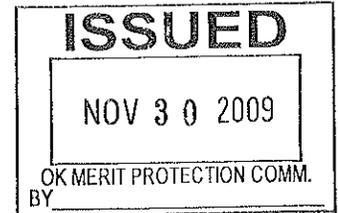


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

COREY DAY,)
Appellant,)
)
v.)
)
DEPARTMENT OF CORRECTIONS,)
Appellee.)
)

Case No. MPC 09-219



FINAL ORDER

This matter comes on for hearing on November 20, 2009 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Corey Day, appears personally, and with his counsel, Kevin Donelson. The Appellee, Department of Corrections, appears by and through counsel, Larry Foster. Also present for Appellee was Table Representative, Warden Mike Addison.

Appellant Corey Day is a permanent, classified state employee appealing an adverse disciplinary action of suspension without pay for five (5) days. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the parties stipulated to the admissibility of Joint Exhibits No. 1 through 31. Accordingly all exhibits presented and admitted are incorporated herein and made a part hereof. The record was closed following the administrative hearing.

After careful consideration of the record, including all relevant evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

The following are the relevant facts of this case based upon the testimony and evidence presented at the hearing. Appellant Corey Day (hereinafter "Day") is a classified employee of the Appellee Department of Corrections (hereinafter "DOC"). Day is a correctional officer, employed at the rank of Lieutenant at the Joseph Harp Correctional Center.

On January 7, 2009, Day was on duty when he entered the canteen or chow hall area of the facility. Offender Frank Norris was present with a group of inmates. Norris engaged in an episode of "hostile staring" at Lt. Day, turning his body and head to continue this staring behavior. In addition, Norris and several of the inmates with him were noted to be making comments about Day with accompanying laughter. According to Day, this type of behavior is considered "disrespectful" and is unacceptable behavior for the inmates. Day chose to counsel Offender Norris privately about this behavior rather than intervene in the chow hall in front of the other inmates. At the end of the meal break, Day instructed Norris to accompany him to the Captain's office. Norris walked in front of Day to the office without incident. Upon reaching the office, Norris entered first. Norris and Day were the only persons present in the small closed office. Day instructed Norris to sit down, which he refused to do. Day then directed Norris to "cuff up" or present himself to be restrained with handcuffs. Norris refused, yelling "You think I'm being disrespectful?" or something similar. Norris assumed an offensive stance and clenched his fists. Day, believing he was about to be assaulted, struck Norris in the face one time. At that point, Norris complied and Day immediately reported the incident. Norris did not require medical treatment, but had "some bleeding noted to the right nostril and a small abrasion to the outside of his upper lip".

A serious incident report was filed on January 7, 2009, identifying the incident as a "Spontaneous Use of Force". (Exhibit 7, pg. 16). In his Preliminary Report memo on January 12, 2009, Warden Addison noted Norris' previous history of assault on staff and his aggressive behavior. He also noted Norris' refusal to "cuff up" and Day's belief that his personal safety was in danger. (Exhibit 7, pgs. 17-18). In a follow-up memo, Warden Addison does state that Day made a poor decision. He discusses the training the correctional officers receive and the "softening" or "distraction" techniques that are authorized to distract offenders long enough to gain control of the situation. Warden Addison also stated that it was common, acceptable practice for shift supervisors to remove offenders from the population and to counsel them privately in the Captain's office. He also stated that this practice at the facility would remain the same, however in the future, additional staff will be present to avoid similar incidents. He concluded that Lt. Day had been counseled about this. (Exhibit 7, pgs. 19-20). On January 27, 2009, in response to a question regarding what disciplinary actions had been taken, Warden Addison stated that Day had been counseled regarding his decisions and actions, noting that

additional staff would be required in future counseling sessions. He specifically noted that Day could not have used his baton or the OC (pepper) spray because of the "close quarters" of the room. (Exhibit 8).

An Internal Affairs Investigation of the incident was conducted by Investigator Shawn Dodson. Dodson's initial report concluded that the use of force was spontaneous, in close quarters and was not excessive. This report was rejected and he was ordered to revise the report with a different conclusion, stating that "according to DOC General Counsel Mike Oakley, Lt. Day did not use the minimum amount of force necessary when he struck Offender Norris". (Exhibit 7, pg. 11). His report was submitted February 23, 2009.

On May 20, 2009, over four months after the incident, DOC provided Day with notice of the proposed disciplinary action (Exhibit 4). In the notice dated May 15, 2009, DOC proposed a ten (10) day suspension without pay. Day was given an opportunity to respond and on May 25, 2009, he filed a written response to the proposed discipline (Exhibit 5). In his response to the proposed discipline, Day noted he used force as a last resort and then only in order to defend himself. He stated the force was the minimum amount necessary to address the situation.

On June 5, 2009, DOC provided Day with final notice of discipline, imposing a five (5) day suspension without pay (Exhibit 6). In the notice, Warden Addison stated that Day violated the Rules Concerning the Individual Conduct of Employees and the Use of Force and Reportable Incidents policy. The notice also contained a reference that there were no prior disciplinary actions. Day timely filed an appeal of the adverse action with the Merit Protection Commission.

The testimony of five witnesses was provided. Investigator Shawn Dodson testified that he interviewed all persons involved. He stated that Offender Norris denied doing anything wrong, denied that Day told him to cuff up, denied that he was aggressive and also denied that he said anything threatening to Day. Dodson also testified that a "stare-down" was considered as disrespectful behavior. He also testified that there had been only one or two prior interactions between Day and Norris with Day ordering Norris to tuck in his shirt. Dodson stated that Norris admitted that he didn't like Day's attitude. Dodson testified that he interviewed Training Officer Nixon about the specific training Correctional Officers receive regarding the use of force. He reported that Nixon denied that a "punch" in the face was ever taught as a defensive mechanism unless the offender is "actively resisting" the officer. He stated that Nixon felt that calling for assistance, using a baton or pepper spray would have been more appropriate use of

force. Dodson also received information that "close quarters" may have necessitated Day's actions. Dodson testified that following his investigation, his initial conclusion was that there was no violation of DOC policy. He testified that his conclusions were rejected because of the DOC General Counsel's opinion. He said he was directed by his supervisor, Mr. Blevins, to change his report. Dodson's final report is contained in Exhibit 7.

Offender Frank Norris, Jr. testified that in January, 2009, he was incarcerated at Joseph Harp Correctional Center. He said that he was not doing anything in the chow hall, but Day approached him and told him to go to the Captain's Office. He stated that once they entered the office, Day began to make accusations about him and Norris responded "that's a lie". Then without provocation, Day struck him once in the face. He said that Day hit him with a straight jab resulting in Norris receiving a bloody nose and a fat lip. Norris denied that he has had more than 10 misconducts, but admits to having two previous assaults on staff. The evidence indicates that Norris has had over 30 misconduct incidents while incarcerated. (Exhibit 12). He said that he had no misconducts at Joseph Harp before this incident and had none since. He stated that he has been transferred to Lexington. Norris admitted that he didn't like Day.

Todd Lillard, a Training Officer with DOC, testified that he was the primary self-defense trainer for correctional officers. Lillard has an extensive background as a training officer, including his long list of credentials and training. He stated that the term "softening" was no longer used. He said it was replaced with "diversionary" techniques. He testified that he was not familiar with the specifics of the incident between Day and Norris. He stated that "punching" was not specifically taught at the academy due to the risk of injury, but that it might be an appropriate use of force depending on the situation. Lillard testified regarding the CLEET model and the handout on self-defense. (Exhibits 14 and 15). He stated that pain compliance is not always effective and the officer must use his or her own assessment in determining the appropriate level of force to use to address the specific situation. Lillard said that there was no way to form an opinion on the most effective use of force in this situation, because of the diversity of offenders and officers and the split second judgment required. He said that DOC teaches that the use of force is a "last resort". On cross-examination, Lillard admitted that a hit to the face could be an appropriate "softening" or "diversionary" technique and would not be a violation of policy in his opinion. He stated that a fist strike may be perfectly acceptable and in compliance with a correctional officer's training, especially when the inmate is in an aggressive

T-stance, with clenched fists, and in close quarters. Lillard stated that according to the CLEET model, officers don't have to wait until they are attacked before they take defensive actions. He stated that it is a misperception that a "show of force" is required prior to a use of force. He said that the DOC policy is to use the least amount of force necessary, and to call for help, or use other means, if possible. However, in close quarters, Day's actions were appropriate.

Warden Mike Addison testified that he has been employed at DOC for 32 years, and has been the warden at Joseph Harp for the last 7 years. He said he essentially oversees everything at the facility. He testified that Day was a very good employee and that he had promoted Day to Lieutenant. He stated that the incident of January 7 was reported to him through the chain of command. He stated that he made the decision to discipline Day based upon the Internal Affairs Report. He said that it was very difficult to make an appropriate judgment without being in the officer's shoes. He admitted that he had given the officers at his facility the discretion to counsel offenders one-on-one, privately, but in retrospect that had been a poor decision. Now, the direction is to have another officer present during the counseling. He said that his decision to impose a suspension without pay was based in part on the IA report that the inmate did not make aggressive moves and that Day should have used other methods prior to striking the inmate. He said he was not aware of any other similar incidents or imposition of similar discipline but assumed that the legal department reviewed that aspect. He stated that it was his understanding that this action was used to set an example and because of the potential liability. He concluded that the seriousness of the incident necessitated the higher level of discipline when there had been no prior discipline. He also admitted that Day often received "exceeds standard" on his performance evaluations. (Exhibit 10).

Lieutenant Corey Day testified that, in addition to his Correctional Officer training, he had received a CLEET certification. He has been a DOC employee for 9 ½ years. He stated that "hard-staring" was an intimidation, non-verbal tactic often used by offenders and is considered to be highly disrespectful. He made the decision to counsel Norris about this type of inappropriate behavior in an effort to prevent similar behavior toward his subordinate officers. Day stated that he didn't confront Norris in the chow hall to avoid escalating the behavior. He said that inmates often act out in front of the others, and that one-on-one was more effective in counseling. Day said that he waited in the back of the room for Norris and escorted him to the Captain's office without incident. He said that his previous encounters with Norris were non-confrontational and

that he had no idea of the threat until they entered the office and the door closed behind them. He said that the entire incident lasted only about 15 seconds once they entered the room. Day stated that he had to make a split second decision, based on the situation. He said that Norris' behavior was aggressive and that he did not have time to call for help, to grab his baton or his pepper spray. He said he reacted in the manner that he did because of the close quarters of the office and the immediate risk of harm to himself. Day testified that he deals with threats on a daily basis and has never felt at risk of personal harm before. This was the first and only time he has had to strike an offender. He said that it was the cumulative effect of the close quarters, Norris' stance, his clenched fists, his yelling and his rapid breathing that caused him to use this level of force with Norris. Day stated that he felt the need to protect himself and used only one fist strike to bring Norris into compliance to have cuffs placed on him. Day stated that his action was consistent with his training, was not excessive and was the least amount of force necessary. He denied violating any DOC policy regarding this incident and testified that his actions were reasonable and appropriate under these circumstances. Day stated that as a result of this incident, he would never again counsel offenders without additional staff present.

ISSUES

1. Was there just cause for DOC to impose discipline in this matter?
2. If so, was the discipline imposed just and appropriate under the circumstances?

DISCUSSION

Day was disciplined for violating two DOC policies - OP-110215 – Rules Concerning the Individual Conduct of Employees and OP-050108 - Use of Force and Reportable Incidents. The first violation is the allegation that Day “disregarded the welfare of others” and failed to “conduct work in a manner which contributes to and supports a safe and healthful work environment”; and further that he “failed to comply with department policies”. The second violation is that he used excessive force.

First, the violations of OP-110215 are simply not supported by the evidence. To state that a correctional officer, under immediate threat of personal harm, “disregarded the welfare” of

the offender by using force to subdue him is absurd. Equally absurd is the allegation that that he failed to "conduct work in a manner which contributes to and supports a safe and healthful work environment". According to all of the testimony, Day is an exemplary officer and employee with an untarnished work record. He is well-trained and has been promoted to a supervisory capacity by the Department. There was no evidence that indicated that his actions were the result of anything except an attempt to protect himself. He may have used "poor judgment" in counseling an offender alone, however, there was clearly a practice of doing this at the facility; a practice authorized by the warden. Day was not aware of Norris' previous history of assaulting staff when he made the decision to counsel Norris alone. He had not had any previous incidents with Norris to cause him alarm or concern. Day was simply attempting to counsel the offender to avoid the escalation of the disrespectful conduct.

The DOC policy OP-050108 on use of force clearly states that "*there is no rigid hierarchy or specific sequences of the levels of force requiring one level to be used before another or any type of force equipment to be used before another is used*". The level is dictated by the "assessed risk presented". Force is used as a last resort and should be limited to the minimum degree "reasonable and necessary to resolve the situation promptly and as safely as possible". The policy continues to state that "*when possible*", a show of force will be used prior to use of force. The policy further states that a "show of force" will not be made without sufficient staff and equipment. Under the evidence presented in this hearing, such a "show of force" was not possible given the close quarters and the immediate risk of harm to Day. Day was forced to make a split-second assessment of the risk and he performed a defensive technique which effectively brought the offender under control with minimal bodily harm. DOC's argument that he should have used a show of force, called for help or used his baton or pepper spray first is not mandated by the DOC Policy. Furthermore, DOC failed to show that using a baton was a lesser form of force, or that using pepper spray would have been appropriate in a small closed office. The "expert" training officer was unable to state that Day's actions were a violation of policy or that they were inappropriate given the circumstances.

Of particular concern is the interference of the Department with the impartiality and fairness of the Internal Affairs Investigation. The Investigator was forced to change his report to support a conclusion made by others, without regard to the facts. E-mails and notes support that this decision was made based upon incorrect or faulty information. (Exhibits 29 and 30). The

Department offered no reasonable explanation for this. DOC's closing argument was simply that "hitting inmates is not acceptable". DOC policy fails to support this argument however, and DOC has failed to meet its burden of proof that Day violated the stated policies of the Department when he engaged in a spontaneous use of force to protect himself. In this matter, one fist strike to subdue the offender was not excessive given Norris' aggressive stance, clenched fists and yelling. There is insufficient evidence that Day could have reasonably used a lesser amount of force.

DOC failed to provide any evidence of the consistency of action taken with respect to similar conduct by other employees of the agency. The Department also offered no explanation for failing to follow its Progressive Discipline Policy. Day has had no other informal or formal disciplinary actions and has received "Exceeds Standards" ratings on his PMP evaluations. DOC's only response was that this single incident was serious enough to justify this level of discipline. DOC has not met its burden to prove by a preponderance of the evidence that there was just cause to impose the discipline, however it is also clear that this disciplinary action was not consistent with its progressive disciplinary procedure.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Merit Rule 455:10-9-2 states that the Appellee DOC has the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the adverse action and that the discipline imposed is just.
4. Merit Rule 455:10-11-15 states that a permanent classified employee may be suspended without pay for any of the reasons set forth in 455:10-11-14, which are misconduct, insubordination, inefficiency, habitual drunkenness, inability to perform the duties of the position in which employed, willful violation of the Oklahoma Personnel Act or the Merit Rules, conduct unbecoming a public employee, conviction of a crime involving moral turpitude or any other just cause.

5. DOC failed to present sufficient evidence to support its decision that Day engaged in misconduct by violating DOC OP-110215 – Rules Concerning the Individual Conduct of Employees and OP-050108 Use of Force and Reportable Incidents. DOC has failed to meet its burden to prove, by a preponderance of the evidence that just cause exists to discipline Day for failing to comply with the above referenced DOC policies.

6. DOC has failed to meet its burden to prove, by a preponderance of the evidence, that it followed the DOC Progressive Disciplinary Procedure.

7. Because there was not just cause to discipline Day, it is not necessary to determine whether the discipline imposed was just under the circumstances considering the seriousness of the conduct as it relates to the employee's duties and responsibilities; the consistency of action taken with respect to similar conduct by other employees of the agency, the previous employment and disciplinary records of the employee and other mitigating circumstances.

8. Merit Rule 455:10-9-2(f)(1)(B) provides that “upon a finding that just cause did not exist for the adverse action”, the presiding official, in this case, the administrative law judge, may order the reinstatement with back pay and other benefits and may also order that documentation of the adverse action be expunged from any and all of the employee’s personnel records.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Corey Day, MPC 09-219 be SUSTAINED. The discipline imposed upon Appellant is rescinded. Appellant’s back pay and benefits are to be paid for the period of suspension without pay. Appellant’s personnel records are to be expunged of all references to this disciplinary action.

This Order entered this 30th day of November, 2009.



Lydia Lee
Administrative Law Judge