

Dep't of Correction v. Thompson

OATH Index No. 2232/19 (Dec. 2, 2020), *adopted*, Comm'r Dec. (Apr. 13, 2021), **appended**

Petitioner proved that correction officer used impermissible force against an inmate and submitted false or misleading report about the incident. Penalty of 55 days' suspension without pay recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
EON THOMPSON
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Correction, brought this disciplinary proceeding under section 75 of the Civil Service Law and alleged that respondent, Correction Officer Eon Thompson, used excessive, unnecessary force against an inmate and submitted a false or misleading report about the incident (Pet. Ex. 1a, Amended Charges). Respondent challenged this tribunal's jurisdiction and denied any wrongdoing.

At trial on October 1, 2020, held remotely via Webex due to the COVID-19 pandemic, petitioner relied on documentary evidence, including surveillance video, screenshots from that video, and testimony from one witness, Investigator Urena. Respondent relied on documentary evidence and did not testify or call any other witnesses. After the parties received an opportunity to submit additional case law, the record was closed on October 6, 2020.

For the reasons below, I find that petitioner proved the charges and recommend a penalty of 55 days' suspension without pay.

ANALYSIS

The charges stem from events that occurred at the Manhattan Detention Center on September 17, 2017. Petitioner alleged that respondent entered a holding cell, used excessive force against an inmate, and filed a false or misleading report about the incident (Pet. Exs. 1, 1a). Respondent argued that he acted at the direction of a supervisor and did not use excessive force against the non-compliant inmate (Tr. 188).

Preliminary Issues

Trial was originally scheduled for October 2019, and adjourned to March 2020, after respondent obtained new representation. After the outbreak of the COVID-19 pandemic, trial was adjourned and rescheduled for September 22, 2020. On September 4, 2020, respondent moved to disqualify me from hearing this case on the grounds that: I lacked written authorization from petitioner's commissioner; I have been an ALJ for more than five years; and this tribunal is not a natural person (Respondent's Motion to Disqualify).

On September 14, 2020, I denied respondent's disqualification motion (Tr. 40-41). As petitioner correctly noted, respondent's arguments are nearly identical to claims that have been repeatedly rejected by this tribunal and reviewing courts (Petitioner's Response to Respondent's Motion to Disqualify at 5). *See, e.g., Dep't of Correction v. Hopton*, OATH Index No. 1230/14 at 2-3 (May 21, 2014), *aff'd, Hopton v. Ponte*, 149 A.D.3d 739 (2nd Dept. 2017) (finding that petitioner's commissioner lawfully designated OATH to hear disciplinary case, ALJ was not limited to one, five-year term, and that "natural person" argument lacked merit); *Dep't of Correction v. Agbai*, OATH Index No. 156/14 (Nov. 25, 2013), *adopted*, Comm'r Dec. (Jan. 2, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2014-0064 (June 3, 2014), *aff'd*, Sup Ct. Index No. 101083/2014 (Mar. 27, 2015), *aff'd*, 150 A.D.3d 443 (1st Dep't 2017) (rejecting "natural person" argument); *see also Dep't of Correction v. Auguste*, OATH Index No. 2770/08 at 6 (Apr. 17, 2009), *adopted*, Comm'r Dec. (May 7, 2009) (noting that the Charter authorizes this tribunal to hear disciplinary cases and Department Directive 7502 states that, following an informal conference, unresolved charges and specifications "will be forwarded to OATH for formal administrative hearing"); *Dep't of Correction v. Malone*, OATH Index No. 882/06 at 6-8 (Jan. 11, 2007), *adopted*, Comm'r Dec. (Mar. 8, 2007), *aff'd sub nom. Malone v. Horn*, 2008 N.Y.

Misc. LEXIS 8225, 2008 NY Slip Op. 30111(U) (Sup. Ct. N.Y. Co. 2008) (finding that petitioner properly designated OATH to conduct disciplinary hearings).

Respondent has shown no basis for a different outcome here. He has been provided with a copy of a May 1, 2020, letter from petitioner's commissioner designating OATH's chief ALJ, or other ALJs assigned by her, to conduct administrative proceedings pursuant to the Civil Service Law (Resp. Ex. D). Section 1049 (1) of the New York City Charter, which provides that ALJs at this tribunal "shall be appointed for a term of five years," does not limit the number of terms that an ALJ may serve. And, contrary to respondent's contention, section 1048 of the Charter does not include the term "natural person."

Following denial of the motion to disqualify, respondent requested an indefinite adjournment based on respondent's representation that he had filed an Article 78 petition in Supreme Court, Queens County, seeking judicial intervention to prevent the trial from going forward (Tr. 8, 21). At a pre-trial conference on September 21, 2020, I denied the motion for an open-ended adjournment based on the belated nature of the motion, the age of the case, and the absence of any indication of when or if the request for judicial intervention would be granted (Tr. 6-7). *See Dep't of Buildings v. Manchester*, OATH Index No. 467/15 at 2-3 (Jan. 28, 2015) (denying adjournment of trial pending outcome of Article 78 petition, where there was no evidence that state court had issued an order to stay the administrative proceeding); *see also Askinazi v. Police Dep't of New York*, 25 A.D.2d 429 (1st Dep't 1966) (finding "it was a palpable abuse of discretion to restrain" administrative disciplinary proceedings pending the outcome of a related civil proceeding). However, over petitioner's objection, I adjourned the matter to October 1, 2020, to give respondent an opportunity to prepare for trial and arrange to participate via video conference (Tr. 23). Though petitioner offered respondent the option to use the Department's videoconference facilities at its administrative headquarters, respondent declined that offer (Tr. 22, 61).

The Evidence

At trial, the contested issue was whether respondent used excessive force against an inmate inside a holding cell. According to an investigator's report, summarizing statements submitted by a captain and several correction officers, the inmate was reportedly "destroying" several items, including plumbing equipment, in the cell (Pet. Ex. 2 at 2-3). The captain

repeatedly ordered the inmate to stop and step out of the cell, but the inmate ignored those orders (Pet. Ex. 2 at 3). Respondent and other officers entered the cell to secure the inmate in mechanical restraints (Pet. Ex. 2 at 3). The inmate refused to cooperate and a struggle ensued (Pet. Ex. 2 at 3).

Surveillance video from multiple camera angles shows what took place inside the cell (Pet. Ex 6). The video shows that the inmate was seated on a toilet at approximately 8:26 p.m., when he got up, went across the cell, stood on a bench, and leaned against a plexiglass window, where he spoke with a captain (Pet. Ex. 6). At 8:30 p.m., an officer entered the cell, spoke with the inmate, placed an infraction notice on the bench, and stepped back (Pet. Ex. 6). Respondent entered the cell, put on gloves, and spoke to the inmate (Pet Ex. 6). Four other officers were inside the cell and a captain stood in the doorway (Pet. Ex. 6).

At 8:32 p.m., respondent and another officer, identified as Officer Brown, approached the inmate, who was still standing on the bench (Pet. Ex. 6). Respondent stood behind the inmate, stepped up on the bench, and reached towards the inmate, putting his right hand on the inmate's shoulder and his left arm around the inmate's neck (Pet. Ex. 6). The inmate turned around and respondent grabbed him by the throat (Pet. Ex. 6, cameras 211.11 and 210.255 at 8:32:16-8:32:20; Pet. Ex. 14, screenshot). The other four officers tried to restrain the inmate (Pet. Ex. 6).

The inmate grabbed respondent's wrist and pushed him in the face (Pet. Ex. 6, camera 211.11 at 8:32:10). As the other officers struggled to bring the inmate to the floor, respondent used his elbow and forearm to strike the inmate in the head (Pet. Ex. 6, camera 211.11 at 8:32:15; Pet. Exs. 11, 12, 13, screenshots).

By 8:33 p.m., five officers, including respondent, were holding the inmate down on the floor near the doorway (Pet. Ex. 6). Meanwhile, respondent used his two hands to push the inmate's head to the floor (Pet. Ex. 6, camera 210.255 at 8:34:12). For more than twenty seconds, respondent used both hands to push the inmate's head down to the floor (Pet. Ex. 6, camera 210.255 at 8:34:12-8:34:35).

By 8:35 p.m., officers applied restraints to the inmate's hands and ankles (Pet. Ex. 6). Respondent began to stand up while continuing to hold the inmate's head to the floor (Pet. Ex. 6, camera 210.255 at 8:34:35). After taking his left hand off the inmate, respondent put his right hand on the inmate's neck (Pet. Ex. 6, camera 210.255 at 8:34:36). The inmate, now in restraints, stood up and the officers escorted him out of the cell (Pet. Ex. 6).

In his use of force report, respondent stated that the inmate refused to comply with an order to step out of the cell after he destroyed plumbing equipment (Pet. Ex. 3). Respondent wrote that he “used upper body holds to place handcuffs” and escort the inmate to another cell “for his safety” (Pet. Ex. 3). In the section where he was required to identify the parts of the inmate’s body where force was applied, respondent wrote, “right shoulder” (Pet. Ex. 3). Elsewhere in the report, where respondent was asked to list other members of staff who were present or involved in the use of force, he only named himself and a captain (Pet. Ex. 3).

The inmate did not make a written or recorded statement (Pet. Exs. 2, 8). However, he told investigators that he was ordered out of the cell due to flooding and he refused to comply (Pet. Exs. 2, 8). The inmate claimed that respondent tried to throw him off the bench and threw a punch at him (Pet. Exs. 2, 8). According to the inmate, he grabbed respondent in self-defense (Pet. Exs. 2, 8). He further claimed that his pants were intentionally pulled down during the struggle to expose his buttocks (Pet. Exs. 2, 8). The inmate also claimed that, after he was thrown to the floor, respondent choked him (Pet. Ex. 8). When the inmate told respondent that he “couldn’t breathe,” respondent replied, “Shut up bitch” (Pet. Ex. 8).

According to the injury to inmate report, the inmate had tenderness to his right arm and left knee, a contusion to his right temple, and a sprain to his left knee and forearm (Pet. Ex. 7). The next day, the inmate was seen by medical staff for right shoulder pain (Pet. Ex. 7).

Use of force

Petitioner charged respondent with excessive use of force for putting his hands around the inmate’s neck, elbowing the inmate to the head, and using his hands to hold the inmate’s face to the floor. This charge should be sustained.

The Department’s Use of Force Directive in effect at the time of this incident limited the types of force that may be used against inmates (Pet. Ex. 4, Dir. 5006R-C § V(B)). Staff must “start with the minimum amount of force needed,” using “control holds or a take-down technique” to “gain compliance by and control over the inmate” (Pet. Ex. 4 at § V(B)(2)(d)). If necessary, staff may apply “blows to the body” and, “[u]nless unavoidable, blows should be directed away from the head” (Pet. Ex. 4 at V(B)(2)(e)). “Deadly physical force” is “force which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury,” including the intentional striking of an inmate’s head against the floor, and may

only be used “as a last resort” and where other reasonable alternatives have been exhausted (Pet. Ex. 4 at §§ (V)(B)(2)(h), V(C)(1)). As the Use of Force Directive and our decisions recognize, blows to the head constitute deadly physical force, because they may cause serious physical injury. *Dep’t of Correction v. Bravo*, OATH Index Nos. 424/15 & 426/15 at 12 (May 14, 2015) (“deadly physical force” includes punch or kick to the head); *Dep’t of Correction v. Monclova*, OATH Index No. 1206/13 at 5 (June 20, 2013), *aff’d*, NYC Civ. Serv. Comm’n Case No. 35460 (Dec. 20, 2013) (punching inmate in the mouth violated the prohibition against unnecessary blows to the head).¹

Here, the video evidence shows that respondent initially attempted to use alternatives to force when he spoke to the inmate. However, matters quickly escalated when respondent grabbed the inmate by the throat. This violated the Use of Force Directive because respondent failed to start with the minimum amount of force needed to restrain the inmate.

Respondent also used excessive force when he elbowed the inmate in the head as fellow officers were trying to bring the inmate down to the floor. The inmate was in the grasp of the other officers. Though the inmate continued to struggle, there was no need for respondent to strike him in the head. Respondent’s actions could have caused serious physical injury. It also appeared that respondent was retaliating because the inmate had pushed him moments earlier.

Finally, there was no justification for respondent to use both hands to grab the inmate’s head and push his face to the floor. This occurred at the end of incident. The inmate was prone on the floor and held by multiple officers who were in the process of applying restraints to his arms and ankles. Even after the inmate stopped resisting, respondent continued to use two hands to push the inmate’s face to the floor. When respondent started to stand up, he continued to push the inmate’s head down and then put one hand around the inmate’s neck.

At petitioner’s request, I drew an adverse inference against respondent because he failed to testify. *See Dep’t of Correction v. Jones*, OATH Index No. 393/04 at 9 (May 3, 2004), *citing Comm’r of Social Services v. Phillip De G.*, 59 N.Y.2d 137, 141 (1983). I inferred that his testimony would not have rebutted petitioner’s case.

¹ Ten days after this incident, petitioner revised its Use of Force Directive, explicitly prohibiting blows to the head or neck, choke holds, or “other neck restraints,” except where a staff member or other person “is in imminent danger of serious bodily injury or death, and where lesser means are impractical or ineffective.” Directive 5006R-D (eff. Sept. 27, 2017); *see Dep’t of Correction v. Ward*, OATH Index No. 2137/18 at 7-8 (Dec. 31, 2018).

In summation, respondent's representative offered a number of possible explanations for respondent's actions. For example, he argued that there were captains on the scene supervising respondent's actions, the inmate had destroyed Department property, the inmate was unruly and uncooperative, the elbow strike did not hit the inmate, and there were no extensive bruises or injuries (Tr. 187-90). None of these claims withstand scrutiny. The video does not show the inmate destroying property. Even if the inmate had caused damage earlier, he was not causing any harm when respondent entered the cell. It appeared from the screenshots that respondent's elbow and forearm struck the inmate's head (Pet. Exs. 11, 12, 13). And if the captain standing outside the cell had ordered respondent and other officers to remove the noncompliant inmate from the cell, that did not justify the excessive use of force.

I did not credit the inmate's claims that his pants were intentionally pulled down by one of the other officers or that respondent cursed at him when he said he could not breathe. The surveillance video did not have any audio and the inmate did not testify, record, write, or sign a statement. Thus, these additional allegations were based on multiple levels of untested hearsay. However, the inmate's reported injuries, including sprains, shoulder pain, and bruising to the face, were consistent with the force shown on the video. Though the inmate did not sustain more serious injuries, that did not excuse respondent's violations of the Use of Force Directive.

False or misleading report

Petitioner also proved that respondent submitted a false or misleading report. Staff members who use or witness a use of force must prepare a written report "based on their own observations," with a "complete account" of events leading to the use of force and a "precise description of the incident," including the force used by the report writer (Pet. Ex. 4, Directive 5006R-C § V(F)(3)(a),(b)). The report must list all persons who participated in or witnessed the event (Pet. Ex. 4 at V(F)(3)(e)). Respondent's report did not comply with the directive.

To prove that respondent provided false or misleading account of the use of force incident, petitioner must establish, by a preponderance of the credible evidence, "that the underlying incident occurred and that respondents' statements materially deviated from the actual events." *Dep't of Correction v. Dominguez, Hernandez, and Christie*, OATH Index Nos. 615/19, 731/19, and 770/19 at 16 (May 21, 2019), *aff'd*, NYC Civ. Serv. Comm'n Case Nos.

2019-0824, 2019-0825 (Feb. 5, 2020) (report that omitted altercation, but included events leading up to it and after it was misleading).

Respondent reported details of the events leading up to the use of force, but he omitted details of the force used and who was present. According to respondent's report, he merely used "upper body holds," handcuffed the inmate, and escorted the inmate to safety. Respondent made no mention of grabbing the inmate's neck, elbowing the inmate in the head, or using his hands to hold the inmate's face to the floor. Nor did respondent make any mention of the force used by several fellow officers in their struggle with the inmate. Indeed, respondent did not mention that any other correction officers were present. Instead, respondent only noted the presence of a captain. Individually and collectively, the omissions were so significant, that the report was false or misleading.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent used unnecessary or excessive force against an inmate on September 17, 2017.
2. Petitioner proved that respondent submitted a false or misleading use of force report regarding an incident that occurred on September 17, 2017.

RECOMMENDATION

After making the above findings, I requested and reviewed a summary of the respondent's personnel history. Petitioner hired respondent in 2006. He has no prior disciplinary record, he was awarded a unit citation in 2008, and he has an excellent attendance record. At trial, petitioner requested penalties, "consistent with OATH precedent," of 40 days' suspension without pay for the use of force and 15 days' suspension without pay for the false or misleading report, for a total of 55 days' suspension without pay (Tr. 197-99). That is appropriate.

Penalties for excessive use of force against an inmate range from 15 days' suspension to termination, 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. Ward*, OATH Index No. 2137/18 at 6 (Dec. 31, 2018) (recommending 35-day suspension where officer,

with seven years of experience with petitioner, 13 years of experience as a peace officer at another agency, and a minor disciplinary record, briefly placed his hand around an inmate's neck, but did not submit a false or misleading report); *see, e.g., Dep't of Correction v. Pannizzo*, OATH Index No. 1691/03 (Nov. 1, 2004), *modified*, NYC Civ. Serv. Comm'n Item No. CD 06-69-M (July 6, 2006) (60-day suspension reduced to 40 days where officer, who had a minor disciplinary record, struck inmate on side of the head, sprayed him with a chemical agent, and falsely claimed that force was used in self-defense); *Dep't of Correction v. Rothwell*, OATH Index No. 1963/17 (Nov. 3, 2017), *modified*, Comm'r Dec. (Jan. 8, 2018) (49-day suspension imposed upon captain who used excessive force by striking an inmate in the head and face after inmate was subdued and prone on the floor; captain also submitted a false or misleading report about the incident and made false or misleading statements to investigators); *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). *Dep't of Correction v. Woodson*, OATH Index Nos. 597/04 & 603/04 (July 1, 2004) (termination of employment where officer, who had a lengthy disciplinary record, slapped, punched, and choked an inmate in response to a "smart remark" and then falsely denied the use of force).

Here, a substantial penalty, short of termination, is warranted. Respondent grabbed the inmate by the throat at the outset of the incident as the inmate stood on a bench. This created a substantial risk of injury. Respondent's use of his elbow and forearm to strike the inmate in the face appeared to be retaliatory. When respondent used both hands to push the inmate's head down to the floor, he needlessly inflicted pain and created a risk of grave injury. And respondent's report about the incident was woefully incomplete.

There is some mitigation. Respondent has an unblemished record during his 14-year career with the Department. Moreover, the use of force resulted from the inmate's refusal to obey an order to leave the cell, followed by the inmate's violent resistance when officers tried to restrain him. A brief struggle ensued and, fortunately, there were no serious injuries.

However, the fact remains that respondent used repeated, excessive force on the inmate and needlessly inflicted pain after the inmate was restrained on the floor. Respondent also tried to conceal his misconduct by submitting a false or misleading report. Based on the multiple violations of the use of force directive, I recommend a penalty of 40 days' suspension for the

excessive force and 15 days' suspension for the false or misleading report, for a total penalty of 55 days' suspension without pay.

Kevin F. Casey
Administrative Law Judge

December 2, 2020

SUBMITTED TO:

CYNTHIA BRANN
Commissioner

APPEARANCES:

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NEW YORK CITY DEPARTMENT OF CORRECTION

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April 13, 2021

Tatanisha Banks
Acting Warden
Manhattan Detention Complex/Court Division (MDC)

Re: C.O. Eon Thompson
Guilty At OATH DR #168/19

Dear Acting Warden Banks,

Please be advised that on December 2, 2020, the Office of Administrative Trials and Hearings issued findings on the charges and specifications listed above. The Honorable Kevin F. Casey found C.O. Eon Thompson guilty on the specifications. The recommended penalty for DR #168/19 was 55 suspension days.

On March 31, 2021, Commissioner Cynthia Brann accepted the Court’s findings and its recommendation as to the penalty. C.O Thompson must therefore be suspended for a total of 55 suspension days.

Please notify C.O. Thompson by serving him ASAP with a copy of this letter. Upon service of this letter on the subject employee, have him sign below acknowledgment of service. After the employee is served, please fax me a copy of the signed acknowledgment. My fax number is (718) 278-6526.

Yours truly,


Sarena Townsend,
Deputy Commissioner

Attachments

C: Nadene Pinnock, Deputy Commissioner, Human Resources
Counsel for Respondent
O.A.T.H.

Served by: _____

Respondent’s Signature: _____

Date: _____