Dep't of Correction v. Virola

OATH Index No. 181/18 (Aug. 31, 2018)

The Department did not prove by a preponderance of the credible evidence that respondent used unauthorized or excessive force or made false statements about the incident. ALJ recommends that the charges against respondent be dismissed.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
ISMAEL VIROLA
Respondent

REPORT AND RECOMMENDATION

JOYCELYN McGEACHY-KULS, *Administrative Law Judge*

Petitioner, the Department of Correction ("Department"), brought this disciplinary proceeding under Section 75 of the Civil Service Law. It alleged that respondent, Captain Ismael Virola, used unauthorized or excessive force against an inmate and made false or misleading statements when interviewed pursuant to Mayoral Executive Order 16 ("MEO 16") (ALJ Ex. 2).

At the four-day trial, petitioner presented documentary evidence and testimony from Department investigator T. Lauture, inmate R. Williams, who was the subject of the use of force, Officer D. Chestnut, and Captain D. Lomas. Respondent testified and presented testimony from Assistant Deputy Warden H. Mitton.

For the reasons below, I find that petitioner did not prove the charges against respondent.

BACKGROUND

The following facts are not in dispute. Respondent has worked for the Department for 17 years and has been a captain for seven years. He has no disciplinary record. On December 28, 2015, respondent was assigned to the food service area in George R. Vierno Center ("GRVC"), working the noon – 8:00 p.m. shift. At approximately 6:30 p.m., Williams and several other

inmates were involved in a fight in Building 9 and an alarm was sounded signaling that officers needed assistance. Respondent was part of a probe team that responded to the alarm. He reported to the staging area to put on his protective gear, which that included a riot helmet, riot vest, 36-inch riot baton, and gas mask. In order to break up the fight and control the inmates, Williams and other inmates were sprayed with chemical agents. When chemical agents are used, inmates must be taken out of the affected area and brought to a shower for decontamination. Chestnut took Williams to the main intake area en route to the decontamination area. Chestnut used an escort hold on Williams, who was also restrained with his wrists flexcuffed behind his back. Respondent saw Chestnut escorting Williams without a supervisor and advised his tour commander that he would accompany Chestnut to secure Williams. Another inmate was in the shower when they arrived at the decontamination area so Chestnut escorted Williams toward another pen to wait until the shower was available. Williams refused to go into the other pen, jumped up and kicked the door closed. Chestnut brought Williams to the ground and at that time, one of Williams's hands came out of the flexcuffs. During this struggle, respondent jabbed Williams with his baton.

Chestnut was called as a Department witness. Chestnut testified that he is 6'1" and weighs 245 pounds. He has worked as a correction officer for five years and is a Security A officer assigned to security risk groups (gangs) and inmates that have a propensity for violence (Tr. 191, 211). Chestnut and his response team responded to the alarm at Building 9A in GRVC. Chestnut testified that he was "fully suited," wearing a helmet and vest, and carrying a baton (Tr. 196). When they arrived, Williams and the other inmates had already been sprayed with the chemical agent. Chestnut used an escort hold and took Williams to main intake to await decontamination (Tr. 199). When they arrived at the decontamination area, the shower was being used by another inmate. Chestnut testified that two inmates cannot be in the shower at the same time so he told Williams that he would have to wait for decontamination and moved him toward another pen (Tr. 229-230).

Chestnut testified that Williams said that he did not want to wait, kicked the door closed, and began shouting that he wanted to be cleaned up (Tr. 205). Officer Stewart-Smalls came over to try to calm Williams but he had gotten his hand out of the flexcuffs (Tr. 207). Chestnut then "grabbed [Williams] and took him down" using an upper body control hold. Chestnut explained that the chemical agent is oil based and makes the inmate's skin slippery. It is easy for an inmate

to "slip the cuffs" (Tr. 207). When Chestnut grabbed Williams, Williams fell on top of him. Chestnut then rolled over onto Williams, at which point both of Williams's hands were free (Tr. 210). Chestnut was on top of Williams trying to get the cuffs back on him but "could only get one [hand on], not both. It was basically a tug of war with [Williams]" (Tr. 212). He testified that he did not use his body weight to restrain Williams but that he was trying to get his hands recuffed (Tr. 215). Chestnut stated that he only had control of one hand at a time. Chestnut was not sure which other officers were around him because he was wearing his helmet, which obstructed his vision. Chestnut testified that he did not recall whether Williams was on his knees or whether Williams was threatening respondent or anyone else. He testified that Williams was not trying to punch him, but recalls telling a Department investigator that Williams was resisting (Tr. 231-32).

Respondent testified that when Williams jumped up and kicked the door closed, Williams's hands came out of the cuffs. He observed Chestnut struggling with Williams and Chestnut taking Williams down to the ground. Respondent testified that he told Williams to stop resisting but Williams kept trying to push up to his knees to get to his feet to come at respondent. Respondent stated that Williams began cursing and was trying to come toward him so respondent used his baton and struck Williams approximately two times in the chest area using jab strikes. Respondent explained that he struck him because he was afraid for his safety and for Chestnut's safety (Tr. 301-02). According to respondent, Williams was not secured and Chestnut was trying to get Williams to stay on the ground so that he could cuff Williams (Tr. 303). Respondent was trained in the Academy on the use of baton and how to administer a jab strike (Tr. 302). Respondent stated that he did not strike Williams in the face, head, or testicles. He did not use the baton as a billy club and did not swing the baton (Tr. 305).

Williams testified that he asked Chestnut why he was not able to go to the shower immediately and that the officers became aggressive with him. Respondent shouted to Chestnut to take him down and Chestnut put him in a chokehold. Williams, who was 5'10" and weighed 150 at the time of the incident, said that he was not being aggressive, that he only wanted to go to the shower, and that he was "just sitting there complaining" when respondent starting poking him with the baton (Tr. 264, 256). According to Williams, he did not refuse to go into the pen and did not kick the door closed; rather, he put his foot "there" to stop himself from going into the pen. He also said that only one hand came out of the cuffs at the end of the incident (Tr.

270). He admitted that he tried to get onto his knees but said that was to block the baton (Tr. 281).

Lauture was the investigator assigned to investigate this case. She testified that she investigates staff misconduct, including use of force allegations. She received three weeks of training on "how to read and fill out closing reports, use of force reports, injury to inmate reports, view videos, write detailed investigative actions, just procure any type of documents that has to do with the case, documents or videos or audio interviews or written interviews, written statements, MEO-16s, anything that has to do with investigating a case" (Tr. 19).

When this trial began in November 2017, Lauture had been employed with the Department for two years. She stated that this December 2015 incident was her first use of force case so she worked closely with her colleagues and her supervising investigator on this investigation (Tr. 32). She stated that in accordance with protocol, a preliminary team investigated this incident within 24 hours of occurrence. Any staff involved in the incident or who witnessed the incident were required to submit related reports by the end of their tours. According to Lauture, the preliminary team also interviewed inmates and was responsible for collecting reports, statements and documents associated with the incident. In this case these staff reports included incident reports, use of force reports from respondent and Chestnut, and use of force witness reports from Officers Gorritz, Okvist, Hood, and Sampson, Captain Stewart-Small, and Assistant Deputy Warden Marie. These reports were not introduced at trial but the summaries were included in Lauture's closing report. Lauture testified that the facilities are under video surveillance and the preliminary team was also responsible for preparing the video request form to ensure that the video footage is preserved (Tr. 33).

When Lauture opened her investigation on January 4, 2016, she received a package from the preliminary team. This package contained statements taken and other documents prepared by the preliminary team. Lauture testified that while the package did not contain a hard copy of the video footage, a copy of the video request form was included (Tr. 33-34). Lauture was able to remotely access the video recording of the incident through the Genetec system, the computerized database that stores surveillance videos. She further testified that when reviewing videos "[investigators] have to write down exactly what we see, not necessarily verbatim but what we observe" (Tr. 20).

Lauture testified that she watched the video six times and at times she magnified it and also watched it in slow motion (Tr. 57). She observed Williams, whose hands were flexcuffed behind him, walking with Chestnut. Chestnut was in protective gear and was using an escort hold to guide Williams toward the intake area. Respondent was in the area also in protective gear with a gas mask and a baton. Lauture saw Chestnut attempt to "push the inmate forward. The inmate jump[ed] up, put both legs on the gate, and push[ed] back" (Tr. 52). Lauture saw Chestnut put his arm around Williams's upper body and brought Williams to the ground at which point Williams's hand came out of the flexcuffs. Chestnut then laid on top of Williams "across his upper torso area" so that "they looked like the letter T" (Tr. 53, 55). According to Lauture, Williams was faced down on the ground with both arms tucked under his chest. Lauture stated that the video depicted respondent "still standing with the baton. [Respondent] walked around to the right side of the inmate, held [sic] the baton and jabbed [sic] three times. Then he walked around to the head area of the inmate and the officer, came around, six times, jabbed" (Tr. 55). Lauture reviewed the video again and counted the jabs – "three on, on the left side. Six on the right side" (Tr. 58). Lauture testified that Williams just laid there with his head tucked. According to Lauture, Williams never tried to get up; he did not kick his legs and he did not try to move his arms (Tr. 56).

The video for this incident was not preserved and therefore was not produced at trial or viewed by respondent, respondent's counsel, or expert witnesses. Lauture explained that investigators are supposed to preserve videos that are reviewed as part of an investigation by completing a video request form for submission to the Operations Security Intelligence Unit ("OSIU"). This unit would then copy the footage that was requested as part of the investigation package. She testified that she "had been looking at the video from the beginning. So in [her] mind, it [was] ordered." Lauture testified that she followed up with OSIU "consistently" but between January and April 2016, her case load increased and that she "did not look at that case." When Lauture followed up in April, she was informed that the video footage was purged from Genetec and was not copied (Tr. 33-34). Lauture explained that, although there was a video request form in her package of documents received from the preliminary investigation, this form was not completed properly and therefore the video was not preserved (Tr. 36). Lauture's notes from her viewing of the purged video were not introduced at trial.

Lauture conducted MEO 16 interviews of Officers Gorritz, Okvist, Hood, and Sampson, Capt. Stewart-Small, and ADW Marie. She summarized these interviews and their use of force reports in her closing report. None of the witnesses reported seeing respondent use his baton to strike or jab Williams. Most of the witnesses reported that they observed only part of the interaction between Williams and respondent. According to Lauture, Gorritz was on her way to receive medical attention for exposure to the chemical agent. She heard someone saying "stop resisting" and she saw Williams on his stomach, secured on the ground, flexcuffed behind his back and Chestnut at his side. She did not see a baton being used and did not mention whether respondent was in the area. (Pet. Ex. 2 at 6).

According to Lauture's summary, Okvist reported that he saw Chestnut and Hood with Williams, who was face down on the ground and that he did not see any force being used against Williams. Williams "was resisting by moving his arms and legs because he was not secured." He did not see a baton being used against Williams and did not see respondent hit or strike Williams with the baton. He reported that he escorted Williams to pen 14 (Pet. Ex. 2 at 7).

In Lauture's summaries of Hood's statements, she reported that Hood observed Williams resisting entering the pen by twisting his body. Hood heard Williams being ordered to stop resisting and to enter the pen. He saw Williams take one hand out of his flexcuffs and pull away from Chestnut. Chestnut took Williams down to the floor using an upper body control hold. He saw Williams resisting being recuffed by placing his hands under his stomach and saw respondent using his baton to pry Williams arms from under him so that he could be recuffed. Hood did not see respondent hit or strike Williams with the baton. Okvist escorted Williams to pen 14. Hood did not think that respondent used force against Williams so he did not include this information in his use of force report (Pet. Ex. 2 at 7).

Sampson was present at the "gang assault" in Building 9A and did not enter the main intake area. He was not aware that there was any force used against Williams. Likewise Marie reported that he was not present in intake during the incident and did not witness the incident. He saw Chestnut with Williams in front of a pen and saw Williams enter the pen when requested. Marie was not sure if he entered the area before or after the incident (Pet. Ex. 2 at 8).

Stewart-Small saw two officers restraining an inmate who was "being disruptive on the ground." Respondent was in the area and said "I got it." She saw that respondent had the situation under control so she left the area. At first she was not aware that respondent was

present because she was not able to see everyone's faces. Stewart-Small did not witness the entire incident. She recalled seeing a baton, but did not recall if anyone had the baton or if it was on the floor or near the inmate. She did not see a baton being used and did not see any punches thrown. She did not know whether Williams received medical attention (Pet. Ex. 2 at 9).

Lauture interviewed Williams approximately 10 days after the incident to record his account of the incident (Pet. Ex. 2 at 4). She also conducted MEO 16 interviews of respondent and Department staff in May and June of 2016, more than five months after the incident. She included summaries of their statements and a summary of her observations of the video footage in her closing report (Pet. Ex. 2). Lauture concluded that Chestnut did not place Williams in a chokehold as Williams claimed and that Williams's claim that he was jabbed in the testicles was unsubstantiated. However, based on these interviews and review of the video, Lauture concluded that Williams provided a credible account of events involving respondent's use of force (Pet. Ex. 2 at 2).

Lauture reported that she did not find respondent credible because of an inconsistency in the number of jabs that respondent reported. During his June 2016, MEO 16 interview, respondent stated that he used the baton to jab Williams "once or twice on the upper torso area" (Pet. Ex. 2 at 5). However, in the Use of Force report filed on December 28, 2015, respondent reported that he used "several jab strikes to restrain [Williams]" (Pet. Ex. 1). Based on this inconsistency, Lauture concluded that respondent "was not being truthful" (Tr. 69). In addition, Lauture testified that in her review of the video, she did not observe Williams resisting or trying to get up (Tr. 60).

The Department and respondent each produced testimony from expert witnesses regarding the appropriate usage and circumstances for use of the baton. Captain D. Lomas is a certified instructor and Battalion Commander at the DOC Training Academy where he trains recruits and teaches in-service officers. He trains of general topics including use of force and deadly use of force in accordance with Use of Force Directive 5006R-C, including when officers should and should not use batons. He has been employed with the Department for 31 years and assigned to the Academy for 17 years (Tr. 145, 146-48).

Lomas did not review the purged video and testified that he reviewed the investigation paperwork, specifically the closing report and the use of force reports from respondent, Chestnut, Hood, and Okvist. He relied solely on these documents in forming his opinions about

respondent's use of force (Tr. 165-66). He concluded that respondent did not use the baton properly during the incident with Williams. Lomas testified that the report stated that Williams was restrained and on the ground when respondent used a jab strike against Williams. He stated that a jab strike would not be authorized because the threat was "not really prevalent at that time" (Tr. 154-55). According to Lomas, officers are trained to use the baton when an inmate is using force that is capable of causing serious physical injury. At the Academy, officers are not trained to jab inmates "while staff is attempting to restrain [them] on the floor face down" (Tr. 157). Lomas asserted that officers are not trained to use a baton to jab an inmate who is "on the ground, even if he is trying to get up, and he has his hands under him" (Tr. 158).

Lomas also referenced the "use of force continuum," which advises that the amount of force used should be proportional to the threat posed by the inmate. (ALJ Ex. 1 at 5; Tr. 171). Under this analysis, the officer would only be allowed to use their baton if the inmate had a weapon. According to Lomas, if an inmate is unarmed, "the officer can use a wrist lock, elbow lock, arm bar take down, or chemical agents" to subdue him. The officer is allowed to use his baton when an inmate is using "force that is capable of causing serious physical injury or death" (Tr. 156). Lomas opined that a jab strike while an inmate is on the floor "based on what I've read, is not authorized" (Tr. 154). Lomas said that respondent could have used other tactics such as a wrist lock or respondent could have engaged other staff in the area (Tr. 155). He asserted further that "we don't train in the Academy to jab inmates while staff is attempting to restrain them [sic] on the floor face down" (Tr. 157). He acknowledged that if an inmate is standing and advancing toward the officer, the officer may use jab strikes to move the inmate (Tr. 172-73).

Lomas testified that in the Academy, officers are not trained to use jab strikes in situations where an inmate is getting up off the floor and coming toward the officer. However, he also stated that he could not identify a rule or regulation prohibiting use of the jab strike under those circumstances (Tr. 162). He maintained that pursuant to the Directive, the baton is institutional equipment and as such, should only be used as a last resort, "when [the officer has] exhausted all use of force tactics and the inmate is using force that's capable of causing serious physical injury or even death" (Tr. 169).

ADW H. Mitton offered expert testimony for respondent. Mitton has been with the Department for 23 years, serving seven years as an officer, and the remainder as a captain and ADW. He is assigned to the training division of the Emergency Service Unit. Mitton is certified

by New York as an instructor in the use of force, baton, taser, and chemical agents. Mitton has been qualified previously as an expert in this tribunal and has previously offered expert testimony on behalf of the Department (Tr. 334). Mitton stated that he has conducted training in the use of the 36-inch baton which included the instruction on the five authorized baton strikes. These are the jab strike, the horizontal, the diagonal, the butt, and the rear buttstrike. Mitton described the jab strike as using the front tip of the baton, jabbing towards the chest or upper body area of another person (Tr. 336).

In contrast to Lomas, Mitton testified that the use of the baton is not reserved to riot or last resort situations. Rather, an officer may use his baton when dealing with a single inmate, if that inmate is threatening an officer and attempting to come toward an officer. It would be permissible to use a jab strike in that instance (Tr. 339). Mitton acknowledged that under the baton training lesson plan ("lesson plan"), if the inmate is non-assaultive, use of the baton would not be authorized and explained that merely struggling with an officer is not assaultive behavior (Pet. Ex. 7 at 8; Tr. 346). He also said that if the inmate is "secured, cuffed [and] no longer resistant, there [is] no reason to strike the inmate" (Tr. 348).

Mitton elaborated on the permissible use of the baton as referenced in the lesson plan, stating that if an inmate is struggling with an officer and is "unable to be subdued, an officer can use the baton to subdue the inmate" (Pet Ex. 7 at 8; Tr. 342-43). He emphasized that if an inmate is "unsecured, uncuffed, struggling, moving, there's still a struggle to secure that inmate," a strike would be appropriate (Tr. 348). The lesson plan further provides that in those circumstances, the officer may use a baton in "an authorized manner consistent with Department training" and Mitton testified the jab strike is part of baton training at the Department (Pet. Ex. 7 at 8-9; Tr. 349-50). Mitton opined that even if the inmate were on the floor, if an officer needs to subdue him, the officer may use authorized strikes or blows with the baton to subdue the inmate (Tr. 343). The lesson plan also provides that an officer may "strike the inmate with one or more blows to non-vital areas of the body, until the inmate discontinues the attack" (Pet. Ex. 7 at 8; Tr. 347-48).

ANALYSIS

In this disciplinary proceeding the petitioner "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 08-33-A (May 30, 2008).

Preponderance has been defined as "the burden of persuading the trier of fact that the existence of a fact is more probable than its non-existence . . ." Prince, *Richardson on Evidence* § 3-206 (Lexis 2008); see also *Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976).

Charge One: Excessive or Unnecessary Use of Force

Closing Report

As referenced previously, Lauture drafted the closing report at the conclusion of the investigation which included a determination of facts in addition to her summaries and assessments of evidence including witness statements, MEO 16s, and the video. The accuracy of the closing report is important as it proposes factual conclusions and offers recommendations as to whether charges should be brought against Department staff. The information reported in this document is also reviewed by expert witnesses and may, as in this matter, provide the basis for their opinions and conclusions. Upon review of the closing report and related recordings, I found significant inconsistencies, inaccuracies, and omissions relating to the summary of the purged video and the MEO 16 summaries, which call into question the thoroughness of this report and the reliability of Lauture's findings and conclusions.

In the closing report, Lauture offers conflicting accounts of events depicted in the purged video and described the depictions in the purged video in varying levels of detail. In summarizing the video footage, she reported generally that respondent jabbed Williams "several times on the left side of his upper torso" and that respondent "continued to jab [Williams] on the right side of his lower torso" (Pet. Ex. 2 at 3-4). Later in the closing report, Lauture reported in general terms that the Genetec footage depicts respondent using his baton to buttstrike Williams "several times on the left side of his torso" and then "to the right side of his torso" (Pet. Ex. 2 at 10). Only when discussing respondent's MEO 16 interview, does Lauture report a specific quantity of strikes stating that "[respondent] struck [Williams] approximately nine times" (Pet. Ex. 2 at 10-11).

In summarizing the purged video for the closing report, Lauture reported "[Williams] was not seen visibly resisting while on the ground" (Pet. Ex. 2 at 3, 10). However, following each of those assertions, Lauture's summary continues in one instance recounting that "three staff members" and in another instance recounting that "several staff members" were attempting to

"restrain Williams to the ground" (Pet. Ex. 2 at 4, 11). It is incongruent that an inmate that was not resisting would require several staff members to "restrain him to the ground" as related by Lauture. Lauture did not offer any explanation for this contradiction.

Although the closing report contained Lauture's summaries of her interviews with respondent and Chestnut, the audio recordings of these interviews are the more reliable evidence since the recordings contain the entirety of the witnesses' statements (Pet. Ex. 3; Resp. Ex. B). Upon review of this evidence, I noted significant disparities between the recorded statements and the reported summaries. The written summaries of the MEO 16s for both respondent and Chestnut did not include or address significant and relevant statements they made during their interviews. However, the summaries included statements attributed to each of them which, they did not make.

Lauture summarized Chestnut's MEO 16 interview and offered her conclusion that Chestnut "failed to provide a credible or accurate account" of the events on December 28, 2015. During the interview, Chestnut stated that Williams was resisting and trying to get up, but these statements were not included or even referenced in the interview summary. Moreover, Lauture's summary directly contradicts the statements that Chestnut made during his MEO 16 interview (Resp. Ex. B). Chestnut told Lauture that Williams's hands were out of the cuffs and that he "brought [Williams] down because he had slipped the cuffs" (Resp. Ex. B at 9:18, 14:30). Chestnut told Lauture that Williams was on the ground but that he was trying to push up (Resp. Ex. B at 8:44). He stated again that Williams was trying to push up and was resisting and that Chestnut was trying to "maintain him secure on the ground" (Resp. Ex. B at 12:06). Chestnut finally explained to Lauture that if Williams is trying to push up then he is resisting (Resp. Ex. B at 12:25). These statements corroborate respondent's version of events but were inexplicably left out of the closing report summary.

In summarizing Chestnut's interview, Lauture reported that "[Williams] was not resisting while he was on the ground" and that Chestnut maintained a secure hold on Williams while he was on the ground (Pet. Ex. 2 at 2, 11). Lauture's insertion of this sentence in the summary of Chestnut's interview implies that Chestnut made this statement. The audio recording however, reveals the opposite: that Chestnut stated that Williams was resisting and that he did not have a secure hold on Williams. Likewise, Lauture reports the same language in respondent's MEO 16 interview summary, stating that "[Williams] was not resisting while on the ground" (Pet. Ex. 2 at

5). This statement, similar to Chestnut's statement, was not uttered by respondent during his interview (Pet. Ex. 3). The insertion of these falsely attributed statements in the interview summaries would reasonably cause a reader to draw an inaccurate conclusion about the force used by respondent and the surrounding circumstances. These insertions are troubling and further undermine the unreliable factual determinations and related recommendations in the closing report.

In the closing report, Lauture concluded that respondent was not credible because the stated number of baton jabs in his use of force report (several) differed from the number he disclosed during his interview (one or two) (Pet. Exs. 1, 2). During respondent's MEO 16 interview, Lauture asked him about this discrepancy and respondent explained that "several could mean one, two, three, four, or five" (Pet. Ex. 3 at 37:35). It was clear from the audio recording of the interview that respondent considered "several" to be an imprecise, unspecified number. Lauture did not include a reference to this exchange or explanation in her summary. Lauture did, however, state that the discrepancy between "one or two" and "several" was sufficient to undermine respondent's credibility.

As a result of the foregoing, I find the report unreliable.

Witness Testimony and Statements

Both respondent and Chestnut reported in their MEO 16 interviews that Chestnut was struggling to secure Williams. Each reported that Williams was resisting and was trying to get to his feet. Chestnut testified in a direct and credible manner about the events of December 28, 2015. Respondent's testimony was largely consistent with his MEO 16 interview. He testified that Chestnut was not able to restrain Williams, that Williams's hands were free, that Williams was trying to get up, and that he jabbed Williams a number of times. I credit respondent's testimony regarding his use of force against Williams. Respondent offered a credible and consistent account of events and his testimony that Williams was unsecured, resisting, and attempting to get up was generally corroborated by Chestnut, Okvist, Stewart-Small, and Williams. Respondent's tenure with the Department and his lack of disciplinary record are noted and further support a credibility finding in his favor.

Williams also related a consistent version of events during his testimony and during his MEO 16 interview. However, his version contained false or unsubstantiated allegations

regarding being placed in a chokehold, the extent of his injuries, and resisting attempts to be recuffed or secured. Williams's testimony that he was just "sitting there" and not resisting was contradicted by the statements of each witness that observed the interaction between him, Chestnut, and respondent. In addition, his statements regarding respondent's use of force were not corroborated by any witness. I conclude that Williams exaggerated his injuries and the conduct of respondent while minimizing his behavior and therefore find Williams less credible.

Lomas, petitioner's expert witness, testified that respondent did not use his baton against Williams properly or in an authorized manner. He based his opinion on his review of the investigation paperwork, including the closing report. He explained that if, according to the investigation reports, an inmate is on the floor and is being restrained by an officer the threat was not prevalent and a jab strike would not be authorized. He continued that the academy does not train officers to jab an inmate while staff is attempting to restrain him on the floor, face down. The conclusion is consistent with the Use of Force Directive that prohibits the use of force "after an inmate has ceased to offer resistance" (ALJ Ex. 1 at 2). Although Lomas was a knowledgeable expert witness, significant portions of the information he received regarding the interaction between respondent and Williams was unreliable, and therefore his conclusions based on this information must be discounted.

Mitton was also an experienced and knowledgeable expert witness. He testified that it is permissible for an officer to use a jab strike against an inmate if the inmate is threatening and attempting to come toward the officer (Tr. 339). Mitton continued that if the inmate is still unsecured, uncuffed, struggling, moving, and "there's still a struggle to secure that inmate, it would be appropriate to use the baton to jab strike the inmate" (Tr. 349). I credit his expert testimony and conclusions as they were based on his experience as a baton and use of force instructor and the credible information regarding the circumstances of respondent's use of force.

Video Recording

The Department offered testimony regarding surveillance video that recorded the respondent's alleged unauthorized use of force against Williams. However, the Department did not produce the video at trial. Lauture testified that this was because the footage was not properly requested and was purged as a result. Lauture was the only witness produced who viewed the video.

Respondent asked that the court draw a negative inference from petitioner's failure to preserve video recordings. Under New York law, once a party reasonably anticipates litigation, it must suspend routine document retention policy and implement a "litigation hold" to prevent routine destruction of electronic data. *Dep't of Correction v. Monclova*, OATH Index No. 1206/13 at 16 (June 20, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 35460 (Dec. 20, 2013), citing *VOOM HD Holdings, LLC v. EchoStar Satellite, LLC,* 93 A.D.3d 33, 41 (1st Dep't 2012). A party seeking sanctions due to evidence spoliation must show: (1) that the party with control over the evidence had an obligation to preserve it when it was destroyed, (2) that the records were destroyed with a "culpable state of mind," and (3) that the destroyed evidence was relevant to the party's claim or defense, such that the trier of fact could find that the evidence would support that claim or defense. *Monclova*, OATH 1206/13 at 16; *Dep't of Correction v. Stepney*, OATH Index Nos. 390/13, 391/13, 392/12 at 2-3 (Mar. 4, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case Nos. 35373, 35459, 35374 (Dec. 20, 2013) both citing *VOOM,* 93 A.D.3d at 45. For the purposes of a spoliation sanction, a "culpable state of mind" includes ordinary negligence. *VOOM,* 93 A.D. 3d at 45. Although there was no evidence of intentional destruction of evidence, the Department neglected to take appropriate steps to ensure that the video was available. Lauture testified that she checked "consistently" with OSIU about the video after the December 28, 2015 incident, but she also testified that after January 2016, her workload increased and that she did not follow up with OSIU until three months later in April 2016. By that time, the video had been purged.

I find that respondent was prejudiced by the Department's failure to preserve the video. The Department offered only the testimony of Lauture as evidence of whether the video depicted unauthorized or excessive use of force. Respondent denied unauthorized or excessive use of force and his ability to challenge Lauture's testimony is thwarted by the absence of the video. *See Stepney*, OATH 390/13, 391/13, 392/12 at 2-3 (no sanction required where there was no dispute about what the destroyed video depicted); *see also People v. Handy,* 20 N.Y.3d 663, 669 (2013) (inmate charged with a crime entitled to an adverse inference instruction where surveillance video of alleged wrongdoing was destroyed prior to trial; court urged correction officials to "take whatever steps are necessary to insure that video will not be erased" when criminal prosecution is foreseeable). It is particularly important in a use of force case to maintain video footage of the incident since this footage typically presents the clearest evidence

of what actually occurred. The Department's failure to take appropriate steps to maintain this critical evidence is disturbing. Under these circumstances, an adverse inference that the video would not support the Department's case is an appropriate remedy.

The credible evidence presented supports a finding that a use of force occurred. However, I find that respondent used the baton in an authorized manner and such use was authorized under the circumstances. The Department did not present sufficient evidence to support the finding that the force used was excessive under the circumstances. Based on the foregoing, the Department has not presented sufficient credible evidence to sustain this charge.

Charge Two: False/Misleading Statements

Regarding the allegation that respondent made false and/or misleading statements regarding the use of force, the Department must establish that respondent made material deviations from the actual incident or intentionally misrepresented the events in question. *See, e.g., Dep't of Correction v. Pelle,* OATH Index No. 1410/07 at 6 (May 22, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD08-11-SA (Feb. 20, 2008); *Dep't of Correction v. Rodriguez*, OATH Index No. 277/06 at 11, 13-15 (Mar. 29, 2006).

In this matter, the allegation is based on respondent's report on the number of jab strikes against Williams as "one or two" in one instance and as "several' in another instance. Respondent explained that he believed several to mean an unspecified number. This tribunal has found that while imprecise language may bear upon the accuracy of a written report, such language will not always establish that a report is false or misleading. *See Dep't of Correction v. Biland*, OATH Index Nos. 569/89 & 570/89 at 11 (Mar. 6, 1990) (inconsistency and imprecise language in ordered report were not intentionally false statements). Likewise, Lauture's report that respondent struck Williams alternatively several or nine times did not establish that aspect of the closing report false or misleading but it did influence my conclusion regarding its accuracy. In sum, the Department did not introduce sufficient evidence to sustain this charge.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to prove that respondent used excessive force when using jab strikes against an inmate as alleged in Charge 1.

2. Petitioner failed to prove that respondent gave false and/or misleading statements regarding that use of force as alleged in Charge 2.

RECOMMENDATION

I recommend dismissal of the charges against respondent.

Joycelyn McGeachy-Kuls
Administrative Law Judge

August 31, 2018

SUBMITTED TO:

CYNTHIA BRANN
Commissioner

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