

# ***Dep't of Homeless Services v. Murray***

OATH Index No. 2149/11 (Sept. 15, 2011)

Petitioner proved that respondent had a verbal and physical altercation with a co-worker. 30-day suspension without pay recommended.

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

*In the Matter of*  
**DEPARTMENT OF HOMELESS SERVICES**  
*Petitioner*  
*- against -*  
**GLORIONE MURRAY**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**KEVIN F. CASEY**, *Administrative Law Judge*

Petitioner brought this disciplinary proceeding under section 75 of the Civil Service Law alleging that respondent, a special officer, committed misconduct by having a verbal and physical altercation with a co-worker (ALJ Ex. 1).

At a hearing on July 20, 2011, petitioner relied on testimony from special officers Houston Vaughn and Wayeedah Kelly, documentary evidence, and surveillance video. Respondent testified in her own behalf and also introduced documentary evidence. For the reasons below, I find that petitioner proved the charges and recommend that respondent be suspended without pay for 30 days.

### **ANALYSIS**

The charges stem from a dispute at the entrance of homeless shelter on March 27, 2010. Respondent and special officer Vaughn screened clients and packages during a 4:00 p.m. to midnight shift. As clients enter the area, they walk through a tall stationary scanner and place packages in an x-ray machine. If necessary, an officer also checks the client with a portable scanner.

Petitioner alleged that, shortly after confiscating contraband liquor from a client entering the shelter, respondent had a verbal disagreement with Vaughn that escalated to a fight. According to petitioner, respondent hit Vaughn. Special officer Kelly arrived at the scene and physically restrained respondent. Respondent conceded that she engaged in an altercation with Vaughn. However, respondent insisted the Vaughn escalated the matter by striking her in the face. Thus, respondent maintained that Vaughn provoked her and she acted in self-defense.

### **The Video Evidence**

The surveillance video shows that respondent confiscated a small plastic bag from a client and put the bag on top of the x-ray machine (Pet. Ex. 5; 18:06:37 – 18:07:03). Later, when there were no clients in the area, respondent rolled up her sleeves and prepared to open the plastic bag while Vaughn stood to the right between respondent and an adjacent room (Pet. Ex. 5; 18:19:54).

Vaughn made a gesture with his thumb over his right shoulder and then walked away from the stationary scanner (Pet. Ex. 5; 18:19:59). Respondent walked to where Vaughn had been standing and got some latex gloves (Pet. Ex. 5; 18:20:26).

A minute later, respondent returned to the x-ray machine and removed a large package. In her left hand, she held latex gloves and the small bag that she previously confiscated; she held the portable scanner in her right hand (Pet. Ex. 5; 18:21:57). Respondent and Vaughn appeared to exchange words (Pet. Ex. 5; 18:21:59). A custodian and two or three clients stood nearby (Pet. Ex. 5; 18:22:00).

Within a few seconds, respondent threw the small bag of contraband and the hand scanner to the ground (Pet. Ex. 5; 18:22:07). Respondent then threw latex gloves towards Vaughn's torso (Pet. Ex. 5; 18:22:21).

Although Vaughn went off camera, it appeared that he took a swing with his fist or open hand towards respondent's face (Pet. Ex. 5; 18:22:22). It is unclear from the video whether he made contact. Respondent charged towards Vaughn and they struggled off camera (Pet. Ex. 5; 18:22:33). Vaughn backed up while he held respondent's wrists up in front of him (Pet. Ex. 5; 18:22:30).

Moments later, Kelly arrived (Pet. Ex. 5; 18:22:36). She grabbed respondent from behind and held her back (Pet. Ex. 5; 18:22:41). Kelly continued to restrain respondent, who swung an expandable baton, while Vaughn left the area (Pet. Ex. 5; 18:22:46)

The parties offered conflicting evidence of what occurred. Vaughn, who had been a special officer for eight years and had previously worked with respondent without incident, testified the small plastic bag contained alcohol that respondent confiscated from the client (Tr. 14-15). Vaughn asked respondent, "What did you bust him with?" and respondent replied, "Never mind, I'll take care of it" (Tr. 15).

Vaughn testified that respondent later asked him to get her latex gloves, which officers wear when examining materials (Tr. 15-16, 24). Although Vaughn was standing next to the supply of latex gloves, he refused to get gloves for respondent (Tr. 16, 30). Respondent walked over, got the gloves herself, and started cursing at Vaughn (16, 24). She threw the portable scanner across the room and threw the latex gloves at him (Tr. 16).

According to Vaughn, respondent then came after him (Tr. 17). Vaughn, who is 5'9" and 180 pounds and much larger than respondent, who is 5'3 and 153 pounds, testified that he was surprised and "very frightened" by her reaction (Tr. 17, 31, 54). Vaughn claimed that he did not know "what really happened" but he put his hands up and grabbed respondent's wrists (Tr. 17-18).

Vaughn claimed that respondent bit him as he held her wrists (Tr. 18, 26-27). He let her go and Kelly intervened (Tr. 19). According to Vaughn, respondent pulled out her expandable baton and tried to hit him with it (Tr. 20). Other personnel responded and the incident ended (Tr. 21).

Following the incident, Vaughn was examined and released at St. Luke's Roosevelt Hospital (Tr. 21). According to Vaughn, hospital personnel did not treat the wound, they simply looked at it and released him (Tr. 22). Petitioner introduced a photograph of the injury, but none of Vaughn's medical records were offered (Pet. Ex. 1). At the hearing, Vaughn displayed his right forearm and stated that he still had a bite mark (Tr. 19). It was difficult to see any mark. Indeed, it seemed unlikely that an injury that required no medical attention would be visible more than a year later.

Kelly, a relatively new officer, was outside the building on the day of the incident (Tr. 36). When a staff member told her that two officers were fighting in the search area, she

responded (Tr. 38-39). Kelly grabbed respondent after seeing her swinging the expandable baton (Tr. 39). As Kelly conceded, she did not recall what respondent said and did not see how the incident began (Tr. 40, 45-46).

Respondent has worked for the agency for more than ten years and never before had a physical altercation with a colleague (Tr. 48, 50, 54). She testified that when she asked Vaughn to get her gloves he responded with profanity (Tr. 48, 50, 54). After respondent got the gloves herself, she asked Vaughn if there was a problem (Tr. 50). He told her, "I'm not your fucking flunky" (Tr. 50). Respondent cursed back and the argument escalated (Tr. 50-51).

In her anger, respondent tossed the contraband and hand scanner to the ground (Tr. 51). She told Vaughn that if the argument was about the contraband alcohol he could take it (Tr. 51). According to respondent, she threw the latex gloves "toward the ground" but they inadvertently hit Vaughn in the chest (Tr. 51, 56).

Vaughn reacted by punching respondent in the face (Tr. 51). According to respondent, Vaughn's fists were clenched and he made a threatening motion, so she lunged toward him to hold him until help arrived (Tr. 51, 52). Vaughn grabbed respondent by her wrists and pushed her up towards the x-ray equipment, and she bit him to make him let go (Tr. 52). Respondent conceded that she had her expandable baton out by the time Kelly arrived and restrained her (Tr. 56-58).

After the incident, respondent went to Harlem Hospital for an x-ray (Tr. 53). There were no broken bones and respondent was released (Tr. 53). She experienced shooting nerve pain and swelling to the left side of her face (Tr. 53). Respondent used an ice patch to reduce swelling and took pain relievers (Tr. 53).

As a result of this incident, respondent was arrested and charged with attempted aggravated assault of a police officer and lesser charges (Pet. Ex. 2). Penal Law §§ 110.00/120.11. There was no evidence offered regarding disposition of those charges. It appears that they are pending. It does not appear that Vaughn was arrested or subject to any discipline for his actions.

While both sides attempted to downplay their actions, I found respondent more believable than Vaughn. Respondent accepted some responsibility. She admitted getting angry, using profanity, throwing items, and grabbing Vaughn. In contrast, Vaughn was evasive. He offered no plausible explanation for how the dispute began. Instead, he claimed that respondent

started cursing at him because he refused to get gloves for her and he said nothing in reply (Tr. 17). He also claimed that respondent suddenly attacked him without any provocation.

Vaughn hedged when questioned about his use of force. Petitioner's counsel asked Vaughn whether he struck respondent:

Q: Do you recall at any point during the scuffle that you hit her?

A: I don't remember (Tr. 18).

Asked the same question on cross-examination, Vaughn again claimed that he did not remember (Tr. 25). Vaughn's answers defied belief. A workplace altercation is an unusual event. Most workers would have no difficulty recalling whether they struck a colleague. Indeed, Vaughn recognized the implausibility of his response. Asked for the third time whether he hit respondent, Vaughn changed his answer, "Well, I was trying to protect myself maybe" (Tr. 25).

The video evidence supports respondent's claim that Vaughn took a swing at her. After respondent threw the latex gloves, Vaughn clearly tried to hit respondent in the face (Pet. Ex. 5; 18:22:22). And the medical evidence indicates that Vaughn may have made contact (Resp. Ex. A). According to a hospital report, respondent was diagnosed with a "contusion of the face, scalp, and neck" and the left side of her face appeared "abnormal" and "tender" (Resp. Ex. A).

In general, respondent's testimony made more sense than Vaughn's. Vaughn's inexplicable refusal to get the gloves bothered respondent, but that alone would not have led to an altercation between two very experienced officers. It is more likely that they exchanged strong words and that Vaughn said something about not being respondent's "flunky." Respondent became angry and threw some items. When the latex gloves hit Vaughn, he reacted by striking or attempting to strike respondent in the face with his hand and a fight ensued.

However, I did not credit all of respondent's testimony. In particular, the video evidence does not support her claim that she intended to throw the latex gloves to the ground. Although the thin gloves could not have caused any harm, it appears that respondent purposefully threw them at Vaughn. Nor do I credit respondent's claim that she charged at Vaughn in self-defense. Respondent was understandably angry with Vaughn because he hit or tried to hit her in the face, and she tried to retaliate.

Petitioner proved that respondent engaged in an improper verbal and physical altercation. As a special officer, respondent should maintain her professionalism especially when a colleague fails to do so. There was no need for a protracted, profanity-laced argument. Nor was there any

need for respondent to throw gloves at Vaughn or to throw other items on the ground. Moreover, even if Vaughn struck the first blow, that did not give respondent permission to charge at him, display her baton, and continue to fight.

Fighting with a colleague at the workplace is misconduct, even if there is provocation. *See Dep't of Correction v. Siddall*, OATH Index No. 617/91, at 9-10 (Apr. 10, 1991) (workplace fight between colleagues is misconduct by both employees regardless of who starts the fight, as long as both parties demonstrated a willingness to participate). Moreover, self-defense can justify participation in a fight only if the employee had no reasonable means to avoid the altercation. *Admin. for Children's Services v. Loney*, OATH Index No. 172/99 (Nov. 6, 1998). Here, respondent had ample opportunity to avoid a fight, both before and after Vaughn hit her.

In sum, petitioner has proven that respondent used profanity and struck or attempted to strike a co-worker, as alleged in Charges I and II. The remaining charges are based on the same facts and are cumulative. Those charges are sustained but will not require a separate penalty recommendation. *See Fire Dep't v. Feret*, OATH Index No. 885/00, at 37 (Mar. 10, 2000).

### **FINDINGS AND CONCLUSIONS**

1. Respondent improperly engaged in a fight with a colleague at their workplace, as alleged in Charge I.
2. Respondent used derisive and offensive language at the workplace, as alleged in Charge II.
3. The remaining charges, III-VII, are cumulative.

### **RECOMMENDATION**

After making the above findings, I requested and reviewed a summary of respondent's personnel history. The Department hired respondent ten years ago. Her prior disciplinary history consists of a loss for four vacation days in 2009 for assorted violations, including insubordination, use of a personal computer on post, and lateness. Petitioner now seeks termination of respondent's employment. That is excessive.

The appropriate penalty for on-duty altercations with co-workers vary from a five-day suspension to termination, depending upon such factors as provocation, the extent of injuries, and the employee's prior disciplinary record. *See, e.g., Dep't of Consumer Affairs v. Wilson*,

OATH Index No. 1402/08 (May 2, 2008), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD-09-11-M (Feb. 18, 2009) (suspension of inspector who engaged in verbal and physical altercation reduced from fifteen to five days, where brief fight was provoked by supervisor who shoved the inspector and no injuries resulted); *Human Resources Admin. v. St. Bernard*, OATH Index Nos. 378-79/88 (Jan. 20, 1989), *modified*, NYC Civ. Serv. Comm'n Item No. CD 90-13 (Feb. 16, 1990) (Civil Service Commission reduced penalty for fighting to 15-day suspension where respondents had no prior disciplinary record, fight was of limited duration, and no significant injury resulted); *Admin for Children's Services v. Thomas*, OATH Index No. 1118/02 (Mar. 29, 2002), *modified*, Comm'r Dec. (May 9, 2002) (30-day suspension imposed for fighting, where employee had no prior disciplinary history and did not strike the first blow); *Dep't of Correction v. Mapp*, OATH Index No. 1305/05 (June 30, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-58-SA (May 2, 2006) (30-day suspension imposed where correction officer scuffled with co-worker, grabbed her hair, and refused to let go, despite a captain's order); *Dep't of Sanitation v. Bacigalupo*, OATH Index No. 2091/07 (Jan. 25, 2008) (60-day suspension recommended for employee who engaged in mutual combat with a supervisor and punched the supervisor in the eye); *Health and Hosp. Corp. (Coney Island Hospital) v. Gelfand*, OATH Index Nos. 1788-89/99 (July 27, 1999), *modified*, Director's Dec. (Aug 6, 1999) (two employees terminated for brawl that resulted in physical injuries, where both had been warned about fighting and had previously committed substantial misconduct).

Here, a verbal dispute escalated to a more serious physical dispute when Vaughn hit or attempted to hit respondent in the face. Respondent's violent reaction does not excuse her conduct, but Vaughn's provocation is substantial mitigation. Moreover, the altercation was of limited duration, it spanned less than 30 seconds, and no serious injuries resulted.

However, respondent could have avoided the entire incident. Vaughn's refusal to get the gloves and his accompanying remarks were annoying and unprofessional, but they did not justify respondent's angry reaction. There was also no need for respondent to throw anything. Had respondent acted more professionally, it is unlikely that there would have been any fight. It is also troubling that the fight took place in the presence of clients and required the intervention of a third officer who had to leave her post.

Without condoning respondent's conduct, it appears to have an aberration and a response to her co-worker's provocation. A substantial penalty would make clear that respondent's

conduct was unacceptable while also giving appropriate weight to relevant mitigating factors. Accordingly, I recommend a 30-day suspension without pay.

Kevin F. Casey  
Administrative Law Judge

September 15, 2011

SUBMITTED TO:

**SETH DIAMOND**  
*Commissioner*

APPEARANCES:

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