

Dep't of Correction v. Ward

OATH Index No. 2137/18 (Dec. 31, 2018)

Correction officer used excessive force when he briefly placed his hand around an inmate's neck, but did not submit a false or misleading written report. Penalty of 35 days suspension recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
RODNEY WARD
Respondent

REPORT AND RECOMMENDATION

NOEL R. GARCIA, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Correction ("Department") under section 75 of the Civil Service Law. Petitioner alleges that respondent, Correction Officer Rodney Ward, used excessive force against an inmate and submitted a false and misleading use of force report (ALJ Ex. 1).

A trial on this matter was held before me on December 17, 2018. Petitioner called two witnesses and offered documentary evidence and a surveillance video, which does not contain audio. Respondent testified on his own behalf. For the reasons set forth below, the excessive force charge is sustained, but the charge for submitting a false and misleading use of force report is dismissed. A suspension of 35 days is recommended.

ANALYSIS

The following facts are not in dispute, and are derived mostly from respondent's testimony and the video evidence. On November 23, 2017, respondent was assigned to the intake area of the Anna M. Kross Center (Pet. Exs. 1-3). His duties included processing new inmates to the facility by, *inter alia*, conducting a search of each inmate, taking their photographs

and fingerprints, and providing the inmates with facility-issued clothing (Tr. 85). Besides respondent, there was one captain and four to six other officers in the intake area during the period in question, including Officer McNealy (Pet. Exs. 2, 5).

Video evidence

During the relevant portion, the video (Pet. Ex. 5) evidence shows Officer McNealy removing an inmate from the pen and guiding him towards a table (2:26:56). Respondent is in view but not near the table. The video shows the inmate walking away, but Officer McNealy intercepts him and guides him back to the table (2:27:22). Officer McNealy and the inmate then engage in a discussion, with the inmate seemingly becoming agitated while Officer McNealy remains calm. During this discussion, respondent and another officer move closer to the table.

The inmate picks up a pair of sneakers from the table and throws them to the floor (2:28:44). Officer McNealy appears to continue to talk to him. The video depicts the inmate walking away from the officers and towards the captain (2:29:09). The inmate becomes irate, and appears to scream at one of the officers. Respondent places himself directly in front of the inmate while two other officers and the captain stand around him (2:29:30).

The inmate is seen raising his arms twice, but respondent guides them down. The inmate walks back towards the holding pen (2:29:45). Officer McNealy opens the door to the pen, while respondent and the captain gesture for the inmate to enter the pen. Instead, he walks away from the officers, picks up the sneakers he had previously thrown on the floor, and throws them further down a hallway (2:30:15). Officer McNealy follows after the inmate and escorts him back to the intake area.

Once in the intake area, respondent is seen gesturing for the inmate to enter the pen, while Officer McNealy again opens the pen door (2:31:32). At this point, the inmate and respondent are standing face to face, with respondent using his hands to guide him into the pen. The inmate suddenly slaps respondent's hands away from him (2:31:47). The inmate is seen in the video leaning his head towards respondent.

Respondent places both hands behind the inmate's neck and appears to pull him forward and down (2:31:49). It then appears that respondent pushes him back towards an upright position, with one hand pulling back on the inmate's collar and his left hand on the inmate's neck (2:31:51). The video does not clearly depict the movement of respondent's left hand from the

back of the neck to the front. A brief struggle ensues, and respondent's left hand stays around the inmate's neck for about four seconds. Respondent releases the inmate as he is pulled away by two other officers, brought to the ground and placed in handcuffs (2:31:59).

Testimonial evidence

Respondent's testimony was consistent with the video evidence. Respondent testified that on the day of the incident, he arrived to the intake area and noticed the inmate in question sleeping on the floor of the holding pen. He also saw the same inmate attempt to spit at the correction officers from inside the pen (Tr. 87-88).

Later, Officer McNealy took the inmate out from the pen to perform his intake. Respondent testified that throughout the encounter, the inmate was combative, non-compliant, cursing, and making threats (Tr. 86-89, 102). Specifically, when the inmate was taken out of the pen, Officer McNealy instructed him to remove his personal sneakers and to put on the facility-issued sneakers, but he refused while using profanity (Tr. 101-103).

Subsequently, the captain ordered the inmate to step back into the pen (Tr. 106). Respondent testified that he placed his hands on the inmate's torso and was attempting to guide him back into the pen when the inmate swatted his hands away (Tr. 90, 105-07). The inmate then told him that he was going to "spit in [respondent's] fucking face" and began to "hock[] up the spit" (Tr. 92, 107-08). In an attempt to stop him, respondent testified that he reached out his hands (Tr. 92, 108). Respondent acknowledged that his left hand ended up around the inmate's neck as he attempted to push him away (Tr. 92).

Respondent admitted that he knew that placing one's hand around an inmate's neck is prohibited by Department policy and expressed regret for doing so (Tr. 92, 94-95). He denied constricting the inmate's throat area, and there was no evidence that the inmate suffered any injuries (Tr. 92).

The Department's two witnesses, Investigator Wooten and Captain Scott, both testified that it was against Department policy for respondent to place his hand around the inmate's neck under the circumstances seen in the video (Tr. 39-40, 62-63).

Use of force charge

The Department charged respondent with excessive use of force for placing his left hand around the inmate's neck, in what it described as a chokehold. The Department "has the burden of proving its case by a fair preponderance of the credible evidence." *Human Resources Admin. v. Nwogu*, OATH Index No. 682/09 at 2 (Jan. 9, 2009), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 09-68-SA (Nov. 12, 2009) (citing *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. CD08-33-SA (May 30, 2008)).

Investigator Wooten and Captain Scott credibly testified, and respondent admitted, that it was impermissible under the circumstances here for respondent to place his hand around the inmate's neck. Accordingly, the charge for excessive use of force is sustained.

False and misleading report charge

The Department charged that respondent "provided false and/or misleading information in his use of force report regarding the use of force on [the inmate]," but failed to specify in what manner the report was false or misleading (ALJ Ex. 1). At trial, the Department alleged that respondent falsely stated in his use of force report that he initially placed his hands on the inmate's chest, and that his hand slipped up to the neck area. The Department argued that this statement was inconsistent with his statement during the investigative interview, where respondent allegedly stated that he placed his hands on the inmate's chin area to keep him from spitting (Tr. 9, 115).

To prove the charge here, petitioner must first establish the facts of the underlying incident which is the basis for the report. Second, petitioner 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). While imprecise and overwrought 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).

The video is the best evidence for establishing the facts regarding this incident (Pet. Ex. 5). The video shows that respondent first pulled the inmate forward, and then pushed him back

in an attempt to stop the inmate from spitting on him. Because the inmate and respondent were in close proximity during their brief struggle and some of the action occurred out of camera view, the video does not show if respondent had his hands on the inmate's chest before his left hand came to his neck.

Respondent filed a use of force report on the date of the incident. In that report, respondent wrote, in relevant part, that "I [] attempted to stop inmate by using upper body control hold to the chest area [. . .] inmate resisted my hands slip through his upper chest area to his neck. Said inmate tried to spit at me. I was trying to hold inmate until more staff could help" (Pet. Ex. 3).

Based on the evidence submitted here, petitioner has not met its burden. Respondent's written statements are consistent with the video evidence and do not contradict his claim that his hand slid from the inmate's chest to the neck. The report also contains the relevant and material facts of the use of force in question, including that respondent's hand went around the inmate's neck.

The Department alleged at trial that respondent's use of force report was inconsistent with statements he made at an investigative interview, not the video. Yet respondent was not charged with making false and misleading statements at the investigative interview.

In any event, the transcript of the interview reveals that respondent stated, consistent with the video and the use of force report, that when the inmate turned aggressive and attempted to spit on him, his "hands went up towards his neck area" (Pet. Ex. 7 at 10). The Department argued that respondent falsely stated that he reached for the inmate's chin area. But in recounting the events of that day, respondent twice stated that his hands went up to the inmate's neck (Pet. Ex. 7 at 10, 17). During the interview, it was respondent's counsel, Mr. Troxler, who first stated that respondent placed his hand "underneath the [inmate's] chin area" as the parties appeared to be watching the video during the interview (Pet. Ex. 7 at 29). After that comment, respondent repeatedly stated that he grabbed both the inmate's neck and chin area, but such a description is neither a material deviation from the actual incident nor sufficient proof that respondent intentionally misrepresented the events in question (Pet. Ex. 7 at 45, 47).

Therefore, because the evidence did not establish that respondent made any false or misleading statements regarding his use of force, the charge should be dismissed.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that on November 23, 2017, respondent used excessive force by placing his hand around an inmate's neck for about four seconds.
2. Petitioner did not prove that respondent submitted a false and misleading use of force report.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's employee performance service report (Form 22R) for purposes of recommending an appropriate penalty (ALJ Ex. 2). Respondent was appointed a correction officer in September 2013, and was issued a command discipline in 2018, a relatively minor disciplinary action. Pursuant to respondent's credible and undisputed testimony, before his appointment as a correction officer respondent served for 13 years as a peace officer with the city's Department of Homeless Services. The Department confirmed by e-mail that respondent started his employment with the city in February 2001, although it could not confirm the agency or last day with that agency (ALJ Ex. 3).

In this matter, the evidence establishes that respondent used excessive force against an inmate. Penalties for the same or similar conduct have ranged from 15-day suspensions to termination of employment, depending on "the employee's disciplinary record, the extent of force, the degree of provocation, if any; and the extent of any subsequent deception." *Dep't of Correction v. Scott*, OATH Index No. 376/06 at 5 (July 10, 2006); *see, e.g., Dep't of Correction v. Bravo*, OATH Index Nos. 424/15 & 426/15 (May 14, 2015) (60-day suspension and termination recommended for two officers who engaged in excessive force based on officers' disciplinary history and levels of culpability); *Dep't of Correction v. Reid*, OATH Index Nos. 1898/14 & 1901/14 (June 18, 2014), *aff'd*, NYC Civ. Serv. Comm'n Item Nos. 2014-1131 & 2014-1133 (Jan. 23, 2015) (30-day and 45-day suspensions imposed on officers who used impermissible force, failed to report the incident, failed to obtain medical attention, and made false reports and statements); *Dep't of Correction v. Saint-Phard*, OATH Index No. 172/11 (Nov. 23, 2010) (60-day suspension for officer who dispersed chemical agent within three feet of a rear-handcuffed inmate and placed the inmate in a chokehold while taking him down to the floor); *Dep't of Correction v. Johnson*, OATH Index No. 1639/05 (Aug. 18, 2005), *modified on*

penalty, Comm'r Dec. (Oct. 27, 2005), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 07-29-M (Mar. 14, 2007) (15-day penalty where officer, with a spotless record, pushed an inmate's head into a cell door without causing injury and submitted a misleading report).

Petitioner requested a penalty of termination of employment. Termination has been generally reserved for those cases where the inmate's injuries are serious, the force used is extreme, the officer has a significant disciplinary history, or the subsequent deception is extensive. *See, e.g., Bravo*, OATH 424/15 & 426/15 at 14-16 (termination recommended for officer with poor disciplinary history who engaged in excessive force by punching and kicking an inmate's face, neck, ribs and back, causing the inmate to need stitches, and making false reports and statements); *Dep't of Correction v. Andino*, OATH Index Nos. 731/13 & 1000/13 (May 14, 2013), *aff'd*, NYC Civ. Serv. Comm'n Item No. 35462 (Jan. 27, 2014) (termination for officer found guilty of four instances of improper use of force, one of which was for the use of a chokehold, along with five instances of false reporting and/or statements); *Dep't of Correction v. Negron*, OATH Index No. 1844/11 at 20-22 (Sept. 16, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-04-SA (Jan. 20, 2012) (termination recommended where officer used excessive force on several inmates, including using a chokehold, submitted false and inaccurate reports, and failed to report a use of force; officer had a significant disciplinary history that included a 50-day suspension for violating the use of force reporting requirements); *Dep't of Correction v. Patterson*, OATH Index No. 2164/09 at 22-23 (Oct. 1, 2009) (termination recommended for correction officer who punched an inmate in the face and created an elaborate cover-up that included creating false documents and incident reports).

Here, there are various factors for mitigation. Respondent is an almost 18-year city employee with minimal prior disciplinary history. The use of force was set in motion by the inmate's conduct, specifically his belligerence and attempt to spit upon respondent. The force used by respondent was a brief single event, did not appear to obstruct the inmate's airway, and the inmate did not suffer any injuries. Respondent accepted responsibility for his actions, and was always candid regarding his conduct. The principles of progressive discipline and the length of respondent's employment also weigh in favor of a penalty that is short of termination.

The Department argued that respondent's employment should be terminated because in September of 2017, it implemented a new Use of Force Directive that specifically prohibits chokeholds and has "zero-tolerance" for such cases. Further, it argued that respondent was

trained regarding the updated policy, and that he was well-aware that placing his hands around the inmate's neck was an impermissible hold (Tr. 116-18).

Certainly the Department has an obligation to hold its personnel to the highest standard, and to implement all necessary policies to reduce and eliminate excessive use of force against inmates, including seeking higher penalties for such conduct. Further, gratuitous acts of violence towards an inmate, repeated impermissible use of force and blatant disregard of Department policy merit high penalties, including termination.

However, this tribunal is required to provide all parties with due process, to adjudicate each claim of alleged misconduct individually based on the facts presented at trial, and to recommend a penalty consistent with the Civil Service Law and the principles of progressive discipline. Accordingly, this tribunal cannot adopt a "one-size-fits-all" approach to penalty recommendations. In determining whether to apply the principle of progressive discipline, the key issue is "whether a penalty short of termination will change the respondent's behavior." *Dep't of Housing Preservation and Development v. Ray*, OATH Index Nos. 1460/00 & 2135/00 at 33 (Sept. 14, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-84-SA (Dec. 28, 2001).

Here, respondent was honest and remorseful regarding his conduct. Respondent admitted in his use of force report, at the investigative interview, and at trial that he placed a hand around respondent's neck during their brief struggle. Respondent credibly testified that he did so to protect himself from the inmate spitting on him, but that it was nevertheless impermissible. Contrary to the Department's argument, the evidence did not establish that respondent simply "lost it," or that his action towards the inmate was gratuitous in nature. Instead, after displaying extraordinary patience and restraint with a non-compliant inmate, respondent resorted to force primarily as a defensive measure. Further, respondent appears unlikely to repeat such conduct.

Nevertheless, placing his hand around the inmate's neck was impermissible and potentially life-threatening, and warrants a significant penalty. Therefore, respondent should be suspended without pay for 35 days.

Noel R. Garcia
Administrative Law Judge

December 31, 2018

SUBMITTED TO:

CYNTHIA BRANN
Commissioner

APPEARANCES:

JUAN PUCHA, ESQ.
NICOLE TARTAK, ESQ.
Attorneys for the Petitioner

KOEHLER & ISAACS, LLP
Attorneys for Respondent
BY: ANDREW A. ROWE, ESQ.