

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Samuel J. Rymarowicz,	:	
Petitioner	:	
	:	
v.	:	No. 482 C.D. 2013
	:	Submitted: November 12, 2013
State Civil Service Commission	:	
(State Correctional Institution at	:	
Pittsburgh, Department of	:	
Corrections),	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge (P)
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
JUDGE LEADBETTER**

FILED: February 11, 2014

Samuel J. Rymarowicz (Petitioner) petitions this court for review of the order of the State Civil Service Commission (Commission) which dismissed Petitioner’s appeal from his removal for just cause pursuant to Section 807 of the Civil Service Act.¹ After review, we affirm.

Petitioner, a Corrections Officer 3 (CO3) at State Correctional Institution at Pittsburgh (SCI-Pittsburgh), was the commissioned officer in charge

¹ Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§ 741.1-741.1005. Section 807 provides that, “No regular employe in the classified service shall be removed except for just cause.” 71 P.S. § 741.807.

of the Secure Special Needs Unit (SSNU) at SCI-Pittsburgh on March 20, 2012, when he was involved in an incident with inmate David Merritt (Merritt). The SSNU is designed for inmates with serious mental health issues whose misconduct often warrants restricted custody time. Merritt, who had been housed in this unit for approximately one month, had been removed from his cell on that date so that he could be questioned by Psychological Services Specialist (PSS) Daniel McGivern regarding a complaint he had made. Merritt was taken to the property room and placed in a therapeutic metal cage, also known as a strip cage, which was the size of a telephone booth. Because Merritt was not strip searched before he was moved from his cell to the cage and he was wearing unauthorized boots, PSS McGivern and Petitioner entered the property room to ask Merritt to submit to the search and relinquish his boots before they addressed his complaint. The property room had three cages, two to the left side of the room and one, housing Merritt, on the right. The room also contained a table and chairs located in the space between the cages, metal filing cabinets, a trash can, an open box, and papers on the floor next to Merritt's cage. Activity in the room was recorded and could be viewed by a CO in the control bubble, who had a direct view into the room through a plexiglass window.

Over the next fifteen minutes, both PSS McGivern and Petitioner were in the room talking with Merritt. After Merritt refused all requests to relinquish his boots, Petitioner exited the room and was told by his Shift Commander to assemble a seven-man extraction team for Merritt. Despite the fact that Merritt had a medical restriction preventing the use of oleo resin capsicum

spray² (OC or pepper spray) to incapacitate him due to his asthma, Petitioner requested that he be allowed to contact Medical to have the restriction lifted, which request was denied.³ After being left alone in the property room, Merritt became increasingly agitated, and proceeded to yell, spit and repeatedly kick the cage. After he removed his shirt to retrieve some paper on the floor which he discarded after spitting on it, he urinated onto the floor outside the cage. Merritt then continued to kick at the bottom of the cage until it was bent outwards and he was able to crawl out of the opening. The video then shows that Merritt walked over to the door, turned around and then sat down in a chair behind the table. Merritt did not attempt to escape the property room.

Although told that Merritt was becoming highly agitated and kicking the cage, Petitioner made no attempt to assess the situation himself nor did he speak with the corrections officer in the control bubble who was observing Merritt. Upon being informed that Merritt was out of the cage, Petitioner alerted all available personnel to help with the extraction. Sergeant Gary Sepelyak and COs Ronald Limmer and Jeffrey Edwards entered the property room and CO Limmer pushed the table away from Merritt while Edwards and Sepelyak pulled Merritt out of the chair and put him on the floor. Sepelyak restrained Merritt's arms and CO Matthew Burford entered the room to restrain Merritt's legs. Petitioner, who had entered with Burford, then kicked Merritt four times in the middle of his body. PSS McGivern entered the room and kicked Merritt in the leg, after which

² Oleo resin capsicum spray is an oil-based chemical derived from cayenne pepper which when used on an inmate inflames the inmate's respiratory and mucous membranes and disorients him. Commission's Adjudication, Findings of Fact No. 28, at 10.

³ Petitioner had made a similar request approximately two weeks earlier, which request was also denied. *Id.*, Finding of Fact No. 29.

Petitioner kicked Merritt in his torso for the fifth time. At this point, Merritt was now on his stomach, handcuffed behind his back and held down by the COs, although he continued to spit towards the COs. After several moments, Petitioner kicked Merritt for a final time in the face. Merritt was then strip searched and eventually removed from the property room, where he was medically assessed by nurses and then subsequently taken to the hospital for treatment of injuries to his thumb, face, back, chest and nose.

An initial review of the incident by the Department of Corrections (DOC) resulted in the immediate suspension of Petitioner, pending further investigation by the Office of Special Investigations and Intelligence (OSII). OSII determined that the kicks delivered by Petitioner to Inmate Merritt were unwarranted and the matter was scheduled for a pre-disciplinary conference (PDC). The PDC panel found the charges against Petitioner to be substantiated and, by letter dated May 11, 2012, Petitioner was notified of his removal for violating Sections B1 and B2 of the DOC's Code of Ethics by "delivering several kicks to an inmate during an unplanned use of force" on March 20, 2012. Commission Exhibit C, Certified Record (C.R.) Volume 1. Thereafter, the Commission determined that the DOC, as the appointing authority, established that Petitioner engaged in excessive force against Inmate Merritt and that those charges were sufficient to constitute just cause for Petitioner's removal. This appeal followed.

Petitioner raises two issues on appeal: first, whether the Commission's findings regarding the use of excessive force as defined in the applicable DOC rules and policies are supported by substantial evidence; and, second, assuming

arguendo that he used excessive force, whether DOC should have imposed a suspension rather than removing him from his position.

The appointing authority has the burden of going forward with the evidence to establish a *prima facie* case justifying its removal of an employee for just cause under Section 807 of the Act. *Mufson v. Dep't of Pub. Welfare, Philadelphia State Hosp.*, 456 A.2d 736 (Pa. Cmwlth. 1983). Although not defined in the Act, “just cause” for dismissal of a regular civil service employee must be related to the employee’s job performance and touch in some rational and logical manner upon the employee’s competency and ability. *Dep't of Corr. v. State Civ. Serv. Comm'n (Clapper)*, 842 A.2d 526, 531 n.8 (Pa. Cmwlth. 2004); *Harper v. Dep't of Pub. Welfare, Phila. Cnty. Assistance Office*, 553 A.2d 521, 524 (Pa. Cmwlth. 1989). The Commission is the sole fact finder in civil service cases and has exclusive authority to assess witness credibility and resolve evidentiary conflicts. *Pennsylvania Bd. of Prob. & Parole v. State Civil Serv. Comm'n (Manson)*, 4 A.3d 1106, 1113 (Pa. Cmwlth. 2010). Finally, whether the employee’s actions constitute just cause for his removal is a question of law subject to plenary review by this court. *Id.* at 1112.

The DOC’s Code of Ethics (Code) B1 provides that:

Each employee in the correctional system is expected to subscribe to the principle that something positive can be done for each inmate. The principle is to be applied without exception. This involves an intelligent, humane, and impartial treatment of inmates. Profanity directed to inmates, or vengeful, brutal, or discriminatory treatment of inmates will not be tolerated. Corporal punishment shall not be used under any circumstances.

See Commission Exhibit D, C.R. B2 of the Code states that “[o]nly the minimum amount of force necessary to defend oneself or others, to prevent escape, to prevent

serious injury or damage to property . . . will be used. Excessive force, violence or intimidation will not be tolerated” *Id.* Petitioner acknowledged receiving a copy of the Code and that he agreed to abide by the terms of the Code. R.R. at 354a. Under DC-ADM 201 entitled “Use of Force,” “[u]se of force against an inmate is authorized when the acting staff member reasonably believes such force is necessary to accomplish any of the following objectives” *e.g.*, protection of self or others; protection of property from damage or destruction; or prevention of escape. When force is used, the policy requires that only “the least amount of force the staff member reasonably believes is necessary to achieve the authorized purpose is to be used and the use of force will stop once control is achieved.” *See* DC-ADM 201, Use of Force Policy, R.R. at 355a-356a. In addition, as a supervisor, Petitioner was also bound by specific Commissioned Officer Use of Force guidelines, as set forth in the Commissioned Officer Use of Force Pocket Guide, which provides:

The Commissioned Officer in charge of the use of force shall refrain from becoming physically involved in the incident unless it is necessary to protect staff or inmates.

The Commissioned Officer shall:

- Be in a position that allows unobstructed visibility.
- Provide clear and concise orders to the inmate and team members.
- Observe and direct the application of the force needed to gain compliance.

Certified Record (C.R.) Item 1, Exhibit AP-2.

Major Lee Estock, a DOC witness, explained that the level of force utilized is determined by the inmate’s actions and resistance at the time of the incident, and only when the inmate’s resistance escalates is the officer justified in

using a higher level of force to achieve the objective. Hearing of August 21, 2012, Notes of Testimony (N.T.) at 194. Major Estock further testified that once the inmate is restrained and the situation is under control, the use of force stops, and the officers “deescalate.” *Id.* at 195. Additionally, Major Estock testified that Petitioner’s role was supervisory, and reiterated the rule quoted above that “the commissioned officer in charge of the use of force shall refrain from becoming physically involved in an incident unless it is necessary to protect staff or inmates.” *Id.* at 201. Major Estock testified that Petitioner was to position himself “where [he could] observe the entire incident” but that “[g]enerally you have to let the officers do their part.” *Id.* at 198, 202. Describing this incident, Major Estock testified that Petitioner’s use of force was inappropriate because at that point in time where Petitioner intervened, it did not appear that inmate Merritt had a weapon, he was seated with “an unobstructed path” to the door, had not barricaded himself behind the table, and it appeared that “[Merritt] was done at that point.” *Id.* at 225. Even before the officers made physical contact with Merritt, “[t]here was no verbal commands to” Merritt and only after contact was made was he ordered to stop resisting. *Id.* Major Estock testified that, in addition to the immediate effect on the inmate, when an officer violates the use of force policies, it affects not only the inmate, but has the potential for escalating the occurrence of violent assaults by inmates on staff. Major Estock testified that it also affects morale and provides tacit approval “that that’s okay in a correctional setting when it’s not.” *Id.* at 230. With respect to the final kick delivered by Petitioner to Merritt’s face, Major Estock testified that there was no reasonable explanation for it, and that if Petitioner had enough time to position himself “to line up for that kick” then he could have just as easily ordered CO Edwards to secure Merritt’s

head. *Id.* at 228. Finally, both Major Estock and Anya Evans, a Human Resource Field Officer, testified that in the meeting immediately following the incident held with Petitioner, Deputy Zaken and Superintendent Myers, Petitioner apologized and stated that he “lost [his] cool” and that he “knew he had messed up.” *Id.* at 140, 204.

The video evidence and the credited testimony of the DOC’s witnesses sufficiently established that during an unplanned use of force, Petitioner kicked Merritt “four times as the COs were getting him under control and once after he was handcuffed and held down.” Commission’s Adjudication at 22. Furthermore, as the Commission concluded, although kicking inmate Merritt did not by itself violate Sections B1 and B2 of the Code of Ethics, in this instance, Petitioner’s kicks were brutal and went beyond the minimum amount of force necessary to achieve any of the goals listed by Section B2. Sufficient evidence supports the Commission’s determination that Petitioner used excessive force in violation of DOC’s Code of Ethics and thus his removal was for just cause.⁴

Finally, Petitioner’s argument that the DOC did not impose a suspension consistent with its own progressive discipline policies and that his removal was inconsistent with the discipline received by others lacks merit. Petitioner cites three cases involving the use of force against an inmate by an employee in the same CO3 position as he was, and yet each employee received only a five or ten-day suspension, rather than removal. *Daniel L. Meck v. State Correctional Institution at Forest, Dep’t of Corrections*, Appeal No. 25976, issued April 1, 2009; *Kenneth W. Fuchs v. State Correctional Institution at Pittsburgh*,

⁴ *Pennsylvania Bd. of Probation & Parole v. State Civil Service Commission (Manson)*, 4 A.3d 1106, 1113 (Pa. Cmwlth. 2011).

Dep't of Corrections, Appeal No. 18698, issued June 25, 1997; and *Robert R. Holmes v. State Correctional Institution at Pittsburgh, Dep't of Corrections*, Appeal No. 18615, issued February 23, 1996. Petitioner's behavior was more, not less, egregious than the behavior of the CO3s in *Meck*, *Fuchs*, and *Holmes*; Petitioner's behavior was brutal, and, unlike the employees in those cases, Petitioner refused to acknowledge his wrongdoing. As Major Estock credibly testified, Petitioner's actions and his failure to admit wrongdoing warranted removal because Petitioner "doesn't think he's wrong . . . His thinking is not in line with our policy." N.T. at 235. We have held that violations of the DOC's Code of Ethics which "constitute a dereliction of duty in a matter of critical public concern and reflect upon [one's] ability to perform his duties as a Corrections Officer" are sufficient to establish just cause for removal, as required by Section 807 of the Act. *Dep't of Corrections v. Roche*, 654 A.2d 64, 69 (Pa. Cmwlth. 1995).

Accordingly, for all of the foregoing reasons, we affirm the order of the Commission.

BONNIE BRIGANCE LEADBETTER,
Judge

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	:	
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ORDER

AND NOW, this 11th day of February, 2014, the order of the State Civil Service Commission, dated March 1, 2013, is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge