

Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Charles

OATH Index Nos. 2802/10 & 2803/10 (Oct. 7, 2010)

Both respondents charged with using excessive force against a hospital visitor, causing the visitor injury. In addition, both respondents were charged with improperly handcuffing the visitor and making false statements about the incident. One respondent is further charged with improperly supervising the other respondent and improperly displaying his expandable baton. Petitioner failed to establish the charges by a preponderance of the credible evidence. Dismissal of the charges recommended.

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

In the Matter of
**HEALTH AND HOSPITALS CORPORATION
(LINCOLN MEDICAL AND MENTAL HEALTH CENTER)**
Petitioner
-against-
MORRIS CHARLES AND CHRISTOPHER ROSS
Respondents

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

The Health and Hospitals Corporation brought this disciplinary proceeding pursuant to section 7:5 of its Personnel Rules and Regulations. Respondent Morris Charles, a special officer is charged with using unnecessary excessive physical force on a visitor to the hospital, causing injury to the visitor, improperly handcuffing the visitor, making false entries in his memo book, and making false statements on a Bronx Supreme Court affidavit. Christopher Ross, a senior special officer, is charged similarly with using unnecessary excessive physical force on a visitor to the hospital, causing injury to the visitor. In addition, respondent Ross is charged with removing his expandable baton and holding it in a combative stance, improperly supervising respondent Charles, and making false statements on a Crime and Incident Report.

This proceeding was originally scheduled for a one-day hearing on July 19, 2010, which was later expanded to two days. On July 21, 2010, the second day of hearing, a medical emergency precluded the completion of the hearing. The hearing was continued late in the afternoon the following day, July 22, 2010. Two unrelated sets of charges against respondent Ross were severed and rescheduled over petitioner's objection.

For the reasons provided below, I find that petitioner failed to establish the charges by a preponderance of the credible evidence and recommend that the charges be dismissed.

ANALYSIS

On January 18, 2010, at approximately 5:30 a.m., P.L., a visitor to the hospital, was asked to leave the premises after becoming disruptive and verbally abusive to the staff. He was subsequently handcuffed and arrested by respondents following a physical altercation near the emergency room entrance. The prelude to the physical altercation and its aftermath were captured on security video (Pet. Exs. 1, 2, 3). The actual altercation, however, occurred in a vestibule between the inner and outer doorways of the entrance to the emergency room ambulance bay, which was not under video surveillance.

Petitioner relied primarily on the video footage from three security cameras in the vicinity of the incident. The two interior cameras (Pet. Exs. 1, 2) show opposite views of the emergency/triage area and the exterior camera shows the ambulance bay (Pet. Ex. 3). The video provided a physical layout of the area in which the incident occurred. There is a security post at a podium near the emergency room entrance. The podium faces a double set of interior doors which leads to the ambulance bay. There is a 10- to 15-foot long vestibule between the interior doors and exterior doors of the ambulance bay, which is not under video surveillance. To the right of the security podium is another entrance to the emergency/triage area leading from the sidewalk. The podium itself is located at the opening of a corridor which leads to the emergency room, referred to as the "C corridor." The camera angles do not permit a view down this corridor. On the opposite side of the corridor, is an enclosed office for triage office personnel. This triage office has windows facing a small reception area. Below the windows is a ledge or small counter. Just past this reception area is the emergency/triage waiting room with a security post near its own entrance. Only a very small portion of the waiting room is visible on camera (Pet. Exs. 1, 2, 3; Tr. 40-42, 113).

A review of the video footage (Pet. Exs. 1, 2, 3) shows that at approximately 5:30 a.m., a male visitor walked out of the C corridor and proceeded towards the emergency/triage waiting room. He had a backpack slung over his shoulder and was carrying a second backpack, a winter coat, and a cane, which he was not using to assist him in walking. Shortly thereafter, respondent Charles walked out of the C corridor towards the waiting room and stood at the entrance, presumably speaking to the visitor who was off camera (5:30:49)¹. The visitor remained out of view for approximately a minute and a half before he walked past respondent Charles out of the waiting room. He stopped at the end of the row of windows by the triage office and dropped one of his bags on the floor below the ledge. Respondent Charles walked slightly past the visitor and leaned against the other end of the ledge to talk to someone in the office through the glass. The visitor remained to the right of respondent Charles and appeared to be speaking (5:31:45). Respondent Charles walked away from the window and proceeded down the C corridor toward the emergency room and out of view (5:32:48). Meanwhile, there was a moderate amount of foot traffic in the area; visitors, hospital employees, and Emergency Medical Technicians (EMTs) pushing gurneys from the ambulance bay down the C corridor towards the emergency room and out of view.

Less than a minute later, respondent Charles returned and was accompanied by Lieutenant Louis Figueroa and respondent Ross (5:33:15). All three men stood at the intersection between the C corridor, the reception area and the emergency room doors, observing the visitor who was leaning against the ledge and talking to someone in the office behind the window. Lieutenant Figueroa spoke to both respondents, who then approached the windows to speak to someone inside the offices (5:33:38). Respondent Ross walked away from the window and went around the corner out of view in the C corridor to presumably discuss the situation with one of the employees in the office (5:34:00). Less than a minute later, respondent Ross returned and spoke with the lieutenant (5:34:39). It appeared at this point as though Lieutenant Figueroa gave instructions to the respondents.

Respondent Charles put on purple latex gloves and respondent Ross put on black gloves before they approached the visitor and apparently asked him to leave the premises (5:34:56). The visitor bent down to pick up one of his bags and started walking towards the interior ambulance bay doors (5:35:04). Respondents began to escort the visitor towards the interior

¹ Times are taken from the security video footage and are reflected as hour:minute:second.

door leading to the ambulance bay by walking slightly behind him (5:35:10). The visitor had a backpack slung over each shoulder and was carrying his coat and a cane in his right hand. A few feet from the doorway, the visitor turned around and faced respondents as he was talking and walking backwards towards the door (5:35:12).

At approximately the same time, respondent Ross took his expandable baton known as an ASP out of its holder and was holding it in a closed, non-extended position in his right hand down near his leg. As they approached the interior doors to the ambulance bay, the visitor continued to talk while he walked backwards into the vestibule between the interior and exterior doors leading to the ambulance bay (5:35:13). Respondent Ross swung his right arm behind him to fully extend the ASP (5:35:16). During the time that the ASP was extended, there was one short moment when it was slightly in front of respondent Ross' leg, but otherwise he kept the ASP down and slightly behind his right leg (5:35:17-5:35:18). Respondents continued to walk with the visitor towards the exit while Lieutenant Figueroa looked on.

Once the visitor and respondents walked through the interior doors of the ambulance bay exit, they were no longer in sight of the cameras (5:35:19). Lieutenant Figueroa did not enter the vestibule during the altercation instead he remained near the interior door observing (5:35:20-5:35:30). Lieutenant Figueroa walked away from the door and returned closer to the podium (5:35:31).

Respondents and the visitor entered the vestibule and were out of sight of the cameras at 5:35:19. At 5:35:31, respondents and the visitor emerged from the vestibule into the ambulance bay. They were struggling on the sidewalk near the exit, in front of where the ambulances were parked. Unlike the interior cameras, the outside camera was time lapsed and progressed in irregular intervals. As a consequence the action is chopped up into segments. Moreover, the exterior video was very unclear and only shows the backs of people's heads. There were a number of people going in and out of the entrance and spectators were milling around nearby. It is difficult to tell exactly when Lieutenant Figueroa was actually on the scene in the ambulance bay from the exterior video, but the interior cameras show him inside for most of the struggle in the ambulance bay with him periodically checking on what was taking place outside.

The first scene from the outside camera showed that respondent Ross and the visitor were on the ground struggling just a few feet to the right of the exit, against the wall of the building while respondent Charles was crouched over the two trying to assist (5:35:31). Respondent Ross

continued to struggle with the visitor for a few seconds until respondent Charles joined in (5:35:50). The three of them were on the ground, while respondents tried to restrain the visitor. Another special officer, Officer Thomas, appeared on the scene to assist respondents in restraining the visitor. Respondent Ross moved slightly to the side and was crouched on the ground while respondent Charles handcuffed the visitor, who was laying face down on the sidewalk (5:35:53). Respondents rolled the visitor on to his side and then assisted him by lifting him off the ground into a standing position (5:36:03-5:36:14). The visitor was standing on the sidewalk, facing the wall with his hands cuffed behind him. He was up against the wall with respondents standing slightly behind him on either side (5:36:17). The ambulances were backed into the spaces approximately two feet behind the parties.

Meanwhile, Lieutenant Figueroa had returned inside at 5:36:06, after respondents had handcuffed the visitor and positioned him against the wall. At the time there was still a moderate amount of foot traffic walking back and forth from the ambulance bay to the C corridor, including hospital personnel, EMTs and visitors. Lieutenant Figueroa made a telephone call on his cell phone and remained on the phone while he paced in front of the podium for a few minutes before he walked towards the ambulance bay exit and out of sight of the cameras (5:36:36-5:38:18). He was still on the telephone when he walked out of sight.

Outside, the visitor continued to resist by pushing himself off of the wall and thrashing about. Respondents were struggling with the visitor trying to get him under control for approximately a minute (5:36:39-5:37:48) before he pushed himself off the wall so hard that he fell backwards and hit his head on one of the parked ambulances (5:37:56). The visitor ended up on the ground in front of the ambulance while respondents were crouched over him, possibly checking his head for an injury (5:38:09-5:38:14). Respondents repositioned the visitor and placed his head on his jacket. The remainder of his belongings were scattered around them on the sidewalk (5:38:25-5:38:44). Lieutenant Figueroa, who had come outside after the visitor bumped his head, returned inside and stood near the podium (5:39:02).

At approximately 5:39, respondent Charles walked back inside, leaving respondent Ross and Officer Thomas with the visitor. Respondent Charles proceeded up the C corridor. About a minute later, respondent Charles came out of the C corridor and walked back outside through the ambulance bay doors (5:40:04). When he returned outside, respondent Charles tried to help the visitor stand up, but he was having trouble standing, so he went down to his knees and

respondent Ross helped him lie down again (5:41:03-5:41:08). A gurney arrived to transport the visitor inside (5:41:08). Respondents assisted the visitor onto the gurney and respondent Charles pushed the gurney inside with the visitor sitting cross-legged on top of it with his hands handcuffed behind him (5:41:13-5:41:48). They proceeded up the C corridor with respondent Ross and Lieutenant Figueroa following behind them (5:42:20).

Gregory Bullock, Assistant Director of Hospital Police, was petitioner's only witness. Mr. Bullock testified that he was aware of the incident because Lieutenant Figueroa had called him at home to advise him of the situation at approximately 5:37 a.m. Based on his conversation with the lieutenant and because the visitor was injured, he conducted an investigation to determine whether the use of force was excessive and inappropriate (Tr. 34-35, 95-96).

Mr. Bullock testified that although special officers are law enforcement officials, they are trained to be "customer friendly." They need to realize that people are coming to the hospital because they are unwell or are visiting friends or relatives who are sick. It is a stressful situation for most people. While it is important to keep the peace, it is equally important to consider the circumstances and try to diffuse the situation. Mr. Bullock maintained that it is inappropriate for a special officer to react physically or arrest someone who is merely disruptive, yelling and/or cursing. The only time that physical action should be taken is if there is an imminent danger or the person is totally disruptive to the operation (Tr. 18-20, 92).

Mr. Bullock testified that the officers should not automatically throw people out of the hospital. Instead, the proper procedure is to ask the person to state his business. Mr. Bullock further testified that it is not within an officer's purview to just ask someone to leave. If the Administrator on Duty (AOD) tells the officer that someone needs to leave, the officers have to justify why before doing anything. If they discover that there is a legitimate reason, the officer should ask the person to leave. If a person does not comply the officer should "have patience and bear with them, and continue to ask them to leave until they are ready to go" (Tr. 94). Mr. Bullock stated that the officers should walk the person to the door, but once the person crosses the threshold the officers should not follow (Tr. 92-94, 111).

Mr. Bullock testified that his usual work hours are between 9:00 a.m. and 5:00 p.m., but he will receive telephone calls while he is off duty regarding unusual incidents. During these calls, he will give directions on how to handle the situation. If a special officer calls him about

conducting an arrest, Mr. Bullock will discuss the situation with them and determine whether the arrest should take place (Tr. 29-30).

On January 18, 2010, Mr. Bullock received a telephone call from Lieutenant Figueroa at approximately 5:37 a.m. Lieutenant Figueroa told him that they were placing a hospital visitor under arrest for cursing out the AOD. The AOD had prohibited him from visiting his girlfriend, who was being treated as a patient. He further stated that Lieutenant Figueroa also informed him, in passing and towards the very end of their conversation, that the visitor had hurt himself by banging his head on an ambulance while respondents were placing him under arrest. Mr. Bullock testified that he told the lieutenant that cursing at the AOD was an insufficient reason to place someone under arrest (Tr. 29-30, 33, 95-96, 134).

Mr. Bullock denied that Lieutenant Figueroa had informed him during their phone conversation that the visitor had assaulted two officers. He further stated that he only learned that the lieutenant contended that there had been an assault when he received his written report. The lieutenant's written statement reflects that the visitor became combative and hit respondents with a cane while he was being escorted out of the building for being loud and abusive (Resp. Ex. A). Mr. Bullock testified that he was surprised by the lieutenant's written statement because shortly after the incident, Lieutenant Figueroa told him that respondents should not have "went after the guy" (Tr. 123). Mr. Bullock testified that he had asked Lieutenant Figueroa about the inconsistency, but the lieutenant never answered him. Instead, he waived his hand and walked out of the room (Tr. 96, 122-23).

Mr. Bullock testified that he conducted an investigation of the incident later that day when he arrived at work. He contacted the technical support staff to obtain video coverage from the security cameras in the area (Tr. 34-35). After reviewing the video, Mr. Bullock made a determination that respondents had committed misconduct. Mr. Bullock testified that as part of his investigation he obtained a statement from respondents and Lieutenant Figueroa. When asked if he obtained statements from other hospital employees, Mr. Bullock responded, "we tried to figure out who was involved, and I think that they were instructed, whoever was there to see if they submit statements" (Tr. 96-97).

Mr. Bullock never identified who "we" was, so it is unclear who, if anyone assisted in the investigation. His recollection of the investigation and the contents of witness statements was somewhat fuzzy. At one point he indicated that Lieutenant Figueroa assisted in conducting the

investigation (Tr. 152), but later denied that Lieutenant Figueroa investigated this matter (Tr. 158).

One thing, however, is clear. Mr. Bullock did not obtain statements from the alleged victim or from eyewitnesses to the incident. When asked why he did not obtain a statement from the visitor, he replied that “he was under arrest” and “in the custody of the penal system” (Tr. 98). Although the charges were dropped, Mr. Bullock never made an attempt to contact the visitor to ask him about what occurred. When asked why, he responded, “it was not necessary at that point” (Tr. 99). Mr. Bullock testified that he arrived at the hospital approximately three and half hours after the incident, but he never attempted to ascertain whether the visitor was still present in the hospital receiving treatment. His primary focus was to speak with Lieutenant Figueroa and respondents to find out why they had made the arrest (Tr. 124-25).

While viewing the video during the hearing, Mr. Bullock was asked to identify a man wearing a blue short sleeve shirt and had a hospital identification card hanging from a cord around his neck. Mr. Bullock testified that he did not know who the man was even though he was present watching the altercation in both the vestibule and the ambulance bay. The man was later identified as Andre Avalos, who had been working in the triage office that day. Mr. Avalos submitted a statement regarding the incident to Lieutenant Figueroa. Mr. Bullock, however, never questioned Mr. Avalos about his statement or spoke with him about what he had witnessed that day. During the hearing, Mr. Bullock questioned whether Mr. Avalos actually worked for the hospital and was unable to recall what he had said in his statement. When shown a copy of Mr. Avalos’ statement, which indicated that the visitor had hit respondents with a cane, Mr. Bullock could not recall if he had ever seen it before (Resp. Ex. B; Tr. 102-03, 136-43,146).

Respondent Charles, who has worked for the hospital for nearly three years, testified that he was working Tour 1, 12:00 to 8:00 a.m., on January 18, 2010. He was assigned to post C-1, the podium in the emergency/triage area, which includes the ambulance bay, the waiting room, the reception area by the triage office, and the entrance from the sidewalk. Respondent Charles testified that at approximately 5:30 a.m., respondent Ross asked him to report to the C-3 post in the emergency room, which is about 50 feet away from his post. He was informed by respondent Ross about a situation with a visitor who had created a disturbance earlier and had been asked to leave the premises by Lieutenant Figueroa. The visitor had left through the main lobby and returned through the emergency room. He was continuing to be boisterous and cursing.

Respondent Ross directed Respondent Charles to await further instructions from the lieutenant (Tr. 184-87, 231-33, 304, 306-307, 334, 336).

As the respondents were discussing the situation, the visitor walked up the hallway towards them and stood right next to them. Respondent Charles described the visitor as belligerent. He was loud and cursing, stating that he was not going to leave and wanted to be seen. Although he was standing next to the respondents, respondent Charles did not believe that the visitor's comments were directed towards them in particular. Respondent Charles stated that he thought that the visitor was becoming more irate because he was being ignored, so both respondents told him to calm down and that they would try to assist him. The visitor responded "Fuck you, I don't have to do that." This conversation took place in the C corridor and was not visible on the video submitted into evidence (Tr. 187-88, 233).

Respondent Charles asked the visitor to come with him to the waiting room. The visitor hesitated, but ultimately complied while he continued to curse and complain. Respondent Charles testified that he spoke briefly with the triage staff in the office through the windows and returned down the corridor to speak with Respondent Ross and Officer Thomas, another special officer assigned to C-3 post. They waited for Lieutenant Figueroa to arrive on the scene for further instructions. When the lieutenant arrived he briefed the three of them on what had occurred earlier that morning. Hospital staff had complained that the visitor had been causing a disturbance. As a consequence, Lieutenant Figueroa escorted him out of the main entrance of the hospital but he came back in the building through the emergency room entrance. The lieutenant further informed them that the AOD wanted the visitor removed from the hospital because he was becoming a nuisance (Tr. 190-92, 234, 238, 254-55, 271, 308, 340).

Respondent Charles testified that he went back to the waiting room and asked the visitor to come out of the waiting room to speak with the lieutenant. The visitor picked up all of his belongings (two backpacks, a winter coat, and a cane) and walked towards him, but stopped by the windows of the triage counter and started complaining and cursing at the triage staff, demanding to be seen by a doctor. Respondent Charles left the visitor by the triage office and walked back up the C corridor to speak with the lieutenant and respondent Ross. After being informed that the visitor was now requesting to be seen by a doctor, Lieutenant Figueroa directed respondent Ross to find out more information (Tr. 192-97, 239, 254, 256-60, 343).

Respondent Ross approached the triage reception area and spoke to a nurse through the windows. He was told that they were refusing to triage the visitor. Respondent Ross then proceeded to walk up the C corridor to speak with Mr. Avalos, a clerk in the triage unit, who informed him that earlier that day the visitor refused to sign the consent to be treated form and tore it up. Respondent Ross updated Lieutenant Figueroa, who then directed respondents to escort the visitor out of the building (Tr. 308-09, 331-34, 345).

Lieutenant Figueroa and respondents approached the visitor. Respondent Charles testified that at this point he put on a pair of rubber gloves for safety reasons. Respondent Ross testified similarly, but he did not have rubber gloves on him, so he put on back leather frisking gloves, just in case the visitor refused to leave peacefully. Respondent Ross informed the visitor that he had to leave and that it would be best for him to return around 8:00 a.m. when the admitting office opened so that someone could help him. Although the visitor told them that he was not going to leave, he started walking towards the door, complaining and cursing at them. Respondents were walking slightly behind him when respondent Ross said something to the effect of "come on, let's leave." The visitor spun around and faced respondents as he walked backwards toward the door, threatening that if they came any closer to him he would hit them with his cane. Respondent Ross testified that it was at this point that he took out his ASP and extended it. He held it down behind his leg, in an interview position and told the visitor that he had to leave (Tr. 197-99, 201, 260, 266-67, 273-74, 276, 292, 308-11, 344-50).

As the parties entered the vestibule between the ambulance bay doors, the visitor stopped and stood his ground. He began to swing his cane wildly towards them. According to respondent Ross, the visitor was swinging the cane as if it were a baseball bat. He took a swing at Respondent Ross and hit him in the left arm. Respondent Charles was slightly behind respondent Ross, so respondent Ross received most of the blows. Respondent Charles testified that he believed respondent Ross was hit in the arm, but he was unable to say definitively which one. Respondent Ross testified that he was unsure how many times the visitor had hit him with the cane because "everything had happened so fast" (Tr. 315). He estimated that he must have been hit maybe three or four times. When the visitor started swinging the cane, respondent Charles tried to help respondent Ross by stepping forward to grab the visitor. In the process, respondent Charles was hit by the cane on his right leg. Respondents described the visitor as

being very combative and out of control. They denied rushing at him or making him feel that he had to protect himself with his cane (Tr. 202 -05, 261-65, 314-15, 351, 357-58, 365).

When asked if the visitor dropped his coat and bags or was he holding everything and swinging the cane at the same time, respondent Charles replied, "Honestly, I don't know. Everything happened so fast that I can't really tell you that much" (Tr. 263). He explained that it felt like forever, but it could have only taken a few minutes or even a few seconds. Respondent Ross testified that the visitor dropped everything that he was holding when he started swinging the cane. But he was unable to explain how the visitor's belongings got outside in the ambulance bay. He testified that he was in a hand-to-hand struggle and was not really focused on the visitor's belongings at the time (Tr. 262-64, 352-55, 357-58).

Since the video of the ambulance bay is time lapsed and the quality of the picture is so poor it is difficult to assess a complete sequence of events. The video shows the parties had stumbled out into the ambulance bay at 5:35:31, and were struggling on the ground. At this point it appears that the visitor does not have his coat or bags with him, they are nowhere to be seen on the video. The first clear picture of the visitor's belongings on the sidewalk near the parties is at 5:36:19, less than a minute later (Pet. Ex. 3). No one was able to explain how the items appeared suddenly outside.

Respondent Charles was unable to estimate how long they were in the vestibule before they ended up outside in the ambulance bay. Neither respondent could recollect whether anyone had walked through the vestibule during the altercation because they were focused on the visitor. Respondent Charles testified that the visitor was swinging the cane and walking backwards, without noticing that he had stepped outside. Respondent Charles further testified that he did not even see that respondent Ross had his ASP out, so he was unable to say whether respondent Ross had used it. Respondent Ross testified that after the visitor had hit him with the cane he used his ASP defensively to block the blow and then to strike the visitor on the leg approximately three times. This subdued the visitor slightly, allowing respondent Ross to grab the cane away from him. Respondent Charles testified that once respondent Ross had gotten the cane away from the visitor, the visitor had grabbed respondent Ross in a "bear hug" (Tr. 205-07, 279, 315, 326, 357-58, 365-66).

After they stumbled outside into the ambulance bay, the visitor began punching and kicking. Respondent Ross was able to bring the visitor down to the ground, but the visitor

“wasn’t giving up” he was resisting arrest and refused to be compliant. Respondent Charles testified that he had trouble getting closer to assist because the visitor was kicking wildly. Once respondent Ross was able to turn the visitor over, respondent Charles stepped in to assist by handcuffing him. Respondents were joined by Officer Thomas, who came outside to help. After respondents and Officer Thomas assisted the visitor to his feet they placed him against the wall. The visitor was facing the wall and cursing at them while respondent Ross frisked him for weapons. Respondent Ross testified that he stepped away to get Lieutenant Figueroa’s attention, who was on the telephone, he believed with Mr. Bullock. Respondent Charles testified that all of a sudden the visitor pushed himself off the wall with his foot in an effort to head butt one of them and fell backwards, hitting his head on an ambulance. At first they did not realize that he was injured. When he calmed down and was sitting still on the ground they noticed blood coming from the back of his head. They got a gurney and transported him inside to the emergency room for treatment, rather than walk him inside because they were concerned that he was going to start fighting them again (Tr. 208-11, 213, 279, 315-16. 353).

After the incident, the visitor’s possessions were scattered on the sidewalk of the ambulance bay. Respondent Ross returned outside approximately five minutes later (5:45:22) and picked up the visitor’s possessions and put them in a bag (Pet. Ex. 3). Shortly after the incident, respondents documented what occurred in their memo books (Pet. Exs. 11, 12). When they returned to the hospital’s command center, respondent Charles filled out a hardcopy of the online booking system arrest worksheet (Pet. Ex. 5) and respondent Ross filled out the 587 crime and incident report (Pet Ex. 4) documenting what took place.

Later that morning, around 8:00 a.m., respondent Charles, as the arresting officer, went to the police precinct to begin the paperwork without the visitor, who was still being treated in the hospital. It was respondent Charles’ first arrest, so he asked some of the police officers to assist him as he filled out the arrest report (Pet. Ex. 8) and complaint (Pet. Ex. 9) but they were busy and not very helpful. It took him most of the day to complete the paperwork, which included two property clerk invoices (Pet. Exs. 6, 7; Tr. 78, 83, 222, 280-83).

The following day both respondents brought the visitor from the hospital to the precinct to central booking to complete the arrest. After the visitor was processed at central booking, respondent Charles met with an Assistant District Attorney to draft his affidavit (Pet. Ex. 10; Tr. 284-85).

In assessing the witnesses' credibility, I found respondents to be more credible than Mr. Bullock. Mr. Bullock was defensive during his cross-examination. He was unresponsive to questions being posed and tried to control the questioning process. At times he would say that he did not understand the line of questioning or what the defense attorney was saying so he would respond by answering a question he would have preferred to have been asked. At other times he would ask the defense attorney questions in response to a question posed to him or would instead reply, "if you say so" (Tr. 96, 99, 100, 101, 102). Mr. Bullock had to be repeatedly instructed to answer the questions being asked and was admonished for being overly antagonistic towards respondent Charles' attorney.

Mr. Bullock demonstrated a clear animus towards respondents. He testified that conducted an investigation, but the reality is that he did very little to find out what actually occurred. Instead, he watched the security video footage, made assumptions and jumped to conclusions. Mr. Bullock had no idea what occurred in the vestibule and did not bother to find out. Since the video has no audio, it is impossible to determine whether the visitor was threatening to hit respondents and if respondents were attempting to de-escalate the situation. An investigation cannot be based on conjecture and presumptions, it requires facts. Mr. Bullock had ample opportunity to question eyewitnesses, including the visitor, who was in the hospital for at least a day and a half after the incident, but for some inexplicable reason chose not to.

On the other hand, I found respondents to be very credible. Respondent Charles has worked at the hospital for nearly three years and credibly testified that he has dealt with difficult or disruptive individuals on many occasions which did not result in violence. Indeed, this was his first arrest during his tenure with the hospital. Respondent Ross has worked for petitioner since 2003, with a two-year leave of absence to go to Iraq with the Army Reserve as a military police officer. He is a veteran officer with military experience, who would know how to de-escalate a situation when someone was being disruptive and would be able to deal with someone who was yelling and cursing without resorting to gratuitous violence.

Moreover, the video evidence supported respondents' version of events as did the eyewitness statements. Respondents' versions of what occurred were not identical or rehearsed, lending to their overall credibility. There were several things that they could not account for, such as whether there were people present in the vestibule during the altercation, how the visitor's belongings ended up outside if he dropped them in the vestibule, and how many times

respondent Ross was hit by the cane. Rather than detract from their credibility it bolstered it. Respondents described this as a very quick and intense event. They were so focused on the visitor and trying to avoid being hit by the cane that they were not really paying attention to other details. Furthermore, respondents' testimony was corroborated by their relatively contemporaneous entries in their memo book, which were written without benefit of reviewing the video footage of the incident.

Unnecessary Excessive Physical Force

Respondents were charged with using unnecessary excessive physical force and unnecessary excessive physical force which caused the visitor to be injured (ALJ Exs. 2, 3). Mr. Bullock testified that respondents had acted inappropriately and escalated the situation. After reviewing the video, he determined that there was never a need for respondents to put their hands on the visitor because he was complying by walking out the door.

Mr. Bullock testified that once the visitor had crossed the threshold, which he considered to be the interior door of the ambulance bay exit, respondents should not have followed him. At first, he stated that special officers were not responsible for removing people from the vestibule between the interior and exterior doors. Ultimately, he conceded that special officers' responsibilities extend past the doors of the hospital to include the entire premises, which is comprised of the building, the sidewalk, and the ambulance bay. When pressed on why he testified that respondents should not have crossed the threshold of the interior door, Mr. Bullock stated that "in this case" that is as far as they should have gone. He further testified that if a person is walking out, just because they stop to vent or hesitate, does not mean that respondents should have "bum rushed" him out the door (Tr. 127-30).

Respondent Charles disagreed with Mr. Bullock's assessment. He testified that based on his experience if he and respondent Ross had walked away once the visitor entered the vestibule, he would have just come back inside. Respondent Ross agreed, pointing out the visitor had previously been escorted out of the building and returned through another exit (Tr. 229).

As special officers, respondents testified that they deal with a lot of homeless individuals who wander into the hospital, where these individuals often curse and yell and become a nuisance. But the officers are trained to deal with them and realize that they may be disturbed or upset because someone they care about is hospitalized. Respondent Charles testified that if

someone is being disruptive, he will talk to them and try to calm them down. He does not escort everyone who is cursing and/or yelling out of the hospital. In those situations, he would try to get the person to go for a walk and get some air to clear their head (Tr. 224-25, 235-36, 288-89, 325-26).

Respondents credibly testified that they considered this gentleman to be a visitor to the hospital and treated him as such, even though he was being disruptive by speaking loudly and cursing at the staff. Respondents further testified they were patient and tried to de-escalate the situation, giving him an opportunity to leave on his own accord. Respondents maintained that if the visitor had not started to swing his cane they would have let him walk out and be on his way. They only took action because the visitor started hitting them with the cane in the vestibule (Tr. 211-12, 319, 324, 360).

Mr. Bullock readily acknowledged that he did not know what happened when the parties were inside the vestibule between the interior and exterior doors of the ambulance bay. Nevertheless, he believed that respondents acted inappropriately and used excessive force. Mr. Bullock conceded, however, that if an individual holds a cane in a position that an officer deems threatening that he should defend himself. He further testified that if someone hit an officer with a cane, then it would be appropriate for the officer to place the person under arrest. When asked if he knew whether the visitor hit respondents with his cane, he replied, "totally don't know" (Tr. 106). In light of this response, Mr. Bullock was asked what evidence he had to suggest that the visitor did not strike respondents with a cane. Mr. Bullock stated that his "information and theory" were based on the amount of traffic flowing through the ambulance bay doors at the time of the altercation (Tr. 99-100, 104-06). Mr. Bullock surmised that the respondents must have misrepresented what occurred because he observed patients going back and forth on stretchers on the video and that would not have been allowed "if there was any kind of commotion going on" (Tr. 106).

A review of the video does not support Mr. Bullock's speculation. The video shows respondents and the visitor had entered the vestibule at 5:35:19 and exited at 5:35:31. The video reveals that no one entered or exited the ambulance bay doors during the 12-second interval in the vestibule when the altercation took place. Indeed, the first person to enter the vestibule after the confrontation was Lieutenant Figueroa at 5:35:50. By this time, respondents and the visitor were already outside, struggling on the sidewalk for 19 seconds. After Lieutenant Figueroa, the

next person to walk in or out through the ambulance bays doors was another special officer, Officer Thomas, who exited the hospital to assist respondents at 5:36:13. He was followed through the doors shortly thereafter by an unidentified woman (Pet. Exs. 1, 2, 3). There was no pedestrian traffic in the vestibule during the altercation. Other than Lieutenant Figueroa and Officer Thomas, the next person to walk through the doors did not come outside until after the visitor was already handcuffed.

From entering the vestibule (5:35:19) to handcuffing the visitor (5:35:53), the altercation took less than a minute. Indeed, they were only inside the vestibule for 12 seconds (5:35:19 – 5:35:31). This was an extremely quick interaction. Respondents used their best judgment under the circumstances of dealing with a belligerent and combative individual who was using his cane as a weapon. Petitioner presented nothing at all to establish that the visitor did not assault or attempt to assault respondents. In contrast, respondents presented credible testimony corroborated by witness statements to establish that it did occur.

Petitioner's theory that respondents caused the visitor to be combative and forced him to assault them is, at best, unsupported. It was postulated that by putting on gloves and taking out the ASP, respondents escalated the situation, causing the visitor to be fearful. Respondents credibly testified that they use gloves, in most instances latex gloves, for safety reasons. It is a precaution that all special officers take to avoid the spread of disease. In this instance, the visitor had been difficult. He had already been escorted out of the building once and returned through another entrance. It was reasonable for respondents to suspect that he may be resistant to leaving the premises. It is necessary to don gloves prior to an incident arising. If they had waited until respondent had become combative to put on their gloves, it would have been too late. The same is true of the ASP. Respondent Ross made an assessment that the visitor was potentially violent when he threatened to hit them with his cane. If respondent Ross had waited until after the visitor started hitting them to unsheath his ASP, there could have been grave consequences. Indeed, reasonable officers could conclude that taking basic preparatory steps could actually de-escalate a situation by signaling the individual not to go too far. It is true, that special officers should be deescalating a situation whenever possible, but it does not mean that they should be defenseless if they anticipate that violence may erupt.

Respondents are charged with using unnecessary excessive physical force and unnecessary excessive physical force which caused the visitor to be injured. Petitioner, however,

was unable to demonstrate that unnecessary excessive physical force was employed. Petitioner bears the burden of proof by a preponderance of the credible evidence. *See Dep't of Correction v. Williams*, OATH Index No. 1080/05 at 13 (June 10, 2005); *Dep't of Correction v. Ingram*, OATH Index No. 320/04 at 4 (Feb. 13, 2004). The video footage with respect to this incident fails to reveal excessive force was used and is insufficient to sustain the charges. *See Dep't of Correction v. Brown*, OATH Index No. 1091/05 at 5 (Oct. 31, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-114-SA (Nov. 8, 2006) (though petitioner tried to prove a use of force charge primarily with video evidence, the video was grainy and of poor quality and neither conclusively proved or disproved the charge, accordingly it was dismissed); *Health & Hospitals Corp. (Coler Goldwater Specialty Hospital) v. Bellinger*, OATH Index No. 133/10 at 4-5 (Oct. 21, 2009) (where use of force happened out of the camera's view, the video surveillance evidence was found to offer little to corroborate the charge); *Dep't of Correction v. Branch*, OATH Index Nos. 902/06**, 903/06*, 904/06, 905/06 at 19 (July 19, 2006), **modified on penalty*, Comm'r Dec. (Sept. 21, 2006), ***modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 07-92-M (Sept. 21, 2007) ("Given the limits of the video ..., it is extremely problematic to try to assess what happened off camera").

Respondents did not touch the visitor inside the emergency/triage area and there is no footage of the altercation inside the vestibule. The footage outside on the sidewalk shows all three engaged in a struggle, but the force used outside in the ambulance bay appears to be completely justified and necessary to restrain the visitor, who was kicking and thrashing about. Accordingly, petitioner failed to establish by a preponderance of the credible evidence that respondents used unnecessary excessive force.

Although it is true that the visitor sustained an injury, it appears to be of his own doing. The visitor was already handcuffed and standing against the wall when he decided to kick off or lurch back on his own accord. In the process of throwing himself backwards, the visitor hit his head on an ambulance which resulted in the injury. Indeed, Mr. Bullock testified that it was clear that the visitor had thrown himself backwards and had hit his head on an ambulance. Mr. Bullock stated that he never thought that respondents had struck the visitor and caused the injury (Tr. 167). Accordingly, petitioner failed to establish by a preponderance of the credible evidence that respondents used unnecessary excessive force which resulted in respondent being injured.

Improper Use of an Expandable Baton

Respondent Ross was charged with improperly removing and using his ASP in a combative stance in the absence of a physical threat (ALJ Ex. 3). Mr. Bullock testified that special officers are trained on how to use an ASP or expandable baton. The ASP should be kept in a closed, non-extended position on the officer's utility belt and should only be used as a defensive tool when the officer believes that he needs to defend himself or others. It should not be used offensively (Tr. 22-23, 26).

Mr. Bullock further testified that special officers are taught that there are two positions or stances, an interview position and a combat position. Mr. Bullock contended that in an interview position, the officer should keep the ASP in a closed position and cross his arms in front of himself, while instructing the person to "cease and desist" whatever they are doing. In contrast, in a combat position the ASP is fully extended and should be held in a downward position pulled back behind the officer's knee. Mr. Bullock conceded that he is not an authority on ASP training, so he was unable to state whether there were other permissible non-threatening positions to hold an ASP (Tr. 23-25, 48).

After reviewing the interaction between respondents and the visitor in the video, Mr. Bullock testified that in his opinion, respondent Ross should never have taken out his ASP. Mr. Bullock acknowledged that there was no audio, so he was unable to hear what was being said. Nevertheless, he maintained that the visitor was backing out of the door, was compliant, and non-threatening. Once the visitor crossed the threshold, respondents should have just allowed him to leave without following him. Mr. Bullock concluded from the video that respondent Ross inappropriately removed his ASP from its holder, extended it, and held it in a combative position down by his leg (Tr. 23-25, 48).

Respondents disagreed with Mr. Bullock's testimony regarding acceptable poses for holding an ASP. Both testified that they were never trained to hold a non-extended ASP in their hands with their arms crossed in front of them. Respondent Ross explained that holding the ASP down and slightly behind his leg is the easiest way to get into a combative position if the situation required him to defend himself. He testified he was trained that holding the ASP down at your side is considered a non-threatening position. Respondent Charles agreed and elaborated that if the ASP is open, it should be held in a downward position, behind the leg to be unobtrusive and not cause alarm (Tr. 226-28, 269, 310-11, 369).

Respondent Ross testified that the visitor verbally threatened to attack respondents with his cane, so he took out his ASP and extended it. He held it in his right hand slightly behind his leg, in a non-threatening, interview position. He maintained that in his judgment the situation had escalated and he needed to be ready in case the visitor carried through on his threats. Respondent Ross further testified that after entering the vestibule the visitor struck him with the cane. In response, he used his ASP defensively to block the blows and to strike the visitor on the leg perhaps three times. Respondent Ross stated that he used his ASP defensively to prevent himself from being hit in the head and to subdue the visitor so that he could get the cane away from him (Tr. 314-15, 351, 357-58, 365, 369).

Respondent Ross is not charged with using his ASP against the visitor, instead he is charged with improperly removing it and holding it in a combative stance in the absence of a physical threat. I disagree with Mr. Bullock's assessment that respondent Ross was holding his ASP in a combative stance. His interpretation of the proper non-threatening stance was ludicrous. It defies logic that someone would take out an ASP and hold it with their arms crossed in front of them. It would be difficult to transition from that position if it was necessary to use the ASP defensively. Since the ASP would not be extended, it would have to be flicked or swung to be released. Furthermore, holding an ASP in such a manner would be more confrontational because it would be in the line of vision of the person you are interviewing. In contrast, both respondents' testimony that a non-threatening, interview stance would be to hold the ASP extended in a downward position and slightly behind the officer's leg comports with common sense. The ASP would be out of sight, but available and extended if it was necessary to react to a combative situation.

In addition, Mr. Bullock's conclusion that there was no physical threat is unsupported by the evidence. Mr. Bullock was not present at the scene and he acknowledged that there is no way to determine what the parties are saying in the video. He made his assessment without knowing if the visitor was threatening to use his cane as a weapon against respondents. I found respondents' testimony regarding the visitor's threats to be credible and corroborated by the eyewitness statements. It is clear from the video that the visitor was holding the cane in his hand and was not using it to aid his walking. Under these circumstances, the cane was a potential weapon capable of causing serious injury. "In evaluating the reasonableness of an officer's judgment, due deference must be given to the officer's experience, knowledge of persons

involved and the assessment of the situation as it unfolded before him.” *Dep’t of Correction v. Allen*, OATH Index Nos. 510/04 & 624/04, at 8-9 (Oct. 13, 2004). *See also, Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Goodman*, OATH Index No. 1632/07 at 9-10 (Dec. 14, 2007) (it was reasonable for officer to use force on a patient after patient attacked him); *Triborough Bridge & Tunnel Auth. v. Simmons*, OATH Index No. 609/97 (Sept. 18, 1997), *modified on penalty*, NYC Civ. Serv. Comm’n Item No. 99-48-O (May 4, 1999) (due deference to respondent’s experience and assessment of situation insulated her on-the-spot judgment, which was not sufficiently flawed as to warrant misconduct finding); *Health & Hospitals Corp. (Jacobi Hospital Ctr.) v. Vairo*, OATH Index No. 720/04 at 9-10 (Mar. 29, 2004) (where patient was kicking his legs and swinging his arms, slapping and biting respondent, ALJ found no excessive force when respondent stuck the patient while attempting to restrain him). It was reasonable and justifiable for respondent Ross to remove his ASP in preparation if the situation necessitated it. Due deference should be given to his judgment in assessing the situation as it unfolded. Accordingly, I find that petitioner failed to establish by a preponderance of the credible evidence that respondent Ross improperly removed and used his ASP in a combative stance in the absence of a physical threat.

Violation of Hospital Police Order #18 – Handcuffs

Respondent Charles was charged with violating Hospital Directive #18 for handcuffing the visitor outside the hospital in the ambulance bay (ALJ Ex. 2). Respondent Ross was charged with improperly supervising respondent Charles and violating Directive #18 for allowing respondent Charles to handcuff the visitor (ALJ Ex. 3). Hospital Directive #18 states,

A Special Officer is never to put a person in handcuffs unless that person is under arrest. Should a Special Officer make an arrest, handcuffs are to be used to protect the officer against attack or injury, and to avoid the arrested individual’s escape.

Handcuffs Use by Special Officers, OD Number: 18, Date Issued 10/22/04. Mr. Bullock testified that respondents violated Directive #18 because the person they handcuffed was not a “perp” but a visitor, who was complying with a lawful order. Moreover, he objected to respondents handcuffing the visitor because he had been yelling and cursing at the staff. Mr. Bullock did not believe that the visitor struck respondents with a cane, so there would have been

no need for them to use handcuffs. Mr. Bullock acknowledged, however, that if the visitor had struck respondents, they would have been justified in handcuffing him (Tr. 117-19).

Respondents disagreed with Mr. Bullock's assessment of the situation. Respondent Charles testified that the visitor was no longer considered a visitor when he placed him in handcuffs because he became a "perp" when he assaulted them with his cane. Respondents maintained that they had been trained on the proper procedures for placing someone in handcuffs and understand that handcuffs should not be used on patients or visitors unless they are being used as a form of restraint in conjunction with an arrest. Respondents asserted that they did not violate Directive # 18 because respondent Charles handcuffed the visitor in accordance with the directive and how he had been taught during his training (Tr. 213, 317-18, 327).

Directive #18 is very clearly written. It gives special officers the authority to use handcuffs to effectuate an arrest and protect the officers against attack or injury, which is what respondents did. I credit respondents' testimony that they were dealing with a combative and violent individual who was using his cane as a weapon against them. Moreover, I agree with their assessment that the visitor ceased to be a visitor once he struck them with the cane. After he assaulted respondents it was justifiable and reasonable to handcuff him and place him under arrest. Respondents were having problems subduing the individual, thereby necessitating the use of handcuffs. It was incumbent upon them to ensure that he did not pose a threat to them or anyone else in the vicinity.

It was appropriate and necessary under the circumstances for respondent Charles to place the visitor in handcuffs. Likewise, it was an appropriate use of respondent Ross' supervisory discretion to allow respondent Charles to handcuff the visitor. Accordingly, I find that petitioner failed to establish by a preponderance of the credible evidence that respondent Charles violated Hospital Directive #18 for handcuffing the visitor. In addition, petitioner failed to establish that respondent Ross improperly supervised respondent Charles regarding the use of handcuffs or that he violated Directive #18 for allowing respondent Charles to handcuff the visitor.

Failure to Supervise – Unauthorized Arrest

Respondent Ross was further charged with failing to properly supervise respondent Charles when he arrested the visitor without authorization and failing to properly supervise respondent Charles by approving the unauthorized arrest (ALJ Ex. 3). Once a perpetrator is

placed under arrest, the special officer must complete an online booking system arrest worksheet either at the hospital's command post or at the police precinct. The online worksheet was filled out by respondent Charles, as the arresting officer, at the hospital's command post. He used a hardcopy of the form which he filled in by hand. In the narrative, he wrote,

At the above T/P/O subject, while being escorted out of the hospital became combative and hit A/O and patrol sector Sgt. With a cane. After being placed in custody, subject continued to resist arrest.

(Pet. Ex. 5). The worksheet was signed by respondent Charles as the arresting officer and respondent Ross as the approving supervisor. The arrest worksheet indicated that the visitor was arrested for aggravated assault on a peace officer, resisting arrest, and disorderly conduct (Pet. Ex. 5).

Mr. Bullock testified that he did not authorize respondents to place the visitor under arrest because he determined that there was no justification for the arrest. He maintained that Lieutenant Figueroa informed him during their telephone conversation that they were placing the visitor under arrest for yelling and cursing at the AOD. Mr. Bullock stated that he had informed the lieutenant that this was insufficient reason for placing the visitor under arrest. Moreover, after reviewing the video as part of his investigation, he concluded that the visitor was compliant and leaving on his own accord. He found that there was no reason for the incident to escalate to the point of the visitor being arrested (Tr. 105-06, 127-28).

Respondent Ross testified that the visitor was not arrested for cursing at an administrator. He was arrested for assaulting respondents with a cane. Respondent Ross further testified that if there had never been physical contact and the visitor had only threatened to hit them with a cane, he would not have been placed under arrest (Tr. 324-27).

As the supervising officer, respondent Ross' role was to review the paperwork for Officer Charles' arrest of the visitor, which he found to be accurate and truthful, so he signed the online booking system arrest worksheet. Respondent Ross stated that in his opinion the arrest was proper because the visitor became combative and assaulted them with a cane. Furthermore, he believes that the arrest was authorized by his superiors because he never received an order from Mr. Bullock or Lieutenant Figueroa not to arrest the visitor. Moreover, respondents stressed that although respondent Ross is a supervisor, Lieutenant Figueroa was the supervisor in charge

during the entire incident. Indeed, even Mr. Bullock acknowledged that Lieutenant Figueroa was in charge (Tr. 148, 317, 324-27).

I found Mr. Bullock's testimony regarding this charge to be incredible. His account of his conversation with Lieutenant Figueroa did not comport with common sense. He contended that Lieutenant Figueroa had informed him that they were arresting the visitor because he was yelling and cursing at hospital staff. He further testified that when he told the lieutenant that was an insufficient reason to arrest someone, the lieutenant told him that the visitor had bumped his head. Mr. Bullock responded "don't give me that crap. You guys just want to make an arrest" (Tr. 153-54). Unfortunately, Lieutenant Figueroa was not called as a witness by either side to corroborate or dispute Mr. Bullock's testimony.

Mr. Bullock believed that the lieutenant mentioned the injury because he was trying to make the situation sound worse in order to justify an arrest. That is unsupported speculation. I find it highly unlikely that the lieutenant actually said that they were arresting the visitor for cursing and yelling. Based on his experience and tenure with the hospital, he had to know that this was insufficient reason to justify an arrest. By the time Lieutenant Figueroa had called Mr. Bullock, the lieutenant had observed the visitor assault respondents with a cane, struggle, kick, punch, thrash about, and resist. It is improbable that he would not have informed Mr. Bullock that the visitor was combative and had assaulted the officers with a cane. And, in any event, if the lieutenant offered an incomplete or inaccurate reason for the arrest, it is not clear that his report should be attributed to either respondent.

Also of some note, although Mr. Bullock contended that he disagreed with the decision to place the visitor under arrest, he did nothing to prevent it from going forward. When asked why he did not stop or void the arrest, Mr. Bullock testified that there was nothing that he could have done because by the time he learned of the arrest the visitor was "in the custody of the penal system" since he was already under arrest and at central booking (Tr. 98). This, however, is untrue. Respondent Charles testified that when he went to the police precinct on January 18, the visitor was still in the hospital. The arrest was not completed because the visitor was not processed until the following day when he was released from the hospital (Tr. 280-83). Although Officer Charles left for the police precinct to begin the paperwork before Mr. Bullock arrived at work, he was at the precinct for the better part of the day. It was his first arrest, he was having trouble with the system, and he received no assistance from the police officers.

Respondent Charles did not return to the hospital until approximately 3:00 p.m. and Mr. Bullock had been on duty since 9:00 a.m. There would have been sufficient time for Mr. Bullock to contact respondent Charles and tell him not to proceed.

Respondent Charles asserted that Mr. Bullock could have voided the arrest if he wanted to because respondent Charles did not finish filling out the complaint and arrest report until approximately 2:30 p.m. (Tr. 294). Respondent Ross testified similarly that Mr. Bullock was fully aware of the arrest and could have voided it if he chose to do so, but he never directed respondents to do so (Tr. 319).

I have already found respondent's testimony that the visitor assaulted them with a cane was credible and even Mr. Bullock acknowledged that if someone hit an officer with a cane, it would be appropriate for the officer to place the person under arrest (Tr. 105). Based on the evidence presented, the arrest was justified. Therefore, it stands to reason, if Officer Charles acted appropriately in arresting the visitor, then respondent Ross did nothing improper in allowing respondent Charles to effectuate the arrest. Accordingly, I find that petitioner failed to establish by a preponderance of the credible evidence that respondent Ross failed to properly supervise respondent Charles when he arrested the visitor without authorization and failed to properly supervise respondent Charles by approving the unauthorized arrest.

False Statements

Respondent Charles' Memo Book

Respondent Charles was charged with making false entries in his memo book regarding the incident with the visitor (ALJ Ex. 2). Mr. Bullock testified that he had also reviewed both respondents' memo book entries as part of his investigation (Pet. Exs. 11, 12; Tr. 87-89). Respondent Charles' memo book entries read,

0530 – Sgt. Ross Lt. Figueroa and (1460)² escorting one visitor out of the building.

0535 – Visitor becomes loud and absence [sic] starting hitting Sgt. Ross in the arm reapeatly [sic]. Sgt Ross tried to remove the cain [sic] which subject begin hitting him with along with officer (1460). We tried to subdue the individually to the ground to place him under arrest but, he began kicking and punching Sgt. Ross and officer (1460).

0537 – Subject under arrest at this time. [Visitor] DOB 3/5/62

0540 – Subject starting kick wildly and hit his head on the back of the ambulance.

² Respondent Charles referred to himself as "1460."

(Pet. Ex. 12). When asked which of the entries were false, Mr. Bullock replied that Lieutenant Figueroa had nothing to do with escorting the patient out of the building. Although Mr. Bullock acknowledged that the lieutenant was standing right there observing the visitor gather his belongings and respondents walk him out the door, he does not consider this as actually assisting. Therefore, he concluded that respondent Charles' statement was false.

Mr. Bullock further testified that he did not understand why respondent Charles had written "escorting one visitor out of the building" since the visitor was leaving of his own volition. In Mr. Bullock's opinion, respondents were not "escorting," but being aggressive and physically forcing the visitor out the door. Mr. Bullock also stated that he did not know if the visitor became loud and obscene. Nor was he able to definitively state whether the visitor started hitting respondents with a cane which caused respondent Ross to attempt to remove the cane from the visitor (Tr. 108-10,114-17).

Although Mr. Bullock was unsure about some of respondent Charles' statements, he testified that he was certain that the visitor did not start kicking and punching respondents. When asked what evidence he was basing his opinion on, Mr. Bullock replied, "I don't have any evidence" (Tr. 116). He then attempted to explain that he does not believe that the visitor was punching and kicking because respondent Charles was just standing there and observing respondent Ross struggling on the ground with the visitor outside on the sidewalk. Mr. Bullock contended that if the visitor was doing what respondent Charles had alleged he was doing, respondent Charles would have done everything he could to help respondent Ross get the individual under control (Tr. 114-17).

Respondent Charles testified that he made these entries in his memo book immediately after the incident so he would not forget what occurred. Respondent Charles maintained that there were no false entries and that everything he wrote in his memo book had happened. He explained that he indicated that Lieutenant Figueroa assisted him and respondent Ross in escorting the visitor out of the building because Lieutenant Figueroa was present at the time. In his opinion, all three of them were dealing with the situation. Respondent Charles testified that the visitor had hit them with the cane while they were in the vestibule and they attempted to subdue him outside, which was when the visitor started kicking and punching. Respondent

Charles had attempted to help respondent Ross, but was having trouble getting close to the visitor because he was kicking wildly (Tr. 208-11, 214-17).

Mr. Bullock's testimony regarding the memo book entries was unconvincing. Petitioner failed to present any evidence to substantiate that respondent Charles' entries were false other than Mr. Bullock's speculation of what occurred based on his review of the incomplete video. Accordingly, I find that petitioner failed to establish by a preponderance of the credible evidence that respondent Charles made false entries in his memo book regarding the incident with the visitor.

Crime and Incident Report

Respondent Ross is additionally charged with making false statements regarding the incident with the visitor on the Crime and Incident Report (ALJ Ex. 3). Mr. Bullock testified that in addition to reviewing the security footage, he looked at the hospital's internal Crime and Incident report (form 587), which was filled out by respondent Ross (Pet. Ex. 4; Tr. 71-73).

The 587 report indicated that the visitor committed aggravated assault on a peace officer, resisted arrest and was disorderly. The report further stated that the visitor had been asked to leave the premises by Lieutenant Figueroa earlier that day because he was cursing at the AOD after he was told that he could not visit his wife. He left, but returned about ten minutes later and continued to make a scene with the triage unit staff, insisting that he be permitted to see his wife. Respondents reported to the area accompanied by Lieutenant Figueroa. The lieutenant asked the visitor to leave and he was escorted from the area by respondents and the lieutenant. The report further stated that once the visitor was escorted past the door he became combative by swinging his cane and using it to hit respondents. Respondent Ross wrote that physical force needed to be used to subdue the visitor, who was kicking and thrashing around. During the arrest, he hit his head on an ambulance (Pet. Ex. 4). Respondent Ross maintained that his statements on the 587 report were accurate and truthful (Tr. 318).

Mr. Bullock disagreed and testified that respondent Ross' statements are false because they did not "jive" with what he had been told on the telephone by Lieutenant Figueroa. Mr. Bullock maintained that the lieutenant had indicated over the phone that they were arresting the visitor because he was disruptive and cursed at the AOD. The report, however, goes beyond

what he had been told earlier in the day by the lieutenant, so he concluded that the report must be false (Tr. 149-52).

Mr. Bullock postulated that since Lieutenant Figueroa never informed him during their telephone conversation that the visitor had hit either respondent and only mentioned the cursing, respondent Ross' statements on the 587 report were false. Mr. Bullock's suppositions are unsupported by the evidence. The video footage and eyewitness statements corroborate respondents' credible testimony regarding the incident. Accordingly, I find that petitioner failed to establish by a preponderance of the credible evidence that respondent Ross made false statements regarding the incident with the visitor on the Crime and Incident Report.

Official Court Documents

Respondent Charles was further charged with giving false information on a Bronx Supreme Court affidavit, indicating that the visitor's arrest was a result of his assault on respondents (ALJ Ex. 2). After a perpetrator is booked, the arresting officer must speak to an assistant district attorney, who takes the officer's statement and drafts the affidavit (Pet. Ex. 10; Tr. 85-86). Respondent Charles testified that he met with the Assistant District Attorney the following day, January 19, when they dropped off the visitor at Central Booking. Respondent Charles told the assistant district attorney what occurred and she typed up the affidavit (Tr. 284-85). Respondent Charles' affidavit reads, in pertinent part,

[The visitor] was told to leave the premises, and refused to do so. Deponent further states that defendant waved a metal cane back and forth, and stated in sum and substance, GET AWAY FROM ME, OR I'LL HIT YOU. Deponent further states that defendant struck SGT. CHRISTOPHER ROSS about the body multiple times with said cane. Deponent further states that [the visitor] struck him on the leg one time with said cane.

(Pet. Ex. 10). The visitor was charged with menacing in the second degree, criminal trespass in the second degree, criminal possession of a weapon in the fourth degree, resisting arrest, attempted assault in the third degree, trespass, disorderly conduct, and harassment.

Respondent Charles credibly testified that everything in the affidavit is correct and accurately reflects what he told the assistant district attorney. He further testified that the assistant district attorney never questioned his veracity or accused him of committing perjury (Tr. 219-20).

Petitioner failed to demonstrate that the incident did not occur as respondents reported. Moreover, I credit respondents' testimony regarding the incident and the subsequent arrest. Respondent Charles' affidavit accurately reflects that the visitor's assault on respondents led to his arrest. Accordingly, I find that petitioner failed to establish by a preponderance of the credible evidence that respondent Charles gave false information on a Bronx Supreme Court affidavit.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to establish by a preponderance of the credible evidence that respondents used unnecessary excessive physical force on a visitor to the hospital on January 18, 2010.
2. Petitioner failed to establish by a preponderance of the credible evidence that respondents used unnecessary excessive physical force, causing injury to a visitor to the hospital on January 18, 2010.
3. Petitioner failed to establish by a preponderance of the credible evidence that respondent Charles failed to follow Hospital Police Directive #18, when he used handcuffs on a visitor to the hospital on January 18, 2010.
4. Petitioner failed to establish by a preponderance of the credible evidence that respondent Charles made false entries in his Hospital Police Memo Book concerning an incident with a visitor to the hospital on January 18, 2010.
5. Petitioner failed to establish by a preponderance of the credible evidence that respondent Charles gave false information on an official document, a Bronx Supreme Court affidavit, regarding the incident with a visitor to the hospital on January 18, 2010.
6. Petitioner failed to establish by a preponderance of the credible evidence that respondent Ross inappropriately removed his ASP expandable baton and used it in a combative stance on a visitor to the hospital on January 18, 2010.
7. Petitioner failed to establish by a preponderance of the credible evidence that respondent Ross failed to properly supervise respondent Charles when he used handcuffs on a visitor to the hospital on January 18, 2010.

8. Petitioner failed to establish by a preponderance of the credible evidence that respondent Ross failed to properly supervise respondent Charles when he arrested a visitor to the hospital on January 18, 2010.
9. Petitioner failed to establish by a preponderance of the credible evidence that respondent Ross failed to properly supervise respondent Charles by approving the arrest of a visitor to the hospital on January 18, 2010.
10. Petitioner failed to establish by a preponderance of the credible evidence that respondent Ross failed to follow Hospital Police Directive #18, when he permitted respondent Charles to use handcuffs on a visitor to the hospital on January 18, 2010.
11. Petitioner failed to establish by a preponderance of the credible evidence that respondent Ross gave false information on an official document, a 587 Crime and Incident Report, regarding the incident with a visitor to the hospital on January 18, 2010.

RECOMMENDATION

I recommend that all of the charges be dismissed with respect to both respondents.

Kara J. Miller
Administrative Law Judge

October 7, 2010

SUBMITTED TO:

JOSÉ R. SÁNCHEZ
Executive Director

APPEARANCES:

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