Hamil and Villodas, who testified that they had been affiliated with ESU since 2010 and 2013, respectively (Hamil: Tr. 425; Villodas: Tr. 297). The team was sent to search for contraband in the housing area, although no contraband was found (Villodas: Tr. 248, 303).

Correction officers who engage in or observe a use of force, including the use of chemical agents, are required to write use of force reports before leaving the facility for the day which are "based on their own observations," including "[a] precise description of the incident," and "the specific reasons, if known to the writer, why force was necessary." (Pet. Ex. 6 at 6-11, DOC Use of Force Directive 5006R-C, section V(F)(3)). Correction officers receive training in how to write use of force reports. This training is given on multiple occasions, including when officers first join the Department and also when officers are accepted into ESU (Villodas: Tr. 343; Hamil: Tr. 447).

It is also undisputed that during the search on June 5, 2015, the inmates in the housing area lined up against a wall. An initial use of force occurred, involving Correction Officer Kevin Suarez and inmate Jarron Melvin. That inmate was subdued. A little over 20 seconds later, Correction Officer Jeffery Redondo dispersed chemical agents towards inmate Rashiem Brown.

Respondents wrote use of force reports about the incident in which they described Mr. Brown as turning around or spinning away from the wall "in an aggressive manner" just before being sprayed. More specifically, Officer Villodas wrote that the inmates were given a direct order to move down to their left, and that Mr. Brown "in an aggressive manner turned around, at

which time C.O. Redondo . . . utilize[d] chemical agents toward inmate Brown[’s] . . . facial area” (Pet. Ex. 10). Officer Hamil wrote that Mr. Melvin “engaged in a use of force” with members of the response team, and that “[o]ther members of the team guided the other inmates away from the scene of the incident at which time [he] witnessed inmate Brown . . . “spin away from the wall in an aggressive manner in the direction that the incident [between Mr. Melvin and Officer Soares] was occurring.” Officer Hamil continued, “Officer Redondo . . . then utilized the chemical agents and deployed a single burst toward inmate Brown’s facial area” (Pet. Ex. 11). Additionally, Officer Hamil wrote in his report that after the incident, Mr. Melvin and Mr. Brown were instructed to pass through the magnometer and sit on the “Boss” chair. Officer Hamil wrote that, “. . . it was found that inmate Melvin could not clear . . . ,” after which he was placed in restraints and secured in a holding cell (Pet. Ex. 11).²

At issue is whether respondents made intentionally false or misleading statements by characterizing Mr. Brown’s behavior as they did and by Officer Hamil writing that Mr. Melvin was unable to clear the “Boss” chair. Petitioner contends in its charges that the Genetec video footage shows that Mr. Brown offered no resistance before being sprayed and did not appear to be acting aggressively, and that respondents’ use of force reports are therefore false (ALJ Ex. 1). Respondents assert, however, that they believed based upon their split-second observations that Mr. Brown acted aggressively and wrote their reports in good faith based upon those observations. Respondents also assert that petitioner failed to prove that Officer Hamil made a false or inaccurate entry regarding the B.O.S.S. chair (Tr. 510).

False Statement Charges Involving Mr. Brown’s Conduct Before Being Sprayed

The video evidence (Pet. Ex. 20),³ taken as a whole, is clear and compelling. The hand-held video and the Genetec video, camera angles 224 and 225, are particularly relevant, up until

² The “Boss” chair is also referred to as a “B.O.S.S chair,” *see* Dep’t of Corrections, Units/Divisions, <http://www1.nyc.gov/site/doc/about/units-divisions.page> (last visited May 22, 2018) (referring to the facility maintenance and repair division which services the B.O.S.S. chairs). B.O.S.S appears to be an acronym for “body orifice security scanner,” *see* <http://bodyorificescanner.com/welcome> (last visited May 22, 2018).

³ Petitioner submitted two CDs into evidence. The CD entered as Petitioner’s Exhibit 20 has a handwritten notation, “HandHeld,” but it contains the hand-held video as well as all the Genetec video. The CD entered as Petitioner’s Exhibit 19 contains a handwritten notation, “Genetec Video,” but it only contains the hand-held video. All references to video evidence in this case will be to Petitioner’s Exhibit 20. Video references will note either “handheld” or the particular camera angle from which the video was taken (224, 225, 227) and will provide a

the point when the video taken at angle 227 becomes more helpful. Although the persons depicted on the video do not identify themselves by name (with the exception of Captain Ross, on the hand-held video), Investigator Lauture and the respondents identified most of the officers and inmates by name.

At about 9:55 a.m., Captain Ross indicates that ESU will be going into the housing area to conduct a search (hand-held: 11). The officers enter the housing area and order the inmates to stand against the wall and place their hands against the wall. The inmates, including Mr. Brown, comply and the officers stand or walk behind them (hand-held: 24; angle 224: 9:56:08:881-9:56:33:049; angle 225: 9:56:00:099-9:56:36:374). On the line of inmates, there are two inmates between Mr. Brown and Mr. Melvin (hand-held: 37). Mr. Brown is the fourth inmate from the left side of the frame, in front of a brown door wearing a black tee shirt and what appear to be grey sweatpants. The inmate directly to the right of Mr. Brown is wearing an oversized white shirt and was not identified by name (hand-held: 37; Tr. 205). Next to the unidentified inmate is inmate Tyriff Little, who has a goatee and is wearing a short-sleeved tee shirt and shorts with an orange stripe. Next to Mr. Little is Mr. Melvin, who is wearing a long-sleeved white tee shirt (hand-held: 37; angle 224: 9:56:18:867; angle 225: 9:56:24:489). The officers continue to order the inmates to “step up to that wall, step all the way up,” (hand-held: 24, 27). An officer stands behind Mr. Brown, who already has his hands on the wall; the officer appears to push him closer to the wall, where he remains (hand-held: 33).

Officers Villodas and Hamil are also not visible in the video at this time. Officer Villodas testified that he had gone to the top tier of the housing area to search for inmates (Tr. 304). Officer Hamil testified that he had entered the shower area, “parallel” to where the inmates were lined up (Tr. 433), to direct three inmates to finish showering and get dressed (Tr. 426). The shower stalls are depicted at the beginning of the hand-held video: two K-9 officers with dogs remain in the vicinity of the shower area while the other ESU members directly approach the inmates (hand-held: 12, 14-19).

Officer Suares then walks down the steps from the top tier into the housing area. He walks directly behind Mr. Melvin, pushes Mr. Melvin’s head into the wall, wraps his left arm around Mr. Melvin’s upper body, and begins to grapple with him to force him to the ground

timestamp. Timestamps for the hand-held video are in increments from :11 to 2:03, while timestamps for the Genetec video are will be in increments from 9:56:00:099 forward.

(hand-held :35-53; angle 224: 9:56:37:146- 9:56:53:342; angle 225: 9:56:49:474-9:56:53:273). The video does not depict what, if anything, justified Officer Suarez' use of force. Other officers begin to assist Officer Suarez in subduing Mr. Melvin (hand-held: 53-1:19; angle 224: 9:56:55:541; angle 225: 9:56:54:573-9:56:56:472). Just a few seconds later, Officer Villodas and another officer walk down the steps from the second tier into the housing area (angle 224: 9:57:01:736).

As Officer Suarez brings Mr. Melvin to the ground, Officer Christopher Flemens (since promoted to captain) moves from where he has been standing (against the back wall of the housing area) towards where Mr. Little, Mr. Brown, and the unidentified inmate are standing (angle 225: 9:56:52:074-9:56:55:755; hand-held: 53-57). About two seconds later, Officer Redondo, holding a spray canister of chemical agents, appears in the frame and moves left, advancing past the struggle on the floor between Mr. Melvin and the officers towards Mr. Brown, Mr. Little, and the unidentified inmate (angle 225: 9:56:57:274-9:57:02:384).

The initial interaction between Officer Flemens, Mr. Little, Mr. Brown, and the unidentified inmate is best observed on the hand-held video. When Officer Flemens approaches the group, Mr. Brown still has both hands on the wall and is facing the wall, although he has turned his head toward the struggle on the ground between Mr. Melvin and the other correction officers (hand-held: 57). Officer Flemens stands between the unidentified inmate (who is next to Mr. Brown) and Mr. Little, places one hand on each inmate, and pushes them down the line away from the incident, while directing, "slide down, slide down" (hand-held: 58-59). As a result, the unidentified inmate pushes into Mr. Brown with his left side. Mr. Brown, who has another inmate standing on the other side of him, is knocked slightly off the wall so that his right side is turned diagonally to the wall while his left side, including his shoulder and arm, remain pressed against the wall. However, Mr. Brown, like the inmate on the other side of him, immediately complies with Officer Flemens' directions to "slide down" and walks backwards, away from the incident on the ground (hand-held: 59-1:01). As Mr. Brown is sliding down the wall, Officer Villodas is shown on the hand-held descending the steps into the lower tier (hand-held: 1:00).

Video from the hand-held camera then pans away from Mr. Brown towards the struggle between Mr. Melvin and the correction officers who are trying to handcuff him (hand-held: 1:03) and does not show any other interaction between Mr. Brown and the correction officers until

after the dispersal of chemical agents, the hissing sound of which is heard on the hand-held at 1:14.

Video from camera angle 225, however, includes the actual spraying. The footage shows Officer Flemens placing his hand on Mr. Little's back to move the inmates away from the incident with Mr. Melvin; at this juncture Mr. Brown has his head against the wall. The inmates move as directed away from the incident (angle 225: 9:57:06:793-893). By this time Officer Villodas has begun walking behind the line of inmates near Mr. Melvin. Officer Villodas then walks around several metal tables towards the back wall near the shower stalls, close to where Mr. Brown is positioned (angle 225: 9:57:05:089-9:57:12:796). At one point Mr. Brown appears to have stepped slightly back from the wall (angle 225: 9:57:09:996), but this is right before he turns his body so that he is actually facing the back wall of the housing unit, away from Mr. Melvin (angle 225: 9:57:10:496-596), as Officer Hamil acknowledged when shown this frame of the video (Tr. 476).

Officer Flemens then places his right hand on Mr. Brown's shoulder and slides it down Mr. Brown's back (angle 225: 9:57:10:896- 9:57:11:996). Mr. Brown moves closer to the wall and faces the wall (angle 225: 9:57:11:396). However, he turns his head to look towards Mr. Melvin while remaining standing close to the wall (angle 225: 9:57:13:395). Almost immediately, Officer Redondo disperses chemical agents towards Mr. Little and Mr. Brown (angle 225: 9:57:13:495-795). Still photos taken from the Genetec video show Mr. Brown's position on the wall just before and when he was sprayed: he is standing close to the wall, with Officer Flemens' hand on his back, and his head slightly turned toward the incident with Mr. Melvin (Pet. Ex. 18 at 6, 7, at 9:57:13).

By the time of the spraying, Officer Villodas had walked around the metal tables and was facing in the direction of Mr. Little and Mr. Brown (angle 225: 9:57:12:662). Indeed, as Officer Redondo advances forward with the spray canister, Officer Villodas also walks forward; by the time that Officer Redondo disperses the spray, Officer Villodas has reached the front of the metal table and is closer to Mr. Little and Mr. Brown (angle 225: 9:57:12:662-9:57:13:895). Officer Villodas continues to walk forward and a few seconds later, pulls Mr. Brown off the wall onto the ground (angle 225: 9:57:17:571-9:57:18:638; hand-held: 1:17-1:20; Tr. 120-21, 207).

At the same time that Officer Villodas pulls Mr. Brown off the wall, Mr. Little complies with the order to lie on the ground and put his hands behind his head (hand-held: 1:17-1:22). Mr.

Little's white tee shirt has an orange splotch on the back from the chemical spray. Officer Villodas continues to try to restrain Mr. Brown, who is resistant but who is ultimately restrained and handcuffed by Officer Villodas with the assistance of other officers, including Officer Hamil and Officer Spatarella (hand-held: 1:20-1:50; angle 225: 9:57:27:269). Mr. Brown is heard yelling that he would sue because it is not permitted to spray chemical agents in an inmate's face (hand-held: 1:56). By this time Mr. Melvin has also been restrained and handcuffed (hand-held: 1:20-1:34). After the inmates are all restrained, Officers Villodas and Spatarella walk Mr. Brown out of the area (hand-held: 2:00). Other correction officers escort Mr. Melvin from the area (hand-held: 2:03).

Officer Hamil, unlike Officer Villodas, is not seen on the Genetec video, angle 225 until 9:57:19:837, which is about six seconds after Officer Redondo sprays chemical agents. Officer Hamil appears from the rear of the housing area, near the showers and where the K-9 officers had been standing, walks towards the incident, pausing momentarily, and then helps Officer Villodas subdue Mr. Brown (angle 225: 9:57:19:837-9:57:27:069). However, Officer Hamil is visible earlier in the video taken by camera angle 227. Officer Hamil testified that the shower area to which he had gone is not on screen, but is to the far left of the screen, behind the blue table (angle 227: 9:55:13:931; Tr. 434, 483). Officer Hamil appears in the doorway of the shower area (angle 227: 9:57:12:744, 9:57:15:234; Hamil: Tr. 487, 490-91). He then walks towards the incident (angle 227: 9:57:18:334, 9:57:19:633, 9:57:20:333), pausing momentarily near the back wall of the housing area (angle 227: 9:57:21:632-9:57:24:829) before walking off frame toward Mr. Brown and the other inmates (angle 227: 9:57:25:49).

In sum, the video evidence is inconsistent with Officer Villodas' use of force report, in which he wrote that Mr. Brown, when ordered to move to his left, "in an aggressive manner turned around at which time" he was sprayed with chemical agents (Pet. Ex. 10). The video evidence is similarly inconsistent with Officer Hamil's use of force report, in which he wrote that "[o]ther members of the team guided the other inmates away from the scene of the incident [with Mr. Melvin], at which time this writer witnessed inmate Brown . . . spin away from the wall in an aggressive manner in the direction that the incident was occurring. Officer Redondo then utilized the chemical agents . . ." (Pet. Ex. 11).

The video evidence instead shows that when Office Flemens "guided" the inmates away from the incident with Mr. Melvin, Mr. Brown complied and moved further down the wall.

Officer Flemens pushed or moved the unidentified inmate to the right of Mr. Brown, while ordering the inmates to move down. The unidentified inmate was pushed into Mr. Brown, knocking Mr. Brown's right side off the wall. Mr. Brown's left side remained against the wall. Mr. Brown then moved further down the wall, as directed by Officer Flemens, away from the incident with Mr. Melvin. Just before he was sprayed, Mr. Brown was standing close to the wall, facing the wall. Mr. Brown turned his head to look at Mr. Melvin. But he did not turn his body around or spin away from the wall in an aggressive manner (angle 225: 9:57:13:395).

Respondents introduced evidence of Mr. Brown's infraction history, which showed that he was convicted of three disciplinary infractions while at Rikers: struggling with another inmate on April 4, 2015, and on June 2, 2010, and not obeying orders promptly on July 10, 2010 (Resp. Ex. A; Tr. 193). However, that infraction history, like Mr. Brown's history of incarceration and custody level,⁴ is ultimately irrelevant, because the clear video evidence shows that Mr. Brown did not turn around or spin away from the wall in an aggressive manner.

The video evidence establishes that respondents' use of force reports were materially false in that they alleged that Mr. Brown "turned around" or "spun away" from the wall in an aggressive manner. The remaining issue is whether respondents intentionally made materially false statements or whether their reports represented good faith efforts to describe their observations, but were simply mistaken. *See Dep't of Correction v. Ford*, OATH Index Nos. 734-738/13 at 14 (May 23, 2013), OATH Index Nos. 735/13, 737/13 and 738/13 *affirmed*, CSC Decisions Nos. 35686, 35684 and 35685 (Apr. 17, 2014), OATH Index No. 736/13, *aff'd in part, rev'd in part*, CSC Decision No. 35683 (May 28, 2014)⁵ ("[n]ot all inaccuracies can be found to be intentionally false and the use of imprecise language should not be sanctioned as a false statement absent intent to conceal or deceive"); *Dep't of Correction v. Holder*, OATH Index No. 2208/07 at 4 (Sept. 14, 2007) ("use of imprecise language should not be punished as a false statement if it appears the author did not intend to conceal or deceive").

⁴ The Investigation Division's closing report shows that Mr. Brown was transferred to state prison on June 22, 2015 and discharged on October 16, 2015, has been in DOC custody on nine different occasions since June 17, 2006, and that his custody level at the time of his transfer to state prison was eight (Pet. Ex. 5 at 4). Respondents also attempted to introduce evidence of Mr. Brown's subsequent conviction, after the incident in question, asserting that this showed that Mr. Brown put his own interests "over that of society's" (Tr. 180-81). I denied that request as irrelevant to the issue of what respondents observed on June 5, 2015.

⁵ The Civil Service Commission reversed the finding that one of the correction officers (Rolle) used excessive force, but sustained findings that he made a false report and false statements at an investigatory interview.

Both Officers Hamil and Villodas testified that they wrote their reports independently, at the ESU compound (Villodas: Tr. 310-11, 373-74; Hamil: Tr. 429, 454). Officer Villodas specified that he wrote his report inside his car, in the ESU Parking lot to which ESU officers usually returned after a search to remove and store their gear (Tr. 373-74). Officer Hamil explained that there had been a debriefing after the incident, as is customary, but denied discussing the use of force with other officers (Tr. 451, 455).

Officer Villodas, when asked about that portion of his report where he wrote that Mr. Brown “in an aggressive manner turned around” before the spraying (Pet. Ex. 10), testified that Mr. Brown did not follow the officers’ instructions to slide down the wall or keep his hands on the wall (Tr. 313). According to Officer Villodas, when ordered to keep moving to his left, Mr. Brown “took his hands off the wall and turned his body,” which he considered to be “aggressive” (Tr. 349). He explained that he saw Officer Flemens “guiding” the inmates left; at the time Mr. Brown was “stationary” (Tr. 353). However, as he approached Officer Flemens, Officer Villodas saw Mr. Brown “. . . turn his body to me, which was an, an aggressive manner” (Tr. 306). Right after this, Officer Redondo sprayed chemical agents (Tr. 306). Officer Villodas denied that Mr. Brown moved down the wall as directed by Officer Flemens (Tr. 351). Officer Villodas testified, however, that had he been interviewed by the Department of Investigation under Mayoral Executive Order 16 (“MEO 16”), he would have “clarified” his use of force report to “maybe” remove the word “aggressive” (Tr. 385). At the same time, he reiterated that he believed Mr. Brown turned off the wall “aggressively” because he had turned off the wall after being ordered by Flemens to slide down the wall. He denied that his report was “misleading” or that he intended to mislead and asserted that he tried to write his report as accurately as possible, without having had the benefit of seeing the video before writing it (Tr. 334).

Officer Villodas’ testimony that he saw Mr. Brown take his hands away from the wall and turn his body in defiance of Officer Flemens’ orders was not persuasive. The video shows no such thing. The video shows instead that Officer Flemens pushed or guided the inmate next to Mr. Brown to the left, causing that inmate to collide into Mr. Brown and knock his right side off the wall. Mr. Brown then followed orders to keep moving left. When Officer Flemens, seconds later, touched Mr. Brown on the arm and shoulder, Mr. Brown moved closer to the wall and faced the wall. Officer Villodas was in a position to see this. He is shown on video looking

in the direction of Officer Flemens and Mr. Brown. It follows that Officer Villodas would have seen what Mr. Brown did next, which was to turn his head. It does not follow that Officer Villodas would construe Mr. Brown turning his head while keeping his body close to the wall as “in an aggressive manner turn[ing] around.” Thus, Officer Villodas’ claim that he did not intend to mislead when writing his use of force report was not credible, and the charge that he intentionally wrote a false or misleading use of force report is sustained. *See Ford*, OATH 734-38/13 at 17 (sustaining false reporting charges where the characterization of an inmate as having “attacked” a correction officer is “inconsistent” with the video, which “fails to show any conduct that might constitute an attack”); *Holder*, OATH 2208/07 at 4 (where correction officer wrote that he “pushed” an inmate and video showed that he instead struck the inmate hard in the face with an open fist, his report “was not merely inaccurate” as “[i]t was clearly intended to conceal the degree of force which he used and, as such, constituted a false statement”).

Officer Hamil’s testimony regarding the incident was also not persuasive. He explained that he had been in the entrance way of the shower area, which was about 25 to 30 feet away from where the inmates were lined up, when he heard a “commotion” from the hallway. He looked into the hallway and saw Officer Soares struggling with Mr. Melvin on the ground (Tr. 426). He also saw Officer Flemens “ushering” Mr. Brown and other inmates down the wall (Tr. 466). Officer Hamil acknowledged that his vantage point from the shower entranceway would have permitted him to observe Mr. Brown and Officer Flemens but he “was not focusing on them” (Tr. 461). He “kept looking back and forth,” between the inmates in the hallway and the inmates in the shower area (Tr. 470, 42-73).

According to Officer Hamil, when he “looked out” from the shower area, he “saw Officer Villodas and Officer Flemens, which was directly in front of [him]. I saw inmate [Brown] go in one direction and then he suddenly spins [in] the other direction and was sprayed with the chemical agents” (Tr. 426). Officer Hamil stressed that it was the “rapid movement” of Mr. Brown “spinning” which prompted Officer Redondo to disperse chemical agents (Tr. 470). He wrote his report indicating that he saw Mr. Brown “spin away from the wall in an aggressive manner in the direction that the incident was occurring” because of “[t]he speed of his turn” (Tr. 432, 439). Indeed, he thought that Mr. Brown “was going to shoot off . . . over where the incident was going on” (Tr. 432).

Upon watching the video at trial, Officer Hamil acknowledged that “the video is showing something different from what [he] saw at the time (Tr. 440). He asserted that the video shows the view from the side “that clearly shows what the inmate was doing” (Tr. 440). The camera from which the video was taken is in the middle of the housing area, mounted about ten to twelve feet high, and was about 40 to 50 feet away from where he was standing in the entranceway to the shower area (Tr. 440-41). He, on the other hand, is slightly over six feet tall (Tr. 441). He asserted that he did not have the same perspective seen through the camera lens, and that his “one second reaction” was that Mr. Brown had acted aggressively (Tr. 440).

The difficulty with Officer Hamil’s testimony is that although the video cameras for both angle 225 and 227 were taken from overhead cameras mounted some distance away from where Officer Hamil was standing, Officer Hamil was standing very close to Mr. Brown and Officer Flemens. Indeed, Officer Hamil testified that Officer Villodas and Officer Clemens were “directly in front” of him and that he saw Officer Flemens ushering Mr. Brown and the other inmates down the hall. He claimed that, from that same vantage point, he saw Mr. Brown spin around rapidly. This makes no sense. If Officer Hamil was in a position to observe the encounter between Mr. Brown and Officer Flemens – as he testified and as the video evidence bears out – then he would have seen the unidentified inmate temporarily knock Mr. Brown’s right side off the wall, after which Mr. Brown complied with Officer Flemens’ instructions to move down the wall. Similarly, he would have seen that Mr. Brown turned his head toward the incident with Mr. Melvin just before being sprayed. As with Officer Villodas, it does not follow that Officer Hamil would have considered the turn of a head to be the same as an aggressive spin off the wall. Officer Hamil’s credibility was further undercut by his prior guilty plea to filing a false or misleading use of force report, notwithstanding his assertion that he “did not accept liability” (Tr. 424, 422). See *Fire Dep’t v. Johnson*, OATH Index No. 1147/18 at 12-13 (May 3, 2018); *Dep’t of Correction v. Gomez*, OATH Index No. 217/04 at 6 (Mar. 22, 2004), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD05-32-SA (Apr. 27, 2005).

The charge that Officer Hamil wrote a false or misleading use of force report, as relating to that portion of the report indicating that he saw Mr. Brown “spin away from the wall in an aggressive manner,” is sustained. See *Ford*, OATH 734-38/13 at 17; *Holder*, OATH 2208/07 at 4.

False Statement Charge relating to B.O.S.S. Chair

Officer Hamil wrote in his use of force report that Mr. Brown, Mr. Melvin, and the other inmates who had been exposed to chemical spray were taken to a “decontamination area” to be decontaminated and searched, after which Mr. Brown and Mr. Melvin were instructed to pass through the magnometer and sit on the “Boss” chair. He wrote, “. . . and it was found that inmate Melvin could not clear. Inmate Melvin was placed in restraints and secure[d] in an intake pen” (Pet. Ex. 11). Petitioner contends that Officer Hamil made an intentionally false statement by writing that Mr. Melvin could not clear the “Boss” chair.

Officer Hamil testified that after the incident, ESU staff took the inmates who were exposed to chemical agents to a shower area within the intake section for decontamination. ESU staff strip-searched Mr. Brown and Mr. Melvin and put them through the magnometer and the B.O.S.S chair. Mr. Brown cleared, but Mr. Melvin did not (Tr. 427- 428, 452). Mr. Melvin was placed in handcuffs and “secured” in the intake area in a holding pen (Tr. 428). Officer Hamil denied having any contact with Mr. Melvin after this (Tr. 428). He was assigned to ESU and ESU’s role stops once inmates are secured in intake (Tr. 429). Officer Villodas agreed that once an inmate is secured in the intake area, ESU exits the location and the officers that work in intake take over (Tr. 402).

It was not disputed that an inmate who is exposed to chemical agents after a use of force is removed from the immediate area and taken to a shower area within the intake section for decontamination (Lauture: Tr. 144; Villodas: Tr. 404). After showering, the inmate must walk through the magnometer and sit in the B.O.S.S. chair (Villodas: Tr. 402). If an inmate clears the magnometer and B.O.S.S. chair, ESU will put him in a holding cell and notify the intake officer that he has cleared. The inmate will be taken from the holding cell to the medical clinic, and after the medical clinic, will be escorted to his housing area (Lauture: Tr. 141; Villodas: Tr. 407).

However, an inmate who has been exposed to chemical agents but does not clear the B.O.S.S. chair after decontamination will not be taken to the medical clinic because of the likelihood that he is secreting some sort of weapon inside his body, posing a security risk (Villodas: Tr. 398, 408; Lauture: Tr. 146). The ESU captain will alert the tour commander if an inmate does not clear the B.O.S.S. chair (Villodas: Tr. 402-03). Instead, an inmate who does not clear the B.O.S.S. chair is taken to an isolation area, which in 2015 was located within building 2B. The inmate will stay in isolation until he clears. Members of the medical team report to

isolation as needed (Lauture: Tr. 145, 146, 151, 281). The logbook entries for building 2B should indicate if an inmate who did not clear the B.O.S.S. chair was sent to isolation (Lauture: Tr. 149).

The documentary evidence establishes that both Mr. Melvin and Mr. Brown received medical attention at the clinic after the incident (Pet. Exs. 16, 17, 24). The clinic logbook shows that Mr. Brown entered the clinic at 1:30 p.m. and exited at 1:45 p.m., and that Mr. Melvin entered the clinic at 1:40 p.m. and exited at 2:00 p.m. (Pet. Ex. 24). There were two other inmates involved in the same use of force (demarcated as injury occurring at 10:10 a.m.) who were also seen at the clinic: Mr. Little, who entered the clinic at noon and exited at 12:20 p.m., and Mr. Rodriguez, who entered at 1 p.m. and departed at 1:45 p.m. (Pet. Ex. 24). The injury to inmate report for Mr. Melvin corroborates that he was treated at the clinic at 2:00 p.m. and returned to the housing area (Pet. Ex. 16). Additionally, the logbook entries for building 2B for the date in question do not contain any reference to Mr. Melvin (Pet. Ex. 25: Tr. 149).

Petitioner contends that the portion of Officer Hamil's report that states that Mr. Melvin failed to clear the "Boss" chair must be false, because he was seen at the medical clinic. Petitioner asks that I infer from the lack of entries in the logbook for building 2B that Mr. Melvin was not taken to isolation, and that I further infer that Mr. Melvin would have been taken to isolation if he had failed to clear the "B.O.S.S." chair. However, these inferences are inappropriate in light of the significant lapse of time between the use of force (indicated in the clinic logbook as 10:10 a.m.) and the time that Mr. Melvin was seen at the clinic (1:40 p.m.). This lapse of time was unexplained. Petitioner, who has the burden of proof, could have called a witness from the intake unit to explain how Mr. Melvin left the intake area to go to the clinic. As petitioner did not, it would be too speculative to draw any conclusions about what occurred after ESU left the intake area, including whether Mr. Melvin was taken to building 2B, despite the lack of logbook entries, whether he went to any other isolation area, or whether he cleared the magnometer or B.O.S.S. chair while still in the intake unit, before being escorted to the clinic.

Accordingly, petitioner did not establish that portion of the charge against Officer Hamil which alleges that he falsely wrote that Mr. Melvin did not clear the "Boss" chair.

Other False Statements – Motion to Amend Denied

On redirect of Investigator Lauture, petitioner's counsel sought to ask whether there were other "problematic" items in the respondents' use of force reports, beyond their description of what Mr. Brown did immediately before being sprayed and Officer Hamil's comments relating to the "Boss" chair (Tr. 269). Petitioner's counsel indicated that the purpose of such questioning would be to "establish the scope of the misconduct and/or the omissions and/or misrepresentations" in the officers' reports, beyond what was contained in the charges (Tr. 272). She asserted further that that respondent's cross-examination had "expanded the scope of these proceedings" (Tr. 271), because counsel had purportedly asked the Investigator if the false and/or misleading statements specified in the charges were the only issues with which she took exception (Tr. 272). As a result, petitioner's counsel argued that the charges be "conformed to the evidence," based upon the witness's testimony, because "OATH routinely conforms the charges to the evidence" (Tr. 274). Respondent's counsel objected, asserting that conforming the charges to the evidence in this matter would be tantamount to amending the charges, which would violate OATH's rules, and more importantly, deprive his clients of due process (Tr. 274).

Charges in administrative proceedings must "apprise the party whose rights are being determined of the charges against him . . . to allow for the preparation of an adequate defense." *Block v. Ambach*, 73 N.Y.2d 323, 333 (1989); *DiAmbrosio v. Dep't of Health*, 4 N.Y. 3d 133, 140 (2005). In an administrative trial, as in a criminal trial, "[n]o person may lose substantial rights because of wrongdoing shown by the evidence, but not charged." *Murray v. Murphy*, 24 N.Y.2d 150, 157 (1969). See also *Baines v. Berlin*, 36 Misc. 3d 203, 207 (Sup Ct. N.Y. Co. 2012). OATH's rules permit for the amendment of charges, upon consent of counsel or with the permission of the administrative law judge if the amendment is less than 25 days before the commencement of trial. 48 RCNY § 1-25 (Lexis 2018). However, consistent with the due process requirement that administrative charges provide sufficient notice to permit a respondent to mount an adequate defense, motions to amend charges on the day of trial, particularly after the petitioner has already presented some of its evidence, are carefully scrutinized to ensure that the respondent is not prejudiced by the belated amendment.

Where amendment of charges on the day of trial will substantially alter the nature of the proof, amendment is not permitted. See *Dep't of Correction v. Boyce*, OATH Index No. 789/97 (July 9, 1997), *adopted*, Comm'r Dec. (Jan. 15, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 99-75-SA (July 19, 1999) (denying motion to amend charges at the beginning of trial where

proposed amendment “represented a change in the theory of prosecution” – alleging a premeditated attack on a civilian rather than a chance altercation – and noting that the Department “should have been aware of the theory on which it wished to proceed well in advance of trial); *Dep’t of Correction v. Slevin*, OATH Index No. 323/87 at 11 (Aug. 5, 1988) (denying motion to amend charges after testimony of inmate, and noting, “[b]y amending its prosecutorial theory so late in the proceeding, the Department has denied respondent both adequate notice of the nature of the charge and a full and fair opportunity to respond”); *Cf. Dep’t of Correction v. Mohr*, OATH Index No. 724/17 at 2 (June 9, 2017), *aff’d*, NYC Civ. Serv. Comm’n Case No. 2017-870 (Dec. 21, 2017) (granting motion to amend petition at start of trial where “the essence of the charges” – concerning the circumstances under which an inmate was rear cuffed – “were not appreciably changed by the amendment”); *Dep’t of Correction v. Bovell*, OATH Index No. 1910/99 at 2, n.1 (Aug. 13, 1999) (respondent not prejudiced by conforming charge to proof presented at hearing when given opportunity to defend substantive charge).

Here, the charges against respondents were appropriately specific regarding the nature of their alleged false statements. Petitioner alleged that both respondents made a false or misleading statement “in that” they stated that Mr. Brown, before being sprayed, “in an aggressive manner turned around” (Officer Villodas) or did “spin away from the wall in an aggressive manner in the direction that the incident was occurring” (Officer Hamil) (ALJ Ex. 1). Petitioner further alleged, as to Officer Hamil, that he made a false statement relating to Mr. Melvin’s failure to clear the “Boss” chair (ALJ Ex. 1). The charges did not contain any other allegation relating to the respondents’ use of force reports. As respondent’s counsel argued, “[t]he issue [as to the alleged misconduct has] been spelled out in this regard” (Tr. 270). Yet petitioner argued that it should be able to pursue a new line of questioning with regard to other portions of the respondents’ use of force reports because of respondent’s counsel’s cross-examination. According to petitioner, it would be proper for this tribunal to make findings against respondent based upon the evidence resulting from such questioning.

The record does not support the assertion that respondent’s counsel questioned Investigator Lauture in the manner claimed (*see, e.g.*, Tr. 198-99). But that is not the point. The way in which a respondent’s counsel chooses to cross-examine does not permit an agency to expand the scope of its charges. Petitioner could have drafted more expansive charges to begin with, and could have amended its charges as a matter of right up to 25 days before trial. Instead,

petitioner sought to expand the scope of the trial on the second day of trial, on the redirect of its primary witness. Respondents' counsel had already spent a full day defending against the charges as drafted and could not be expected to alter its strategy to conform with a new theory of proof on the second day of trial.

Accordingly, petitioner was precluded from questioning Investigator Lauture about other "problematic" portions of respondents' use of force reports and to have the charges conformed to the evidence adduced from such questioning.

FINDINGS AND CONCLUSIONS

1. On June 5, 2015, Officer Villodas made false and misleading statements in his use of force report, as alleged in the charge against him (DR B0643/2016).
2. On June 5, 2015, Officer Hamil made false and misleading statements in his use of force report, as alleged in the charge against him, except that petitioner failed to establish that he made false and misleading statements about whether an inmate cleared the B.O.S.S. chair (DR BO641/2016).

RECOMMENDATION

Upon making these findings, I reviewed respondents' disciplinary abstracts. The abstract for Officer Villodas showed that he has been a correction officer since 2008 and has no prior disciplinary record. The abstract for Officer Hamil shows that he was appointed as a correction officer in 2006 and has been disciplined twice before for excessive use of force. In 2008, he accepted a penalty of a loss of 30 vacation days and two years full probation, and in 2013, he accepted a penalty of 15 "comp/vac" days.

Petitioner has asked that I recommend a penalty of 45 suspension days for Officer Hamil, and 20 suspension days for Officer Villodas, with the lower penalty justified by Officer Villodas' lack of prior discipline (Tr. 529). Respondents, while contending that the charges should be dismissed, assert in the alternative that Officer Villodas should not be suspended for more than 15 days and that Officer Hamil should not be suspended for more than 20 days (Tr. 512).

I agree with respondents concerning Officer Villodas. As petitioner notes, this tribunal has generally recommended penalties between 15 and 45 days for false reporting, considering the officer's disciplinary history, the severity of the force and injury, and the degree of the officer's

involvement in the deception (Tr. 527). See *Dep't of Correction v. Cantelmo*, OATH Index No. 2562/17 at 5-6 (Oct. 20, 2017) (citations omitted). In *Cantelmo*, Judge Zorngiotti recommended that a correction officer who had filed a false use of force report and made a false statement in a MEO 16 interview receive a 15-day suspension for *each* instance of false reporting. Similarly, in *Ford*, OATH 734-38/13 at 29-30, Judge Gloade recommended a 20-day suspension for a correction officer with no prior disciplinary record who had submitted a misleading use of force report and made misleading statements during an MEO 16 interview. By contrast, she recommended a 15-day suspension for two correction officers, neither of whom had a disciplinary record, who each had submitted a misleading use for force report. Following this precedent, and in keeping with the principles of progressive discipline, I recommend that Officer Villodas be suspended for 15 days.

A far more substantial penalty, however, is required for Officer Hamil. This is Officer Hamil's third use of force incident, the last one being just five years ago. False reporting of use of force is not a minor violation. The Department has a duty of care to the inmates in its custody. Part of that duty is to ensure that inmates are not subject to unwarranted and excessive force. An officer who lies about or exaggerates an inmate's aggressiveness in order to justify the use of force by other officers thwarts the Department from carrying out its duty of care and undermines its mission. Accordingly, given Officer Hamil's disciplinary record, I recommend that he be suspended for 45 days.

Faye Lewis
Administrative Law Judge

July 9, 2018

SUBMITTED TO:

CYNTHIA BRANN
Commissioner

APPEARANCES:

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

In the Matter of the Appeal of

JASON HAMIL and JOSE VILLODAS

Appellants

-against-

DEPARTMENT OF CORRECTION

Respondent

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

CSC Index No: 2018-1174 and Index No: 2018-1176

DECISION

JASON HAMIL and **JOSE VILLODAS** (“Appellants”) appealed from a determination of the Department of Correction (“DOC”) finding Appellants guilty of incompetency and/or misconduct and imposing a penalty of a 45-days’ suspension and a 15-days’ suspension respectively following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission (“Commission”) heard arguments from the parties on March 7, 2019.¹

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 as to both Appellants.

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¹ Although the Commission assigned an index number to each Appellant individually, the cases were consolidated and heard together as had been done during the disciplinary proceedings conducted at the Office of Administrative Trials and Hearings (OATH). Appellants Jason Hamil and Jose Villodas were jointly represented by Peter Troxler, Esq. at both the OATH hearing and for the current appeal before the Commission.

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

SO ORDERED.

Dated: March 14, 2019