

Dep't of Homeless Services v. Smith

OATH Index No. 518/14 (Apr. 25, 2014)

Petitioner proved that respondent had a fight with a co-worker and punched a homeless shelter resident. Evidence failed to show that respondent made harassing phone calls or used obscene, derisive language. 60-day suspension without pay recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF HOMELESS SERVICES
Petitioner
- against -
JASMINE SMITH
Respondent

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, engaged in an off-duty fight with a co-worker on December 1, 2012, made harassing phone calls to that co-worker, and unjustifiably struck a homeless shelter resident on January 7, 2013 (ALJ Ex. 1).

At a four-day hearing ending March 13, 2014, petitioner relied on testimony from nine co-workers and documentary evidence. Respondent testified in her own behalf, presented testimony from another co-worker, and also offered documentary evidence.

For the reasons below, I find that petitioner proved that respondent fought with a co-worker and impermissibly struck a resident, and recommend that she be suspended without pay for sixty days. Additional charges that respondent used offensive language and later made harassing phone calls should be dismissed.

ANALYSIS

Off-Duty Verbal and Physical Altercation (Charge I, Specification 2; Charge IV)

These charges stem from an incident that took place in the early morning on December 1, 2012, in a Manhattan bar where Department personnel gathered to honor a deceased former colleague. Petitioner alleged that respondent confronted Special Officer Allison Diaz and Sergeant Robert Diaz (no relation), and asked Sergeant Diaz, “What are you doing with this fat bitch?” Petitioner also alleged that respondent punched Officer Diaz and pulled her to the floor by her hair (ALJ Ex. 1).

Respondent denied that she had a physical altercation. She claimed that Officer Diaz made hostile remarks and pointed at her. When respondent brushed Officer Diaz’s hand away, Officer Diaz pushed respondent.

The charges should be sustained, in part, because the evidence showed that there was a brief struggle between the two officers, and respondent pulled Officer Diaz’s hair. Petitioner did not prove that respondent used derisive language or punched Officer Diaz.

Officer Diaz testified that she was the victim of an unprovoked attack. She recalled driving Sergeant Diaz to the bar (Tr. 161). When respondent and Officer Battle entered the bar they gave Officer Diaz “a look” (Tr. 163). Later, Sergeant Diaz reached into his pocket to get Officer Diaz’s car keys that he had been holding for her (Tr. 165, 203). Respondent asked Officer Diaz why she reached into Sergeant Diaz’s pockets (Tr. 165). Officer Diaz, who was not going into anyone’s pockets, turned and looked at respondent before walking away (Tr. 166).

After Officer Diaz returned, she was holding a drink and speaking to Sergeant Martinez (Tr. 167). Respondent, who was talking to Sergeant Diaz, pushed a table, spilling Officer Diaz’s drink (Tr. 167, 208-09). Officer Diaz did not respond (Tr. 168).

Later, when Sergeant Diaz was talking to Officer Diaz, respondent slapped Sergeant Diaz in the head, and asked him, “Why are you talking to this fat bitch?” (Tr. 168, 216). Officer Diaz said “What?” (Tr. 168). Respondent did not say anything in reply, or said something inaudible, and punched Officer Diaz on the side of her face (Tr. 168-69, 217). According to Officer Diaz, respondent punched her in the head 10 to 15 times and dragged her by her hair across the floor (Tr. 222-23). Officer Diaz hit respondent back two or three times with her left hand (Tr. 254-55, 258-59, 271).

Officer Diaz felt other people kicking and punching her, until Martinez picked her up and took her to a table where Sergeant Aquart checked on her (Tr. 169, 221-23, 283). According to Officer Diaz, the attack lasted 45 seconds to a minute (Tr. 225).

At about 3:00 a.m., Officer Diaz drove Sergeant Diaz and his friend to Brooklyn (Tr. 171-72, 241-42). When Officer Diaz got home, she did not notice any injuries, but she could not sleep because of the pain in her head and legs (Tr. 247). Officer Diaz, who has been out on worker's compensation leave since June 2012 due to a wrist injury sustained when Sergeant Diaz was handcuffing a suspect, claimed that her wrist swelled as a result of this incident (Tr. 158, 199-200). She also claimed that later in the afternoon, she noticed bruises on her legs and face (Tr. 173, 178; Pet. Ex. 7). At about 3:00 p.m., she photographed scratches on her legs (Tr. 249). At 7:00 p.m., she took photos of a rash on her face (Tr. 248-49). At 10:00 p.m. she "could not take the pain anymore" and went to a local hospital (Tr. 181; Pet. Ex. 8). Emergency room records indicate that Officer Diaz had a bruise on her left knee and she complained of a headache and pain on the left side of her face (Pet. Ex. 8). There was no evidence of any fractures or dislocations (Pet. Ex. 8). She was instructed to take over-the-counter painkillers, such as Advil, as needed (Pet. Ex. 8).

Martinez testified that he was dancing with another officer when he heard a commotion, looked to his right, and saw respondent grabbing Officer Diaz's hair (Tr. 30, 46). Officer Diaz was kneeling down, facing the floor, and respondent was standing over her (Tr. 80, 83, 85-86). Martinez and others separated the officers and picked them up off the floor (Tr. 31, 53, 80). As Martinez escorted Officer Diaz away, her face was red, her hair was a mess, she struggled to get loose, and she said that respondent had hit her (Tr. 32, 51, 53-55). Martinez did not know how the dispute started (Tr. 33, 57).

After leaving Officer Diaz with Aquart, Martinez went to the bathroom and saw Sergeant Diaz holding respondent back (Tr. 34, 59-60). Respondent seemed upset and she struggled with Sergeant Diaz (Tr. 34, 63). Martinez escorted respondent out of the bar (Tr. 34-35, 64).

Aquart, who was at the other end of bar when the commotion began, did not see how it started (Tr. 129). She recalled that Martinez asked her to help move Officer Diaz (Tr. 108, 121, 120-21, 141). Aquart sat with Officer Diaz, who seemed flustered and said that she had been hit (Tr. 110). Officer Diaz told Aquart, "She pulled my hair" (Tr. 109, 146). Through the bathroom

door, Aquart saw Sergeant Diaz struggling with respondent and trying to restrain her (Tr. 110-11, 142).

Department Investigator Blanchard testified that Officer Diaz, Sergeant Diaz, and respondent were the initial subjects of the ensuing investigation (Tr. 353; Resp. Ex. A). Blanchard noted that Officer Diaz was the niece of a lieutenant and respondent was the daughter of a captain (Tr. 375; Pet. Ex. 4). After speaking with Officer Diaz's uncle, petitioner's counsel, and the employment unit, Blanchard closed out her investigation of Sergeant Diaz and Officer Diaz (Tr. 356, 358; Resp. Ex. C).

Respondent testified that she arrived at the bar after midnight and saw Sergeant Diaz with Officer Diaz (Tr. 876). During the evening, respondent overheard Officer Diaz ask someone, in a loud and confrontational manner, "What is she doing here? She doesn't even know him" (Tr. 879, 942). Respondent looked at Officer Diaz and ignored the remark (Tr. 879, 943). Officer Diaz gave respondent "dirty looks" (Tr. 880).

Later, Sergeant Diaz was dancing with Officer Diaz (Tr. 881). Respondent tapped Sergeant Diaz on the shoulder and asked him to take a picture with co-workers (Tr. 881). Officer Diaz waved her hands in respondent's face and told Sergeant Diaz, "You better fucking get her" (Tr. 881, 947, 951). Respondent said, "Get who?" (Tr. 945, 953). Officer Diaz's hand almost touched respondent's nose (Tr. 881, 953). Respondent "smacked" the hand away and Officer Diaz pushed her into a table (Tr. 881, 953). Sergeant Diaz separated them and moved respondent toward the bathroom (Tr. 881).

In the bathroom, respondent was upset and she told Sergeant Diaz to let her go home (Tr. 883). He blocked her way (Tr. 955). She pushed him away and when her friend Officer Battle came in and said "let her go, we're leaving," they left (Tr. 885).

According to respondent, the incident started as a verbal altercation and escalated when Officer Diaz pushed her (Tr. 944). Respondent denied saying anything to Officer Diaz, knocking her drink over, pushing her into a table, punching her, or pulling her hair (Tr. 882-83). Claiming that Officer Diaz was heavier and taller than her, respondent said that she could not have dragged Officer Diaz across the floor (Tr. 878, 882-83).

Battle testified that she went to the bar with respondent (Tr. 847, 867). Shortly after respondent went to get Sergeant Diaz to join in the group, Battle noticed a commotion (Tr. 847). She made her way through the crowd and saw Sergeant Diaz holding respondent (Tr. 851, 863).

Respondent was saying, “Let me go, I want to go home” (Tr. 863). Battle told Sergeant Diaz to let respondent go, he complied, and respondent and Battle went home (Tr. 851, 862, 866).

Sergeant Diaz was available to both sides, but not called as a witness. He submitted a written report and spoke to Department investigators. Because his statements were inconsistent, I gave them little weight. In his written report he stated that respondent and Officer Diaz shoved each other (Tr. 394-96; Pet. Ex. 9). However, in his recorded interview, Sergeant Diaz stated that he never saw the officers get into a physical altercation and he did not want either officer to get into trouble because of a minor dispute (Pet. Ex. 1 Sergeant Diaz Part I at 5:50; Part II at 1:26, 4:00).

I did not attach much weight to Officer Diaz’s testimony. Her account was implausible, largely uncorroborated, and misleading. Early in the hearing, Officer Diaz demonstrated a lack of candor. After Martinez’s testimony, respondent’s counsel noted that a woman later identified as Officer Diaz’s mother, was texting on her cell phone in the hearing room (Tr. 88-89). When questioned about this, Mrs. Diaz first said that she was texting co-workers and checking her Facebook page, before conceding that she had texted her daughter, Officer Diaz, who was in the waiting room (Tr. 93).

Yet when Officer Diaz was asked whether she had any communication with anyone in the hearing room, she claimed that she had texted her mother before the hearing (Tr. 96). Asked if she had received any other texts from her mother, Officer Diaz said, “My phone’s dead” (Tr. 96). Confronted with her mother’s concession that she had texted her during the hearing, Officer Diaz admitted that she had texted her mother in the last 15 minutes (Tr. 98). She said that she had texted, “Oh my God” (Tr. 98). Asked if there were any texts regarding testimony, Officer Diaz said, “No” (Tr. 100). After Officer Diaz’s phone was re-charged, her texts were read into the record:

Mrs. Diaz: ... The lawyer is not here yet. You’re being called last.

Officer Diaz: Oh, my God! OMG!

Mrs. Diaz: No stress her lawyer is not scoring points so far, because she’s denying it happened and there’s proof that it did....

Officer Diaz: Why did they leave the room?

Mrs. Diaz: Lawyer is trying to establish when Martinez met Smith.

Officer Diaz: Why does that matter, oh God (Tr. 147-48).

As counsel argued, Officer Diaz's responses were not "exactly truthful" (Tr. 154). She falsely denied texting her mother during the hearing. Confronted with proof to the contrary, Officer Diaz falsely denied that there was any texting regarding the testimony. Officer Diaz's inability to recall those recent facts raised serious questions about the accuracy of her recall regarding events that occurred more than a year before the hearing.

Other aspects of Officer Diaz's testimony were troubling. Her claim that respondent attacked her for no reason did not make sense. The incident occurred in a bar crowded with current and former co-workers. Yet no other witness heard respondent call Officer Diaz a "bitch" or saw respondent pushing a table or spilling a drink. Officer Diaz also claimed that respondent attacked her for up to a minute, dragged her across the floor, and struck her in the head 10 to 15 times, as others kicked and punched her. No other witness – including Martinez, who was standing next to Officer Diaz – described such a protracted and violent struggle.

Similarly, Officer Diaz's description of her injuries seemed inflated. She claimed that she could not sleep because of the pain at 5:00 a.m., yet she waited until 10:00 p.m. to seek medical attention. The photos that she purportedly took that day were inconclusive (Pet. Ex. 7). Oddly, when Officer Diaz took the photos of her legs in the middle of the afternoon, she did not take a photo of her face. The photo of her face, allegedly taken at 7:00 p.m., depicted noticeable redness. But in light of Officer Diaz's general lack of credibility, it is difficult to conclude that the photo shows an injury caused by respondent. Officer Diaz also did not show the photos to Investigator Blanchard, who interviewed her one month later (Tr. 336, 384).

Sergeant Aquart, who sat with Officer Diaz for 20 to 30 minutes after the incident and a good opportunity to see her face, did not see any injuries (Tr. 124, 142-43). And, remarkably, Officer Diaz claimed that she drove Sergeant Diaz from the bar in Manhattan to his home in Brooklyn and she did not mention any injuries to him; indeed, she testified that they did not even get a chance to discuss the incident that night because he was too busy talking to his friend (Tr. 171-72).

Though I did not credit Officer Diaz's testimony, I did not credit respondent's testimony either because it was inconsistent and unsupported. For example, one month after the incident, respondent told Department investigators in a recorded interview that she had no idea why Diaz was confrontational, she had "nothing to do with Diaz," and she had never before spoken with

Diaz (Pet. Ex. 1 Smith at 15:25, 21:05-21:20). Yet at the hearing, respondent claimed that when she and Officer Diaz previously worked at the same location in Brooklyn, Officer Diaz routinely went to the command office to “shoot the breeze” with Sergeant Diaz. It was so bad that respondent complained to Sergeant Diaz that she felt uncomfortable being in the same office as Officer Diaz (Tr. 884).

No other witnesses supported respondent’s testimony regarding Officer Diaz’s jealousy, comments, or facial expressions preceding the incident. Though the bar was crowded with current and former Department personnel, no witness supported respondent’s claim that she merely brushed Officer Diaz’s hand away. And respondent also made the unlikely claim that she did not discuss the incident with her passengers on the way home from the bar (Tr. 867).

Respondent’s testimony that it was only a verbal dispute, contradicted her written statement that she submitted to the Department the next day. She wrote that the verbal altercation throughout the night led to a “shoving match” between her and Officer Diaz (Pet. Ex. 20). Her description of a “shoving match” was more consistent with Martinez’s testimony. He credibly recalled the incident in vivid detail and had no motive to lie. Specifically, he recalled that respondent leaned over Officer Diaz and pulled her hair.

According to respondent, Martinez should not be credited because he was intoxicated that night and he gave inaccurate testimony regarding his work history with respondent. Respondent’s arguments are mistaken.

Martinez candidly conceded that he arrived at the bar at 7:30 p.m. and consumed six to ten rum and cokes during the evening. Even though he drove to the bar, he decided not to drive home because he had been drinking (Tr. 43-44, 46, 65-66). Though Martinez may have been inebriated, he watched events unfold and promptly reacted. The fight took place next to him and he forcibly separated the officers (Tr. 110-11, 142).

One officer pulling another officer’s hair in a bar was a memorable event. It is unlikely that Martinez was mistaken. Aquart’s testimony regarding the immediate aftermath was also consistent with Martinez’s account.

There was conflicting testimony about when Martinez and respondent first worked together, but that was an immaterial discrepancy. Martinez, who had been assigned to various commands in his 11-year career, initially testified that he worked at the Bellevue Men’s Shelter from November 2011 to November 2012 (Tr. 38-39). He also testified that he worked there from

February 2011 to August 2013, and he recalled that respondent started there prior to the incident in the bar (Tr. 24, 40, 42). Respondent testified that she first worked with Martinez when she was transferred to Bellevue Men's Shelter on December 16, 2012, a few weeks after the incident (Tr. 873).

Even if Martinez was mistaken as to when he first worked with respondent, they had worked together prior to the hearing (Tr. 874). Thus, it is unlikely that he misidentified respondent at the bar. Any confusion about when Martinez first worked with respondent did not detract from his overall credibility.

In short, I credited Martinez's testimony that there was a physical altercation between respondent and Officer Diaz, respondent pulled Officer Diaz's hair, and the two officers struggled as they separated from each other. That testimony was corroborated by respondent's written admission that there had been a shoving match and Aquart's testimony that the officers were forcibly pulled apart. However, I did not credit Officer Diaz's claim that it was an unprovoked, prolonged attack. I find it more likely that the two officers briefly struggled before they were separated.

Regardless of who started this off-duty fight, it was misconduct because it cast the Department in an unfavorable light, in violation of chapter IV, section 4.2 of petitioner's Code of Conduct (Pet. Ex. 2). The fight occurred during an informal tribute to a deceased former colleague. Many current and former employees were in attendance. Whatever the cause of the dispute, respondent and Officer Diaz failed to exercise appropriate restraint and they behaved unprofessionally. Though the fight took place while the officers were off-duty, it was punishable misconduct. *See Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Elter*, OATH Index No. 519/96 at 8 (Jan. 11, 1996) (off-duty fight between co-workers deemed misconduct because of adverse impact on morale and other employment-related concerns); *see also Dep't of Correction v. Siddall*, OATH Index No. 617/91 at 9-10 (Apr. 10, 1991) (fight between colleagues is misconduct by both employees, regardless of provocation). Even if Officer Diaz was the aggressor, respondent could have walked away. Because respondent elected to fight with Officer Diaz, the charge should be sustained.

Petitioner also charged respondent with using derisive, offensive, or sexual language (ALJ Ex. 1). Officer Diaz testified that respondent called her a "fat bitch" (Tr. 168, 216). She told Department investigators that respondent called her a "Puerto Rican bitch" (Pet. Ex. 1 Diaz

at 54:24). No other witness who was present, including Martinez who was right next to Officer Diaz, heard either remark. In light of Officer Diaz's general lack of credibility and the absence of any evidence that respondent uttered those remarks, this charge should be dismissed.

Harassment (Charge I, Specification 3)

Petitioner alleged that respondent harassed Officer Diaz, by repeatedly calling her cell phone and making laughing or breathing noises, from December 1 to December 5, 2012 (ALJ Ex. 1). This charge should be dismissed because petitioner failed to prove that the calls were made or that respondent was the caller.

Officer Diaz testified that the morning after the bar fight, she received three phone calls from a "blocked number" (Tr. 172, 242). During the first call, the caller laughed and Officer Diaz said that it sound like respondent's voice (Tr. 172, 195, 242). Moments later, she received a second and third call (Tr. 243).

After Officer Diaz discussed the matter with a Department official, the calls stopped for a few hours (Tr. 195). Later that afternoon, Officer Diaz received more calls from the blocked number (Tr. 195, 252-53). The calls continued until December 3 when Officer Diaz filed a complaint with the police (Tr. 196, 261).

Based on Officer Diaz's complaint, the police arrested respondent for aggravated harassment. The charges were later dismissed. Officer Diaz claimed that a detective told her that the charges were dropped because the police were told that petitioner would handle the matter internally (Tr. 272-73). Respondent denied making the calls and testified that the charges were later dismissed when the prosecution declined to prosecute (Tr. 889, 978; Resp. Ex. D).

Petitioner did not prove this charge. As noted, Officer Diaz generally lacked credibility. Moreover, Officer Diaz told Department investigators that she was unsure about the caller's identity but she "felt" that it was respondent (Pet. Ex. 1 Diaz: 35:20). There was a lack of other supporting evidence. Officer Diaz was interviewed by a Department investigator the day after she started receiving the phone calls, but she did not mention the calls to the investigator (Tr. 276-77). Nor did Officer Diaz provide the police or petitioner with any phone records (Tr. 261, 263). She claimed that she showed the phone to a detective, but petitioner offered no evidence to support that claim (Tr. 265). In her January 2013 recorded interview with Department investigators, Officer Diaz claimed that she could provide "screen shots" to show the times and

dates of the harassing phone calls (Pet. Ex. 1 Officer Diaz at 21:00-21:20). But she never offered such evidence. Officer Diaz testified that, when she tried to obtain phone records in December 2013, her cell phone carrier told her that it was too late (Tr. 265, 272).

The evidence failed to show that Officer Diaz received any harassing phone calls. Even if she received the calls, there was no credible evidence that respondent made them. There was no proof that respondent had access to Officer Diaz's cell phone number. Besides the timing of the calls, the only evidence connecting the calls to respondent was Officer Diaz's claim that she recognized respondent's laugh. Officer Diaz testified that she had minimal prior contact with respondent and there was no proof that respondent had a distinctive laugh. Based on their limited contact, it is unlikely that Officer Diaz could have identified respondent by her laugh.

Finally, petitioner offered no credible evidence that criminal charges against respondent were dropped because someone within the Department had decided that the matter would be pursued internally. The more likely explanation was the prosecution declined to prosecute because of insufficient evidence. The charge should be dismissed.

Striking a Homeless Resident (Charge I, Specification 1)

This charge arises from an incident that took place at the Bellevue Men's Shelter on January 7, 2013, after a dispute occurred between two residents on the shelter's third floor. The parties agree that a sergeant ordered officers to handcuff one of the residents and take him to the first-floor command office. That resident, who will be referred to as BT, was 6'0" and weighed at least 250 pounds (Tr. 462-63). He was loud, aggressive, threatening, and possibly intoxicated or emotionally disturbed (Tr. 561).¹ Among other things BT told several of the officers "I'm going to fuck you up" and "I'm going to kill you" (Tr. 475, 562). BT was so abusive that one of the officers had to leave the room to calm down (Tr. 503, 565-66, 570).

According to petitioner, when they were in the office, respondent repeatedly struck BT in the face (ALJ Ex. 1). Denying that she hit BT in the face, respondent said that she pushed BT away as he tried to stand and head-butt her. Because petitioner's evidence was more credible than respondent's, this charge should be sustained.

Petitioner's case rested primarily on the testimony of Officer Reese, who was a probationary sergeant at the time of the incident and later demoted to officer (Tr. 496-97, 542-45, 625). Reese testified that he and all five special officers who were on duty that night responded to a report of a disturbance between two residents on the third floor (Tr. 550-51). According to Reese, he ordered officers to take BT to the first-floor command office and, because BT was boisterous and irate, Reese ordered the officers to handcuff him for the safety of all involved (Holton: Tr. 432; Reese: Tr. 501, 558).

When the other officers returned to their posts, Reese and respondent were alone with BT in the office (Tr. 504-05, 593,607). As Reese sat at a desk in the small office filling out paperwork, he faced BT, who was seated in a chair (Tr. 504-05, 559). BT and respondent were on Reese's right side; BT sat in a chair facing Reese, and respondent was slightly behind Reese, facing BT (Tr. 505-06, 585). They were within three feet of each other and BT was still handcuffed behind his back (Tr. 560, 567, 572, 574, 629).

According to Reese, he and respondent tried to calm BT but he kept trying to get up out of the chair and "we (sic) kind of like put my hands on him, just tell him to sit down" (Tr. 508, 529, 572-73). At one point, Reese looked up from his desk and he did not see respondent (Tr.

¹ At petitioner's request, the resident's name has been redacted to protect his privacy rights (Pet. Mem. at 304). *See* Soc. Serv. Law § 136(1) (names of public assistance recipients shall not be included in published reports); 48 RCNY § 1-49(d) (where applicable laws require confidentiality, names should not be published in this tribunal's decisions).

506, 578). When he turned, he saw respondent standing over BT, who was seated (Tr. 506, 578). Reese saw respondent strike BT on the left side of his face with her closed fist (Tr. 506, 578-80, 587).

Respondent denied striking BT in the face or head (Tr. 903). She testified that Reese left her alone in the office with BT because Reese had a “girlfriend” posted in the intake area (Tr. 902-03). When Reese returned to the office, he saw respondent “tussling” with BT (Tr. 903). Respondent held one hand on BT’s chest and the other on his shoulder trying to keep him down in the chair (Tr. 903-04). Reese asked what was going on and BT said, “She just hit me, you seen that she hit me” (Tr. 904). Respondent told Reese that she did not hit BT; she said that she pushed him because he came after her with a head-butt motion (Tr. 904).

An ambulance arrived but BT declined medical attention (Cartagena: Tr: 659). BT notified the police and respondent was arrested for assault, but the charges were later dismissed on speedy trial grounds (Resp. Ex. E).

This was largely a credibility contest between respondent and Reese. The charge should be sustained because I found Reese more credible than respondent. He recalled the incident with specific details in a straightforward manner. Reese also had no motive to lie. In fact, it would have been much easier for him to look the other way and say that he did not see any wrongdoing. He credibly recalled that he was shaken up after the incident and had to compose himself because he was a probationary supervisor and respondent was a captain’s daughter (Tr. 513-14, 592).

Despite the fear of reprisals, Reese promptly reported the incident to other Department personnel. Those witnesses corroborated Reese’s claims regarding the immediate aftermath. Officers Holton and Noble both credibly testified that they returned to the office and saw BT screaming and yelling at respondent (Holton: Tr. 491; Noble: Tr. 712). Reese told both officers that respondent had punched BT in the face (Holton: Tr. 437-39, 492; Noble: Tr. 715). Sergeant Cartagena, who arrived shortly after the incident, saw respondent standing in front of BT, who said “this little girl hit me” (Tr. 648). After respondent left the room, Reese told Cartagena that he saw respondent hit BT (Tr. 651). Reese told Assistant Superintendent, then lieutenant, Warfield, who arrived at about 3:00 a.m., that respondent repeatedly punched BT (Tr. 768).

In contrast, respondent’s explanation was implausible. There was no support for her speculation that Reese left the office to see a girlfriend assigned to the intake area. The officers

who were assigned to the intake area never mentioned any visit by Reese and respondent never questioned them about any supposed girlfriend.

Nor did I credit respondent's claim that she simply pushed BT in the torso when he attempted to head-butt her. Other officers confirmed that BT was bleeding on the side of his face when they saw him shortly after the incident. Respondent suggested that the injury might have been sustained during BT's initial dispute with another resident on the third floor, but no other witnesses supported that theory.

Respondent argued that Reese should not be credited because he gave false testimony regarding the command log (Tr. 991). Reese first testified that he was at his desk making entries in the log book when respondent struck BT, but he later conceded that he fell behind in his paperwork and the entries after 10:00 p.m. were entered by Cartagena (Tr. 505; Pet. Ex. 15). Respondent suggests that if Reese was wrong about writing in the log book when the incident occurred, he could be wrong about respondent striking BT.

That argument is flawed for several reasons. Reese testified that he was filling out the log book and a report, referred to as a PSR, at the time respondent struck BT (Tr. 571; Pet. Ex. 12). Even though Cartagena finished the entries that night, Reese wrote the entries for events that occurred from the 3:45 p.m. roll call until 7:30 a.m. (Pet. Ex. 15). Thus, Reese may have been filling out the PSR or earlier log book entries at the time of the incident, and even if he was confused about his paperwork, it is not likely that he was mistaken about seeing respondent striking BT in the face.

Respondent also faulted petitioner for failing to calling BT as a witness (Tr. 991). That argument was unpersuasive. BT was hostile and belligerent before and after the incident. The evidence also showed that he had a tendency to exaggerate. For example, he told Cartagena that respondent struck him 25 times (Pet. 14). Respondent did not establish that, at the time of the hearing, BT was within petitioner's control or could be naturally expected to testify in petitioner's favor. *See Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital & Nursing Facility) v. Vega*, OATH Index No. 1695/08 at 2, n. 1 (June 2, 2008) (declining to draw an adverse inference against an agency for failing to call an ex-employee as a witness); *see also People v. Gonzalez*, 68 N.Y.2d 424, 427 (1986) (adverse inference may be appropriate where party fails to call a witness within its control where witness would naturally be expected to be

favorable to that party). Under these circumstances, it made sense for petitioner to rely on Reese and others, rather than BT.

In sum, I credited Reese's testimony that respondent repeatedly and unjustifiably struck BT in the face, in violation of Department policy that special officers are to use the "minimum necessary force" when dealing with drunk, violent, or emotionally disturbed people (Pet. Ex. 3 at 120-08). The charge should be sustained.

Additional Charges (Charges II, III, V, VI)

The remaining charges repeated the factual allegations addressed above and are cumulative. Where those facts were proved, the charges should be sustained without additional penalty. *Fire Dep't v. Feret*, OATH Index No. 885/00 at 37 (Mar. 10, 2000).

FINDINGS AND CONCLUSIONS

1. Respondent fought with a colleague, as alleged in Charge I, specification 2.
2. Petitioner did not prove that respondent used offensive language or gestures, as alleged in Charge IV.
3. Petitioner failed to prove that respondent made harassing phone calls, as alleged in Charge I, specification 3.
4. Respondent used improper force when she struck a homeless shelter resident, as alleged in Charge I, specification 1.
5. The remaining charges are cumulative.

RECOMMENDATION

After making the above findings, I requested and reviewed a summary of respondent's personnel history. The Department hired respondent two years ago and she previously worked for the New York City Police Department as a traffic control agent. Respondent had no prior disciplinary record and her most recent available performance evaluation rated her work as good. Petitioner now seeks termination of respondent's employment. That is excessive.

The appropriate penalty for off-duty fights or altercations with co-workers ranges from a five-day suspension to termination, depending upon factors including 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 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); *Dep't of Correction v. Mapp*, OATH Index No. 1305/05 (June 30, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-58-SA (May 2, 2006) (30-day suspension imposed where correction officer scuffled with co-worker, grabbed her hair, and disobeyed order to let go); *Health & 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 fired for brawl resulting in injuries, where both workers had been warned about fighting and had previously committed substantial misconduct).

Substantial penalties are also imposed for workers who strike people entrusted to their care. *See, e.g., Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Castro*, OATH Index No. 462/13 (Mar. 20, 2013), *modified*, Exec. Dir. Dec. (May 2, 2013) (60-day suspension imposed on hospital lieutenant who arrested an apparently homeless man and slapped him in the face after he was handcuffed, where the man spat in lieutenant's face); *Health & Hospitals Corp. (Coler Goldwater Specialty Hospital) v. Bellinger*, OATH Index No. 133/10 (Oct. 21, 2009) (termination of employment where sergeant, with disciplinary record and frequent warnings for rules violations, pushed patient against a wall, causing chest injury); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Goodman*, OATH Index No. 1632/07 (Dec. 14, 2007) (employment terminated where special officer, with a prior disciplinary record, slapped psychiatric patient across the face, without provocation, and said, "I am doing my job." Officer also failed to remove a patient's belt and shoelaces and engaged in a private phone call while on duty); *Dep't of Juvenile Justice v. Clements*, OATH Index No. 1198/06 (Apr. 24, 2006), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 07-44-SA (Apr. 5, 2007) (termination of employment deemed excessive and penalty reduced to time served, where juvenile counselor used unnecessary force against one juvenile by lifting him up against a wall and evidence failed

to prove allegations that excessive force was used against two other juveniles); *Dep't of Correction v. Johnson*, OATH Index No. 1639/05 (Aug. 18, 2005), *modified*, Comm'r Dec. (Oct. 27, 2005), *modified*, NYC Civ. Serv. Comm'n Item No. CD 07-29-M (Mar. 14, 2007) (15-day penalty for officer with no prior record who pushed an inmate's head into a door during a struggle and submitted a misleading report); *Police Dep't v. Miller*, OATH Index No. 444/01 (June 20, 2001), *aff'd*, 299 A.D.2d 267 (1st Dep't 2002) (20-day suspension for officer who struck handcuffed person in patrol car).

Here, petitioner seeks the maximum available penalty of termination of employment because respondent was involved in two different uses of force in a brief time span and she is a relatively junior employee. Petitioner contends that respondent lacks the maturity and judgment necessary to be a special officer.

Without minimizing the seriousness of respondent's misconduct, there are mitigating circumstances. All of the charges were not proved. Contrary to petitioner's allegations, the brief off-duty altercation ended quickly. Petitioner failed to prove that it was an unprovoked, prolonged attack or that there were any serious injuries. That does not excuse respondent's conduct, but it suggests a lesser penalty is appropriate.

There was also no justification for respondent to strike a handcuffed resident. Yet it appears that she was provoked by extraordinary provocation, including explicit death threats. Department personnel are trained to deflect such taunts from intoxicated or emotionally disturbed people. Indeed, other officers demonstrated their professionalism when they refrained from using unnecessary force against BT. Respondent's failure to live up to that standard does not mean that she is unfit to serve as an officer. She was an inexperienced officer who suffered a lapse of judgment. There was evidence that she has the potential to be a valuable member of the Department. Sergeant Cartagena, who knew about the incident involving BT, recommended that respondent be considered for supervisory position based on his later supervision of her work (Tr. 676-77).

A severe penalty is necessary in light of the gravity of the proven charges. However, a penalty short of termination would recognize the fleeting nature of both incidents, the absence of serious injuries, and respondent's lack of a disciplinary record. Such a penalty would be consistent with the principle of progressive discipline.

Accordingly, I recommend a 15-day suspension for the off-duty altercation and a 45-day suspension for unjustified use of force against a resident, for a total penalty of 60 days' suspension without pay, with credit for time already served.

Kevin F. Casey
Administrative Law Judge

April 25, 2014

SUBMITTED TO:

GILBERT TAYLOR
Commissioner

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