Dep't of Correction v. Behari

OATH Index Nos. 781/14, 782/14, 783/14, 784/14,
785/14 & 786/14 (Sept. 25, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2015-0162 (Nov. 10, 2015), **appended**

Captain and correction officers were guilty of using unnecessary, impermissible, and excessive force against inmate Hinton, falsely reporting such force, and other violations. ALJ did not sustain charges alleging a failure to report the use of force, conspiracy and wearing leather gloves. ALJ recommended termination of respondents' employment.

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

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
**BUDNARINE BEHARI, PAUL BUNTON,
RAUL MARQUEZ, VINCENT SIEDERMAN,
GERONIMO ALMANZAR AND RAMON CABRERA**
Respondents

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This disciplinary proceeding was referred by the Department of Correction ("Department"), pursuant to section 75 of the Civil Service Law. Civ. Serv. Law § 75 (Lexis 2014). The primary charges allege that Captain Budnarine Behari and Correction Officers Geronimo Almanzar and Vincent Siederman used unnecessary, impermissible, and excessive force against an inmate and that Correction Officers Paul Bunton, Raul Marquez, and Ramon Cabrera observed and failed to report such force. Respondents deny these and other charges asserted here.

The hearing was conducted before me over the course of eight days: February 10, 14 and 18, March 25, April 4, May 23, June 9, and June 24, 2014.[1] The proceedings included a tour of

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[1] A pre-trial settlement conference was held in this case on October 16, 2013, and trial was scheduled for January 16, 21, and 27, 2014. Three trial days were selected as petitioner anticipated calling seven or eight witnesses and

the facility conducted on June 9, 2014, at the request of petitioner and unopposed by respondents (Tr. 587-88). The record was closed on July 14, 2014, after post-trial submissions. Petitioner presented the testimony of 13 witnesses, including former inmate Robert Hinton who was the subject of the use of force.[2] Respondents testified on their own behalf.

This case involves a use of force that occurred on Rikers Island on April 3, 2012, at George R. Vierno Center ("GRVC") when and after Mr. Hinton was escorted to his cell by Captain Behari and five correction officers, who are the respondents in this case. The escort is captured on surveillance video; the use of force inside Hinton's cell is not. For the reasons set forth below, I find the evidence established that the force was unnecessary, impermissible, and excessive, and that respondents failed to report the true nature of the force used. Additional charges also were sustained. Charges that respondents violated the uniform directive by wearing leather gloves and engaged in a conspiracy to cover up the improper use of force should be dismissed. The tribunal recommends termination of employment for all respondents.

MOTION FOR MISTRIAL, OTHER SANCTION

Robert Hinton is currently the plaintiff in a federal lawsuit commenced in 2013 against respondents and the City of New York (the "City") that seeks monetary damages for personal injuries sustained as a result of the force that is the subject of this proceeding (Resp. Motion ¶ 4, Watford Aff. (May 23, 2014)). The federal case, *Robert Hinton v. City of New York, et. al*, 13-CV-00651-NRB, filed in the Southern District of New York (the "federal case"), has been stayed pending a determination in these proceedings. Hinton is represented in that case by the law firm of Stoll, Glickman & Bellina, LLP ("SGB").

On May 23, 2014, respondents moved for mistrial of this proceeding or for sanctions and dismissal of the petition on the grounds that petitioner's counsel, David Klopman, Esq., intentionally engaged in "acts . . . designed to undermine the integrity [of] the instant proceedings," created a conflict of interest, and caused irreparable prejudice to respondents by disclosing confidential information to an attorney at SGB, Cynthia Conti-Cook (Resp. Motion ¶ 5; Tr. 1289). In the alternative, they ask that Hinton's testimony be stricken from the record (Tr. 1289). The motion for mistrial was denied (Tr. 1736). The motion for dismissal is denied. The motion for sanctions is granted, as set forth below.

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respondents expected to call six or seven. Trial was adjourned, once, due to respondents' counsel's prior-scheduled two-week trial.

[2] Though incarcerated at the time of the incident, Hinton was released from jail prior to the hearing.

The following is not in dispute:

- On January 8, 2014, agency counsel e-mailed Hinton's counsel transcripts of respondents' MEO 16 interviews, five weeks before Mr. Hinton's testimony in this proceeding.[3]
- On February 21, 2014, agency counsel forwarded Hinton's counsel a series of e-mail transmissions internal to the Department that (i) disclosed that Captain Behari had been discharged from the hospital after a surgery and was recovering at his parents' home, (ii) provided the parents' home address, and (iii) reported that the Department had issued Behari a radio and ballistic vest but would not issue him a firearm (Resp. Motion ¶ 12, Ex. 1 at 00771-00772). The transmission also attached a copy of a police report Behari filed alleging that Hinton threatened him near Behari's home (Ex. 1 at 00771).[4]
- On April 9, 2014, agency counsel e-mailed transcripts of the proceedings conducted in this hearing on February 10, 14, and 18, 2014, to Hinton's counsel, at her request. Both agency counsel and Hinton's counsel knew the transcripts were not yet published, as the proceeding had not yet been completed (Resp. Motion ¶ 14, Ex. 1 at 00780-00781).

Mr. Klopman was removed as counsel in the case prior to the motion, as soon as his actions became known to the Department.[5] He has made no response to these accusations.

Respondents argue that agency counsel was not authorized to make these disclosures because the City is represented in the federal case by the Corporation Counsel for the City of New York, whose attorneys *solely* hold such authority (Resp. Motion ¶ 10). Moreover, as a witness in this case, Hinton had no right to the materials sent to his attorney. Respondents fear

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[3] The "MEO 16" is an interview conducted pursuant to Mayor's Executive Order 16, dated July 26, 1978, which entitles a City agency to examine its employees as to allegations of wrongdoing. Such examinations are routinely conducted by the Department in investigations of excessive force, and the recordings and/or transcripts of such interviews are frequently entered into evidence in disciplinary proceedings at the tribunal. The sworn statements therein may be significant to a disciplinary proceeding in that they may corroborate, or contradict, later statements made at a hearing.

[4] Hinton testified at the hearing that he and Behari live in the same Queens neighborhood (Tr. 307-08). Behari's counsel disputed this, asserting that they live far from one another, and contended that DOC records containing Hinton's address substantiate this assertion (Tr. 230-31).

[5] The Department was informed of this conduct by respondents' counsel on April 25, 2014, verified the transmissions, and removed Mr. Klopman from the case (Tr. 1293-95). Further, Klopman was removed from the Trials Division and transferred to a different location. Kassandra King, Esq., was assigned as lead counsel in the case on April 28, 2014. The matter was brought to the attention of this tribunal on the next trial date, May 23, 2014 (Tr. 1279-99).

that their statements in the MEO 16 interviews were used to provide an advantage to Hinton in this proceeding and in the federal case (Resp. Motion ¶ 8, Ex. 1 at 00769).

In opposition to the motion, the Department contends there is no evidence that Hinton was in fact given the transcripts of the MEO 16 interviews (Pet. Response, King Aff. at 2). The Department submitted in support of its contention an undated affirmation made by Hinton's counsel in which she denies giving the MEO 16 transcripts to Hinton (Pet. Surreply, Conti-Cook Aff. ¶ 5).[6] Although she acknowledged receiving and saving them to SGB's computer hard drive, she denied ever reading them, according to her affirmation, because they were lengthy and the federal case had been stayed pending a determination in this administrative proceeding (Pet. Surreply, Conti-Cook Aff. ¶ 3). Conti-Cook further stated that, until her last day of work at SGB, on May 9, 2014, she was the only attorney at the firm in regular contact with Hinton, and she neither provided the MEO 16 interviews to Hinton "to read or review" nor saw Klopman provide them to Hinton (Pet. Surreply, Conti-Cook Aff. ¶¶ 5, 6). On the basis of the Conti-Cook Affirmation, the Department asserts there is no evidence of taint. I did not give her statement great weight.

The Department further argues there is no evidence of taint because Hinton's hearing testimony was "consistent" with the statements he provided to Department investigators shortly after the incident occurred (Pet. Response, King Aff. at 2). In general, they are consistent. However, his statement was provided during a recorded 15-minute interview given to Department investigators six hours after the use of force (Pet. Ex. 24) and his testimony was the product of direct and cross examination posed by three attorneys over the course of three to four hours almost two years after the incident.

The Department contends that respondents have offered no evidence that Mr. Klopman's actions undermined the integrity of the proceeding (Pet. Response, King Aff. at 2). To the extent that Klopman provided Conti-Cook with strategic and other information about the case, the Department contends, Klopman's actions are of no significance because Conti-Cook is not a witness in this case. *Id*. And, in any event, the Department did what it could to excise from the proceedings any appearance of impropriety by removing Klopman from the case as soon as it learned of his actions (Pet. Response, King Aff. at 3).

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[6] (annexed to Surreply).

All attorneys admitted to the Bar are required to follow the Rules of Professional Conduct, which provide that a lawyer "shall not knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . ." Rules of Professional Conduct Rule 1.6, published in Jud. Law Appendix (Lexis 2014) ("Rules of Professional Conduct"). *See also* 48 RCNY 1-13(d) (Lexis 2014) (requiring all attorneys who appear before OATH to abide by the ethical considerations, disciplinary rules, and code of professional responsibility). Confidential information is broadly defined as information that is protected by attorney-client privilege, information likely to be embarrassing or detrimental to the client, or information that the client has requested be kept confidential. Rules of Professional Conduct Rule 1.6(a)(3). Providing confidential information to a client's adversary "strikes at the heart of the attorney-client relationship, that is, the trust that clients place in their attorneys to pursue their legal interests." *In re Caliguiri*, 50 A.D.3d 90, 97 (1st Dep't 2008) (where respondent entered into an agreement to exchange information with an adverse party); *In re Kiczales*, 36 A.D.3d 276 (1st Dep't 2006) (where respondent used client's confidences and secrets to advise a party adverse to his client).

Klopman's February 21 e-mail improperly disclosed confidential and intimate information about Behari such as where he chose to recover from surgery, his parents' home address, and his personal security precautions. In light of Hinton's alleged threats to Behari, the release of this information could have presented a risk to Behari's life, though there is no record evidence indicating it did. It was given to Conti-Cook one week after Hinton's testimony in this proceeding, on February 14, 2014, and Hinton had approached Captain Behari near his home months earlier, in July 2013.

The unpublished transcripts of the first three days of testimony in this case, which were provided to Hinton's counsel in April (Resp. Motion, Ex. 1 at 00781-00783), were transmitted improperly. Both counsels understood at the time that the unpublished transcripts of the first three days of testimony "are not a public record yet as they haven't been published" (Resp. Motion, Ex. 1 at 00783). It is not clear whether they would have been subject to Freedom of Information Law ("FOIL") disclosure; however, it could be inferred from the fact that agency counsel released unpublished, uncorrected transcripts to an adverse party in the civil case that the materials were likely to be used to the detriment of his client. *See Lipin v. Bender*, 84 N.Y.2d 562 (1994). In addition, OATH's rules of practice provide that transcripts shall be released with

the approval of the assigned administrative law judge. 48 RCNY §§ 1-49 (b), (c); 1-51 (Lexis 2014). As the ALJ assigned to the case, I understood the release to be for distribution to the parties alone.

Generally, agencies are required to make all records available for public inspection under FOIL. However, section 87(2)(a) of the Public Officers Law creates an exception for records that are specifically exempted from disclosure by state or federal statute. Section 50-a of the Civil Rights Law is such a statute; it specifically exempts from public disclosure "[a]ll personnel records used to evaluate performance toward continued employment or promotion . . . ." Civ. Rights Law § 50-a (Lexis 2014). The Court of Appeals has held that "[d]ocuments pertaining to misconduct or rules violations by correction officers . . . are the very sort of record which, the legislative history reveals, was intended to be kept confidential." *Prisoners' Legal Services of New York v. Dep't of Correctional Services*, 73 N.Y.2d 26, 31 (1988); *see also Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 154-159 (1999). Courts have interpreted "personnel records" to include inmate grievances against correction officers and an internal affairs investigation report. *Prisoners' Legal Services,* 73 N.Y.2d at 31 (inmate grievances); *Cook v. Nassau County Police Dep't*, 110 A.D.3d 718 (2d Dep't 2013) (internal affairs investigation report).

Given that I am now evaluating respondents' MEO 16 interviews, along with other evidence, to determine whether respondents are worthy of continued employment with the Department, I find that the interviews are protected by Civil Rights Law 50-a, and were improperly disclosed. Although they would have become public knowledge when entered into evidence on February 18, 2014, the MEO 16 interviews were sent to Hinton's counsel on January 8, 2014, more than one month prior (Tr. 444; Resp. Motion, Ex. 1 at 00769). Even if the documents had been properly disclosed in the federal case, they could be subject to a protective order, imparting some measure of confidentiality (Tr. 1739).

Respondents seek to rid the proceeding of any potential prejudice created by the misconduct of petitioner's attorney. Petitioner maintains there is no evidence of taint in the proceeding so the record should stand as is.

OATH's rules provide that:

> Willful failure of any person to abide by the standards of conduct . . ., may, in the discretion of the administrative law judge, be cause for the imposition of sanctions. Such sanctions may include formal

> admonishment or reprimand, assessment of costs or imposition of a fine, exclusion of the offending person from the proceedings, exclusion or limitation of evidence, adverse evidentiary inference, adverse disposition of the case, in whole or in part, or other sanctions as the administrative law judge may determine to be appropriate. The imposition of sanctions may be made after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

48 RCNY § 1-13 (e). The standards for covered conduct include "the canons, ethical considerations and disciplinary rules set forth in the code of professional responsibility." *Id*. at § 1-13(d). It is appropriate to consider striking testimony from the record of a proceeding to rid it of improper influence. *Newman v. Ernst*, 10 N.Y.S. 310, 312-14 (Sup. Ct. Buffalo 1890).

Manifestly, there is no smoking gun evidence that the materials shared with SGB were shared with Hinton. Nevertheless, the responsibility of this tribunal is to ensure a full and fair adjudication of the disciplinary charges for which respondents' careers hang in the balance. The possibility of prejudice resulting to respondents is something this tribunal must seriously consider. The Department's counsel knowingly deviated from the ethical standards of conduct of this tribunal. While Hinton's statement and testimony are generally consistent, that fact does not rule out the possibility that he read and benefitted from reading these materials. It is impossible to know whether Klopman's improper release of information affected Hinton's testimony. However, Hinton's testimony is not necessary to a prosecution of the claims asserted by the Department; ample additional evidence exists in the record for that purpose, not the least of which is the statement Hinton made to investigators hours after the use of force took place. Therefore, as an appropriate precaution, Hinton's testimony will be stricken from the record to rid this proceeding of any taint.

As for the appropriateness of imposing a sanction for Klopman's conduct, the Department contends the question is "not ripe" because an independent fact finding process must precede a sanction and such a process is underway and should not be undermined by "premature judicial intervention" (Pet. Response, King Aff. at 3). The record contains no details of the noted inquiry into Mr. Klopman's conduct. Respondents have not proposed a sanction against Klopman personally. The Department would not commence such proceedings here, inasmuch as

attorney conduct is the province of the Appellate Division of the Supreme Court in each judicial department. Jud. Law § 90 (Lexis 2014).

BACKGROUND

On April 3, 2012, inmate Hinton was living in the Mental Health Assessment Unit for Infracted Inmates or MHAUII (pronounced "Maui"), a punitive segregation housing unit within GRVC for inmates with mental health issues, when he was badly beaten in his cell by the respondents in this case. Respondents Behari, Siederman, and Almanzar are charged with using unnecessary, impermissible, and excessive force against Hinton inside his cell by punching and striking him while he was handcuffed and causing significant injuries. They are also charged with using impermissible force by carrying Hinton hog-tied; Officers Marquez, Bunton, and Cabrera are charged with failure to report this conduct. All respondents are charged with falsely reporting what occurred, and conspiring to cover up the nature of the force used. Officers Almanzar, Marquez, Bunton, and Cabrera are charged with wearing prohibited leather gloves, which is a uniform violation. Captain Behari, as supervisor, is charged with additional violations. Respondents dispute the charges but do not dispute that there was a use of force that ended in Hinton being transported to Elmhurst Hospital where he was found to have severe facial trauma and a transverse process fracture in his back.

Petitioner and respondents offered different versions of what happened inside Hinton's cell. The Department contends that Hinton refused to move while being escorted to his cell and respondents dragged him inside the cell and commenced a brutal beating, provoked by Hinton when he kicked the captain. After realizing their actions were excessive, respondents cooked up a false explanation, which is their claim that Hinton put Officer Bunton in a chokehold. Respondents contend that, although Hinton was fully cooperative while being escorted to his cell, he suddenly jumped up and kicked the captain soon after they removed his handcuffs and leg shackles and then put Officer Bunton in a chokehold. The force they utilized (punches to Hinton's face and body) was necessary to subdue him and save Bunton's life and continued only until they were able to break Bunton free.

Mr. Hinton's injuries are not in dispute. Hospital medical records show that Hinton sustained "multiple blunt trauma to the face" (Pet. Ex. 18 at D) that included (i) closed nasal bone fractures (his nose was broken and tilted to the right), with swelling and bleeding from the nose (Pet. Ex. 18 at CC); (ii) a laceration to his left eye with peri-orbital swelling and edema

(Pet. Ex. 18 at VV); and (iii) cuts and swelling of the upper and lower lips and bleeding from the mouth (Pet. Ex. 18, Pet. Ex. 38 at 28). He also had a fracture of the L3 transverse process in his lower back, c-spine tenderness (Pet. Ex. 18 at HH), and a closed head injury. Hinton complained of jaw, neck, and back pain. Photographs taken by Department investigators show extensive facial injury (Pet. Exs. 5, 6). Petitioner's Exhibit 5M is appended to this report, below.

Inmate Hinton's Escort from Building 11 to Building 13

On April 3, 2012, Hinton was scheduled to be transferred from a housing area in Building 11A to another in Building 13A, both of which are MHAUII units.[7] Several of the charges involve acts taken by Captain Behari and respondents while escorting Hinton to his new cell in 13A.

At the time of this incident, Captain Behari was security captain and in charge of scheduling all inmate transfers in MHAUII (Tr. 1018). Behari arranged Hinton's transfer, which was authorized by Deputy Warden Williams because family members are required to be separated and Hinton was believed to be related to another inmate named "Hinton" who lived in 11A (Tr. 970-73, 998). Behari admitted that the two Hintons had lived in 11A for quite some time. One inmate recalled that Hinton was brought to a cell in 13A the previous day and was allowed to leave (Concepcion: Pet. Ex. 2). Captain Behari knew Hinton was scheduled for transfer on April 2nd but he was unaware why he was not moved that day (Tr. 1018). Investigator Garcia said Hinton was scheduled for transfer twice prior to April 3rd (Tr. 757).

While Hinton was at court the morning of April 3rd, Captain Behari ordered officers to pack up his property so he could be moved to his new cell immediately upon his return from court (Tr. 970-71). When Hinton arrived at the MHAUII intake area escorted by Officer Shanice Martin (Pet. Ex. 38 at 1), Behari ordered Officer Almanzar and, later, Officer Marquez to take custody of him and escort him to his new cell in 13A (Tr. 971-74, 1501). Behari asked Officer Cabrera to help Marquez carry Hinton's property (Tr. 1503).

Respondents knew Hinton prior to this.[8] Captain Behari knew that Hinton was an enhanced restraint inmate and a member of the Bloods who are the largest security risk group

[7] Although referred to as Building 11 and Building 13, these housing units are in fact in the same building but on different floors (Tr. 970).
[8] Marquez was aware of Hinton because he had filled out paperwork for him (Tr. 1499). Almanzar knew Hinton from his assignment to Building 11 where Hinton was in punitive segregation (Tr. 1635-36). He had a good rapport with him and never had a use of force with him or wrote any infractions on him. Cabrera had tested Hinton for drugs prior to this incident and infracted him when he tested positive (Tr. 1207-08). He otherwise had no

("SRG") on Rikers Island and are known for violence and extortion (Tr. 966, 968-69). Investigator Garcia, who was in charge of the investigation of this incident and authored the 30-page Investigative Report, was not sure that OSIU, the operations security intelligence unit that makes such determinations, had confirmed Hinton as a gang member (Tr. 804-05). The report does not mention any gang affiliation (Pet. Ex. 38). Officer Bunton, a member of the security staff, believed that Hinton was a "well-known" member of the Bloods and that it was documented in the Department's database (Tr. 1306, 1490).

MHAUII is a punitive segregation housing unit designed for inmates who have infractions and are "identified by Mental Health as requiring closer monitoring of their mental health condition during their confinement to a cell."[9] Directive 4501R-A, Pre-Hearing Detention and Punitive Segregation Status Inmates § III(B) (rev. Oct. 14, 2005) ("Dir. 4501R-A"). Inmates are placed in punitive segregation to serve a sentence of confinement after being found guilty of committing an infraction of Department rules. Dir. 4501R-A § III(C). Department records show that Hinton had been found guilty of 20 infractions prior to this incident (Pet. Ex. 38 at 23). The Department has promulgated rules designed to address the needs of this inmate population. *See generally* GRVC MHAUII Operating Manual (rev. May 11, 2006) ("MHAUII Manual").

According to the MHAUII restraint and escort policy, unless contraindicated for medical reasons, all inmates must be handcuffed behind the back ("rear-cuffed"), palms out and thumbs up, prior to exiting their cells. MHAUII Manual at 18; Dir. 4501R-A § IV(C)(2)(d)(i). Enhanced restraints are required for inmates who have assaulted staff or another inmate with a weapon, caused medically detectable injuries or serious injury to an inmate, or are qualified for a "Red Identification Card" ("Red ID"). MHAUII Manual at 18. An inmate who qualifies for enhanced restraints must be rear-cuffed and wear a waist chain and leg irons or daisy chain prior to removal from his cell and during all program activities and movement outside the housing area, except for visits, recreation, and religious services. MHAUII Manual at 18. Red ID inmates have been caught with a weapon and must wear enhanced handcuffs with mitts attached (Tr. 420-21). The operations order for enhanced restraint and Red ID inmates also requires they be escorted by a captain and one or two officers (Tr. 1018, 1521). OSIU designates which

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interactions with Hinton. Siederman knew Hinton as a punitive segregation inmate who he frequently took out to the recreation yard (Tr. 1123). Bunton, who is assigned to security, knew Hinton had been in and out of punitive segregation (Tr. 1303). He wrote an infraction on him for refusing a drug test but had no problems with him (Tr. 1306-07).

[9] The record did not indicate that Hinton had any mental health diagnosis (Tr. 824-25).

inmates are required to wear enhanced restraints (Tr. 967, 974). Hinton had both enhanced restraint and Red ID designations. Officer Bunton testified that enhanced restraint inmates, such as Hinton, were known to be "very assaultive" and might attack staff with their hands or a weapon, or splash an officer with an unknown liquid (Tr. 1348).

Captain Behari, who began working for the Department as a correction officer in 2002 when he was assigned to GRVC, has worked in punitive segregation since November 2008 (Tr. 959, 993). As a security captain in MHAUII for two years prior to his testimony, he was responsible for supervising the daily institutional search of inmate cells to find contraband (Tr. 961). The Department has charged him with violating a number of its security provisions while escorting Hinton, including (1) transporting the inmate without enhanced restraints; (2) failing to anticipate a use of force and to request the assistance of a supervisor; (3) instructing staff to lift Hinton off the ground and carry him hog-tied, rather than have him transported on a gurney; and (4) removing Hinton's handcuffs inside the cell rather than through the cuffing port.

ANALYSIS

I. Behari Violated Numerous Safety Rules

Captain Behari is charged with misconduct for escorting Hinton without the proper enhanced restraints (Specification 6). It was not disputed that Hinton should have been escorted with enhanced restraints and that Captain Behari failed to follow the requirement for much of the escort. The charge was sustained by the evidence.

A. The Video

Hinton's escort to his new cell in 13A was captured on surveillance cameras which are positioned throughout the facility. Staff and inmates are generally aware of the presence of these cameras. The Department entered the surveillance video in evidence as Petitioner's Exhibit 1. The exhibit consists of nine videos from various cameras in the facility, which capture Hinton and respondents inside the vestibule outside 13A and on the lower tier of 13A before, during and after the use of force. Hinton's removal from the cell after the use of force is captured as is his transport to and from GRVC's clinics. There is no audio in the surveillance video.

The earliest video is of Hinton and respondents inside the vestibule at the entrance to 13A at around 4:51 p.m. (Pet. Ex. 1, #10.100).[10] At 4:51.18, Officers Almanzar and Marquez enter the vestibule on either side of Hinton as Captain Behari follows close behind. Hinton is rear-

[10] Video #10.101 is of the same vestibule, taken from a different camera angle (Pet. Ex. 1).

cuffed. The gate opens to allow them into the 13A housing area, and Hinton steps forward to proceed through the gate as Almanzar pulls him back. Hinton stands still. He appears calm. The gate closes and Officer Siederman enters the vestibule from the control room at 4:52.21; at the same time, Officers Cabrera and Bunton enter the vestibule dragging bags of Hinton's property behind them.

Four of the respondents are wearing gloves: Marquez and Bunton wear grey gloves with a black overlay; Almanzar is wearing grey gloves; and Cabrera is wearing black gloves.

As they wait, Hinton looks over his shoulder at Captain Behari several times while Behari walks around the vestibule. At 4:52.35, Behari makes eye contact with Hinton and Hinton's lips and head move as he is speaking to Behari. It is less clear whether Behari's lips are moving as his head is turned away from the camera. Captain Behari denied that Hinton said anything to him inside the vestibule (Tr. 999, 1001). Once all are assembled inside the vestibule, the gate opens again and Hinton is escorted into 13A by Captain Behari, Officers Almanzar and Marquez, with Officer Siederman trailing them, and Officers Cabrera and Bunton pulling bags filled with Hinton's property. It is 4:53.10. Although Officer Siederman who is an escort officer for 13B has joined the group, neither he nor Behari knows why; Siederman was not assigned to this task (Behari: Tr. 978-79, 1096-97; Siederman: Tr. 1113, 1126-28).

At about 4:53.10, the group moves from the vestibule to the main floor which is adjacent to tiers of cells (Pet. Ex. 1, #10.223). The group must descend six steps to get onto the lower tier, where Hinton is being taken to cell 6. As they approach the tier, Hinton sits down on the top step at 4:53.11 (Pet. Ex. 1, #10.223)

As Hinton sits down, Marquez and Almanzar quickly take hold of his arms and shoulders and begin to drag him down the steps at 4:53.18 p.m. (Pet. Ex. 1, #10.223). Hinton, who is 6 feet 3 inches tall, passively resists by lifting his legs and turning his body sideways so his body becomes a weight.[11] Respondents drag him down the steps. At the bottom, Hinton sits sideways on the floor of the tier and is pulled up by Marquez and Almanzar as Hinton continues to swivel his legs to the side. They place him flat on the floor, face down, and hold him there as Siederman leaves. Cabrera is standing directly in front of the group, facing them, with his arms stretched open; he stands in front of the group, as if to block them from view.

[11] Officer Marquez said Hinton "made himself limp" and was "passively resisting" (Tr. 1546-47).

The next 30 seconds of video is missing (from 4:54.00 to 4:54.30), but it is not disputed that Siederman returns with leg irons and puts them on Hinton. When video resumes, the leg irons are on and, at 4:54.38 p.m., Hinton is hoisted up by the group: he is suspended aloft with his shoulders tightly pulled back as his hands are rear-cuffed; his midsection hovers above the floor and his legs are above the ground behind him, held together by shackles. Marquez holds his right arm and Almanzar his left arm; Bunton is behind Marquez holding Hinton's right leg, and Siederman is behind Almanzar with Hinton's left leg. Behari follows them and Cabrera follows Behari. It is 4:55.00 p.m. Petitioner's Exhibit 9, appended below, is a screen shot of this moment from the video, with Hinton suspended, arms and legs tightly clasped behind him, as if he is a masthead on a ship. Petitioner's counsel characterized it as carrying Hinton "like a pig on a stick" (Tr. 1015-17).

B. Anticipated Use of Force

Captain Behari is charged with being aware of an anticipated use of force and failing to notify or request the assistance of a supervisor about an inmate's refusal to move, failing to

contact a mental health care professional to speak to Hinton, and failing to request a handheld video camera, in violation of Department rules (Specification 7). This charge was sustained by a preponderance of the evidence.

Captain Behari acknowledged that MHAUII rules require staff to notify the tour commander whenever an inmate refuses to move. He testified that he did not notify the tour commander when Hinton sat down on the steps because Hinton "was not refusing. He stated he could not walk" (Tr. 1004). Behari said he did not consider Hinton's conduct to be a refusal, and he denied that Hinton voiced outright refusal or stated that he was "not going into that cell" (Tr. 1004-05).

Behari stated that he utilized interpersonal communication (known as IPC skills) by asking Hinton if he could walk and why he could not walk and that Hinton responded to both questions by stating he could not walk (Tr. 1005-06). Behari's testimony was contradicted by his own MEO 16 interview where he stated that he never asked Hinton why he could not walk (Pet. Ex. 38 at 26) and by the video, which shows that he did not stop to talk to Hinton. There is a delay of barely seven seconds from the moment that Hinton sat on the step (at 4:53.11) to the officers' efforts to pull him up and drag his body forward and down the steps (at 4:53.18).

Even if Hinton said he *could not* rather than *would not* walk, Behari's insistence that he did not consider this a refusal (Tr. 1003-13) contradicts his own Use of Force report which states "the subject inmate refused to walk" (Pet. Ex. 29). Moreover, it suggested Behari had no ability to interpret Hinton's conduct as a refusal when he is required as a supervisor to use his judgment. I did not credit it.

The Use of Force Directive states that:

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

Dir. 5006R-C § IV(C)(1). The Directive requires the supervisor at the scene of an anticipated use of force to maintain a dialogue with the Tour Commander "to develop a strategy" to address the situation. *Id.* § IV(D)(1). It also requires staff to immediately obtain a video camera and begin recording the event, except where safety or security concerns make waiting for a camera

impractical. *Id.* § IV(C)(4). None of these actions were taken here. Nor did Behari seek mental health intervention (Tr. 1008). As an alternative to contacting the tour commander, Behari could have radioed the control room for the assistance of a probe team which is appropriately suited up and equipped to assist in moving an inmate who is passively resisting and may become violent (Tr. 415-16). He failed to do this as well.

The Directive acknowledges that it is not always possible to predict when force will be necessary. Dir. 5006R-C § IV(C)(3). However, correction staff are trained to anticipate the need to use force in certain situations, such as an inmate's refusal to go to court, or to leave his cell when ordered, or to comply with search procedures. *Id.* § IV(C)(2). Deputy Warden Clifford, head of the correction academy, acknowledged that it is the judgment call of the supervisor to determine when a use of force is anticipated, "but once an inmate is clearly sitting on the floor or laying on the floor, he's resisting, he's not moving" (Tr. 421-22, 425). ADW Texeira agreed (Tr. 660-61). Deputy Warden Clifford had no doubt this inmate was refusing after watching the video (Tr. 418-19). Three of the officers involved agreed that Hinton's conduct was a refusal (Siederman: Tr. 1138-39; Bunton: Tr. 1356; Marquez: Tr. 1526-27).

Hinton was obviously refusing to move even if he stated that he "could not walk" and Behari should have treated Hinton's conduct as a refusal, which was properly a basis for Behari to anticipate a use of force and to follow the mandates of the Directive. His failure to follow the Directive under the circumstances constitutes misconduct. I therefore find that Specification 7 is sustained.

C. <u>An Inmate Refusal to Move Required a Gurney</u>

There is no distinction in the MHAUII Manual between a refusal and an inmate who states that he cannot walk. The restraints and escort policy is explicit about the manner in which staff must respond to an inmate who, for example, sits down in the middle of an escort. It states:

> If an inmate cannot, or refuses to walk, he is to be placed on the gurney and transported from the area (i.e. two staff members lift the inmate by the arms and one staff member lift the inmates [sic] legs in order to place the inmate on the gurney). . . . **Under no circumstance will an inmate be dragged during an escort.**

MHAUII Manual at 18, ¶ 3 (emphasis in original). Thus, under the rule, the second that Hinton said he was unable to walk, as Behari claimed, he should have been put on a gurney and transported to his cell. Department rules offer no exception to this requirement. The restraints

and escort policy treats the refusal to walk and the inability to walk the same, because in many instances it is, since inmates may fake the inability to walk as a form of passive resistance (Tr. 415).

Captain Behari did not dispute the rule. He said it was impossible to comply with because a gurney could not fit on the narrow tier (Tr. 977). He and Officer Marquez testified that the food boxes, otherwise known as Food Slot Cuffing Ports, protrude from the wall of each cell and narrow the walkway (Tr. 1540-43). Behari conceded, though, that he had never tried to transport a gurney down the tier walkway (Tr. 1014). Other than conjecture, Behari offered no evidence that it was impossible for a gurney to pass down the walkway of the tier.

Behari testified that he told his officers "to guide [Hinton] down to the floor gently" (Tr. 976), language the officers mimicked in their testimony. As for "guiding" Hinton "gently," the video shows the officers struggle to drag Hinton down the steps before putting him face down on the floor. Behari then instructed them to apply leg shackles and carry Hinton into his cell, while shackled and rear-cuffed. These acts are all confirmed in the video.

Officer Marquez described the process undertaken by the escorts:

> Q: Well, let's put it like this. When he was coming down the stairs or when you guys -- excuse me, when the officers dragged him down the stairs, he wasn't going willingly, correct?
> A: No, he was still passively resisting.
> Q: Okay. So it required a lot of force and effort to pull him down the stairs, correct?
> A: Yeah.
> Q: So it's fair to say he was dragged down the stairs and then placed on his stomach, correct?
> A: According to the video, that's how it looks, yes.
> ALJ RICHARD: I'm sorry? According to?
> MR. MARQUEZ: That's how it looks, it appears in the video.
> Q: And, as you know, that is a violation of the MHAUII operating manual, correct?
> A: Yes.

(Tr. 1547). Presumably, the Department's requirement that a refusing inmate be placed on a gurney was put in place to prevent a situation in which dragging an inmate becomes an option. The failure to use a gurney led to staff carry Hinton into his cell in what the Department characterized as a "hog-tying manner."

D. Hog-tying as a Use of Force

The Department charged Behari, Almanzar and Siederman with using impermissible force by carrying "Hinton into his cell in a hog-tying manner" when they were required to transport him on a gurney (Specification 1).[12] Officers Bunton, Marquez, and Cabrera are charged with the failure to report such impermissible force. The Use of Force directive explicitly prohibits hog-tying an inmate: "Mechanical restraints may not be used: a. To punish an inmate by using restraints for an excessive period of time or in an unauthorized manner such as hog-tying." Directive 5006R-C § (V)(B)(3)(a)).

Respondents object to use of the term "hog-tying" as a misnomer and dispute that Hinton was "hog-tied" (E-mail from Frankie to ALJ Richard of June 23, 2014; Tr. 1728-29, 1733). Counsel argued that, since Hinton was handcuffed and shackled in accordance with Department rules, being carried in that condition could not possibly constitute improper hog-tying. Moreover, counsel distinguished the manner in which Hinton was carried by arguing that hog-tying consists of tying "all four hooves or both hands and feet 'together'" (*id.*). Thus, they contend that having one's hands tied together and one's feet tied together – but not all four together – is not the same as hog-tying (Tr. 1728-29, 1733). No appreciable difference exists between the two. Here, Hinton not only had his hands tied together behind his back and his feet tied together, but also his feet were elevated behind his back and near his hands so that his body was in a backbend. It is this backward folding of the body contemporaneous with the metal restraints on his hands and legs and his suspension above ground that rendered him hog-tied. Contemporary definitions of the term are not at variance with this description.

At least two online publications define hog-tying as tying together the "feet" *or* "legs", without requiring all four to be tied together and without limiting the term of reference to animals. *See* The Free Dictionary, www.thefreedictionary.com/hog-tied (last visited Sept. 10,

[12] Having set forth its theory in support of the charge in an e-mail dated April 9, 2014, the Department moved to conform the charges to the proof (Tr. 1726, 1730, 1732). The motion was granted over respondents' objection (Tr. 1746). *See Office of the Comptroller v. Mackey Reed Electric, Inc.*, OATH Index No. 1950/13 at 3-4 (Jan. 3, 2014). Respondents argued that the Department, which explicitly prohibits hog-tying, has not defined the meaning of the term and therefore notice is lacking (Tr. 1735). This argument is without merit as respondents are on notice of the word's common usage. Although at least two of the respondents had done it before without repercussion (Siederman: Tr. 1194-95; Behari: Tr. 1014-15), there was no proof that hog-tying was condoned by the Department. The argument that the probe team carried Hinton in the same manner as respondents (Tr. 1733-34) is not a measure of proper procedure, but of another instance of a derogation of proper procedure. *Dep't of Environmental Protection v. Critchlow*, OATH Index No. 709/07 at 12 (Mar. 5, 2007) ("For waiver and condonation to apply as a defense to misconduct, respondent must show that the behavior alleged to be misconduct was a regular practice known to and accepted by his supervisor.").

2014); Merriam-Webster, www.merriam-webster.com/dictionary/hog-tie (last visited Sept. 10, 2014). As an example of usage in a sentence, The Free Dictionary offered the following: "The prisoner was hog-tied." The Free Dictionary, www.thefreedictionary.com/hog-tied (last visited Sept. 10, 2014) (see "Thesaurus" box located below definition). A third source defines the term as "secur[ing] by fastening together the hands and feet (of a person) or all four feet (of an animal)." Oxford Dictionaries, www.oxforddictionaries.com/us/definition/american_english/hog-tie (last visited Sept. 10, 2014).

Captain Behari, who stated that he requested leg irons for Hinton as a "precaution" to prevent Hinton from kicking the officers when they carried him into his cell (Tr. 1009-10), acknowledged the value of the leg irons as a lever which "ma[de] it easier for the officers lifting his legs" (Tr. 977). Officer Siederman employed euphemism, writing in his Use of Force report that, after securing Hinton's ankles in leg irons, Behari ordered him to "take hold of inmate Hinton's legs in order to assist him to his cell" (Pet. Ex. 31). Siederman therefore "took hold of inmate Hinton's left leg and assisted in carrying" him to his cell.

As the video plainly shows, respondents dragged Hinton down the steps, struggling with him the entire time, and then carried him, arms and legs tied behind his back, down the walkway to his cell. Both are blatant violations of the rules for restraining and escorting inmates in MHAUII. MHAUII Manual at 18. Not until they employed the hog-tying were they able to contain Hinton's movements. Their interactions with Hinton throughout the effort to get him to his cell are intentionally physically imposing and involve a series of maneuvers prohibited by Department rules. Clearly, respondents are employing force. The force employed is in derogation of the Directive prohibitions against dragging and hog-tying and, I find, it constitutes an impermissible use of force.

Not only were these acts prohibited, but they caused intense physical contact with the inmate that was unnecessary, physically stressful,[13] and provocative. Under the Directive, force is not to be punitive or assaultive or retaliatory. There should be no doubt and absolute certainty that Department rules do not permit or condone tying and carrying inmates in the manner in which animals are tied and carried.

[13] Nothing in the record pinpointed the cause of the L3 transverse process fracture in Hinton's lower back, but carrying Hinton, who is six feet three inches tall, in this manner potentially contributed to his injury.

By this point in the escort, respondents have violated several Departmental rules. After entering Hinton's cell, they immediately violate the Department rule that requires use of the cuffing port to effect the removal of the inmate's handcuffs when an inmate is placed in his cell. MHAUII Manual at 21-22.

E. Failure to Utilize the Cuffing Port

Captain Behari is charged with conduct unbecoming for removing the inmate's handcuffs inside his cell rather than through the cuffing port, as required by Department rules (Specification 8). This specification was proved by a preponderance of the evidence.

Aside from furnishing inmates with food, the Food Slot Cuffing Port (or "cuffing port") is used as a conduit through which to place handcuffs on an inmate before he is taken out of the cell and to remove handcuffs from an inmate who has just been returned to and locked inside his cell. The cuffing port eliminates the need for officers to remove cuffs while inside the cell with the inmate. It therefore protects officers by giving inmates less access to them and reduces the risk that a use of force may occur (Tr. 422). The MHAUII manual sets forth a detailed procedure for use of the cuffing port. MHAUII Manual at 22. This is not the procedure used by respondents in this case.

When respondents arrived at Hinton's cell, all except Cabrera entered the cell with Hinton. Some were carrying Hinton. It is not in dispute that Captain Behari then ordered staff to uncuff Hinton and respondents did so with the cell door open (Pet. Ex. 17A at 29).

Captain Behari conceded that MHAUII rules require use of the cuffing port for all MHAUII and punitive segregation inmates (Tr. 1036-37). Behari admitted that he made a conscious decision not to follow the cuffing port procedure. He stated that, if he had left Hinton inside the cell with his cuffs on, an extraction team would have been needed and his tour commander would have "crucified" him for it. His explanation presumes that Hinton would not have cooperated with removal of the cuffs and demonstrates again that he anticipated a use of force. It goes without saying that the possibility that an extraction team may be needed is a poor excuse for shortcutting security procedures.

Behari also stated that he did not use the cuffing port because Hinton could not walk to it (Tr. 981). I rejected the claim that Hinton could not walk at this time. To the extent that Hinton continued to communicate a refusal to comply with orders, Behari should have contacted a supervisor and/or called for a probe team. Rather than utilize the cuffing port to reduce Hinton's

access to staff, Behari effectively optimized inmate access to them by deciding to remove Hinton's cuffs while Behari and four officers stood inside Hinton's tiny 7-foot by 10-foot cell, moments after violating procedure by dragging Hinton into the cell and carrying him hog-tied.

Captain Behari is not a novice and he is not new to MHAUII. He is an experienced supervisor fully familiar with punitive segregation generally and MHAUII in particular, having served in this setting for four years at the time of the incident. Although it is understood that supervisors will make mistakes on occasion, Behari's serious error in judgment requires a finding of misconduct. *See Admin. for Children's Services v. Gold*, OATH Index No. 585/05 at 10 (Apr. 13, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-40-SA (Apr. 9, 2007) (supervising child welfare specialist's failure to follow agency reporting procedures for adolescent's AWOL from a group home was a serious error in judgment constituting misconduct); *Fire Dep't v. Guerrero*, OATH Index No. 2240/01 at 21 (Aug. 9, 2002) (EMT's failure to classify patient as a trauma patient and to strictly follow Basic Lifesaving Protocols, was such a gross error of judgment in the circumstances as to constitute misconduct).

Behari's actions and judgments in this and other respects are so poor from a law enforcement perspective that they raised a question of intent.

II. The Use of Force Inside Cell 6

The Department's Directive on the Use of Force provides that force may be used against an inmate "[t]o defend oneself or another from a physical attack or from an imminent physical attack" and "[a]s a last resort, and when there is no practical alternative available to prevent serious physical injury to staff, visitors, inmates, or any other person." Directive 5006R-C § IV(A)(1) & (7). Force may not be used to "punish, discipline, assault or retaliate against an inmate" nor should it be used after the inmate has "ceased to offer resistance." *Id*. § IV(B). When force is used, the amount of force must be proportional to the threat posed by the inmate at that particular time. *Id*. § V(B)(1). "[S]taff must start with the minimum amount of force needed and escalate the amount of force used only if the situation requires escalation." *Id*. § V(B)(2).

The process should commence with attempts to defuse the situation by talking to the inmate, seeking the intervention of mental health staff, and using non-contact control techniques such as chemical agents. Next, an officer may apply control holds or take-down techniques. An officer may then apply a combination of blocks and may strike the inmate with "one or more

blows to the body until the inmate discontinues the attack and is under control." *Id.* Blows should be directed away from the head, unless unavoidable. Only as a last resort may an officer employ an authorized weapon, such as a baton or a club, or may kick an inmate or strike an inmate with institutional equipment. Deadly physical force such as the employment of a chokehold or intentionally striking an inmate's head against the wall, floor, or other object is permitted only as a last resort, when all other reasonable alternatives have been exhausted. *Id.* § V(C).

The evidence pertaining to this use of force consisted of respondents' statements, inmate statements, video, and the Investigative Report, which summarized the probe team reports and radio transmissions. I find that respondents employed unnecessary, impermissible, and excessive force inside Hinton's cell.

A. <u>Respondents' Statements on the Use of Force</u>

There is no video of what occurred inside Hinton's cell during the use of force, because inmate cells are not subject to surveillance. Thus, resolution of the charges rests in part upon the relative credibility of the witnesses, including respondents.

In analyzing credibility, the tribunal may consider witness demeanor, consistency of a witness's testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *adopted*, NYC Civ. Serv. Comm'n Item No. CD98-101-A (Sept. 9, 1998); *Dep't of Correction v. Callabrass*, OATH Index No. 1981/10 at 4-5 (July 23, 2010), *adopted in part, rejected in part*, Comm'r Dec. (Dec. 1, 2010), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 11-81-M (Oct. 31, 2011); *Comm'n on Human Rights ex rel. Latif v. New Master Nail, Inc.*, OATH Index Nos. 1576/10 & 1577/10 at 7 (Aug. 10, 2010), *adopted*, Comm'n Dec. & Order (Nov. 16, 2010); *Dep't of Correction v. Hansley*, OATH Index No. 575/88 at 24 (Aug. 29, 1989), *aff'd*, 169 A.D.2d 545 (1st Dep't 1991). In this case, respondents are highly motivated to avoid liability for the serious charges preferred against them.

For purposes of evaluating the statements, I considered the dimensions and configuration of Hinton's cell, which are not in dispute (Pet. Ex. 7). The cell was 7 feet wide by 10 feet long. The bed was 7 feet long and was positioned on the long wall of the room, facing the cell door. The bed was just over 3 feet wide, as is the doorway to the cell. The distance from the foot of

the bed to the doorway of the cell is approximately 3 to 4 feet. The distance from the toilet, which is on the opposite wall from the bed, to the doorway is approximately 5 feet 2 inches (Pet. Ex. 7; Tr. 741).

Respondents' accounts of what happened inside Hinton's cell are contained in several forms: written Use of Force reports submitted on the date of the incident, interviews provided pursuant to Mayor's Executive Order 16, and testimony at the hearing. Captain Behari's account generally reflects respondents' version of events.

Captain Behari testified at the hearing that when they entered cell 6, he instructed the officers to place Hinton on the bed (Tr. 980-83). He told Hinton that they would remove the mechanical restraints from his ankles and wrists and instructed him not to move until they all exited the cell. Captain Behari told Officer Siederman to remove the leg irons, and he did. Behari's Use of Force report states that he told Siederman to remove the handcuffs and, as he did so, "without provocation inmate Hinton stood up from the bed and kicked this writer [sic] left knee and groin area" (Pet. Ex. 29 at §6). In his testimony, Behari said the handcuffs had been removed and he and the officers were backing out of the cell when Hinton rolled over, sat up, and kicked him once in the left knee. Then Hinton stood and kicked him a second time in the groin (Tr. 982-83).

As Officer Bunton came to Behari's aid and attempted to apply an upper body control hold to Hinton, Hinton "grabbed Officer Bunton by his neck and apply [sic] a chokehold. They both fell onto the bed" (Pet. Ex. 29). Behari gave Hinton several orders to release Bunton, as Almanzar and Siederman tried "to break the chokehold by pulling on the subject inmate's arms and delivering punches to his body to no avail." (*id.*) Captain Behari called the probe team by radio. And he, Almanzar and Siederman "delivered several punches to the facial area of the subject inmate." (*id.*) Hinton still did not release hold of Bunton's neck. "Bunton's face was turning red and gasping for air." (*id.*) They delivered several more punches to Hinton's facial area and upper body "in desperation to free Officer Bunton." (*id.*) Hinton let go of Officer Bunton and mechanical restraints were reapplied to Hinton's wrists and ankles. The probe team arrived and Captain Behari instructed all staff to exit the cell.[14]

[14] Hinton was charged in this incident with infractions for an assault on staff, physically resisting staff, and refusing a direct order (Pet. Ex. 35). The infraction hearing commenced on April 12, 2012, was adjourned at Hinton's request, and was never completed (Pet. Ex. 38 at 4). No papers or audio files evidencing a final disposition could be located by the Department (Tr. 807). I concluded based on the record that this infraction hearing was never

Officer Bunton testified that the following occurred as they uncuffed Hinton and began to exit his cell:

> Siederman began uncuffing the leg irons, irons. I crossed his legs, just so he wouldn't whip them up or kick anybody, and then Siederman proceeded to uncuff his hands. I still had control of his legs, which were crossed. And so Almanzar and Siederman, they began to pass behind me, exiting the cell. Behari was to my left. And once I saw him, I knew everyone was out. I turned and faced the rear of the cell, decided to back out. Behari was in front of me.

(Tr. 1369). Bunton said the officers were backing out of the cell "[i]n case [Hinton] decide[d] to do something" (Tr. 1388). As they did, Hinton kicked Behari twice, and Bunton advanced toward Hinton to "take him down" (Tr. 1312-13). Hinton was lying "flat on his stomach" (Tr. 1385) when he "spun around and using his momentum to get up," kicked Behari, and then "jumped up and . . . kicked Behari again" (Tr. 1384).

Bunton, who is 5 feet 9 inches tall and 220 pounds, testified that he advanced toward Hinton to apply an upper body control hold (Tr. 1313, 1412-13), and Hinton put him in a chokehold after pivoting "in a juking motion":

> I advanced towards Hinton and at that time, since he's, he's basically facing me, he stepped or pivoted on his right foot in a juking motion, kind of like I compared it to an "Olé," like a bullfighter, getting out of the way of me. And at that time, he kind of grabbed my, my left arm quickly. He jerked it. And he was able to like really turn me where now my back is partially facing his front and with his right arm, he went around my head and slowly went down to my neck, and due to our momentum and, I guess, my quick fighting or his strength, however it may be, we both fell onto the bed.

(Tr. 1401). The chokehold that Hinton applied with his right arm was so strong that Bunton believed Hinton was using his left arm also to increase the amount of force on his neck (Tr. 1409-10). He was afraid that Hinton would collapse his trachea (Tr. 1315). Bunton tucked in his chin to create room to breathe and gripped Hinton's bicep and forearm in an attempt to work his fingers between Hinton's arm and his neck to break Hinton's grip (Tr. 1411, 1418-19). Bunton believed that he caused the bruise seen on Hinton's right arm with his fingers (Tr. 1421, 1423;

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resumed; therefore respondents' request for a sanction for petitioner's failure to produce discovery regarding the hearing is denied.

Pet. Exs. 6X, 6Y, 6Z, 6AA). He was successful, he said, after a period of about a minute and a half (Tr. 1314). He arose and sat at the edge of the bed, with his back to Hinton, trying to collect himself (Pet. Ex. 16B at 73). Bunton, who had a yellow belt in jujitsu at the time of the incident, said he had practiced chokeholds and maneuvers to get out of them, and he credited jujitsu techniques with minimizing his injuries (Tr. 1462-64, 1480).

Bunton testified that he and Hinton were lying on the bed on their left sides, in a "spooning" position, so close that he could feel Hinton's breath on the back of his neck (Tr. 1413-14). Once in the chokehold, he could not see any of the force administered by the others to subdue Hinton. Nor did he feel any of its impact except for some pulling, perhaps on the inmate's jumpsuit (Tr. 1415). He heard the others issue orders to Hinton to let go of him and he heard the "thump" of punches being thrown (Tr. 1414-15). He said his gloves picked up some of Hinton's blood from the mattress, and he removed the gloves but did not know if the blood got on his hands (Tr. 1468-71). He said there was no blood on his face or the back of his head (Tr. 1475-76).

Bunton testified that this was "the fight of his life" (Tr. 1440). He referred to it as "a little incident" at his MEO 16 interview, which reference he did not recall at the hearing (Tr. 1442-43; Pet. Ex. 13A at 45).

According to Officer Siederman's Use of Force report, he and the other officers were instructed by Captain Behari to place Mr. Hinton on the bed and remove his leg irons, which he did (Pet. Ex. 31). But when Siederman removed one of Hinton's handcuffs, Hinton "without warning, kicked Captain Behari in the groin area" (Tr. 1130, 1160). As Officer Bunton attempted a control hold, Hinton "attacked" Bunton and put him in a chokehold. Siederman went to Bunton's aid, hitting Hinton with face and body blows to break Bunton free. "After several blows inmate Hinton eventually released his hold on CO Bunton's neck and this writer was able to secure inmate Hinton's right arm behind his back"; Officer Marquez applied the handcuffs and the inmate "ceased his aggression." The probe team arrived and Siederman reported to the clinic for medical attention (Pet. Ex. 31).

Almanzar knew Hinton prior to this incident and said they had a good rapport (Tr. 1635). Hinton initially asked him where he was going and why he was being moved, and his demeanor was "normal" (Tr. 1641-42). Almanzar said no one asked Hinton why he was not able to walk when he sat down on the steps, and none of them took the time to find out what was wrong with

him (Tr. 1642, 1662-64). Captain Behari told them to assist Hinton to his feet, instructed them to guide Hinton to the floor facedown, and, once leg irons were applied, instructed them to "assist" Hinton to his cell. They lifted Hinton and carried him to his cell (Tr. 1643-44).

Once inside the cell, they placed Hinton on the bed and removed his handcuffs (Tr. 1644-45). Hinton was instructed to stay where he was and the officers began backing out of the cell. They did not get a chance to exit because Hinton flipped over and kicked Behari in the groin. When Bunton tried to restrain him, Hinton "used his momentum" to put Bunton in a chokehold and the two fell onto the bed (Tr. 1645). Almanzar attempted to pry Hinton's arm from Bunton's neck; when unsuccessful, he began hitting Hinton's face and the back of his head (Tr. 1646-47). Captain Behari and Officer Siederman both punched Hinton in his back (Tr. 1698). After a few minutes Hinton released Bunton, and the officers put him back in rear-cuffs and leg restraints (Tr. 1648-49). His Use of Force report was similar, although there were inconsistencies (Pet. Ex. 32). Almanzar testified at the hearing and his MEO 16 that Behari radioed for the probe team after the incident terminated (Tr. 1706-07; Pet. Ex. 16B at 73). In his Use of Force report he said Behari radioed for the probe team while recovering from the groin kick (Pet. Ex. 32 at §6).

Officer Almanzar, who is 5 feet 8 inches tall and weighs 220 pounds, has some experience as a boxer, though not professionally; he said he trained for two years (Tr. 1693-94, 1710). He said he was no longer boxing at the time of the incident, but at his MEO 16 interview he described applying "hooks" and "uppercuts" during this incident (Pet. Ex. 16B at 59-60). He testified that Hinton held Bunton in a chokehold and, after failing to pry Hinton's arm from Bunton's neck, he leaned over Hinton, who was lying on his left side, placed his foot on the bedframe for leverage, and punched Hinton in the left side of his face (Tr. 1694-95). At his MEO, he said he hit Hinton's left eye (Pet. Ex. 16B at 58-59). He testified that it was an uppercut but said that it was a left hook at his MEO 16. At the hearing, he was not sure where the uppercut landed but it was somewhere on the face. At his MEO 16, he was quite clear that the punch landed on the left side of Hinton's face, which he repeated several times (Pet. Ex. 16B at 59-61).

With the uppercut, Almanzar said he was able to punch Hinton to the left side of his face while Hinton was lying on the left side of his body on the bed, choking Bunton, and then apply blows to the right side of his face as well (Tr. 1695-96). Hinton did not say anything during this process; he was "switching his face from left to right" as Almanzar delivered the blows (Tr.

1696-97). At his MEO, Almanzar described how he and Behari alternated punches to Hinton's face (Pet. Ex. 16B at 70). Behari was "a big guy" with a "wide hand" and would hit Hinton "from the top" and Almanzar would "hit from the bottom" (*id.*). When Almanzar punched Hinton, his "face went up" and then came down (*id.*). Almanzar also said that he hit Hinton three or four times to the body, twice to the left side of his face, and to the back (Pet. Ex. 16B at 67-68).

Despite Almanzar's testifying that Hinton was holding Bunton in a chokehold, he asserted that his blows to Hinton never struck Bunton (Tr. 1696-97).

Officer Marquez in his Use of Force report states that Hinton was placed on the bed so the mechanical restraints could be removed and once "one leg iron and cuffs were removed" Hinton "violently kicked Capt. Behari in the groin area and grabbed CO Bunton by the neck in a choke hold" (Pet. Ex. 30). Almanzar and Siederman threw several punches to Hinton's facial area to obtain Bunton's release. Once Hinton released Bunton, Marquez placed the mechanical restraints on his hands and legs, and they awaited the arrival of the probe team.

Officer Marquez claimed that he did not use force and his only role inside the cell was to retrieve the handcuffs and leg restraints from Siederman as he removed them, and to restrain Hinton's legs to place the shackles back on (Tr. 1508-09). He testified, improbably, that he did not see any force being used because he was concentrating on Hinton's legs (Tr. 1510).

When his handcuffs were removed, Hinton sat up on the bed, swung his legs around, stood and kicked Behari (Tr. 1564-65). Marquez is the only one who said that Hinton sat up and stood before kicking Behari the first time. Marquez was "halfway out the cell door" when Hinton kicked Behari (Tr. 1508) and that it was "more than likely" that they were backing out of the cell when Behari was kicked (Tr. 1560-61).

I noted on the video when Officer Marquez exited the cell after the use of force had ended, at about 5:02, the back of his shirt appeared to be wet with perspiration (Pet. Ex. 1, #10.176).

Officer Cabrera in his Use of Force report states that he was ordered by Captain Behari to retrieve Hinton's property from his cell in Building 11A and he did so (Pet. Ex. 34). Once Hinton was put into his cell in 13A, the captain ordered Cabrera to the control room to "close the cell door half way, since it was open all the way when I placed the property in the cell." He did so. When he returned to the cell, Hinton was "aggressively holding officer Bunton in a full

headlock around his neck" and Behari was ordering him to release it. When he failed to do so, Behari, Siederman and Almanzar "str[uck] said inmate to the facial area several times in order to prevent serious injury to Bunton." Cabrera remained outside the cell to ensure that the inmate did not attempt to leave the cell without mechanical restraints. Eventually, mechanical restraints were again applied to Hinton and the incident terminated.

Officer Cabrera, who was a probationary employee at the time of the incident, said he had never witnessed a use of force, and he stood at the doorway "in shock" and did not know what to do (Pet. Ex. 11A at 15; Tr. 1265-66). There is no dispute that Cabrera observed the use of force from the doorway of the cell only (Tr. 888-89). He testified that when he returned from the control room and saw Officer Bunton being choked by Hinton, the two men were "in a spooning position" halfway on the bed and halfway off the bed (Tr. 1217). Behari, Siederman, and Almanzar were striking Hinton in the face as Marquez tried to apply the mechanical restraints to his legs (Tr. 1217). He saw no stomping or kicking (Tr. 1222). He did not enter the cell because the cell was small and crowded. Standing at the doorway, he could ensure that Hinton did not escape the cell and that other inmates (who might "pop" their cell doors) did not try to enter (Tr. 1217-18). He had seen this happen two weeks earlier.

I will note here some aspects of respondents' version of events that I did not find to be credible.

Officer Cabrera's explanation for how he responded to the use of force described in his testimony did not ring true. Asked whether he called out to anyone, he did not (Tr. 1250-52). Asked whether he thought to summon help, he said he did not know who to summon so he called no one. His radio was dead (Tr. 783); yet he did not see fit to "scream" for help (Tr. 1250). Thus, he stood at the door as staff struggled for several minutes with an inmate who had a member of service in a chokehold and merely watched. This testimony was not believable.

Respondents similarly described how they all were "backing out of the cell" prior to the use of force, with Marquez the first to exit and Behari the last in line (Behari: Tr. 982; Siederman: Tr. 1156; Bunton: Tr. 1369; Almanzar: Tr. 1666). This testimony was intended, I think, to explain how Behari happened to be kicked by Hinton and to convey that they were acting cautiously by keeping Hinton in their sights while exiting the cell. The latter would have to be explained because uncuffing the inmate inside his cell with five members of service present is a security breach and violation of procedure. However, I was unable to muster a visual of five

members of service, many of whom are large, muscular men, simultaneously backing out of a space that was only three to five feet in length. The video does not show this. The video shows Marquez who comes out of the cell about the time that an object flies out of the door (Pet. Ex. 1, #10.176), but there is no evidence of an orderly procession of men backing out of the door. This testimony was not believable.

Bunton estimates that he was held in a chokehold by Hinton for one and a half minutes; yet, the use of force according to respondents' description was more than four minutes long, starting about the time that Marquez came out of the cell at 4:55.47 and ending before the first group of officers respond to the scene at 5:00. There is no explanation for the time differential in respondents' account. The longer timeline is more consistent with the account given by inmate Hinton and the other inmate witnesses who said that staff brutally beat Hinton for several minutes.

B. Hinton's Statement on the Use of Force

The Department provided audio recordings of the inmate interviews, including Hinton's, but no transcripts (Pet. Exs. 2, 3, 4, 24). All were listened to in their entirety; most are summarized here.

Department investigators interviewed Mr. Hinton at Elmhurst Hospital on April 3rd at 2300 hours, approximately six hours after the incident (Pet. Ex. 24). Hinton's statement, taken on the night of the incident, is without any taint caused by the unauthorized disclosures made by petitioner's counsel.

In the recording of his interview, Hinton's voice is muffled and reflects nasal congestion.

Hinton told investigators that he was being moved that day from 11A to 13A because of his relationship to another inmate named Hinton who also lived in 11A and with whom he was friends but was not related. They both had lived in 11A for years without incident, so he did not see the point. He said Captain Behari had a "vendetta" against the other Hinton. Hinton did not know about the move until he returned from court, when he and his escort, Officer Martin, encountered Behari who relieved Martin of the escort. Hinton had successfully resisted transfer to 13A the previous day when Deputy Warden Williams attempted to move him (Pet. Ex. 24; Pet. Ex. 38 at 3). He had argued then that the area was full of noisy youngsters and he just wanted to do his time in peace (Pet. Ex. 24). He was returned to 11A.

When Captain Behari took over the escort, Hinton "figured something was going on." (Pet. Ex. 24). Captain Behari said to him "you are gonna get what you deserve today; you think you run this shit." Behari said, "I run this shit; fuck Dep. Williams." Hinton was not allowed to return to his cell in 11A; the officers went to pack his things. Hinton knew he had no choice so he kept quiet. He decided to resist, however, when Behari said to him, "we are gonna fuck you up today. I don't give a fuck what you talking about." As they reached the tier where his new cell was located, Hinton sat down on the floor. He would not cooperate because he "knew what they were going to try to do to" him. "I know how they do already." He urged investigators to look at the surveillance video, saying "[t]he cameras will show all of this" (Pet. Ex. 24).

Hinton said they "dragged" him into the cell, threw him on the bed, and started punching and kicking him (Pet. Ex. 24). He said the captain called him a "fucking pussy." He was never uncuffed or unshackled. He identified the participants as Captain Behari, Officers Almanzar, Bunton, and Siederman, and a short "Spanish" officer whose name he did not know. (Officer Marquez is 5 feet 3 inches tall (Tr. 1547)).

Hinton was thrown onto the bed, face down, on his stomach (Pet. Ex. 24). He turned himself around and saw Siederman hit him first, in the face. He turned back around to cover his face from the blows but Officer Almanzar "put [him] in a chokehold from behind" and kept his head up. They were repeatedly punching him. At some point, he could not breathe from the chokehold and he blacked out. He believes he was unconscious for a time and he awoke "fighting to breathe." He couldn't fight back because he was cuffed and shackled. Hinton felt as though he was "fighting for his life," because when he awoke he could not see out of his eye or breathe and did not know where he was (Pet. Ex. 24). He could hear Captain Lodge and some officers trying to revive him. He recalled an officer pumping his chest to help him breathe. Eventually he was put on a stretcher and taken to the mini-clinic where he collapsed because he could not stand or breathe. The doctors took him to the main clinic and from there he was taken to the hospital.

He recalled the inmates were screaming, "they're killing him" (Pet. Ex. 24). The inmates in the cells across from his, particularly on the top tier, could see what was going on inside his cell. He recalled Captain Behari saying to him, "I'll fucking kill you. You think you're fucking tough. You and this other Hinton." After it was over, Behari said to him in the hallway, "Yeah,

I did this to you. I did this to you, motherfucker." He said the officers heard Behari say this and that inmate Bruno heard it as well.

C. Inmate Witness Statements Regarding the Use of Force

Inmate Parker, cell 42

Department investigators interviewed inmate Parker on April 4 at 0040 hours, seven and a half hours after the incident (Pet. Ex. 24).

At the time of the incident, Parker occupied cell 42. According to photographs taken by the Department the following day (Pet. Ex. 8H, 8I), cell 42 was across from cell 6 and on an upper tier and provided a direct view into cell 6. During a visit to GRVC and the area formerly known as MHAUII 13A on June 9, 2014, the tribunal visited the facility and observed from cell 42 that Parker would have had a direct line of sight into Hinton's cell.[15] Even with the door closed halfway and an officer standing in the doorway, which was demonstrated at the time of the visit, I was able to see into cell 6 and could see most but not all of the bed where the use of force took place. At the time of the incident, there was a set of lockers on the floor at the level of Hinton's cell (Tr. 452, 468), depicted in photographs, which was not present at the time of my visit. However, because of the downward trajectory from cell 42, which was on an upper tier, to cell 6 below, Hinton's bed still would have been visible to the inmate in cell 42, as it can be seen in Petitioner's Exhibit 8H, which was taken at the time the lockers were present. Although the bodies of the captain and four officers may have been viewing obstacles during parts of the encounter, they all could not have blocked the doorway as there was not sufficient room for all to stand.

Mr. Parker told investigators that he heard a commotion and saw Captain Behari, who he identified, and a group of officers escort a new inmate in (he did not know Hinton's name). The inmate sat down on the steps. He guessed the inmate was refusing to go to his cell. He saw the officers retrieve shackles, place them on Hinton's legs, and carry him inside the cell. They had difficulty carrying him, and they carried him with his body hanging. Once inside, they threw him on the bed and started punching and kicking him.

Hinton's cell door was closed halfway by one of the officers. But Parker could see Hinton rear-cuffed and shackled, lying face down on the bed. The officers were facing in

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[15] MHAUII, as a specialized unit, was disbanded after this incident; there is no evidence in this record that such action was connected to this incident (Tr. 97, 661-62, 966). However, the physical plant remains in use and was populated by inmates on the date of our visit.

Parker's direction as they kicked and punched Hinton all over: in his face, midsection and lower body. Even when Hinton was down and seemed out of it, they continued to stomp on him, kick him in the face, and punch him. He did not see anyone grab Hinton by the face to hold his head up. The beating went on for five to 10 minutes. By the end of it, Hinton's legs were on the floor and his stomach on the bed. Parker never saw Hinton fight back. He did not see officers remove Hinton's handcuffs. When Hinton was taken out of the cell, he was cuffed and shackled.

When the probe team arrived, they went in and seemed to decide that they needed a gurney; a gurney was brought to the end of the tier. The probe team carried Hinton out of the cell the same way he was taken in, with his body hanging above the floor. He did not look the same; he was really messed up and appeared to be unconscious. On the gurney, he moved his head a little but seemed not to know where he was.

Parker saw the suicide prevention aide cleaning the cell a short while later.

The inmate witness statements which are hearsay were reviewed for indicia of reliability, such as consistency with other objective evidence including the video or medical evidence of Hinton's injuries. I also considered a lack of prior knowledge of Hinton and other factors. *Dep't of Housing Preservation & Development v. Davron*, OATH Index No. 1533/11 at 16 (Dec. 21, 2011) ("[H]earsay must have probative value and bear some indicia of reliability in order to be given significant weight."); *Dep't of Correction v. Crichlow*, OATH Index Nos. 577/03 & 578/03 at 3 (June 11, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item, No.CD06-131-SA (Nov. 14, 2006) ("It is well established that hearsay is admissible in administrative proceedings; nevertheless, it must be sufficiently reliable to be accorded substantial weight.") (citing *People ex. rel. Vega v. Smith*, 66 N.Y.2d 130, 139 (1985).

With respect to the inmate statements, I found some to be credible and others lacking.[16] I looked for consistency in the inmate statements but recognized that some inmates might be motivated by the opportunity to put Department staff in the worst possible light, without regard to the facts. I considered the amount of time that passed between the incident and the statement, since the passage of time would offer opportunities for inmates to share stories or to collude. I

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[16] For example, Inmate Thomas was interviewed by Department investigators on April 4 at 1205 hours (Pet. Ex. 2), and he testified at the hearing. When confronted at the hearing with discrepancies from his earlier statement, he said they did not matter because he did not swear an oath to investigators. He stated, "It doesn't matter to me regardless, I'm a criminal, you know I mean? I do whatever I want, when I want, you know I mean?" (Tr. 134). In light of the witness's professed unreliability, I did not attribute any weight to his statement or testimony. Inmate Sanchez stated that the probe team beat Hinton with batons which were covered in blood, a claim that was not corroborated in any respect by the video. His statement was disregarded. Inmate Medina did not offer many independent observations.

considered whether the inmate could have heard or seen what they claimed to hear or see, given the location of their cell. I took note when a statement varied significantly from the objective evidence represented in the video. At the same time, I decided that an inmate who had gotten one fact wrong (viewed against the objective evidence, whether mistakenly or intentionally) should not suffer a lack of credibility as to all facts offered. I noted corroboration and other consistent threads in the evidence to bolster my fact finding. I have not included discussion of all the inmate statements.

I found Parker's statement to be credible and reliable.[17] *Cf. Dep't of Correction v. Graham*, OATH Index No. 1380/03 (Feb. 25, 2004), *modified on penalty*, Comm'r Dec. (Aug. 6, 2004), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD07-83-M (July 27, 2007) (indicia of reliability were insufficient to support a captain's statement when the captain appeared reluctant to attend the trial and credible evidence established that the captain harbored bias against or animus towards respondent). His statement was consistent with the video which indicated truthfulness and confirmed an ability to see some of what happened. Parker did not know Hinton at the time of this incident. His was only the second interview conducted by investigators shortly after Hinton's while Hinton was still in the hospital. Although respondents argued there could have been collusion between the inmates, Investigator Garcia reviewed Parker's movement history for the evening of April 3rd and early morning of April 4th and found that Parker had not been transferred to any clinic in the facility, which "virtually eliminate[ed] the opportunity for collusion between Hinton and Parker" (Pet. Ex. 38 at 4, 28). Investigator Garcia also concluded that Hinton's and Parker's statements were credible and consistent with one another (Pet. Ex. 38 at 28).

Parker's statement corroborates two central contentions made by Hinton: that he was beaten while handcuffed, and he was unable to defend himself. Although Parker could not confirm whether Hinton lost consciousness, Parker does indicate that Hinton became unresponsive to the blows. He also identified pieces of evidence that are independently verifiable: that Hinton's cell door was closed halfway and the visit by a suicide prevention aide to clean the cell shortly after the use of force. During my visit, I confirmed that Parker would have been able to see much of what occurred on the bed in cell 6, even with the door in "half

[17] Department investigators made several unsuccessful attempts to reach Mr. Parker for further questioning after his release from Rikers Island (Pet. Ex. 38 at 5). He was not a witness at the hearing and did not subject himself to cross examination (Tr. 1750).

lock" and with an individual standing at the doorway. In consideration of all these factors, I found Parker's statement credible and accorded it significant weight.

Inmate Bruno, cell 41

Inmate Bruno was interviewed by investigators on April 4 at 1250 hours, approximately 20 hours after the incident (Pet. Ex. 4). Mr. Bruno stated that he knows Hinton "very well." He saw Hinton resisting on the tier and saw Captain Behari and Officers Siederman and Bunton and others carry Hinton into the cell. They put him on the bed and started punching him in the face. A short Hispanic officer with a goatee was standing on the bed kicking him. Hinton cursed at them. They all were "going in on him," beating him for at least 10 minutes. Initially Bruno did not know who this inmate was, but he realized it was Hinton when they took him out and passed his cell. When he saw him, Bruno started kicking his cell door and tried to flood his cell in protest.

Before investigators arrived, Bruno saw the pantry worker come and clean the cell. This worker sprayed down the room and removed Hinton's property, which Bruno said may have had blood on it. Asked if Hinton put an officer in a chokehold, he said no; Hinton was handcuffed and shackled the whole time. Asked if anyone tried to remove Hinton's cuffs, he said respondents were holding him down and telling him to stop moving and Hinton kept moving. Then they started hitting him. Asked if Hinton kicked anyone in the testicles, he said Hinton was flat on his stomach on the bed during the incident. Because he is tall, Bruno could see that everyone in the cell was throwing punches and kicking Hinton, and some of them were standing on the bed. He could not see much of Hinton, only his feet at the edge of the bed.

Bruno did not mention hearing anything said by Captain Behari.

I was unable to confirm from the evidence whether inmate Bruno had a view into the cell. Despite the fact that Bruno knew Hinton, and could have been a friend given his expressed concern, I did find his statement credible.

Inmate Johnson, SPA

Inmate Johnson, a suicide prevention aide, was interviewed by Department investigators on April 4 at or around 1051 hours, approximately 18 hours after the incident (Pet. Ex. 3). Mr. Johnson told investigators that he was working on the B side of Building 13 around 5:00 p.m. when an officer -- whose name he did not know -- told him to "stop what you're doing" and go to the A side and clean out a cell. When he arrived at the cell, he saw clothes in disarray. He

saw droplets of blood on the floor and the bed. He brought the clothing and property to the front desk, removed the mattress, and placed it near the elevator. He then washed his hands and changed his apron before returning to the B side. When asked whether any of the inmates told him what went on inside the cell, Johnson said he did not get "the full rundown" but he "figured something must have happened in there." He stated that the other inmates tried to discourage him from going into the cell, but he had to do his job.

I found inmate Johnson's statement to be credible. As an inmate who works cooperatively with staff, he might be less likely to offer negative views of staff. I noted that this inmate did not recall the identity of the officer who told him to clean the cell. However, Johnson confirmed there was blood in the cell. It was significant that he was sent so soon after the incident to clean the cell, which suggests an effort to eliminate evidence of what happened. A use of force resulting in such serious injuries would have to be investigated, and staff should have known to avoid contaminating the scene.

Inmate Concepcion, cell 4

Inmate Concepcion was interviewed by Department investigators on April 4 at 1238 hours, approximately 19 hours after the incident (Pet. Ex. 2). He was assigned to cell 4, two doors away from Hinton's cell. He had seen Hinton on April 2nd when he came through the tier with his property, and then left. He did not know why. On April 3rd, Concepcion saw officers carry Hinton past his cell door and overheard the altercation between Hinton and the officers inside of cell 6. Concepcion recognized Captain Behari who he knew as the security captain who conducts the institutional searches (Pet. Exs. 2, 38 at 10). Behari was escorting the inmate.

He first heard some tussling but could not see what was happening. He heard Hinton complain that he could not walk and an officer say, "get the fuck up" (Pet. Ex. 2). He saw the group pass by his cell carrying Hinton, four men each carrying an arm or leg. They were holding his legs up with his stomach toward the floor; the officers had a firm grip on the shackles on his legs and were squeezing in what seemed to be an attempt to cause pain. Hinton said "you're messing with the right one now." Concepcion heard Behari say, "you're going to see once we get inside the cell" (*id.*). Concepcion overheard one of the officers, a chubby light-skinned Hispanic male, say, "we are going to see when we get in that cell; we'll see how tough you are, tough guy" (Pet. Exs. 2, 38 at 10).

Once they were inside Hinton's cell, Concepcion heard a struggle and statements like, "I'm going to show you who you are fucking with now" (Pet. Ex. 2). Concepcion heard Hinton ask for his cuffs to be taken off and Behari say, "I ain't got to take off shit." Hinton called him a "pussy." Behari said, "I'm pussy?" Then they struggled for one to two minutes. During the struggle, the officers said things like, "how do you like that? Who's the bitch now?" This was interspersed with yelling by Hinton, apparently, when hit. Then Hinton stopped yelling but the sound of punches being thrown continued. Concepcion described the officers as "joyful of what they were doing."

Concepcion saw more officers arrive in two groups a short time later (Pet. Ex. 2). He saw Hinton's face swollen and bleeding as he was taken out of the cell. He overheard Captain Behari say to Officer Diaz as Behari walked near Concepcion's cell, "Yeah, I fucked his ass up, go look at him" (*id.*). He overheard other officers who had gathered outside the cell say they wished they had had "a piece of that."

In his statement, Concepcion confirmed the verbal taunts Hinton described. He also stated that the sound of punches continued even after Hinton stopped yelling, which supports Hinton's claim that he was unable to defend himself. There was a discrepancy between Concepcion's testimony that Hinton's handcuffs may have been taken off due to clicking sounds he heard inside the cell;[18] his earlier statement quoted Behari refusing to remove the cuffs as Hinton had asked and made no mention of clicking sounds. He was not asked to explain the discrepancy at the hearing. His testimony about hearing clicking sounds further contrasted with his testimony that the inmates were loudly banging on their cells and yelling during the use of force in Hinton's cell (Tr. 193, 201). In the absence of any reason why Concepcion would make up a false story in his initial statement, it should be credited over his testimony, which was provided two years later after his memory had faded.

Concepcion's statement offered an explanation for why Officer Diaz went inside the cell (to satisfy Behari's request that he see how he "fucked" Hinton up). On the video, Diaz steps inside the doorway around 5:01.20 and leaves when the probe team arrives at 5:01.40 (Pet. Ex. 1, #10.176); the other officers who arrived with Diaz did not enter the cell. Officer Diaz stated that

[18] Concepcion, who was still incarcerated at Rikers Island at the time of the hearing, testified that he heard a verbal dispute but could not recall exactly what was said due to the passage of time (Tr. 176). He thought he heard the sound of restraints being taken off and put back on; he was not sure whether they were handcuffs or leg shackles (Tr. 194, 199-200). He could not say for sure that Hinton's handcuffs were taken off (Tr. 202).

he went inside the cell to see if Bunton needed medical attention (Pet. Ex. 38 at 12). Officer Diaz is not a medic. No explanation was given for why he would be needed to render aid when Hinton was restrained by that time, according to respondents, and Behari, Almanzar, Siederman, and Marquez all were inside the cell and capable of rendering aid. I could find no reason why Concepcion would make up this particular observation; Diaz was not a critical figure in this incident and is not a respondent. I therefore found it plausible that Diaz entered the cell for the purpose offered in Concepcion's statement.

Inmate Vasquez, cell 7

Inmate Vasquez was interviewed by Department investigators on April 4 at 1329 hours, approximately 20 hours after the incident (Pet. Ex. 2). Inmate Vasquez was assigned to cell 7, which is next to cell 6. He was "half asleep" when he heard the door to cell 6 open. He looked and saw three officers carry Hinton into the cell, cuffed and shackled, by his arms and legs which were "in mid-air." Captain Behari had the inmate's legs and Officer Bravo had his arms.[19] Vasquez described Captain Behari and Officer Bravo as heavyset, weighing 300 to 400 pounds. (Behari was 5 feet 10 inches tall and 320 pounds at the time of the incident) (Tr. 1019).

Behari and Bravo were in the cell with the inmate not 15 seconds when he heard noises like they were beating Hinton up, "boom, boom, boom." He heard no conversation inside the cell before the noises. It was quiet then because the inmates were watching what was happening. The inmate inside cell 6 did not make sounds.

The inmate went in with his hands cuffed and came out the same way; his legs were unshackled when taken out. He said the officers were saying afterwards that the inmate had swung at the security officer but that could not be true; he saw the cuffs on the inmate's hands going in and coming out so he wondered "how did he swing?"

When Hinton came out, "his face was all fucked up" and he looked like he was in a different world. He did not move his eyes; he had one look. [Demonstrates]. He was bleeding and had three or four "knots" on his face; he looked like he did not know where he was. "They were going to bring the stretcher down but Captain Behari told them, "No, leave the stretcher up there." The officers "almost dropped him on the stairs" when taking him to the stretcher.

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[19] There is no evidence that Officer Bravo was involved in the escort or in the subsequent use of force. Captain Behari did not help carry Hinton but he was one of the last to enter the cell.

There was a third officer, whose name Vasquez did not know, who was acting like nothing was happening. This third officer had a name that began with the letter "C" and his badge number was 645. Vasquez remembers badge numbers because officers "do so many things." Officer "C" was outside the cell "putting his arm on the door acting like nothing was happening." He must have been "making the camera look good," he said, but "I'm hearing all the noise inside."

Vasquez said he told Officer "C", "Oh, that Nigga's violated! I know y'all fucked that Nigga up!" And Officer "C" replied, "You're next." He described Officer "C" as Spanish, light-brown skin, around 35 years old with no facial hair or glasses (a fair description of Officer Cabrera whose shield number begins with 645 (Pet. Ex. 34)).

Vasquez's account is credible because it compares so closely to the video. On the video, the first group of officers arrived at the scene at 5:00 p.m. (Pet. Ex. 1, #10.176). As they did, Officer Cabrera, who had been standing outside of cell 6 staring inside with his hands on the doorway for several minutes, moved farther down the tier to make room for the officers who arrive and fill the area outside of cell 6. Cabrera stood next to cell 7 and, from 5:00 to 5:01.04 p.m., he can be seen leaning his ear toward and then turning his face toward the cell as if in conversation. His lips move and he breaks into a wide smile and throws his head back as if laughing. When asked about this part of the videotape on cross examination, Cabrera did not deny speaking to Vasquez, but he did not recall what he or Vasquez said to one another. He denied telling the inmate that he would be "next" (Tr. 1255). He admitted laughing at something the inmate said, but he did not recall what it was (Tr. 1257). Vasquez said that Officer "C" also spoke to the inmate in cell 8, next door to him. From 5:02.04 to 5:03.27 p.m., Cabrera is seen on the video chatting with someone inside the next cell farther down the tier, likely cell 8. His lips move and his hands gesture as if making a point to the person inside.

If Cabrera is in fact laughing about Vasquez being "next," the clear inference is that staff had just administered a beating to Hinton. Such a laugh, mirthful, with the head thrown back, would not be indicative of having just watched his fellow officer being choked by an inmate. Cabrera's demeanor also recalls Concepcion's description of staff as "joyful of what they were doing."

I noted that Vasquez did not appear to know Hinton and that he laughed at his predicament ("Oh, that Nigga's violated! I know y'all fucked that Nigga up!"). Despite his

apparent lack of sympathy, or gallows humor, he provided an apt description of Cabrera's lack of urgency as this event is taking place. He described Cabrera as posing for the surveillance camera (leaning on the door and "making the camera look good") while "I'm hearing all the noise inside." Based on my observation of the video, he describes Cabrera's activity and demeanor outside of Hinton's cell door accurately. Cabrera appears relaxed in spite of the activity going on inside.

I noted Vasquez's erroneous belief that Captain Behari and Officer Bravo carried Hinton into cell 6, which might be explained by the fact that he had just awakened when respondents entered cell 6 and missed much of the action on the tier. I nevertheless found critical parts of Vasquez's statement bolstered by the video. I also noted that his vigilance about staff conduct (officers "do so many things") caused him to accurately recall three digits of Cabrera's four-digit badge number.

Inmate Jenkins, cell 22

Inmate Jenkins was interviewed by Department investigators on April 4 at 1337 hours (Pet. Ex. 4). He occupied cell 22, but he was walking near cell 16 or 17 at the time of the incident. Inmate Jenkins said Hinton was partially cuffed, with one cuff still attached to his arm and his legs were shackled. Captain Behari and Officers Bunton and Almanzar were beating and stepping on him, and Hinton was trying to defend himself by trying to block them. Bunton uncuffed him and words were exchanged. He heard loud talking, something about cuffs. They rushed Hinton and after the second or third punch from Bunton, Hinton was on the floor. Jenkins did not see Hinton throw any punches or grab an officer by the neck. Hinton was being punched, kicked, and stomped in his face and upper body. Jenkins did not discuss the incident with any other inmates.

There was no evidence supporting Jenkins' ability to see or hear what happened.

Inmate Corbett, cell 44

Inmate Corbett was interviewed by Department investigators on April 4 at around 1143 hours (Pet. Ex. 3). He was the occupant of cell 44. Corbett was in his cell "on the gate" talking to the occupant of cell 42 when he saw Captain Behari and Officers Bunton and Almanzar, and another officer he could not name drag an inmate into cell 6. He did not know the inmate's "government" name but his nickname was Bo Green. He was rear-cuffed and his legs were

shackled. More officers came to help carry him. They laid him on the bed on his stomach, half on the bed and half on the floor.

The officers put the inmate on the bed and unshackled his feet, and Almanzar took off his cuffs. The inmate said he was not staying in this house and the officers were taunting him. He saw Officer Bunton stand on the bed and stomp on the inmate's head as the inmate laid on the bed. A lot of people were in the cell so he could not see everything but he heard lots of noises. Behari was holding down the inmate's legs. He denied the inmate attacked the officers.

He said he heard impact sounds and yelling from someone in pain. The probe team came and went in and there was more scuffling before the inmate was carried out of the cell. Corbett heard Bunton walk out bragging, "Yeah we did him good." He has seen Bunton do this before and knows that he brags about it.

The investigative photographs did not show whether Corbett could see inside of cell 6, and the site visit was not used for this purpose (Pet. Ex. 8A-8E). Given his admission that his statement was a mix of what he had "seen and heard" from other inmates "that really had a visual," including inmates Parker, Bruno, and Mitchell, I was unable to attribute much weight to it.

D. The Video and Other Evidence

Although there is no video of what occurred inside Hinton's cell, there is video of the area outside of the cell which provides circumstantial evidence of what occurred.

Several things are evident from the video. We know that Captain Behari and four officers were alone inside the cell with Hinton for approximately seven minutes, from 4:55 p.m. to 5:02 p.m., when respondents began to exit the cell (Pet. Ex. 1, #10.176; Tr. 778-79). We know that Officer Cabrera stood in the doorway of cell 6 for most of that time (from 4:55 p.m. to 5:00 p.m.), looking in, and watching what went on and doing no more than that, except leaving briefly to go to the control room to put the door in "half lock." At 4:55.45, Marquez came out of the cell and stayed at the doorway while Cabrera was away. He shouted something to someone not in view, and the door closed partly and Marquez waved (Tr. 1072). He then went back inside the cell. At 4:56.35, Cabrera returns to the area outside the cell but pauses and leans against the wall before walking to the opening of the cell where he can see inside. He does not look inside the cell, though he should be able to hear what is going on inside. At 4:56.44, he resumes his position at the door, looking in with his right arm leaning on the door jamb. As subsequent

minutes pass, Cabrera rests his head on his arm; he periodically backs away from the door opening; he shifts his weight from one leg to the other; he leans on the food slot. He does not appear to be alarmed nor does he look around for help.

According to his testimony, Cabrera returned to find Officer Bunton held by Hinton in a chokehold. Cabrera's reaction as he returns to Hinton's cell door is not consistent with watching a colleague fight for his life. When he looks inside the cell, there is no reaction on his face. He does not look startled or "in shock," as he described (Tr. 1265-66).

We know from the video that three officers, Almanzar, Marquez, and Bunton, entered Hinton's cell wearing gloves. And Cabrera stood at the door to the cell wearing gloves. Hinton had not been taken out of the cell at 5:02.20, when Officer Almanzar can be seen on the video placing his gloves in his left rear pocket as he exits cell 6 (Pet. Ex. 1, #10.176). At 5:02.35, Marquez exits the cell no longer wearing the gloves he wore when he entered (Pet. Ex. 1, #10.176). At 5:03.04, Bunton exits the cell without gloves, clutches his left bicep with his right hand, and makes a grimacing facial gesture.

We know that the first group of officers to respond to the scene arrived around 5:00 p.m. (Pet. Ex. 1, #10.176). The group includes Captain Vasquez and Officers Bravo, Diaz, and Fries (Tr. 864-65), who crowd around the door to the cell, looking inside. These members of service, who had been escorting another inmate in 13A, came in response to an alarm (Tr. 920-22). They congregated on the tier outside the cell, chatting and looking, for about six minutes before they disburse. These officers submitted witness Use of Force reports that were not put in evidence but were summarized in the Investigative Report (Pet. Ex. 38 at 12). None of them reported that Hinton was unconscious or was at any point given chest compressions (Tr. 864). Officer Diaz reported seeing Officer Bunton sitting on the bed, apparently injured and said he entered the cell to see if Bunton needed medical attention (Pet. Ex. 38 at 12).

The probe team, comprised of Captain Arkeesha Lodge and Officers Barrett and Butler, arrived at 5:01.40 and entered cell 6 (Pet. Ex. 38 at 12). One of the officers backed out and Officers Almanzar, Marquez, and Siederman each exited, making room for the officer to re-enter the cell. Respondents and other responding officers loiter outside the cell; some are chatting. According to respondents' testimony, nothing should be happening at this time. Although the probe team arrived at 5:01:40, they are still there at 5:06 when Captain Lodge exits the cell and gives instructions to a group of officers. Hinton is still inside the cell. Two additional officers

arrive at the cell and the four officers carry Hinton out of the cell at 5:07. Captain Behari exited the cell at 5:07.18. He is the last person to leave.

As tour commander at the time of the incident, ADW Texeira was responsible for reporting the use of force to the Central Operations Desk ("COD") within an hour of its occurrence (Tr. 677). She was also responsible for making an entry in the use of force log book (Pet. Ex. 25). She made her report to COD at 1823 hours, which was a little over the time limit (Tr. 673). Captain Behari testified that the probe team captain was present that evening when he gave his report to ADW Texeira regarding the incident, but he did not recall Captain Lodge's identity (Tr. 1028-29). ADW Texeira acknowledged that her log book entry may contain errors to the extent that she wrote that Behari was kicked in his right, rather than left, knee and said that Officer Marquez utilized force in this incident. In addition, her log book entry, which does not use the term "chokehold," reports that Hinton "grasped Officer Bunton by his neck" and that the use of force ended when officers were able to "remove inmates hands from Officer Bunton's neck" (Pet. Ex. 25). There was no evidence that Hinton had his hands on the neck of Officer Bunton, who described being in a chokehold with Hinton's arm around his neck.

The probe team submitted witness Use of Force reports, which were not entered in evidence but were summarized in the Investigative Report (Pet. Ex. 38 at 12). None of them reported that Hinton was unconscious or was given chest compressions (Tr. 858-59). Captain Lodge reportedly ordered Officers Butler and Barrett to "assist Hinton to his feet" when Hinton told her "I can't walk" (Pet. Ex. 38 at 12). Captain Lodge called for a medical gurney. When it arrived, her officers carried Hinton to the gurney and escorted him to the mini-clinic where he was "secured . . . in a holding pen with no further incident" (Pet. Ex. 38 at 12-13).

The captain's report, notably, does not state that Hinton was seriously injured and bleeding at this time. To the extent that Officer Bunton reported blood on the mattress and on his gloves, the only place it could have come from is Hinton's face. Reporting that Hinton said "I can't walk," does not state the obvious, that Hinton could not in fact stand or walk. When Hinton is taken out of the cell at 5:07.10, the video shows his body completely collapsed as the officer's carry him dangling barely above the floor; when placed face down on the gurney, at 5:07.58, he appears out of it but raises his head, staring blankly into space (Pet. Ex. 1, #10.176). Hinton reported falling to the floor in the holding pen at the mini-clinic (Pet. Ex. 24), where Captain Lodge and the probe team officers deposited him; clinic staff reported finding Hinton on

the floor of said holding pen (Tr. 489). By all observations on the video, and the medical report of the injury to his back, Hinton was not capable of walking and it seemed unlikely that the probe team "assist[ed] Hinton to his feet" (Pet. Ex. 38 at 12). He is not seen *on his feet* at any time after leaving cell 6.

The Investigative Report detailed radio transmissions sent in the wake of this incident. The report does not note the exact time of the transmissions, which were made between 1630 hours and 2100 hours on April 3rd. The report indicates that the probe team requested a gurney because Hinton was "unable to walk," and that Hinton (who is referred to as the "package" on the transmission) was placed on a gurney and transported by the probe team to the mini-clinic in Building 11 (Pet. Ex. 38 at 25). Aside from Hinton's statement that he collapsed inside the holding cell, there is no record of what happened when he arrived at the mini-clinic, whether anyone attended to him or was on duty, or how long he remained there.[20] Subsequent radio transmissions report a medical emergency in Building 11 and a request that the corridor be cleared for Hinton (who is referred to as "one" on the transmission) en route from the mini-clinic to the main clinic (Pet. Ex. 38 at 25). Hinton did not leave GRVC until approximately 1900 hours (*id.*). It is not clear if his departure from the jail to the hospital an hour and a half after his removal from the housing area was typical in light of the circumstances.

III. Analysis of Injuries

A. Hinton's Injuries

As demonstrated in photographs taken by the Department's investigators, Hinton's injuries were severe (*see* Pet. Ex. 5M, appended below).

[20] In a photograph of Bharat and Ibitoye transporting Hinton inside the facility, as Bharat notes, Hinton is cuffed with his hands in front of his body (Pet. Ex. 20). When last in the housing area, Hinton was placed on the gurney face down with his hands rear-cuffed (Pet. Ex. 1, #10.176 at 5:07.38 to 5:07.48).

Licensed physician's assistant Ivor Bharat is employed by Corizon Health, Inc., which provides healthcare services for the Rikers Island jails (Tr. 482, 484). He was on duty in GRVC when called to an emergency involving inmate Hinton. Bharat and LPN Akinpelu Ibitoye reported finding Hinton lying on his side on the floor of a holding cell in the mini-clinic; he was complaining of head, neck, and back pain (Pet. Ex. 18 at F; Tr. 489, 493-94). They stabilized Hinton, applied a neck collar, put him on a backboard on a stretcher, and transported him to the main clinic (Tr. 489, 510; Pet. Ex. 18 at C, F; Pet. Exs. 19 & 20). Hinton stated that he was assaulted by DOC (Tr. 493-94, 537). He had facial trauma including bilateral peri-orbital swelling, bleeding from the nose, nasal swelling, swelling of the upper and lower lips, bleeding from the mouth, bilateral jaw tenderness, and c-spine tenderness (Tr. 497-98). Bharat considered his injuries to be serious (Tr. 500). He did not provide Hinton with CPR and he was unaware of anyone giving him CPR (Tr. 531). Hinton did not indicate that he had lost consciousness (Tr. 520). Bharat completed the injury to inmate report (Pet. Ex. 19) and contacted the Department care physician to confirm they were sending Hinton to Elmhurst Hospital (Tr. 495-96).

Hinton was transported to Elmhurst Hospital Center by Emergency Medical Services ("EMS") (Pet. Ex. 18 at R). Hinton reportedly denied loss of consciousness to EMS technicians (Pet. Ex. 18 at M).

At Elmhurst, Hinton was diagnosed with sustained multiple blunt trauma to the face, including closed nasal bone fractures, with swelling and bleeding from the nose; a laceration to his left eye with peri-orbital swelling and edema; and cuts and swelling of the upper and lower lips and bleeding from the mouth (Pet. Ex. 18). His diagnosis of "nasal bone fractures with displacement on the right" indicates that the nose was broken and tilted to the right (Tr. 502; Pet. Ex. 18 at CC). He also had a closed head injury.

A CAT scan performed at Elmhurst indicated a transverse process fracture of the left aspect of the L3 vertebral body, which is in the lower back (Tr. 505). The transverse process is shaped like a butterfly and sticks out of the main spine (Resp. Ex. A). Bharat testified that one would get such a fracture from blunt force trauma, a fall, or severe twisting (Tr. 507; Resp. Ex. C). Bharat did not examine Hinton's back himself because of the potential for paralysis from an injury (Tr. 509).

A review by the City's Office of the Medical Examiner of the physical injuries sustained by Hinton was inconclusive as to whether Hinton's facial injuries were caused by a beating administered while he was handcuffed and shackled, as Hinton claimed, or were inflicted in a fight with staff by someone capable of defending himself, as respondents claimed (Pet. Ex. 38 at 24; Resp. Ex. C). As for his vertebral fracture, the medical examiner stated that neither narrative provided an obvious explanation as to its causation. "Most likely it was associated with a significant blow to the back, quite possibly as the inmate was pushed/slammed/fell against the concrete bed." (Resp. Ex. C).

B. Respondents' Injuries

Injuries to staff were minimal.

Officer Almanzar reported no injuries (Pet. Ex. 32).

Officer Siederman testified that he went to the clinic for injuries to his right wrist and shoulder, as stated in his Use of Force report (Pet. Ex. 31), but he could not recall his injury or remember being seen at the clinic (Tr. 1142-43, 1159). He submitted no documentation of injury.

Officer Marquez, who testified that he stayed out of the fight, stood near the door and used no force against Hinton except for grabbing his legs to place them in restraints (Tr. 1509-10), reported injury to his right hand and lower back from "struggling to place mechanical restraints on said inmate" (Pet. Ex. 30). At the clinic, he complained of pain in his right wrist and right knee (Pet. Ex. 23). No medication or follow-up was recommended.

Captain Behari testified that Hinton kicked him twice to his leg and/or groin area. The medical documentation revealed that Behari reported to medical staff at the clinic that he was kicked to the left knee and right hand (Pet. Ex. 22). The clinic physician, Dr. Hossain, noted mild tenderness to both areas and recommended Naprosyn and a visit to his private physician. Captain Behari later returned to the clinic and received authorization for transfer to the hospital, where he was given patient care information for "knee pain, general" and a "sprained finger" (Pet. Ex. 38 at 28; Resp. Ex. F). There is no evidence that he received a diagnosis. Nor is there evidence that he reported being kicked to the groin. Captain Behari reported to work the day after this incident (Tr. 1075).

To support his claim of knee injury, the captain submitted photographs of himself sitting in a chair with his left pant leg rolled up and his knee exposed (Resp. Ex. G). He testified on direct examination that the photos were taken at the clinic (Tr. 991); he testified on cross that they were taken in his office after he returned from the hospital (Tr. 1029-30). The photo indicates a patch of darkened skin on his knee. Discoloration of joint extremities, such as the elbow and knee, is not necessarily a sign of injury. It could be a bruise but it could also be mild discoloration caused by use or hyperpigmentation. I did not find the photograph to be convincing evidence of injury.

As for the allegation that Behari had a limp as a result of this incident, the Department contended that Behari had a limp prior to the use of force. Behari denied that he walked with a limp prior to the incident (Tr. 1000, 1002-03). In fact, in surveillance video of the vestibule prior to this incident he can be seen favoring one leg while walking (Pet. Ex. 1, #10.100 at 4:51.35). His gait appears to be the same when he exited Hinton's cell at 5:07 (Pet. Ex. 1, #10.176).

The tour commander's report states that Captain Behari was kicked in his right knee, although ADW Texeira testified that it was possible that Behari told her he was kicked in his left knee and she mistakenly wrote "right" knee (Tr. 684, 690-91). When asked on direct

examination which knee was injured in the use of force, after a delay Behari stated, "It was I believe it was, it was, I believe it was my left knee" (Tr. 983).

I found the evidence that Behari was injured during this use of force marginal and ultimately unpersuasive. Despite the oft-repeated testimony that Behari was kicked in his groin, there was no evidence of that. He received neither a diagnosis nor treatment plan from the hospital, which provided him merely with patient information.

Officer Bunton reported injury to his left neck, left shoulder, and left and right forearms, and dizziness, resulting from Hinton's chokehold (Pet. Ex. 33 §11; Tr. 1314). In his Use of Force report, Officer Bunton described the aftermath of the struggle with Hinton:

> After . . . an extensive struggle and effort by the Officers and Captain Behari this writer's neck and airway was cleared of any choke holds. This writer then positioned himself at the edge of the bed due to not feeling well enough to vacate the area. This writer was still trying [sic] gain composure from the actions that had just occurred. After a brief moment . . . this writer . . . went to the . . . bathroom to throw water on this writer face to clear this writers head.

(Pet. Ex. 33 §6).

Bunton reported to the clinic at 5:27 p.m., twenty-five minutes after leaving the cell (Pet. Ex. 21). Dr. Hossain's medical evaluation notes "mild redness" at the left side of Bunton's neck and bilateral forearm redness; it reports that Bunton complained of "mild pain" to his left shoulder and said the "inmate pulled [his] left arm" (Pet. Ex. 21). Dr. Hossain wrote under "Assessment/plan," "no apparent injury noted" (Tr. 1423; Pet. Ex. 21). His evaluation does not report that Bunton complained of a chokehold.

Bunton blamed Dr. Hossain for the error, stating that he treated him "real quick." Bunton said he told Dr. Hossain that he was assaulted by an inmate who jerked his arm and put him in a chokehold; when the doctor asked where was his most pressing pain, he said in his left shoulder (Tr. 1320-21). Pressed at the hearing about an inconsistency in his MEO 16, Bunton tried to explain having denied that Hinton pulled his arm by distinguishing between the words "pulled" and "tugged."[21] I found Bunton's wordplay disingenuous and damaging to his credibility.

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[21] At his MEO 16, Bunton said he told Dr. Hossain that he "was being choked" by the inmate and that his "shoulder was killing" him (Pet. Ex. 17A at 20). He denied at the MEO telling Dr. Hossain that Hinton pulled his left arm (Pet. Ex. 17A at 21, 27; Tr. 1460). At the hearing, Bunton again denied telling Dr. Hossain that Hinton "pulled" his left arm, but he conceded that Hinton "tugged" at his arm (Tr. 1452). He said that he did not "clarify" with the

Dr. Hossain, who acknowledged having no independent recollection of what occurred during his examinations of staff, conceded the exams were brief and the evaluation form, which is limited in space, requires him to be concise in his descriptions (Tr. 567). However, his goal in these exams is to address any complaints raised; if he had been told that an officer was choked by an inmate, he would have documented it (Tr. 584). While possible that Dr. Hossain mistakenly omitted information from his evaluation forms, I did not believe that he neglected to note an assault on staff as serious as a chokehold.

Bunton later returned to the clinic and still did not get any acknowledgment of a chokehold or chokehold injury. Bunton reported dizziness and nausea to Dr. Ronjon who authorized him for transport to the hospital (Resp. Ex. D; Tr. 1323). On the form Bunton filled out for transfer to the hospital, he wrote "injury to left arm" as the nature of his injury (Pet. Ex. 37). He made no mention of a chokehold or neck injury or neck pain. Bunton was released from the hospital with a patient information form for a "shoulder sprain" and "assault, physical" and sent home with Tylenol (Tr. 1326; Pet. Ex. 37). There is no hospital diagnosis and no evidence that Bunton reported to hospital personnel being put in a chokehold.

In a form completed the following day, for worker's compensation, Bunton described being placed in a chokehold by Hinton, who also pulled his left shoulder (Pet. Ex. 40 at 1; Tr. 1460). This form describes the nature and extent of his injury as a left shoulder sprain, dizziness, neck strain, and redness and pain in his forearms; it indicates that his left shoulder, left side of the neck, and arms were injured (Pet. Ex. 40 at 4). A subsequent MRI of his left shoulder was normal (Resp. Ex. I). Bunton further reported on this form an exposure to the inmate's blood, on his left arm (Pet. Ex. 40 at 5, 6). He testified, inconsistently with the form, that Hinton's blood got on his gloves and he did not know if the blood touched the skin underneath (Tr. 1468-71). He did not testify that Hinton's blood got on his arm.

Bunton produced photographs he took of the left side of his neck that evening, which show a large swath of redness (Resp. Ex. H). There is no appearance of hand marks, finger impressions, or abrasions to the neck. Bunton did not report scratches, bruising, or bleeding of the neck after the incident (Tr. 1422, 1446, 1475; Resp. Ex. H).

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investigators who questioned him at his MEO 16 that when he denied that Hinton "pulled" his arm, he meant that Hinton "tugged" at his arm (Tr. 1451).

To the extent that the medical evidence for Captain Behari and Officer Bunton is limited in nature, they both declined to sign medical release forms (Tr. 762-63).

C. Injury Analysis

The most objective evidence of what occurred inside Hinton's cell is provided by the video and the injuries suffered by Hinton and the respondents. Hinton's injuries are severe and admittedly were sustained through the use of deadly force. They center in his facial area, an area of the body that the Department puts off-limits to officers except under the most challenging conditions, such as when deadly force is required. If Hinton were not himself using deadly force, such as applying a chokehold to Officer Bunton, the use of deadly force against him would be excessive under the Use of Force directive. Thus, the injuries are a primary factor in assessing the truthfulness of the statements as to what occurred. I found critical parts of respondents' testimony inconsistent with the injuries sustained by Hinton.

Hinton's injuries were not consistent with respondents' testimony that they were incurred while Hinton had Officer Bunton in a chokehold as they both lay on their left sides on Hinton's bed, one behind the other in "a spooning position." The bruising and swelling that covers Hinton's face, from left to right and top to bottom, belies the body positioning respondents described. Hinton's injuries indicate that blows were delivered to each side of his face, causing both eyes to be swollen and blackened; his left eye had a laceration, swelling and edema (Pet. Ex. 18). According to photographs taken by investigators, his left eye was swollen shut and his right eye was barely open (Pet. Exs. 5, 6). There also was damage to the center of his face resulting in a broken nose, cuts and swelling of his upper and lower lips, and bleeding from the mouth. With his left side against the mattress, injury to the left side of his face was not logical.

Because Officer Bunton is a large muscular individual, his bulky size should have blocked some of the blows to Hinton's face; Bunton said they were so close that he could feel Hinton's breath on the back of his neck. Yet, despite extensive damage to Hinton's face, Bunton was not hit even once by his fellow officers. Despite the fact that blood was found on the bed and floor of the cell, Bunton found no blood on his own face or neck or the back of his head after the encounter (Tr. 1474-76).

Had Bunton been directly in front of Hinton, as they claim, respondents would have been unable to hit Hinton's face straight on. Yet, Hinton suffered a broken nose. Moreover, medical records indicate that Hinton's nose was broken and tilted to the right. With the left side of his

face pressed to the bed, the punch that tilted his nose to the right would have to have come up through the mattress. This physical evidence cannot be explained by respondents' rendering of the facts.

As for Almanzar's claim that his hook and uppercut propelled Hinton to turn his head from side to side, I could envision no scenario in which that would be possible if Hinton were lying on his side on a hard surface with another man directly in front of him. The alternating punches that Almanzar described administering with Behari, which was credible given the damage to Hinton's face, had to have occurred with Hinton's face readily accessible to both men doing the punching, and not partially shielded behind another individual. The damage to Hinton's face was much more aligned with Hinton's claim that he was held from behind, in a chokehold, with his head held up.

In the same vein, I reject respondents' testimony that Hinton put Bunton in a chokehold. This is in part because of the implausibility of Hinton's receiving such injuries while choking Bunton, but also because of the lack of evidence that Bunton had any neck injury. Had he been placed in a chokehold by Hinton, Bunton could have sustained significant injury. But there was no evidence of injury.

Hinton is a young man, 6 feet 3 inches tall, with a record of involvement in assaults on staff and history of violence that includes a conviction for attempted murder (Pet. Ex. 38 at 23), all of which should indicate that he knows how to use his hands and would have no hesitation using them to defend himself. Yet, Hinton failed to protect his own face and inflicted no injuries on staff. It is not believable that Hinton used force against Bunton for a minute and a half to four minutes without inflicting any scratch, bruise, welt, or other injury on Bunton. Rather than showing injury, Bunton alights from the cell after the use of force, at 5:03.04, appearing composed (Pet. Ex. 1, #10.176). Although he winces while grabbing his left bicep, he did not grab his neck, which he claimed was injured. Bunton shows no sign of being out of breath; he does not even describe being out of breath (Tr. 1320, 1443-45). The evidence that Bunton suffered left shoulder strain, which is more credible, would not be caused by being in a chokehold, though it could have occurred while restraining or beating Hinton in the cramped space of cell 6.

Moreover, Bunton's failure to report that Hinton put him in a chokehold to doctors in the clinic immediately after the incident cannot be explained. Even after visiting the hospital,

Bunton produced no medical record in which he reported being put in a chokehold. The redness on the side of the neck demonstrated in Bunton's photo, by itself, seems as if it could have occurred from someone slapping the neck to produce a flushed appearance.

Although Hinton denied it to the EMTs who transported him to Elmhurst Hospital, he told investigators that he lost consciousness during this incident. Hinton told EMTs that he "got into a fight with a CO" (Pet. Ex. 18 at M). Respondents contend that Hinton never lost consciousness and the contradictions demonstrate his lack of credibility. Significantly, Hinton is a plaintiff in a federal lawsuit that seeks monetary damages against the City for the injuries he suffered on April 3rd. In addition, Hinton lied to investigators when he denied having any infractions or use of force incidents when in fact he did. Respondents argue that Hinton is unreliable and is a gang leader who was convicted of attempted murder (Tr. 1752).

Surely, Hinton's credibility is compromised by the fact that he stands to win a substantial monetary award in the federal case based upon injuries sustained in this force incident. I have taken that into account.

While the statement about being "in a fight" is very different than being assaulted by staff, it is a solitary statement and but one factor to consider. Given the extent of his injuries including blows to the head, I do not know the state of Hinton's cognition or emotions at the time he spoke to EMTs, or the extent to which he felt obligated to provide more than a superficial description of what happened. Hinton's initial denial to EMTs that he lost consciousness is a significant inconsistency with his version of events. He vividly described to investigators being unable to breathe during what appeared to be a process of coming in and out of consciousness, which I thought credibly described what might occur when put in a chokehold or if one's ability to breathe was impeded by a bloody, broken nose.

Respondents argued that there was no evidence that Hinton lost consciousness or that chest compressions were applied. I noted, however, a seven-minute delay from the time that force ended around 5:00 p.m., according to respondents' reports, and the time that Hinton was removed from his cell at 5:07 p.m., a length of time that was not fully explained. The application of chest compressions could have taken place during this time and could have caused the delay in removing Hinton from the cell. The investigation did not seek physical evidence to corroborate Hinton's claim that he was put in a chokehold, lost consciousness, and was revived through chest

compressions.[22] Although Hinton stated that he awoke to find Captain Lodge performing chest compressions on him, Captain Lodge did not report this. However, Captain Lodge was not interviewed for the investigation and was never asked whether she or any member of the probe team applied chest compressions (Tr. 858-59). I did not give significant weight to the failure of Captain Lodge or other members of service to voluntarily report actions that might corroborate the extent of Hinton's injuries; there were many things that members of service should have reported that were not.

Hinton's claim that he was put in a chokehold and lost consciousness was plausible viewed alongside other credible evidence, including his extensive injuries and inmate claims that he stopped responding to respondents' punches. Even rear-cuffed and shackled, as Hinton testified, he should have been able to bury his face in the mattress or turn toward the wall or position himself in a corner – anything to make himself less vulnerable – unless he was restrained, immobilized, or rendered unconscious. I do not make a finding on this record of whether Hinton was ever unconscious during the use of force.

I find that Hinton was never uncuffed during the use of force and was incapable of defending himself. The City's Office of the Medical Examiner noted that "an unrestrained individual would be likely to use his hands to defend himself in an attack; in the photographs of the hands, I can see no obvious injury, and a single contusion (bruise) is noted on the forearm" (Pet. Ex. 38 at 24). Photographs taken of Hinton's hands that night verify the same (Pet. Exs. 5FF, 5GG); there are no bruises, scratches, or abrasions on his hands.

Therefore, respondents falsely reported uncuffing Hinton inside his cell. Though there was some dispute among the inmate statements with respect to whether Hinton had one or both hands cuffed, or whether certain "clicking sounds" indicated he was uncuffed, none of the inmates reported seeing Hinton hold Bunton in a chokehold and none reported seeing Hinton throw a punch or kick respondents. The inmates consistently reported seeing Hinton punched, kicked, and/or stomped and reported that this action started very shortly after the group entered

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[22] Captain Garraway testified that investigative staff was not looking for injury to his neck area, were not aware of the magnitude of Hinton's injuries even after interviewing him on the night of April 3rd, and took no photographs of his neck (Tr. 98, 100). There is one photograph of Hinton's neck (Pet. Ex. 5Z), which is not sufficient to establish whether there is injury. No reason was given why the investigative team did not check for a neck injury after Hinton reported it; investigative photographs were taken that night at 2220 hours (Pet. Ex. 5) and the following morning at 1151 hours (Pet. Ex. 6).

his cell. Even if they embellished, the extent of Hinton's injuries according to the medical evidence can only be explained by Hinton being rendered unable to defend himself.

Since I have found that Hinton was handcuffed during the use of force, it therefore follows that he was incapable of putting Officer Bunton in a chokehold. I also did not believe that Hinton kicked Captain Behari, thereby provoking the assault against him, or that Behari suffered any knee (or other) injury as a result of this use of force.

IV. Findings of Misconduct

A. Charges and Specifications

Captain Behari is charged with misconduct in eight specifications that allege inefficient performance of his duties and conduct unbecoming by (i) instructing his staff to lift an inmate off the ground and carry him hog-tied rather than have him transported on a gurney, as required; (ii) verbally threatening an inmate with bodily harm, stating that he was going to get "fucked up"; (iii) using unnecessary, impermissible, or excessive force on the inmate by punching or striking him while the inmate was handcuffed, causing him significant injuries; (iv) submitting a false report and making false statements about said force; (v) deliberately inflicting pain on an inmate and conspiring to conceal the true nature of the force used; (vi) transporting the inmate without enhanced restraints, as required; (vii) failing to notify or request the assistance of a supervisor about an anticipated use of force; and (viii) removing the inmate's handcuffs inside the cell rather than through the cuffing port, in violation of the MHAUII manual (OATH 781/14, DR 466/13).[23]

Officers Bunton, Marquez, and Cabrera are charged in four specifications that allege conduct unbecoming and of a nature to bring discredit upon the Department by (i) failing to report the use of unnecessary, excessive, and/or impermissible force taken against inmate Hinton when he was carried hog-tied, and when Hinton was struck inside of cell 6 while handcuffed; (ii) submitting a false report and making false statements about said force; (iii) being present when staff deliberately inflicted pain on an inmate and conspiring to conceal the true nature of the force used; and (iv) wearing black leather gloves (OATH 782/14, DR 465/13); (OATH 783/14, DR 464/13); (OATH 786/14, DR 461/13).

[23] Specifications 7 and 8 were added by amendment on or about January 17, 2014, without objection.

Officer Siederman is charged in three specifications that allege conduct unbecoming and of a nature to bring discredit upon the Department by (i) using unnecessary, excessive, and/or impermissible force against inmate Hinton by carrying him hog-tied, and striking Hinton inside of cell 6 when he was handcuffed, causing him significant injuries; (ii) submitting a false report and making false statements about said force; and (iii) deliberately inflicting pain on an inmate and conspiring to conceal the true nature of the force used (OATH 784/14, DR 463/13).

Officer Almanzar is charged in four specifications that allege conduct unbecoming and of a nature to bring discredit upon the Department by (i) using unnecessary, excessive, and/or impermissible force against inmate Hinton by carrying him hog-tied, and striking Hinton inside of cell 6 when he was handcuffed, causing him significant injuries; (ii) submitting a false report and making false statements about said force; (iii) deliberately inflicting pain on an inmate and conspiring to conceal the true nature of the force used; and (iv) wearing black leather gloves (OATH 785/14, DR 462/13).

B. Section 75 of the Civil Service Law

Respondents are charged with misconduct pursuant to section 75 of the Civil Service Law. Petitioner has alleged that Captain Behari violated several Departmental rules, such as a failure to use the cuffing port. As this tribunal has often held, each and every rule violation does not necessarily constitute misconduct under section 75 of the Civil Service Law. *Dep't of Sanitation v. Pezzulo*, OATH Index No. 334/07 at 7 (Nov. 15, 2006) ("It is axiomatic that not every mistake or error in judgment is sanctionable misconduct."); *Human Resources Admin. v. Green*, OATH Index No. 1794/02 at 18 (Dec. 6, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-78-SA (Aug. 23, 2006) (all job performance errors are not misconduct). Sanctionable misconduct requires the petitioner to prove willful or intentional conduct, *Reisig v. Kirby*, 62 Misc. 2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969); or negligence or carelessness, *McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979); *Dep't of Sanitation v. Beecher*, OATH Index No. 176/01 at 4 (Mar. 7, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 02-05-SA (Mar. 20, 2002). Thus, in the absence of a showing of fault, no misconduct can be found. *Dep't of Sanitation v. Venegas*, OATH Index No. 379/04 at 4 (May 7, 2004); *Beecher*, OATH 176/01 at 4.

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. CDO8-33-SA (May 30, 2008)).

I have found Captain Behari guilty of misconduct for his violation of Department rules requiring use of the cuffing port; the application of enhanced restraints; notification of a supervisor about an anticipated use of force; transport of a refusing inmate on a gurney; and the prohibition against dragging and hog-tying an inmate (*see* Specifications 1, 6, 7, 8 discussed *infra* at pp. 11-20). Behari's reckless rejection or wanton disregard of these security precautions put himself and his officers, and potentially others in the facility, at risk. His recklessness is heightened by the number of violations he committed in a short span of time with respect to this one inmate, who required not the normal, but enhanced security precautions. I have stated that his judgment in these matters was so poor, indeed reckless, as to suggest that Behari intended to engage Hinton or provoke a conflict that day. Without a doubt, they constitute misconduct under the Civil Service Law.

His decision to have Hinton carried hog-tied by his restraints in spite of the alternatives specified in applicable rules seemed intended to impose a degrading punishment on this inmate. The odiousness of the spectacle of carrying an inmate in this manner is aptly captured in the screen shot in Petitioner's Exhibit 9. The Department's prohibition against carrying inmates in this manner provides no exceptions and it must be strictly applied.

The remaining charges are addressed here.

C. Unnecessary, Impermissible, and Excessive Force

The Use of Force directive provides that force may be used against an inmate "[t]o defend oneself or another from a physical attack or from an imminent physical attack" and as a last resort "when there is no practical alternative available to prevent serious physical injury to staff, visitors, inmates, or any other person"; force may not be used to "punish, discipline, assault or retaliate against an inmate." Directive 5006R-C § IV(A) & (B).

Based upon the facts set forth here, I find that the use of force inside cell 6 was unnecessary, impermissible, and excessive.

I find that Captain Behari violated the directive by ordering an assault upon inmate Hinton, likely in an effort to exact punishment or discipline the inmate for resisting his new cell assignment. I believe that Behari sought through extraordinary means to enforce a transfer that

was expected to be difficult and simultaneously to drive the point that Hinton had to submit to his authority.

Behari was assigned to effectuate Hinton's transfer to 13A the day after the transfer had failed for reasons not clearly explained on the record. Behari claimed to be ignorant about why the transfer did not occur, which I did not believe. As the security captain in charge of scheduling transfers, he would have been notified of a failed transfer by ADW Williams who was involved in the earlier attempt and who witnesses say was present for this attempt.[24]

In his statement to investigators hours after the incident, Hinton reported that Behari taunted him with the following statements before, during, and after the assault on him: "you are gonna get what you deserve today; you think you run this shit"; "I run this shit; fuck Dep. Williams"; "we are gonna fuck you up today"; "I'll fucking kill you. You think you're fucking tough. You and this other Hinton"; "I did this to you, motherfucker." In this regard, I find Hinton's statement to be credible.

I found Hinton's statement in general to be credible, in that it was given a short time after the event and while he was still in serious condition at the hospital (Pet. Ex. 24). *Cf. People v. Brown*, 80 N.Y.2d 729, 733 (1993) (contemporaneous statements usually evince reliability because they eliminate "the likelihood of deliberate misrepresentation or faulty recollection . . . ."). His statement is consistent with many other pieces of evidence, including the medical evidence and video, and it comports with common sense in ways that respondents' version of events does not.

To believe Hinton's version of events, one must believe that individuals in authority sometimes act with corrupt motives. As security captain, Behari is charged with maintaining order in the jail. An inmate identified as a ranking gang member or with close relationships to gang members and a reputation for violence presents a challenge to the order that Behari is sworn to protect. However, Hinton was not a danger to good order and discipline at the time of this incident. He was calm and compliant and was reported by respondents even to be friendly.[25] On the video, he appears mostly at ease in the vestibule before entering Building 13, where he is

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[24] ADW Williams did not testify at the hearing, though a number of inmates said they saw him in the vicinity and believed he was involved in the escort. There is an official in a white uniform shirt on the video at the door to Hinton's cell after the use of force, from 5:00.48 to 5:01.21 (Pet. Ex. 1, #10.176), but he does not appear to be identified in the Investigative Report (Pet. Ex. 38 at 2).

[25] Almanzar, who knew Hinton and had a good rapport with him, said Hinton asked him where he was being moved and why, but his demeanor was "normal" (Tr. 1635, 1641-42). Marquez said Hinton greeted Almanzar with a "what's up?" (Tr. 1501).

seen talking to Behari. The demeanor and mannerisms of Hinton and respondents as they wait in the vestibule are visible on the video (Pet. Ex. 1, #10.100).

Once the entire team assembles in the vestibule, it becomes apparent that an escort that would normally include one officer or as many as two officers and a captain, in this instance involved five officers and a captain. Even Behari, as supervisor, could not explain why Officer Siederman joined this escort to which he was not tasked.

The relatively relaxed atmosphere changed by the time Hinton arrived at the steps to the tier. Hinton attributed the change to Behari's threats to "fuck him up," which began when he took over the escort from Officer Martin and led him to resist and sit down on the steps (Pet. Ex. 24). Having spent four years at GRVC, Hinton was likely aware that sitting down should trigger the intervention of Behari's superiors and would be captured on video. When giving his account to Department investigators, Hinton assured them that "[t]he cameras will show all of this" (Pet. Ex. 24).

I do not suggest that all of Hinton's actions were rational or logical. However, his actions and statement are consistent with one another, while respondents' rejoinder to Hinton's version of these events is lacking in substance or intuitive value. Respondents offered no motivation for Hinton to have stopped walking, except tepid claims that he could not walk. Respondent officers, who implausibly denied hearing any conversation between Behari and Hinton prior to entering the cell, offered no reason for Hinton's sudden change in attitude.[26] In their principal responsibility of care, custody, and control of inmates, respondents are expected to pay attention to what an inmate says, particularly one who is resisting orders.

Respondents offered no motivation for Hinton to start a fight with five members of service inside his cell, where he would be outnumbered and they would be untethered by video surveillance. Respondents offered no reason why choking Bunton would be a priority for Hinton over his own self-preservation; he had no history with Bunton.

Once inside the cell, respondents left Hinton handcuffed and shackled and administered a brutal beating that was contemplated before they entered the cell. Notably, four of these officers wore gloves, of questionable origin, that were not turned over in the investigation of this case.

[26] Officer Siederman said he heard Behari give orders to Hinton, but he heard nothing that Hinton said (Tr. 1139-40). Bunton said he did not hear anything being said when they arrived at 13A; he did not really pay attention because there was a lot of noise in the housing area (Tr. 1351). Marquez said Hinton was silent as they entered 13A; he asked no questions and said nothing (Tr. 1523). Almanzar said Hinton said he could not walk but never said anything was wrong with him (Tr. 1663).

The succession of rule violations committed here is circumstantial evidence of their ill intent. The results of the beating are clearly established in the medical evidence, and analysis of the injuries proves the force was unnecessary, impermissible and excessive.

Investigator Garcia concluded that the use of force in this case was inappropriate and excessive and that the inmate was handcuffed the entire time (Tr. 784-86; Pet. Ex. 38 at 27). He noted that Hinton's version of what happened, from the statement he gave to Department investigators to the personal phone calls he made in the days following the incident, remained consistent.[27] I agree. Garcia cited basic inconsistencies in respondents' statements that caused him to conclude that they were not being truthful (Tr. 786). I concluded the same.

The evidence convincingly established that (i) Hinton was handcuffed and unable to fight back or protect himself when beaten by respondents inside his cell on April 3, 2012, as established by the physical and medical evidence of his injuries which prove that he sustained severe facial trauma, his nose was broken and tilted to the right, and he had a fracture in his back; (ii) the use of force was not initiated by Hinton kicking Captain Behari as there is no credible evidence of Behari suffering a knee (or other) injury that day; (iii) the extent of the force utilized by respondents against Hinton was not predicated upon Hinton placing and holding Officer Bunton in a chokehold, as there is a lack of evidence that Bunton was ever in a chokehold or sustained an injury related to a chokehold. Therefore, I find respondents' claims that Hinton provoked the force to be false.

Because Hinton was cuffed and shackled and non-assaultive, the force asserted was unnecessary. Because said force was unnecessary, it was also impermissible and excessive. Accordingly, Captain Behari, Officer Almanzar and Officer Siederman are guilty of misconduct for engaging in an unnecessary, impermissible and excessive use of force and intentionally and maliciously causing serious physical injury to Mr. Hinton. *Dep't of Correction v. Reid*, OATH Index Nos. 1898/14, 1901/14 at 10-11 (June 18, 2014) (where two officers used unnecessary force, causing serious physical injury to an inmate, when they entered his cell, and severely beat him while he was handcuffed as punishment for a prior violation of facility rules); *Dep't of Correction v. Butler*, OATH Index Nos. 876/92, 877/92 & 878/92 at 12 (Dec. 2, 1992), *aff'd*, 254

[27] Inmate phone calls are routinely recorded by the Department and Hinton's and Parker's were submitted in evidence at the hearing (Pet. Exs. 26, 27).

A.D.2d 86 (1st Dep't 1998) (where officer's use of force prior to inmate's restraint was proper, but his use of force after the inmate was restrained was unnecessary).

Officers Bunton, Marquez and Cabrera are charged with misconduct for their failure to report both the unnecessary, impermissible and excessive use of force that took place inside Hinton's cell, and the force used against Hinton when he was hog-tied. I do not sustain this charge against respondents, as I find that they made reports as to both instances of force.

With respect to the hog-tying, Officers Bunton, Marquez and Cabrera all reported carrying Hinton to his cell in their Use of Force reports, albeit euphemistically. This does not constitute a failure to report force.

While their reports of what happened inside the cell were not truthful, they do acknowledge force was used against Hinton. *See Dep't of Correction v. Andino*, OATH Index Nos. 731/13 & 1000/13 at 6 (May 14, 2013) (false reporting charge upheld where respondent stated in his use of force report that he tried to "guide" the inmate to the wall, when video evidence displayed that respondent tripped the inmate and threw him into a wall). The lack of truthfulness in their description of the nature of the force used is not a failure to report force. *Cf. Dep't of Correction v. Holmes*, OATH Index No. 1256/13 (July 18, 2013) (respondent was guilty of both failing to file a use of force report and filing a false report when he filed an unusual incident form instead of the use of force report, and upon being directed to file a use of force form, filed a false use of force report); *Dep't of Correction v. Williams*, OATH Index No. 2215/08 & 2216/08 (Jan. 22, 2009) (where officers did not file any report, but upon subsequent direction to file a use of force report, did so falsely).

The Department alleges that the excessive force constitutes a violation of Penal Law section 120.00, assault in the third degree, a class A misdemeanor. The law provides that a person is guilty of assault in the third degree when "[w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person" or when he does so recklessly. Penal Law § 120.00(1), (2) (Lexis 2014). As discussed above, I found that Captain Behari, Officer Almanzar and Officer Siederman intentionally and maliciously caused serious physical injury to Hinton. However, having determined that respondents committed misconduct by their actions, there is no need to determine whether such conduct also constitutes a crime. I therefore decline to do so.

D. Threats

Captain Behari is charged with verbally threatening Hinton with bodily harm, stating in effect that Hinton was going to get "fucked up," among other things (Specification 2). This misconduct was sustained by the evidence.

In his statement to investigators, Hinton reported several statements that Behari made to him that day, from the time that Behari took over Hinton's escort (Pet. Ex. 24). Hinton reported that Behari said: "you are gonna get what you deserve today; you think you run this shit"; "I run this shit; fuck Dep. Williams"; "we are gonna fuck you up today"; "I'll fucking kill you. You think you're fucking tough. You and this other Hinton"; "I did this to you, motherfucker." He said the threats continued throughout the escort, during the use of force, and after the use of force when he bragged, "I did this to you, motherfucker." Inmate Concepcion reported overhearing a number of the threats.

I found the evidence that Captain Behari threatened Hinton that he would "fuck [him] up" prior to the use of force established the charge.

E. False and/or Misleading Reports and Statements

Respondents are charged with making false or misleading statements in their reports and MEO 16 interviews, including statements that (1) the force used inside Hinton's cell was in response to Hinton kicking Captain Behari and putting Officer Bunton in a chokehold; (2) the force used consisted merely of punches that would force Hinton to release Bunton of said chokehold; and (3) Hinton was uncuffed and unshackled at the time force was used.

The evidence demonstrates that all three statements were made in respondents' Use of Force reports and MEO 16 interviews. As discussed above, I found that Hinton was not uncuffed or unshackled at the time force was used. The force used was unnecessary and was not in response to provocation by Hinton, as I also found that Hinton did not kick Captain Behari or put Officer Bunton in a chokehold. As a result, the punches applied to Hinton had no relationship to any such (fictional) events. Respondents' statements were not mistaken. They were intentional misrepresentations of what occurred designed to cover up their misconduct. *See Dep't of Correction v. Scott*, OATH Index No. 376/06 at 5-6 (July 10, 2006) (where respondent submitted false or misleading reports when he attempted to cover up his excessive use of force in his written reports and MEO 16 interview by "concoct[ing] a self-defense claim.").

I find that these false statements constitute misconduct.

F. Conspiracy to Conceal

Captain Behari and Officers Siederman and Almanzar are charged with deliberately inflicting pain and injury upon inmate Hinton and conspiring with each other to conceal the true nature of what occurred in cell 6. Officers Bunton, Marquez, and Cabrera are charged with being present at the time such pain and injury were inflicted and conspiring to conceal it. I have not sustained this conspiracy charge as to any of respondents.

With minor differences, respondents consistently told the same version of events about what occurred in cell 6, and I have largely rejected their accounts. There is a basis for believing that respondents conspired to come up with a false account to cover up their misconduct, coordinated their telling of it, and made certain agreements about doing so. Although these inferences might reasonably be drawn, aside from the consistency in their version of events, there is not much more upon which to pin a finding of liability. There is no evidence of a joint meeting or meeting place, or of phone calls to rehearse and plan a story. Without more, I found it impossible to distinguish the charge from a finding that respondents made false and misleading statements, a charge that I have already sustained. I did not find sufficient basis for an independent act of misconduct. *See Dep't of Correction v. Jackson*, OATH Index Nos. 2927/10, 2929/10, 2930/10 & 2931/10 (Apr. 7, 2011), *adopted*, Comm'r Dec. (Aug. 1, 2011), *aff'd*, 105 A.D.3d 613 (1st Dep't 2013) (while it is odd that respondents had very similar reports, that evidence, without more, is not enough to prove that the respondents shared or copied their reports).

G. Uniform Violation for Wearing Gloves

Officers Almanzar, Marquez, Bunton, and Cabrera are charged with failing to comply with the uniform requirement by wearing leather gloves, in violation of the Department's directive. Dir. 2270 § VII(D) (leather gloves to be worn only on outdoor assignments). The charge was not sustained, as there was no evidence that the gloves they wore were leather.

Latex gloves are approved by the Department, as they provide protection against the spread of pathogens or contagions (Tr. 615). The Department prohibits the wearing of leather and other types of gloves, which can be used for improper purposes, such as concealing evidence of a beating (Tr. 614-15). The Department permits the use of "protective search gloves" to provide additional "cut and abrasion resistance" for staff who perform searches (Teletype Order

No. HQ-01303-0 (May 22, 2009)) (ALJ Ex. 3). These gloves must be gray in color and machine washable.

Officers Almanzar, Marquez, Bunton, and Cabrera are all seen on the video wearing gloves prior to the use of force. They all denied that the gloves they wore were leather gloves. Almanzar wore grey gloves; Marquez and Bunton wore grey gloves with a black overlay; and Cabrera wore black gloves. Though they wore gloves when entering cell 6, Marquez and Bunton were no longer wearing them when they exited the cell. Almanzar removed his gloves as he exited the cell. Bunton, who testified that he got Hinton's blood on the gloves he wore during the use of force (Tr. 1468-71), told investigators that he threw them away (Pet. Ex. 38 at 25). The Department later confiscated a different pair of gloves (white and grey with red palms) from his locker.

Officer Marquez testified that he wore "grey baseball gloves with black accents" (Tr. 1516). Officer Almanzar also described his as "baseball gloves" (Tr. 1655-56). Officer Cabrera testified that he wore unpadded black latex Gorilla gloves purchased from Home Depot, which he uses to protect his hands from urine when he conducts drug testing (Tr. 1223-24). He said he had never been instructed to remove the gloves by a supervisor.

Captain Behari said he did not notice that four of his officers were wearing gloves at the time of the incident, which is notable given the Department's prohibition against wearing all gloves except those that are specifically sanctioned (Tr. 1019-20). A supervisor would be expected to notice whether the gloves being worn by staff are permitted.

Although undisputed that these officers wore gloves at the time of the incident, the gloves they wore were not secured in the subsequent investigation, and their fabrication and condition after the use of force was not determined by Department investigators (Pet. Ex. 38 at 25). There was no evidence the gloves that were worn were leather. The gloves worn by Almanzar, Marquez, and Bunton were grey, as permitted in the teletype. As for Cabrera's testimony that his black Gorilla gloves were latex, there is no contradictory evidence.

In the absence of proof that the gloves' fabrication violated uniform requirements, the charges alleging misconduct should be dismissed. *Cf. Dep't of Correction v. Holder*, OATH Index No. 2208/07 at 5 (Sept. 14, 2007) (upholding uniform violation where respondent wore black leather gloves).

FINDINGS AND CONCLUSIONS

1. Captain Behari, Officer Almanzar, and Officer Siederman are guilty of misconduct for using unnecessary, impermissible, and excessive force on inmate Hinton by punching and striking him while he was handcuffed and causing him serious physical injury;

2. Captain Behari is guilty of misconduct for instructing his staff to carry an inmate hog-tied, rather than have him transported on a gurney, as required;

3. Captain Behari is guilty of misconduct for verbally threatening an inmate with bodily harm;

4. Captain Behari is guilty of misconduct for transporting an inmate without enhanced restraints, as required;

5. Captain Behari is guilty of misconduct for failure to notify or request the assistance of a supervisor about an anticipated use of force;

6. Captain Behari is guilty of misconduct for failing to remove an inmate's handcuffs through the cuffing port, as required;

7. Petitioner failed to prove that Officer Bunton, Officer Marquez or Officer Cabrera committed misconduct by failing to report the use of force inside Hinton's cell and the force used carrying Hinton hog-tied;

8. Captain Behari, Officer Bunton, Officer Marquez, Officer Siederman, Officer Almanzar, and Officer Cabrera are guilty of misconduct for submitting false reports and making false statements about the nature of the force used against inmate Hinton;

9. Petitioner failed to prove that Captain Behari, Officer Almanzar, or Officer Siederman committed misconduct by conspiring to conceal the true nature of the force used; and

10. Petitioner failed to prove that Officer Almanzar, Officer Marquez, Officer Bunton, or Officer Cabrera violated the uniform directive by wearing leather gloves.

RECOMMENDATION

Upon making the above findings, I obtained and reviewed an abstract of respondents' employee performance service reports (Form 22R) for purposes of recommending appropriate penalties. Captain Behari has been employed by the Department 12 years, since June 2002. He has no prior discipline. Captain Behari received employee of the month awards in May 2010, July 2010, and March 2012, and a letter of appreciation in August 2011.

Officer Bunton has no prior discipline. He has been employed by the Department for seven years, since April 2007. Officer Bunton received a unit citation in July 2013.

Officer Marquez has been employed by the Department since February 2004. He received a 30-day suspension and 12 months of limited probation for a use of force in 2007. Officer Marquez received employee of the month in May 2006 and a letter of appreciation in January 2013.

Officer Siederman was appointed in November 2006, and he received a letter of appreciation in November 2009. He has no prior disciplinary history.

Officer Almanzar also has no prior discipline. He began his service in December 2006. He has received various awards: a perfect attendance acknowledgement in April 2010, a letter of appreciation in May 2009, employee of the month in September 2010, and a unit citation in July 2013.

Officer Cabrera was appointed to the Department in December 2010. He was a probationary employee at the time of this incident (Tr. 1224). He has no prior discipline. Officer Cabrera received a unit citation in July 2013.

Captain Behari and Officers Siederman and Almanzar have been found guilty of using unnecessary, impermissible, and excessive force by punching and striking Robert Hinton in the perpetration of a brutal beating against inside his cell that resulted in severe injuries. Officers Siederman and Almanzar are also guilty of using unnecessary, impermissible, and excessive force by carrying Hinton hog-tied to his cell rather than transporting him on a gurney, as required, and Captain Behari is guilty of ordering that it be done. All respondents are guilty of submitting false reports and making false statements about the force that occurred.

Captain Behari, in addition to these charges, is guilty of misconduct for threatening Hinton and for violating security procedures that required him to notify a supervisor of an anticipated use of force, to use enhanced restraints during an inmate transfer, and to utilize the

cuffing port to remove the inmate's handcuffs, which violations I find led directly to the excessive force committed here. I have not sustained charges alleging that respondents failed to report the use of force, conspired to conceal the nature of force, or violated the uniform directive by wearing leather gloves.

The Department seeks the penalty of termination for all respondents (Tr. 1866-67). Although all charges were not sustained, because of the severity of the misconduct established, I agree that penalty is appropriate.

Penalties for excessive force range from 20 days' suspension to termination, depending upon the mitigating or aggravating circumstances surrounding the misconduct, such as inmate provocation, prior discipline, and the existence or extent of injury to the inmate. *See Dep't of Correction v. Andrews*, OATH Index No. 296/90 (Apr. 17, 1990) (20-day suspension for officer who slapped inmate's head into a wall, causing a gash, when provoked by inmate); *Dep't of Correction v. Pannizzo*, OATH Index No. 1691/03 (Nov. 1, 2004) (60-day suspension for an officer with a minor disciplinary record who slapped the inmate on the side of the head and sprayed him with a chemical agent resulting in minor injuries), *modified*, NYC Civ. Serv. Comm'n Item No. CD06-69-M (July 6, 2006) (suspension reduced to 40 days); *Dep't of Correction v. Andino*, OATH Index Nos. 731/13 & 1000/13 (May 14, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 35462 (Jan. 27, 2014) (termination recommended for officer with brief tenure and no prior discipline when he was found guilty of using excessive force against four inmates and making false statements).

This tribunal has seen few cases where inmates suffered injuries similar in severity to Hinton's. *See, e.g., Dep't of Correction v. Jackson*, OATH Index Nos. 2927/10, 2929/10, 2930/10, & 2931/10 (Apr. 7, 2011), *adopted*, Comm'r Dec. (Aug. 1, 2011), *aff'd*, 105 A.D.3d 613 (1st Dep't 2013) (inmate was beaten and struck in the head with a radio and helmet and suffered two punctuate high density foreign bodies in the right frontal bone; swelling in the skull, shoulder, left leg; eight stitches on the nose; an eyebrow laceration; cuts on the wrists; and blood in the right eye); *Dep't of Correction v. Davis*, OATH Index Nos. 2648 & 2649/09 (Feb. 12, 2010) (inmate sustained nasal fractures and a fractured left orbital bone); *Dep't of Correction v. Debblay*, OATH Index Nos. 2008/04, 2009/04, 2011/04 & 2012/04 (Dec. 3, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-02-SA (Jan. 9, 2006) (Debblay 2008/04 and Echevarria 2011/04); *appeals by Turrisi (2009/04) and Clark (2012/04) withdrawn*, *aff'd*, NYC Civ. Serv.

Comm'n Item No. CD 05-78-O (Sept. 30, 2005) (inmate had fractured ribs, a cut on the eye, and a punctured ear drum); *Dep't of Correction v. Butler*, OATH Index Nos. 876/92, 877/92 & 878/92 (Dec. 2, 1992), *aff'd*, 254 A.D.2d 86 (1st Dep't 1998) (inmate suffered nasal bone fractures, facial lacerations, a metatarsal fracture, two loose teeth, and bilateral corneal abrasions). Although not all of the respondents in these cases were terminated from employment, these cases provide useful insight into how this tribunal determines appropriate penalties.

Both *Jackson* and *Butler* involved significant inmate provocation. In *Jackson*, the inmate refused to hand over a razor and hit an assistant deputy warden with a baton in an ensuing altercation. The improper use of force occurred after he was subdued. In light of the events, the officer who used force had no prior disciplinary history and received a 60-day suspension. *Jackson*, OATH 2927/10, 2929/10, 2930/10, & 2931/10 at 23 (officer was not defending herself and submitted a false report). In *Butler*, the inmate hit an officer, initiating an altercation. *Butler*, OATH 876/92, 877/92 & 878/92 at 3, 7, 8. Officer Butler, who used force against the inmate, had an extensive disciplinary history and was terminated; other respondents who filed false reports and had no disciplinary history received 20-day suspensions. *Id.* at 13-15. Unlike the instant case, the officers in the above two cases were responding to a situation that was unfolding, as opposed to creating the situation themselves.

The tribunal generally recommends lesser penalties where the inmate does not suffer serious injury as a result of the improper use of force. *Reid* is notable because it is a case that involves officers in MHAUII who were disciplined for a coordinated effort to enter an inmate's cell with an improper motive, using excessive force while the inmate was rear-cuffed, and failing to report the incident, facts that are similar to the instant case. *Dep't of Correction v. Reid*, OATH Index Nos. 1898/14, 1901/14 (June 18, 2014). In contrast to the events here, the inmate in *Reid* had no serious injury. *Id*. at 14, 15. Recognizing that, the tribunal recommended 45-day and 30-day suspensions for the two correction officers, who had no prior discipline. In *Davis*, an inmate suffered serious injuries, but the medical evidence was not sufficient to establish that the injuries stemmed from the improper use of force instead of an earlier assault on the inmate by a gang of inmates. *Davis*, OATH 2648 & 2649/09 at 15.

The Department argued that *Debblay* is a comparable case. I agree. There, two respondents entered an inmate's cell and used substantial force against him. Two additional

officers responded to the incident and conspired with them to cover it up. Declaring that "[t]here can be little doubt that, as a general rule, correction officers who conspire to conceal a use of improper force by making false statements should be terminated," the tribunal recommended termination for all officers, even those who did not participate in the use of force. *Debblay*, OATH 2008/04, 2009/04, 2011/04 & 2012/04 at 17.

Here, not only did Captain Behari and Officers Siederman and Almanzar savagely beat a handcuffed inmate, but respondents all lied to cover it up. Respondents' joint efforts are exhibited in the written reports and in testimony that demonstrates a striking similarity in language. (*E.g.*, Hinton and Bunton were in a "spooning" position on the bed (Cabrera: Tr. 1215, 1237; Bunton: Tr. 1314, 1414); the way that Hinton kicked Behari (Behari: Tr. 1038-39; 1056-57; Siederman: Tr. 1130; Bunton: Tr. 1384-85; Almanzar: Tr. 1644-45; 1669-70); Hinton used "his momentum" to put Bunton in a chokehold (Behari: Tr. 983; Siederman: Tr. 1130; Bunton: Tr. 1313; Almanzar: Tr. 1676)). The violent assault and the joint effort to evade culpability are a sufficient basis to impose a penalty of termination for all involved.

Respondents have received awards, which they proffer to mitigate their penalty. While such awards are notable, they do not mitigate the substantial breach of conduct here. *See Andino*, OATH 731/13 & 1000/13 (respondent was terminated for uses of force, though he received a letter of appreciation and employee of the month); *Dep't of Correction v. Connell*, OATH Index No. 1598/11 (May 24, 2011) (correction officer who received unit citation and certificate of appreciation was terminated for allowing inmates to assault another inmate).

Respondents have varying terms of service with the Department, ranging from 12 years to 4. Generally, many years of service to an agency, without significant disciplinary history, mitigates a penalty. *Dep't of Correction v. Dyce*, OATH Index Nos. 1456/08, 1459/08, & 1542/08 (June 17, 2008), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 09-23-M (Apr. 6, 2009); *Dep't of Correction v. Hills*, OATH Index No. 632/04 (Apr. 26, 2004), *modified on penalty*, Comm'r Dec. (Oct. 28, 2004). However, termination is not a disproportionate penalty, nor shocking, when the use of force is particularly violent and the respondent falsely reports it. *Andino*, OATH 731/13 & 1000/13 at 27, *aff'd*, NYC Civ. Serv. Comm'n Case No. 35462; *Debblay*, NYC Civ. Serv. Comm'n Item No. CD 06-02-SA (Debblay 2008/04 and Echevarria 2011/04), *aff'g*, OATH 2008/04, 2009/04, 2011/04 & 2012/04.

This case appears to combine some of the worst aspects of the use of force cases: a coordinated effort to enter an inmate's cell, serious physical injury, an attempted cover-up, and a lack of provocation by the inmate. Moreover, the detachment of the officers involved before, during, and after the assault, as depicted in the video, is striking evidence that such violence is acceptable to them. This conduct and attitude cannot be tolerated in a Department whose mission it is to provide care, custody and control. Individuals who themselves are out of control cannot be made the overlords of any group of inmates.

Although the lack of participation in the physical act of beating this inmate would offer mitigation in the average use of force case, it did not merit a different finding here for Officer's Bunton, Marquez, and Cabrera. As for Cabrera, his short tenure with the Department aggravates rather than mitigates the penalty. More importantly, the sight of him assuming what is effectively a "look out" position for this flagrant misconduct made him no less a participant. His youth in the service shows how quickly the meaning of care, custody and control can be corrupted. Although unfortunate that he got caught up in the actions and poor judgment of more seasoned staff, that should offer no safe haven for anyone who participated in the ensuing cover-up. I am convinced of the primacy of the deterrence principle in this instance, in hopes that imposing the most severe sanction would deter future misconduct by those who would participate in or stand idly by when such brazen misconduct occurs. Hopefully, it will help break the vice grip that silence and collusion played in this incident.

The Department has lost all confidence that respondents are committed to the most fundamental responsibilities of a member of service. For the reasons set forth herein, I recommend termination of employment for all respondents.

Tynia D. Richard
Administrative Law Judge

September 25, 2014

SUBMITTED TO:

JOSEPH PONTE
Commissioner

APPEARANCES:

KASSANDRA KING, ESQ.
ASST. COMMISSIONER DEANNA LOGAN
Attorneys for Petitioner

FRANKIE & GENTILE, P.C.
Attorneys for Respondent
Captain Budnarine Behari
BY: JAMES FRANKIE, ESQ.

KOHLER & ISAACS, LLP.
Attorneys for Respondents
Correction Officers Bunton, Marquez, Siederman, Almanzar & Cabrera
BY: GREGORY WATFORD, ESQ.

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeals of
BUDNARINE BEHARI, PAUL BUNTON, RAUL MARQUEZ, VINCENT SIEDERMAN, GERONIMO ALMANZAR, AND RAMON CABRERA,
Appellants
-against-
NEW YORK CITY DEPARTMENT OF CORRECTION.
Respondent
Pursuant to Section 76 of the New York State Civil Service Law
Appeal Nos. 2015-0162, 2015-0160, 2015-0159,2015-0161,2015-0091, and 2015-0158

DECISION

PRESENT:

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

RUDY WASIDNGTON, COMMISSIONER
VICE CHAIR

CHARLES D. MCFAUL
COMMISSIONER

BUDNARINE BEHARI, PAUL BUNTON, RAUL MARQUEZ, VINCENT SIEDERMAN, GERONIMO ALMANZAR AND RAMON CABRERA (“Appellants") appealed from a determination of the New York City Department of Correction ("DOC") finding them guilty of using unnecessary, impermissible, and excessive force against inmate Robert Hinton, falsely reporting such force, and other misconduct, and imposing a penalty of termination following disciplinary proceedings conducted at the Office of Administrative Trials and Hearings (“OATH") pursuant to Civil Service Law ('"CSL") Section 75.

The Civil Service Commission ("CSC" or "Commission") conducted a hearing on May 28, 2015. The Commission has carefully reviewed the record below, and the arguments presented to the Commission on appeal. Based upon this review, the Commission affirms certain findings of the ALJ and finds no basis to modify the penalty imposed.

The Commission acknowledges the legitimate concern that DOC Attorney David

Klopman's improper disclosure of confidential information to a private attorney who was representing inmate Hinton in a lawsuit against the City may have tainted Hinton's testimony[28]• Hinton had already testified at OATH when discovery of the improper disclosure was made, and the ALJ properly struck Hinton's testimony from the record, only considering inmate Hinton's earlier statements in arriving at her decision. Appellants argue that inmate Hinton's testimony may have nonetheless affected the ALJ's view of the case, regardless of her attempt to limit the damage. However, in affirming certain of the ALJ's findings of guilt and her recommendation of termination, the Commission does not rely on any of inmate Hinton's statements or testimony, which it considers to be of very limited probative value, given the circumstances of this case. The Commission finds that the evidence in this case unrelated to inmate Hinton's earlier statements and testimony is sufficient to support its decision herein.

As an appellate body under Section 76, the Commission defers to the trier of fact below, and only sets aside its conclusions when they are not reasonably supported by the record. With the exception of two counts of misconduct noted below, the Commission finds that the record before it in this case provides a sufficient basis to support the ALJ's findings that Appellants Behari, Siederman, and Almanzar are guilty of using unnecessary, impermissible, and excessive force against an inmate, and that Appellants Behari, Siedennan, Almanzar, Bunton, Marquez, and Cabrera are guilty of making false reports regarding such incident. However, the record does not support the finding that Appellant Behari is guilty of improperly removing inmate Hinton's handcuffs by not removing them through the cuffing port, while at the same time finding Appellants Behari, Almanzar and Seiderman guilty of striking and punching Hinton while he remained handcuffed. Further, we find that the evidence does not support a conclusion that Appellant Behari is guilty of instructing his staff to carry inmate Hinton "”hog-tied"' rather than having him transported on a gurney. Although the video evidence does show Hinton being carried to his cell along the tier for a short distance without the use of a gurney, further video evidence shows that the “"probe team” that transported him to the clinic after the incident also carried him in a similar fashion along the tier and did not use a gurney. This suggests that either there was no space along the tier to transport an inmate on a gurney, as argued by Appellants, or

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[28] 1 *See Dep't of Correction* v. *Klopman,* OATH Index No. 984/15 (Mar. 13, 2015), *modified on penalty,* Comm'r Dec. (Apr. 2, 2015), *aff'd,* NYC Civ. Serv. Comm'n Case No. 2015-0385 (Jun. 17, 2015),

that certain practices, although they may technically violate regulations are de minimus violations that are, in practice, excused by the Department.

The Commission takes into consideration in reviewing the ALJ's penalty recommendation that Appellant Marquez was previously disciplined for use of excessive force and that Appellant Cabrera was still a probationary employee when this incident occurred. The Corrunission affirms the penalty of termination for Appellant Marquez based, in part, on the fact that this is the second time he has been found guilty of serious misconduct. We affirm Appellant Cabrera's termination, in part, because he was not a permanent employee when he failed to report the use of force inside the cell and was, therefore, subject to termination without further process.

With respect to Appellants Behari. Siederman, Bunton, and Almanzar, while they are employees of good standing without previous disciplinary records, they have been found guilty of extremely serious misconduct, *i.e.,* using unnecessary and excessive force, causing severe injury to an inmate. and/or falsely reporting the use of excessive force. This level of misconduct justifies subjecting them to the ultimate penalty of termination should it be recommended by the ALJ, and should the agency elect to accept the recommendation, as both have done in this case. We do not find that the principle of progressive discipline requires that Appellants be given a penalty of less than termination under these circumstances.

DECISION

The Commission does not reach the remaining counts of misconduct in this case as we find Appellants' use of unnecessary and excessive force, and submission of false reports are sufficient to warrant a penalty of termination under the circumstances of this case. We therefore affirm those findings and penalty.

NANCY G. CHAFFETZ, COMMISSIONER
CHAIR

Charles D. McFaul, Commissioner

DISSENTING OPINION: SEE NEXT PAGE

DISSENTING OPINION:

I respectfully dissent from the majority opinion in this case. While I agree with the majority's statement of the Commission's standard of review in Section 75 cases, I strongly disagree with its application here. The trial officer below erred in not granting Respondents' motion for a mistrial. Barring that, the record before the Commission does not support a finding of guilt for the most serious charges against Appellants and the lesser changes that should be sustained do not warrant termination, especially in light of five of the officers' perfect employment records.

While the trial below was in progress, the attorney for the Department of Correction, David Klopman, was removed from the case, and later terminated for collusion and prosecutorial misconduct. ALJ Spooner found that Mr. Klopman provided Mr. Hinton's attorney with transcripts of the officer's first interviews with the department five weeks before inmate Hinton's testimony. Further, it was discovered that internal DOC documents were e-mailed back and forward to Mr. Hinton's attorney in preparation for the trial, including personal and confidential information pertaining to Captain Behari, which could have compromised his case and put him at risk of physical harm. ALJ Spooner found Mr. Klopman's actions compromised the pending disciplinary case by creating the appearance that Mr. Klopman, while representing DOC, was actively assisting Mr. Hinton and his counsel in successfully suing the city for damages. ALJ Spooner’s finding requires a mistrial in this matter.

Instead, the trial officer below struck Mr. Hinton's testimony and cross-examination from consideration, although she had already heard all of it. She did consider the inmates' statements as corroboration of Mr. Hinton's account of events, some of which were conflicting, and all of whom were interviewed by Mr. Klopman, and therefore should be considered tainted. Under these circumstances Appellants were never able to confront their accuser and did not get a fair trial below. Therefore, ALJ Richard's decision to go forward and not to declare a mistrial guaranteed a completely distorted outcome, depriving the Appellants of their right to due process.

Further, ALJ Richard's factual conclusions are not reasonably supported by the record. The Commission could not consider what was potentially the most probative evidence, i.e. the testimony and cross-examination of Mr. Hinton, but the evidence available to review does not support a finding that it was more likely than not that Mr. Hinton remained handcuffed throughout the incident, and therefore unable to put Appellant Burton in a chokehold, as

consistently maintained by all of the Appellants. There were, for example, contradictions among the inmates' statements, some of whom corroborated Mr. Hinton's account that he remained cuffed, and others not. Disturbingly, ALJ Richards ignored the testimony of the city's medical examiner who said, "When a handcuffed individual struggles, there is often evidence of injury on the wrists in the form of scrapes and bruises," but found that he was unable to find those kinds of injuries on Mr. Hinton's wrists.

The record supports a finding that Mr. Hinton was severely injured in that cell, but the DOC did not meet its burden of proving that it was more likely than not that Appellants engaged in an unprovoked attack on Mr. Hinton, needlessly beating, hitting, and kicking him while he was helpless and handcuffed. Charges 1 and 8 should be reversed for all six Appellants.

Finally, the remaining charges affirmed by the majority do not warrant termination for Captain Behari because progressive discipline would require that Captain Behari, who bad no prior discipline, should receive a lesser penalty.

ALJ Richards ends her decision with a sweeping statement that her recommendation to terminate all six Appellants would “;deter future misconduct by those who would participate in or stand idly by when such brazen misconduct occurs." However, the integrity and culture of DOC as a whole was not before ALJ Richards, nor is it before this Commission on appeal. We are charged with the more limited duty to assess each Appellant fairly and on an individual basis. In my opinion the decision below and the majority opinion does not achieve that end.

Rudy Washington, Commissioner
Vice Chair

Dated: Nov. 10, 2015