

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

KEVIN PAIM,
Appellant

v.

Case No.: D1-12-254

**DEPARTMENT OF
CORRECTION,**
Respondent

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. The Appellant submitted written objections on February 21, 2014 and the Respondent submitted a response to those objections on March 11, 2014.

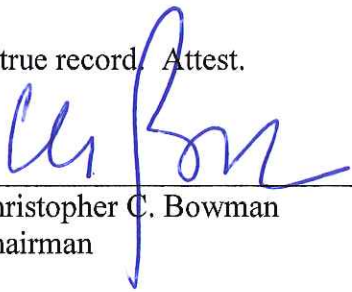
After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole¹, thus making this the Final Decision of the Commission.

The decision of the Department of Correction to terminate Mr. Paim from his position as a Correction Officer is affirmed and the Mr. Paim's appeal under Docket No. D1-12-254 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on March 6, 2014.

¹ While it does not change the final outcome of this appeal, a clarification is warranted regarding the Magistrate's conclusion on Page 10 which states in relevant part, "Officer Paim had previously been disciplined five times. Although some of that discipline may appear relevant, when defending its decisions, an appointing authority may rely only on the 'specified reasons' when it took an action" citing Murray v. Justices of Second Dist. Court, 389 Mass. 508, 516 (1983). While the Commission concurs that an Appointing Authority must show, by a preponderance of the evidence, that the stated allegations of misconduct occurred, nothing in Murray stands for the proposition that the Commission cannot consider an Appellant's prior disciplinary history in determining whether the penalty imposed was appropriate. Here, having determined that the misconduct occurred, it is indeed appropriate to examine the Appellant's lengthy disciplinary history, cited in the findings, to determine whether the ultimate penalty of termination was appropriate. While the misconduct here, standing alone, justifies termination, we have also examined the Appellant's prior disciplinary history which only reaffirms the justification for termination.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:

Bradford Louison, Esq. (for Appellant)

Heidi Handler, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Kevin Paim,

Appellant

v.

Docket No. D1-12-254

DALA No. CS-12-666

Department of Correction,

Respondent

Appearance for Appellant:

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Administrative Magistrate:

James Rooney, Esq.

Summary of Recommended Decision

The Department of Correction has shown just cause to terminate a correction officer for spontaneous use of excessive force against an inmate in the inmate's cell. The decision to terminate the officer is consistent with the Department's general policy on the inappropriate use of force by correction officers; the officer has not shown that he is being treated disparately.

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CIVIL SERVICE COMMISSION

RECOMMENDED DECISION

Introduction

Under the provisions of M.G.L. c. 31, § 43, Correction Officer Kevin Paim appeals the decision of the Department of Correction to terminate him for violating the Department's rules and policies barring use of excessive force or force as punishment against an inmate and disciplining an inmate in a private area. In this decision, I conclude that the Department has shown that Officer Paim violated Department rules and policies on the use force and has reasonably justified its decision to terminate him.

I held a hearing at the Division of Administrative Law Appeals on December 14, 2012, conducted under the Standard Rules of Adjudication, 801 CMR 1.01. No party filed written notice to make the hearing public, and thus I declared it to be private. I recorded the hearing digitally. I admitted nine exhibits into evidence at the hearing. Eight exhibits were submitted by the Department; the ninth, submitted by Officer Paim, comprised four disciplinary letters involving other officers.¹ Both parties submitted post-hearing briefs. I left the record open for the Department to submit other relevant instances of discipline for similar acts. I now mark the discipline letters the Department submitted as Exhibit 10 and Officer Paim's appeal as Exhibit 11.

The Department offered testimony by Sergeant Dennis Butler, who conducted an investigation of the incident. Officer Paim testified on his own behalf.

¹ The Department objected to admission of two of these disciplinary letters because they involve settlements whose terms preclude their use in other proceedings. I have reviewed these disciplinary letters, which are dated December 21, 2009 and January 22, 2010. Only one, the discipline letter of December 21, 2009, appears to involve a settlement. A limit on its future use is not stated in the document provided to me. Assuming such a limit exists, I conclude this presents an insufficient basis to preclude Officer Paim from arguing that the discipline imposed on him is unwarranted, given the less harsh discipline imposed on another officer for actions he claims are similar.

FINDINGS OF FACT

Based on the testimony and evidence presented and reasonable inferences drawn from them, I make the following findings of fact:

1. Kevin Paim was hired by the Department of Correction as a Correction Officer on September 17, 1995. He was a 17-year Department veteran and tenured civil service employee at the time of his termination. (Ex. 8.)
2. Officer Paim's disciplinary record consists of:
 - a. a letter of reprimand on February 15, 2000, for a verbal confrontation with a fellow officer in front of inmates. (Ex. 8.)
 - b. a one-day suspension on November 30, 2001, for an off-duty, road rage incident in which Officer Paim drew his firearm and then failed to report the incident to the Department. (Ex. 8.)
 - c. a twenty-day suspension on March 30, 2006, later reduced to five days, for forcing a female correction officer "into a wall preventing her from leaving the area and engaged in a verbal altercation calling her a 'rat' and directed other inappropriate comments to her." (Ex. 8.)
 - d. a twenty-day suspension on March 29, 2007 for consulting with an inmate about blueprints for his construction business. The disciplinary letter included a "final warning that any further rule violations may result in your termination from employment with the Department of Correction." (Ex. 8.)
 - e. a two-day suspension on October 31, 2008 for making racist comments to a fellow officer at the Old Colony facility and failing to report court appearances he had in 2003, when

he was charged with fraudulent use of electricity, and in 2006, when he was charged with assault. (Ex. 8.)²

3. On February 28, 2012, Officer Paim was working the 3:00-11:00 p.m. shift as a correction officer assigned to the Multipurpose Unit in the Old Colony Correctional Center in Bridgewater, Massachusetts. The Multipurpose Unit is a two-tiered unit housing inmates

² Officer Paim offered an explanation of his disciplinary record. Because the Department's decision to terminate him was not based on his disciplinary record, I have limited the findings of fact to a recitation of his disciplinary history. I nonetheless note for the Commission Officer Paim's explanation, as follows:

Regarding the verbal confrontation in 2000, Officer Paim stated that he was working in a unit setting out trays to feed approximately 180 inmates, that another officer refused to help when Officer Paim asked him to, and Officer Paim told him they would settle it later in the parking lot. (Paim testimony.)

Regarding the road rage incident in 2001, Officer Paim asserted that on the night in question he had been assigned to pick up another officer at MCI Bridgewater and then proceed to an assignment at the Tobin Bridge. He had not been to MCI Bridgewater before and was driving slowly along a curvy road. A truck driver behind him became impatient; he tried braking a few times to warn the driver not to get too close and eventually allowed the truck to pass. The driver, however, had become so angry that he proceeded to block the road with his truck, get out, and approach Officer Paim's car holding a billy club. Officer Paim, who was in uniform, pulled his service revolver to warn the driver to back off. The driver did, and Officer Paim proceeded to MCI Bridgewater, where he picked up the other officer, but did not tell anyone at the facility what had happened on the road. (Paim testimony.)

Regarding his confrontation with a female correction officer in 2006, Officer Paim testified that he had had a previous run-in with this officer and that on this occasion they exchanged harsh words when they both were beginning a shift and picking up equipment. The officer brought criminal assault charges against him, but he was acquitted after a bench trial. He denied bumping his chest into the female officer, but acknowledged that he knew from this that chest bumping could lead to discipline. (Paim testimony.)

Regarding the blueprint-related discipline in 2007, Officer Paim acknowledged that he brought construction plans into the minimum security facility at MCI Plymouth. He was reviewing them at his desk when an inmate walked by and mentioned that his family builds roads. Officer Paim then asked the inmate what he thought it would cost to build a subdivision road. (Paim testimony.)

Regarding the discipline in 2008 for making racist comments, Officer Paim explained that he was having a conversation with two officers, one white and one black, and was recounting his experiences in Georgia and the attitude the people he came across had toward black people. He denied making racially derogatory remarks toward the black officer or any black inmate. (Paim testimony.)

awaiting trial. Officer Paim was assigned to monitor the unit along with another officer, with a sergeant supervising them. (Paim and Butler testimony.)

4. Prior to February 28, 2012, Officer Paim, other officers, and nursing staff in the unit had experienced problems with Inmate A, who had previously been placed in segregation for some of these incidents. (Paim testimony.)
5. Inmates at Old Colony must wear a shirt when they are walking to and from the shower. Officer Paim was told by a lieutenant to strictly enforce this rule. When Officer Paim enforced this rule with Inmate A, the inmate would argue and denigrate Officer Paim about his height. The inmate, however, typically complied. (Paim testimony.)
6. At approximately 8:45 P.M., the Multipurpose Unit inmates, including Inmate A, were allowed out of their cells. They were free to walk about the unit, watch television, use the common shower facilities on the upper tier, and socialize in the common area on the lower tier. Officer Paim was the only officer present on the unit at that time. Inmate A left his cell on the lower tier and walked toward the upper tier shower without a shirt on. (Paim testimony; Exhibit 3(e) (5) – videotape.)
7. Officer Paim approached Inmate A and told him to put a shirt on. Inmate A responded by insulting Officer Paim about his height saying, “You’re just mad because I’m six foot three and you’re five foot nothing.” (Paim and Butler testimony; Exhibit 3(d)(1).)
8. Following this exchange, Inmate A left the upper tier shower area, descended to the lower tier, and walked towards his cell. Officer Paim followed the inmate to his cell on the lower tier at the end of a corridor, exchanging verbal taunts as they walked. (Exhibit 4; Paim and Butler testimony.)

9. After the inmate entered his cell, Officer Paim began to walk back towards the common area. Halfway down the tier, he stopped, raised both hands in the air and turned back towards Inmate A's cell once more. (Exhibit 3(e) (5) - video; Paim testimony.) He decided to return to Inmate A's cell because Inmate A "just wouldn't let it go." He knew he could have locked Inmate A in his cell and stopped arguing, but he did not. (Paim testimony.)
10. Instead, Officer Paim entered Inmate A's cell and the two men exchanged further insults. (Paim testimony.) When Officer Paim first entered the cell, Inmate A was facing a sink with his back toward the officer. The inmate then turned around, putting the men chest-to-chest. Officer Paim was standing still; Inmate A bumped into his chest. At that point, both men started throwing punches. Officer Paim did not think, at the time, that either man had landed a blow. (Paim testimony.)
11. Officer Paim was in Inmate A's cell for about two to three minutes. (Butler testimony). Once they stopped trying to punch each other, Officer Paim and Inmate A spoke outside the cell. They agreed that neither would report the incident to the Department. Paim told the inmate he would not report it because no one was hurt. He also thought that had he reported it, the incident might have negatively affected any sentence the inmate would later receive. (Paim testimony.)
12. Officer Paim saw the inmate the next day. He did not recall seeing any particular injury then, just a minor red mark under Inmate A's eye. (Paim testimony.)
13. On the same day, Officer Patricia Keaney noticed that Inmate A had a black eye. Officers interviewed all the inmates in the Multipurpose Unit. Two confidential informants told investigators that there had been an altercation between Officer Paim and Inmate A the previous day. (Butler testimony; Exhibit 3(c)(5).)

14. Sgt. Butler then interviewed Officer Paim about the incident. He admitted to the fighting with Inmate A. (Butler and Paim testimony; Exhibit 3(e)(4).)³
15. On July 11, 2012 the Department charged Officer Paim with violating General Policy 1, Rule 1, Rule 8(a), Rule 10(a), and Rule 12(a), the Department's Inmate Management Policy (103 DOC 400), and the Department's Use of Force Regulation (103 CMR § 505) for his confrontation with Inmate A. (Ex. 2.)
16. The Department conducted a hearing on the alleged violations on July 24, 2012. Hearing officer Kieran Sullivan found that Officer Paim had "entered Inmate [A]'s cell alone for the purpose of addressing Inmate [A]'s attitude and behavior" and had "used excessive force/ or used force as punishment against Inmate [A]" including "striking Inmate [A] with closed fist punches." Hearing Officer Sullivan concluded that the charges were sustained and noted that:
- CO Paim was extremely forthright and honest in his interview with Sgt. Butler and admitted he could and should have walked away from the inmate. No force was necessary to subdue an inmate with whom he had, to that point, engaged in an exchange of words. The inappropriate verbal exchange got the best of CO Paim which led him to enter the inmate's cell and use unnecessary force on the inmate.
- (Ex. 4.)
17. On August 29, 2012, Department Commissioner Luis S. Spencer terminated Officer Paim as a correction officer for violating Department policies and rules by entering Inmate A's cell "alone for the purpose of addressing his attitude and behavior," using "excessive force and/or used force as punishment," and striking Inmate A with closed fist punches. (Ex. 1.)
18. Officer Paim timely appealed. (Ex. 11.)

³ Inmate A, when interviewed, denied fighting with Officer Paim and instead claimed that his black eye was the result of fall in the shower. (Ex. 3(b)(1).) In light of Officer Paim's testimony, I do not credit the inmate's statement.

DISCUSSION

I conclude that the Department of Correction had just cause to terminate Officer Paim for use of excessive force or force as punishment against an inmate. The evidence shows that Officer Paim used excessive force or used force as punishment against an inmate and that the decision to terminate him was consistent with the Department's past practice.

A. Legal Standard

A tenured civil service employee may not be discharged except for "just cause." *See* M.G.L. c. 31, § 41; *School Committee of Brockton v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, 622 (1997). A disciplinary action, including termination, is justified if the employee has "been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." *Murray v. Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514, 451 N.E.2d 408, 412 (1983).

The role of the Civil Service Commission is to determine whether the appointing authority has proven by a preponderance of the evidence that there was a "reasonable justification" for the action it took. *City of Cambridge v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 300, 304, 682 N.E.2d 923, 925 (1997). Reasonable justification means that the appointing authority's actions were based on "adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." 43 Mass. App. Ct. at 304, 682 N.E.2d at 926, quoting *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482, 160 N.E. 427 (1928). An appointing authority must prove that discipline is justified by a preponderance of the evidence. *School Comm. of Brockton v. Civil Serv. Comm'n.*, 43 Mass. App. Ct. 486, 488, 684 N.E.2d 620, 622 (1997).

The Civil Service Commission may modify discipline imposed by an appointing authority, but in deciding whether to do so it must be mindful that the issue it must resolve is “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” *Watertown v. Arria*, 16 Mass.App.Ct. 331, 334, 451 N.E.2d 443, 445 (1983). When analyzing whether reasonable justification exists or discipline should be modified:

the commission must focus on the fundamental purposes of the civil service system—to guard against political considerations, favoritism, and bias in governmental employment decisions.... When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.

Town of Falmouth v Civil Serv. Comm’n, 61 Mass. App. Ct. 796, 800, 814 N.E.2d 735, 739, quoting *City of Cambridge*, 43 Mass.App.Ct. at 304, 682 N.E.2d at 926. Even if the Commission finds some facts different from those found by the appointing authority, if “the charges for which discipline had been imposed were still satisfied by the remainder of the inappropriate conduct” that the Commission found, then the Commission must affirm the discipline imposed. 61 Mass. App. Ct. at 802-803, 814 N.E.2d at 740.

B. Department Rules and Policies

The Department asserts that the termination of Officer Paim was warranted because he unjustifiably punched an inmate in the inmate’s cell, thereby violating Massachusetts Department of Correction General Policy I, Rule 1, Rule 8(a), Rule 10(a), Rule 12(a), the Department’s Inmate Management Policy, and the Department’s Use of Force Regulation. In the

termination letter, Department Commissioner Spencer did not mention Officer Paim's disciplinary history. Officer Paim had previously been disciplined five times. Although some of that discipline may appear relevant, when defending its decisions, an appointing authority may rely only on the "reasons specified" when it took an action. *Murray v. Justices of Second Dist. Court*, 389 Mass. 508, 516, 451 N.E.2d 408, 412 (1983). Consequently, I will not consider Officer Paim's disciplinary history when evaluating whether his termination was justified. I note that in the other instances the parties have cited to me in which the Department has terminated correction officers for improper use of force, it did not base its decision on the officer's discipline history.

Some of these rules and policies that Officer Paim is alleged to have violated establish the context in which correction officer must operate. General Policy I informs correction officers that they are under a "constant obligation to render good judgment," while Rule 1 requires them to "give dignity to their position." Rule 8(a) sets forth the general nature of the relationship between correction officers and inmates. It provides that:

Relations with inmates may be twofold, that of counselor and disciplinarian simultaneously, which will require your utmost tact and diplomacy. For those employees having job responsibilities which require inmate contact, your attitude toward inmates should be friendly not familiar, firm not harsh, vigilant not unduly suspicious, strict not unjust. Your leadership ability may be enhanced by the professional image you project.

The delicate balance that Rule 8(a) requires that correction officers maintain in the manner they interact with inmates is reinforced by Rule 12(a), which warns correction officers that they should "exercise constant vigilance and caution in the performance of their duties."

The Department recognizes that there may be occasions when correction officers must use force when dealing with inmates. Its rules and policies address when and how much force

may be used. Rule 10(a) states the Department's general approach to the use of force. It provides that:

Department of Correction regulations shall only permit an employee to use force against an inmate which is reasonable. Under no circumstances shall an employee use or permit the use of excessive force, or use of force as punishment.

The Department's Use of Force Regulation makes clear that the Department wants to know whenever force has been used. It requires that "[a]fter an employee uses force . . . the employee as soon as possible and in no event later than the end of the employee's tour of duty . . . shall submit a written report to the Superintendent or the Special Unit Director." 103 C.M.R. § 505.

Lastly, the Department's Inmate Management Policy forbids certain one-on-one interactions between correction officers and inmates. It provides, in pertinent part that:

The superintendent shall also ensure that communication between staff and inmates remain courteous and professional. During the normal performance of one's duties, it is acknowledged that staff has reason to interact with inmates on a one to one basis. However, the practice of staff bringing an inmate to a private area, e.g. isolated room, office, etc., for the purpose of an "attitude adjustment," also known as a "counseling session" is strictly forbidden. The department will not tolerate this type of unprofessional behavior from any employee and will pursue disciplinary action against any staff person who engaged in such conduct.

103 DOC 400.

C. Evidence of Violations

The issue here is whether the evidence establishes facts that show the Officer Paim violated these rules and policies, and if so, whether termination was reasonably justified.

Many of the facts are not in dispute. The surveillance video showing Officer Paim following Inmate A to his cell corroborates the officer's own testimony that he entered the cell to address Inmate A's on-going disrespectful behavior toward the officer. Officer Paim was aware that entering the inmate's cell to discipline him was against Department policy. After Office

Paim entered Inmate A's cell, he threw punches at the inmate with a closed fist and hit him at least once causing a black eye. At no point during either the Department's internal investigation or the hearing before the Division of Administrative Law Appeals did Officer Paim assert that he struck Inmate A in self-defense. He made the decision to enter the cell when, instead, he could have locked the inmate in his cell and walked away. Furthermore, following this use of force, Office Paim failed to report the incident, as he was required to do.

There is also little dispute that Officer Paim violated the Department's rules and policies. By entering Inmate A's cell and fighting with him, he did not use good judgment (General Policy I), give dignity to his position as a correction officer (Rule 1), act with "tact and diplomacy," be "firm not harsh" (Rule 8(a)), or "exercise constant vigilance and caution in the performance of [his] duties" (Rule 12(a)). By failing to report the fight, he violated 103 C.M.R. § 505, the Department's Use of Force Regulation, which requires a prompt report of the use of force, whether or not anyone is injured or there might be negative consequences to the inmate or the correction officer if the existence of the use of force became known.

Officer Paim's use of force can hardly be described as reasonable. He had an obligation to attempt to address the disrespectful behavior that Inmate A exhibited toward him. But even he does not contend that hitting the inmate was a reasonable way to handle the situation. When the inmate refused to let up on his verbal abuse he could have locked the inmate in his cell, walked away, and taken other reasonable steps later on to address the inmate's behavior. That the inmate bumped the officer in the chest was no reason to throw punches at the inmate. Officer's Paim use of force was thus, almost by definition, excessive. He therefore violated Rule 10(a) on the use of force.

Whether Officer Paim violated the Department's Inmate Management Policy is a closer call. This policy bans "the practice of staff bringing an inmate to a private area, e.g., isolated room, office, etc., for the purpose of an 'attitude adjustment,' also known as a 'counseling session.'" Officer Paim fought Inmate A in the inmate's cell, which is an isolated area, but he did not bring the inmate to his cell for that purpose. Rather, he followed the inmate as the inmate returned to his cell and then, after briefly walking away, he returned to confront the inmate about his disrespectful behavior. There is no evidence that he intended to hit Inmate A when he entered the inmate's cell, but, whatever he thought would happen, he appears to have intended to continue to berate the inmate until he stopped his verbal abuse of the officer. As written, the Department's policy against attitude adjustment in a secluded place applies whether an officer intended to physically punish an inmate or verbally harangue him. Thus, I conclude that Officer Paim violated this policy when he entered the inmate's cell alone for purposes of trying to correct the inmate's behavior.

D. Termination Decision and Disparate Treatment Allegation

Having determined that Officer Paim violated the rules and policies of the Department of Correction, I examine next whether its decision to terminate him was based on a neutrally applied public policy or was, instead, biased or showed that Officer Paim was disparately treated.

I note at the outset that the Department's rules and policies make clear that it will not tolerate use of excessive force by correction officers, *see* Rule 10(a), and that it requires all use of force by such officers to be immediately reported, *see* 103 C.M.R. § 505. If an officer brings an inmate into a secluded area for an "attitude adjustment," the Department's Inmate Management Policy states explicitly that the officer will be subject to discipline, but does not say that the officer will necessarily be terminated. In sum, what these rules and policies show is that

the Department wants to monitor carefully use force by correction officers, and that serious disciplinary consequences may follow if an officer violates the Department's rules and policies on the use of force.

How serious those consequences are likely to be can be seen by examining other instances in which the Department has disciplined officers for violating its rules and policies on the use of force. The Department has cited seven cases in which officers have been terminated over their use of force. Officer Paim has cited four instances in which officers were disciplined for incidents in which force was used, but were not terminated.⁴

In order to demonstrate that its decision to terminate Officer Paim was based on a neutrally applied policy, the Department need not show that it always terminated an officer found to have used excessive force or to have imposed physical punishment in a secluded location. Instead, it must show a generally consistent approach under similar circumstances.

The number of times the Department has terminated officers for use of excessive force shows the Department's general approach, but some of the termination letters submitted do not provide enough detail to determine to what extent they reflect circumstances similar or dissimilar to those involving Officer Paim. See *Matter of JH* (July 19, 2010) (officer terminated for bringing inmate to private area to address his attitude, using excessive force, and filing a false incident report), *Matter of PP* (Apr. 5, 2004) (officer terminated for use of force that resulted in injury to inmate, filing an incomplete written report, and making contradictory statements to the Department's investigator), *Matter of SC* (Oct. 9, 2002) (officer terminated after he entering an inmate's cell without authorization, the inmate was found injured, and the officer falsely denied

⁴ Two of the prior instances of discipline cited by Officer Paim are not instructive or analogous for they involved discipline of officers who failed to report excessive use of force against an inmate, but were not charged with use of excessive force themselves. See *Matter of Officer X* (Aug. 4, 2009) and *Matter of Officer Y* (Jan. 22, 2010).

entering the inmate's cell), and *Matter of RP* (Aug. 23, 2002) (shift commander terminated for using excessive force on an inmate and for instructing subordinate employees to file false reports about his actions). There is some suggestion of deliberate action by the officers in these cases – the charge in *Matter of SC*, for example, was that the officer assaulted the inmate. In each instance, the officers were untruthful about their actions or compelled others to be untruthful, which is not true of Officer Paim.

Some of the instances cited by the Department involve cases in which it is clear that the officers deliberately took an inmate into a private area in order to punish him physically. In one instance, a sergeant and a lieutenant were terminated for punching and walking on an inmate prone to violence who was handcuffed and on the floor of a holding cell. *McGuinness v. Dep't of Correction*, 21 MCSR 247 (June 13, 2008). In another instance, two officers were ultimately terminated for beating up an addict who had been committed to a treatment program after the addict had taken a cup of coffee belonging to one of the officers. *Dep't. of Correction v. Mass. Correction Officers Fed. Union*, No. 06-1741-D, Memorandum and Order on Motion for Summary Judgment, 23 Mass. L. Rptr. 160 (Suffolk Super. Ct., Jul. 31, 2007) (Superior Court vacated an arbitrator's award that had reduced the discipline imposed on one of the officers).

These cases show a consistent practice by the Department to terminate officers who deliberately use force to punish an inmate in a secluded area. They do not necessarily shed much light on the Department's approach when the use of force in a private area is spontaneous, as it was here. The Department did cite one case in which an officer who spontaneously assaulted an inmate and subsequently filed a false report about his actions was terminated. *Matter of RR* (Dec. 7, 2007). The termination letter does not spell out the circumstances surrounding the assault, but it does note that the officer appeared to have had a prior conflict with the inmate

whom he assaulted. It thus establishes, at least, that the Department has previously terminated a correction officer who spontaneously assaulted an inmate.

However, in another instance the Department did not terminate an officer who spontaneously assaulted an inmate. In this instance, an inmate who was being escorted down a corridor began making comments about a correction officer's son who had been killed in Iraq. The inmate refused an order to cease his comments and attempted to pull away. The escorting officers brought him to the floor, and one of them punched him in the back of the head and upper body while attempting to restrain him. The officer, who had himself served in Iraq and was being treated for post-traumatic stress syndrome, acknowledged his action to the Department's investigator and conceded that he had violated regulations. The Department determined that he had used excessive force and force as punishment and suspended him for twenty days, which was later reduced to a ten day suspension. *Matter of D. Sousa* (Oct. 30, 2007).

Officer Sousa's case has some features that distinguish it from Officer Paim's and Officer RR's. The blows were struck in a public, not a private area, and Officer Sousa was justified in using some level of force to restrain a disruptive inmate who was trying to pull away. It is not clear whether the Department considered the nature of the inmate's comments about the death of another officer's son in Iraq to be a mitigating factor, but in the present case there is no suggestion, even by Officer's Paim, that his use of force is mitigated because he might have been responding to Inmate A's taunts about his height or to a chest bump that Inmate A delivered.

In two other instances, officers were not terminated for excessive use of force. One of these involved a 3-2 decision by the Civil Service Commission to vacate the Department's termination of an officer for twice punching an inmate who had been placed in restraints and was refusing to allow a strip search. *Gariepy v Department of Correction*, 20 MCSR 16 (Jan. 12,

2007). The underlying decision to terminate the officer is consistent with the Department's contention that it generally terminates officers who have used excessive force or have used force as punishment. One of the reasons the Commission majority decided to vacate this determination was that the Superintendent who made the decision was himself later accused of using excessive force – for ordering the use of a chemical spray on an unresisting inmate as part of an effort to quell a possible prison uprising – but was demoted, not fired. The Department attributed the disparity in treatment to the Superintendent's willingness to acknowledge his error. The majority found this unconvincing because the Department had not stated in its letter terminating Officer Gariepy that the decision had been based in part on any untruthfulness on his part. 20 MCSR at 21. The minority, as well, viewed the Department's treatment of the Superintendent as hard to square with its general approach of punishing instances of excessive use of force harshly, but would have concluded that the Superintendent's willingness to accept responsibility distinguished his case, and that, in any event, there was no showing of bias. *Id.* at 22. The Department's decision in the instance of the Superintendent may be difficult to explain, but for present purposes it does not shed much light on what to do here. The Superintendent, unlike Officer Paim, had some justification for using force in order to prevent a prison uprising, but he chose unwisely the person on whom to use it.

The final instance involved an unnamed officer who was charged with being “involved in an altercation” with an inmate, using excessive force or force as punishment, filing false incident and disciplinary reports, and being “less than truthful” when interviewed by a Department investigator. The officer was not terminated. Rather, prior to a disciplinary hearing, the parties settled and agreed that the officer would be suspended for 60 days and made subject to a last chance agreement. *Matter of Officer Z* (Dec. 21, 2009). Because the parties settled prior to a

hearing means that no finding was made that the officer had committed the acts alleged. The specific reasons for the settlement are not in the record. Absent a finding or a stipulation that the officer had committed the acts alleged, the settlement allowing him to remain a correction officer is not proof of disparate treatment.

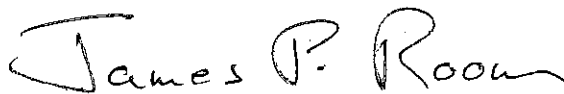
The Department's prior disciplinary actions show that, generally, the Department terminates correction officer who have used excessive force on inmates, used force as punishment, or assaulted inmates in a private location, and that the Department takes the wrongful use of force so seriously that its termination decisions are based on that conduct alone, not on any consideration of the officer's disciplinary record. While many of the instances cited by the Department appear to concern deliberate inappropriate use of force, there is evidence that the Department takes the same dim view of spontaneous use of excessive force or force as punishment, particularly if this occurs in a private area. While in one instance it did not terminate an officer who struck an inmate in a public area, *see Matter of D. Sousa*, this does not help Officer Paim, who struck Inmate A in the inmate's cell. Thus, there is strong evidence supporting the Department's contention that the decision to terminate Officer Paim is consistent with its general approach to discipline of officers who have used excessive force. In addition, there is insufficient evidence that this termination decision is so inconsistent with past instances of discipline imposed by the Department for spontaneous use of excessive force in a private area that it shows that Officer Paim is being treated disparately.

The facts as I have found them do not differ to any marked degree from those determined by the Department. Officer Paim entered Inmate A's cell to attempt to get him to stop his verbal harangue. He had no evident intention to use force when he entered the cell, but he spontaneously fought with the inmate after the inmate bumped into his chest. He did not think at

the time that he had hurt the inmate, but he knew they had fought and he decided not to report the fight. When subsequently interviewed, he acknowledged his actions and that his decision to enter the inmate's cell and his use of force were inconsistent with Department policy. Some of these facts are favorable to Officer Paim: his lack of intention to use inappropriate force and his forthcoming response when interviewed. Some facts cut against him: entering an inmate's cell to resolve a heated exchange, subsequently fighting without justification, and failing to report the fight. The Department has made a policy judgment that the facts that weigh against Officer Paim warrant his termination. There is no evidence that the Department's decision was influenced by any bias against Officer Paim.

It was the Department's role to make this policy call. The Department had sufficient facts to establish reasonable justification for its decision. I therefore recommend that the Department of Correction's decision to terminate Officer Paim be affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS



James P. Rooney
First Administrative Magistrate

Dated:

FEB - 7 2014