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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
EMPLOYEE, <sup>1</sup>	)	OEA Matter No. 1601-0020-21
	)	
v.	)	Date of Issuance: March 4, 2022
	)	
D.C. DEPARTMENT OF CORRECTIONS,	)	JOSEPH E. LIM, ESQ.
<u>Agency</u>	)	Senior Administrative Judge
Daniel M. Thaler, Esq., Agency Representative		
Dana S. Bushrod, Employee Representative		

**INITIAL DECISION**

**PROCEDURAL HISTORY**

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on March 29, 2021, challenging the D.C. Department of Corrections (“Agency” or “DOC”) decision to suspend him from his position as a Corporal for thirty (30) days. Employee’s suspension was based on Negligence, excessive use of force, and other violations of Agency policies. Following OEA’s April 22, 2021, Request for Agency’s Response, Agency filed its Answer on May 20, 2021. This matter was assigned to the undersigned Senior Administrative Judge (“SAJ”) on August 5, 2021. A Prehearing Conference was held on September 21, 2021, and an Evidentiary Hearing was held virtually on November 5, 2021. The record is now closed.

**JURISDICTION**

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

**ISSUES**

1. Whether Agency had cause to take adverse action against Employee; and

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<sup>1</sup> Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

2. If so, whether the penalty of a thirty-day suspension was appropriate under the circumstances.

### UNDISPUTED FACTS

On September 17, 2019, Agency served Employee, a Sanitation Crew Chief, an Advance Written Notice of Proposed Thirty (30) Day Suspension based on the following causes:

Violation of DCMR 6-B-1607.2 (d)(1) and (2), which states, "Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions." "Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions."

Your conduct also violated the following DOC policies and procedures:

- Violation of DC DOC Policy and Procedure 3300.IF, Section 2(a), which states, "It is DOC policy to require that employees, contractors and volunteers: Perform their duties in an ethical and accountable manner by maintaining high standards of honesty, integrity, impartiality, and professional conduct."
- Violation of DC DOC Policy and Procedure 3300.IF, Section 11(a), which states, "No employee shall exhibit conduct that would adversely affect his/her job duties or the efficiency of the agency's operation ... "
- Violation of DC DOC Policy and Procedure 5011.3 Section 2 (b.1a, b, c, and d) which states, "Each application of force must meet an objective and subjective standard. 1) In order to meet the objective standard, the level of force used must be reasonable based upon the totality of the circumstances, to include: a) the seriousness of the incident or inmates' actions, b) the level of threat or resistance, c) the immediacy or imminence of danger, d) the amount of force used is reasonably necessary to achieve compliance."
- Violation of DC DOC Policy and Procedure 5011.3 Section 2 (b.2b) which states, "Tactical applications: In cases where Department personnel must take action to conduct lawful duties where there is not necessarily an immediate physical threat, staff members shall take into account and communicate (where applicable) tactical considerations predicated on preventing the use of force whenever possible. For planned tactical operations, such as tactical cell extractions, and prolonged passive resistance, staff shall develop a tactical plan predicated on preventing the use of force whenever possible. Inmate mental health status shall be considered in the development of the plan. A supervisor shall be present during planned tactical operations."
- Violation of DC DOC Policy and Procedure 5011.3 Section 12 which states, "The determination to use force and how much force to use will be made on a case by case basis after taking into account the totality of the circumstances at the time. The

amount of force utilized must be the reasonable amount of force necessary to control or regain control of the situation."

- Violation of DC DOC Policy and Procedure 5011.3 Section 16 (f.5) which states, "The use of Chemical or Inflammatory Agents is prohibited in the following situations: 5) As a method to coerce an inmate into obeying verbal commands in the absence of a threat of imminent harm."
- Violation of DC DOC Policy and Procedure 5011.3 Section 25 which states, "Staff may immediately use force when the behavior constitutes an immediate, serious threat to the resident, staff, others, property, or to the orderly operation of the facility."

Agency alleges that on August 31, 2020, Employee was negligent in complying with its rules, regulations and written procedures or supervisory instructions when he assaulted Resident Kurt Hewitt with improper and excessive deployment of a chemical agent in violation of DOC policy.

The Advance Notice states: "On Monday, August 31, 2020, at approximately 12:20 p.m., you and Private Adjetey Djahlin were on the lower left tier of the Northwest Two Housing Unit (NW2), of the Central Detention Facility escorting Resident Hewitt to his assigned cell. While escorting Resident Hewitt, you and Private Djahlin instructed him to return to his assigned cell. Resident Hewitt refused to comply with the instructions provided by you and Private Djahlin to return to his assigned cell. In your interview with the Office of Investigative Services (OIS), you indicated that the resident "took his time" as he returned to the area of his cell assignment. Video surveillance footage revealed that the resident was walking towards the area of his assigned cell, however, upon arriving to the lower left tier, refused to enter the cell. Video surveillance reveals that as you and Resident Hewitt were near his assigned cell, you sprayed him with five bursts of a chemical agent. During your interview with OIS, you claimed that, prior to the deployment of chemical agent, Resident Hewitt had turned to face you with clinched fists, nevertheless, the video surveillance does not corroborate your claims. The surveillance footage revealed that Resident Hewitt had his hands down to his sides with unclenched fists prior to your deployment of the chemical agent. In addition, it appeared that you closed the distance gap and tapped Resident Hewitt on the right shoulder two times prior to the initial deployment of chemical agent. Resident Hewitt did not assume an aggressive posture until *after* you deployed the fourth burst of chemical agent. You deployed approximately five bursts of chemical agent upon Resident Hewitt, which directly contradicts your DCDC-1 submission as well as your oral interview within the OIS. Your unauthorized and excessive use of a chemical agent on a resident violated Program Statement 5011.3, Use of Force. In addition, your failure to report the truth in your DCDC-1 and oral interview violates DC DOC Policy and Procedure 3300.1F, Section 2(a). Furthermore, your negligent and deliberate failure to comply with DOC rules, regulations, written procedures, or proper supervisory instructions establishes cause to suspend you for 30 days from your position as Correctional Officer with DOC."

## SUMMARY OF TESTIMONIAL AND DOCUMENTARY EVIDENCE

On November 5, 2021, a virtual Evidentiary Hearing was held via WebEx.<sup>2</sup> The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as “Tr.”) which was generated following the conclusion of the proceeding. Both Agency and Employee presented documentary and testimonial evidence during the hearing to support their positions.

### Adjetej Djahlin (“Djahlin”) Tr. pages 10-23.

Djahlin serves as a corporal with Agency. On August 31, 2020, Djahlin submitted a DCDC-1 Form to report an incident that involved him, Inmate Kurt Hewitt (“Hewitt”) and Employee in the Northwest 2 Housing Unit of the Central Detention Facility. Djahlin and Employee had instructed Hewitt to return to his prison cell after leaving the infirmary. When Hewitt failed to comply, Djahlin went to the control module to have the officer working there contact their supervisor. Once Djahlin returned to the holding cell, he no longer saw Hewitt. Employee told Djahlin that he used Oleoresin Capsicum (“OC”) spray on Hewitt because Hewitt struck Employee with his fist. While Djahlin did not witness the altercation, he was not surprised that the incident occurred due to the nature of their work. Djahlin testified that there are many assaults on staff by inmates in the Northwest 2 unit. There were typically three (3) to four (4) officers who worked in the unit. On the day of the incident, three (3) officers were on duty.

Djahlin testified that he had used OC spray in the past to stop a fight and save a life in an incident involving two inmates. He said that he had never used OC spray in a one-on-one scenario with an inmate. He stated that had he been in Employee’s position, he would have contacted a supervisor. Furthermore, if his life was not in imminent threat, he would not have used the chemical agent.

### Kevin Hammond (“Hammond”) Tr. pages 24-104.

Hammond currently serves as the Chief of the Office of Investigative Services (“OIS”) for Agency. Prior to this position, he was a 28-year police officer veteran in Chesapeake, Virginia. Hammond testified that most of his career was in investigations and management. He explained that an administrative investigation could be self-initiated based on an incident that may have occurred within its office or from other sources i.e. receiving a call from a citizen. Hammond was the lead investigator in the incident that involved Employee. His OIS Report<sup>3</sup> contained interview statements, surveillance video footage, photos, the incident notification, DC-1s and DC-2s. Hammond explained that DC-1s were individual fields reported by witnesses to an incident. DC-2 is an overall summary and collection of packages when there is an incident that has been originated in Operations.

Hammond narrated the surveillance footage and described what was captured in the video. He explained that two officers, Employee and Djahlin, followed Hewitt to his assigned cell.

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<sup>2</sup> WebEx is a software program that enables participants to engage in a hearing or meeting remotely via an electronic device.

<sup>3</sup> Agency’s Exhibit 4.

Instead of returning to his cell, Hewitt plugged in an industrial floor fan and walked towards the stairwell that led up to the control module. The control module controls the access to all of the cell doors, the main door, and the door to the sally port.

According to Hammond, the officers were trying to convince Hewitt to return to his cell. Employee remained with Hewitt while Djahlin walked up the staircase towards the control module. The video showed that Employee tapped Hewitt twice on his shoulder. The second time that Employee tapped Hewitt's shoulder, he disbursed the OC spray on Hewitt. That action prompted Hewitt to turn away from Employee.

Based on the surveillance video,<sup>4</sup> Hammond opined that Hewitt did not appear to be a threat or make any aggressive gestures towards Employee. After viewing the video surveillance time stamps, Hammond testified that approximately three (3) seconds later, Employee deployed another burst of OC spray at Hewitt. He stated that Hewitt's body was still turned away from Employee. Employee then deployed a third burst of OC spray. Approximately forty seconds later, Employee disbursed a fourth burst of OC spray on Hewitt. Subsequently, a fifth disbursement of OC spray was deployed and then Hewitt quickly entered his assigned cell. Employee signaled the control module to close the cell door. Once the cell door was closed, Employee had his right arm extended with the OC canister in his hand. While Employee did not disburse the chemical agent, he pointed the OC spray in the food slot of Hewitt's cell door before he walked away back towards the control module.

According to Hammond, Agency's Exhibit 4, Policy and Procedure, section (f) provides that "the use of chemical or inflammatory agents is prohibited in the following situations..." He stated that Employee violated Agency's policies by improperly deploying the OC spray. Agency's use of force policy outlines when a chemical agent can be deployed. Hammond distinguished between a spontaneous use of force from a planned use of force. He explained that a spontaneous use of force is almost instantaneous, describing it as a self-defense mechanism. However, when an incident is not spontaneous, it would be considered a planned use of force. This type of force requires an officer to contact the lieutenant or his own supervisor. The supervisor or lieutenant would then determine the next steps. Planning the use of force is important because in this incident, Hewitt was passive-aggressive because he refused to enter the cell. However, there was no indication that Hewitt's intent was to harm Employee. Hammond further explained that the mere presence of an inmate in the housing unit did not constitute a threat, it is the inmate's actions that would determine if the threat was imminent or if the inmate failed to obey instructions.

Hammond stated that according to the DCDC-1 incident report submitted, Employee instructed Hewitt to report to his cell. Hewitt retorted that he was not going back to his cell and then clenched both fists. On the report, Employee wrote that he felt threatened. Again, Employee instructed Hewitt to return to his cell; however, Hewitt remained where he was and because Employee felt threatened, he deployed one burst of the OC spray at Hewitt. Hammond also testified that Employee's summary of the incident said that Hewitt swung his fist, striking Employee on the right shoulder. Subsequently, Employee deployed an additional burst of the OC spray, which led Hewitt to run into his cell.

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<sup>4</sup> Agency Exhibit 6.

Hammond opined that the events that Employee provided on the DCDC-1 report and oral report partially aligned with what was depicted on the video surveillance. He explained that he viewed five deployments of OC spray viewed on the surveillance video compared to the two deployments that were written in Employee's report. Additionally, Hammond did not view Hewitt behaving aggressive towards Employee as provided in the report. In the oral interview, Employee attested to deploying no more than two (2) sprays of OC. However, Hammond reiterated that he counted five (5) disbursements based on the video footage. Additionally, Hewitt did not appear to threaten Employee, nor did Hammond see Hewitt's fists balled up until Employee disbursed the fourth OC spray on Hewitt. When Hewitt swung closed fist at Employee, Employee deployed a fifth disbursement of the chemical agent. Hammond did not see that Hewitt turned his back to Employee after the initial deployment of OC spray, nor did he see Hewitt reach for the right side of his waistband or shirt pocket. Agency found that Employee lied about the number of times he used his chemical spray.

Hammond opined that if an inmate refused to enter their cell, the employee should immediately notify the lieutenant on duty via radio for them to assess if a tactical response unit should be contacted. The tactical response unit would negotiate with the inmate to have them return to their cell. If negotiations were unsuccessful and the inmate refused to enter, a determination would be made on which type of force, (chemical agent, physical or hand techniques) if needed, should be used.

Wanda Patten ("Patten") Tr. pages 106-117

Patten serves as the Deputy Director of Operations with Agency. Prior to this position, she worked as Chief of Investigative Services as a Supervisory Criminal Investigator. In this role, she conducted administrative investigations. Patten stated that she investigated Employee. Per her review of the video surveillance, she saw Employee and Djahlin speaking with Hewitt. It appeared to her that Hewitt was reluctant to follow directions given by Employee and Djahlin. Subsequently, Employee disbursed chemical agent approximately four or five times on Hewitt. Because she did not see Hewitt threaten Employee, she believed Employee's actions violated Agency's policy and procedure.

Patten explained that once Hewitt refused to return to his cell, Employee should have contacted a supervisor and allowed the supervisor to take responsibility of getting Hewitt to return to his cell or planning to possible use force if necessary. She opined that if Employee felt that he was under attack from Hewitt, he should have not turned his back. Once Employee turned around, he advanced towards Hewitt, tapped Hewitt on the shoulder, and then disbursed the OC spray.

Employee Tr. pages 118-162

Correction Officer Employee worked as a Medical Transportation Officer with Agency. As a corporal for twenty-one of his thirty years with Agency, he typically took inmates to clinics, hospitals, and doctor's appointments. On the date in question, Employee was assigned to work in the Northwest 2 unit. Employee was aware that the inmates of that unit were known to be aggressive and that the inmates were known to assault officers.

Employee recalled that on August 31, 2020, Hewitt returned to the Northwest 2 Unit from a medical check-up. Hewitt went to another cell that he was not housed in and refused to enter his own personal cell. Employee instructed Hewitt to return, but Hewitt did not comply. Hewitt told Employee that he was not going to his cell and there was nothing Employee could do. Because of Hewitt's stance and position, Employee believed that Hewitt was going to strike him. Ultimately, Hewitt struck Employee which led Employee to deploy the OC spray on Hewitt. Once the situation escalated, Employee felt threatened and disbursed another spray of the chemical agent. Hewitt turned away from Employee and Employee could not tell if Hewitt was reaching for a weapon. Employee stated that he could not grab his radio because he is right-handed. He explained that inmates have shirt pockets and sometimes cut holes to put weapons inside their pants or waistband.

Employee explained that when an inmate leaves their cell, the officers would use a metal detector and frisk inmates for possible weapons and contraband. However, because inmates are free to roam the jail, it was possible for inmates to pick up weapons from inmates in other units, or other detail. Inmates receive a walking movement pass when an officer signs out the inmate to their appropriate destination and the inmate receives the pass back to return to their unit. When an inmate had a movement pass, they were not supervised to and from their destination.

The last in-person training Employee received was prior to COVID-19. During this training, he was instructed on the use of chemical agents. Its use was to prevent harm to an officer or inmate. Employee testified that he only recalled disbursing the chemical agent two times, which was why he reported that number on the DCDC-1 form. He admitted that his interpretation of the threat was subjective. Employee stated that the video only depicted the lower left tier where the incident occurred. The surveillance footage did not show what occurred on the upper right tier. He explained that if Hewitt visited inmates, an officer would not know if Hewitt received a weapon.

Employee testified that Djahlin went to the command module inside the unit to have an officer contact their supervisor. While Djahlin was in the module, Employee ordered Hewitt to return to his cell, but Hewitt refused. He stated that Hewitt was combative and clenched his fists. He then had his left hand on a rail, and it appeared to Employee that he was going to try and jump through the rail. Employee stepped back to prevent Hewitt from jumping through the rail. Once Hewitt turned his back to Employee, Employee stated that it appeared he was reaching for something in his arm. Because Employee felt threatened, he believed he was justified to spray Hewitt. In fact, Hewitt struck Employee with his fist on his right shoulder, which justified disbursing any additional deployment of the chemical agent on Hewitt. Subsequently, Hewitt entered his cell and Employee signaled for the officer to close the cell. Employee stated that Hewitt was belligerent and made vulgar remarks towards him. Because Hewitt was yelling, it caused other inmates to yell, which was why Employee felt the threat was heightened.

Employee was unable to recall exactly how many disbursements of OC spray he used on Hewitt. However, he was adamant that he did not deploy a spray once Hewitt was inside his cell. Employee testified that he suffered a stroke a year-and-a-half ago. He also suffered from two minor heart attacks. Employee attributes his medication affected his memory.

According to Employee, the supervisor that Djahlin attempted to contact failed to show up at the time of the incident. However, he admitted that because the incident happened within ten (10) seconds, he could not reasonably expect a supervisor to come to the scene in that short time frame. Employee asserted that he did not spray Hewitt with the chemical agent while he was in his cell. He stated that he just stood at the cell door. Once Hewitt turned around in his cell, Employee walked away and contacted the command center of the jail and spoke to a supervisor to inform them of the incident.

## FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

### *Whether Agency's adverse action was taken for cause*

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

- (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Chapter 16, Section 1607.2 of the District Personnel Manual ("DPM") sets forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Employee's thirty (30) day suspension was based on:

Violation of DCMR 6-B-1607.2 (d)(1) and (2), which states, "Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions." "Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions."

Agency's notice of adverse action then goes on to list its written policies and procedures that it alleges Employee violated. At the heart of its allegations is the issue of whether Employee complied with Agency's rules on the use of force against an inmate. Correctional officers may use force against an inmate or inmates to prevent imminent harm or injury to themselves or others or to ensure Agency's smooth operation. However, the type and degree of force to be applied must be commensurate with the circumstances encountered, and in any event, the use of force must only be used as a last resort. The issue that this Office must determine is whether Employee's use of a chemical agent or OC spray against Inmate Hewitt was a reasonable use of force under the circumstances.



Due to the fact that the actions of both Employee and Inmate Hewitt were captured on surveillance video, there is no credible dispute as to their actions on August 31, 2020. I viewed the video and audio recording and I find the following actions occurred that day.

Around 12:21 p.m. on August 31, 2020, Correctional Officers Djahlin and Employee accompanied Hewitt back to the Northwest Two Housing Unit where Hewitt's jail cell was located. Both correctional officers ordered Hewitt to return to his cell, but Hewitt continually rebuffed their orders with curses. Employee taps Hewitt on the shoulder and again orders him to go to his cell, but Hewitt refuses. Exasperated, Djahlin turned and walked towards the Control Module to summon assistance from a zone supervisor. Employee again ordered Hewitt to return to his cell. When Hewitt failed to comply, he approaches Hewitt and taps his shoulder. Again, Hewitt refused. Employee sprays Hewitt with OC. Hewitt moves away from Employee. Employee follows Hewitt and sprays him with OC again. Hewitt raised his left arm in an effort to deflect the OC. Employee sprays Hewitt with OC two more times after which Hewitt assumes an aggressive posture and then punches Employee. Employee retaliates with another OC spray and loses his balance.

Hewitt turns and quickly retreats to his cell with Employee following him. As Hewitt enters his cell, Employee signals the Control Module to close and lock Hewitt's cell door. Employee then approaches the closed cell and points his OC spray towards Hewitt's open food slot. It appears that he sprays one more time before turning around and leaving.

Agency's investigative report<sup>5</sup> indicated that Djahlin said Hewitt cursed at them and refused their commands to return to his cell, but that Hewitt did not physically or verbally threaten them. When asked by an investigator why he sprayed OC on Hewitt, Employee replied that Hewitt took his time in complying with his orders. He did not mention any physical aggression or threat from Hewitt until later. The video showed that Hewitt clenched his fists and adopted an aggressive stance only after he had been sprayed four times with OC. Finally, the video revealed that even after Hewitt retreats to his cell, Employee uses his OC spray to aim at Hewitt while Hewitt was locked inside his cell.

Agency's policies and procedures as laid out in its notice of adverse action provide detailed guidance on when and what circumstances warrant using force towards an inmate. DC DOC Policy and Procedure 5011.3 Section 2 (b.1a, b, c, and d) states, "Each application of force must meet an *objective* and *subjective* standard. 1) In order to meet the *objective* standard, the level of force used must be *reasonable based upon the totality of the circumstances*, to include: a) the seriousness of the incident or inmates' actions, b) the level of threat or resistance, c) the immediacy or imminence of danger, d) the amount of force used is reasonably necessary to achieve compliance." (Emphasis added.)

DC DOC Policy and Procedure 5011.3 Section 2 (b.2b) states, "Tactical applications: *In cases where Department personnel must take action to conduct lawful duties where there is not necessarily an immediate physical threat, staff members shall take into account and communicate (where applicable) tactical considerations predicated on preventing the use of force whenever possible.* For planned tactical operations, such as tactical cell extractions, and prolonged passive resistance, *staff shall develop a tactical plan predicated on preventing the use of force whenever*

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<sup>5</sup> Agency Exhibit 4.

*possible. Inmate mental health status shall be considered in the development of the plan. A supervisor shall be present during planned tactical operations.*" (Emphasis added.)

DC DOC Policy and Procedure 5011.3 Section 12 states, "The determination to use force and how much force to use will be made on a case-by-case basis after taking into account the totality of the circumstances at the time. *The amount of force utilized must be the reasonable amount of force necessary to control or regain control of the situation.*" DC DOC Policy and Procedure 5011.3 Section 16 (f.5) which states, "The *use of Chemical or Inflammatory Agents is prohibited* in the following situations: 5) *As a method to coerce an inmate into obeying verbal commands in the absence of a threat of imminent harm.*" DC DOC Policy and Procedure 5011.3 Section 25 which states, "*Staff may immediately use force when the behavior constitutes an immediate, serious threat* to the resident, staff, others, property, or to the orderly operation of the facility." (Emphasis added.)

Agency's clear written policies reveal that its overarching goal is for its staff to use force only as a last resort, and that any such use of force must be reasonable under the circumstances. What is also clear is that in the absence of a threat of imminent harm, force should not be used, and any excessive use of force by correctional officers is prohibited.

Employee argues that he only used his OC spray because he felt an imminent threat of danger from Hewitt due to the inmate's alleged verbal threats as well as the physical attack that the inmate launched against him. What is telling is that when Employee was first asked by the investigator why he used an OC spray, Employee's first reply was that the inmate "took his time" and was being disobedient, not that the inmate physically threatened him.<sup>6</sup> It was only later that Employee stated that he felt threatened when he saw the inmate clenched his fist and then swing at him. However, the video clearly depicts that the inmate only became physically aggressive after Employee sprayed him with OC a couple of times.

Agency's policies clearly state that the application of force must meet not only a subjective standard but an objective one. While Employee may have subjectively felt a threat from the inmate, it is clear from their body language and actions on the video that Employee's contention does not meet an objective standard for what would constitute a credible, imminent threat. At no time before Employee used his OC spray did Hewitt display any action suggesting an imminent attack upon Employee. Faced with the same situation, Employee's fellow Officer Djalín chose the approved step of calling for a supervisor. Whereas in Employee's case, Employee immediately decided to use force when faced with an intransigent inmate instead of calling for a supervisor. Employee's use of force was not only unnecessary, but excessive. He sprayed the inmate several times when there was no attack upon him. Even after the inmate was securely locked inside his cell, Employee sprayed the inmate one last time through the food slot.

Based on a preponderance of the evidence presented, I therefore find that Employee displayed a deliberate refusal to comply with Agency's rules and written procedures regarding the use of force. Accordingly, I find that Employee was guilty of all charges and specifications leveled by Agency.

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<sup>6</sup> *Id.* at page 23.

***Whether the penalty of a thirty-day suspension was appropriate under the circumstances.***

As discussed above, all the charges were upheld. In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency.

Chapter 16 of the DPM and the D.C. Municipal Regulations ("DCMR") outlines the Table of Illustrative Actions ("TIA") for various causes of adverse actions taken against District government employees. The penalty for the first offense for DCMR § 6-B1607.2(d)(2) Failure/Refusal to Follow Instructions: Deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions ranges a 3-day suspension to removal. In short, even if Employee was guilty of only one of the charges or specifications, the allowable penalty for a first offense includes suspension.

Based on the foregoing, I do not find that Agency exceeded the limits of reasonableness with the penalty imposed against Employee. Accordingly, in light of the testimony and evidence presented, I find that Agency's penalty of a thirty (30) days suspension was appropriate for the sustained charges of safety and health violations, failure/refusal to follow instructions, and neglect of duty.

**ORDER**

Accordingly, it is hereby **ORDERED** that Agency's 30-day suspension of Employee is **UPHELD**.

FOR THE OFFICE:

s/Joseph Lim  
Joseph E. Lim, Esq.  
Senior Administration Judge