Triborough Bridge & Tunnel Auth. v. Francis

OATH Index No. 825/13 (Oct. 10, 2013)

An off duty Bridge and Tunnel Officer was charged with pushing and shoving a carwash employee, displaying his weapon and pointing it at carwash employees, failing to identify himself, failing to display his shield and identification, and making false statements during an official interview. Petitioner established that respondent committed misconduct by pushing and shoving a carwash employee. ALJ recommended that the remaining charges be dismissed and respondent be suspended for 30 days.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY
Petitioner
- against -
WORRELL FRANCIS
Respondent

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Triborough Bridge and Tunnel Authority, pursuant to section 75 of the Civil Service Law. The charges allege that respondent Worrell Francis, a Bridge and Tunnel Officer, while off duty, struck and pushed a carwash employee, drew his weapon and menaced carwash employees, failed to identify himself as a peace officer and display his shield and identification, and made false statements during an investigative interview (ALJ Ex. 2).

Following a three-day hearing before me, I find that petitioner established that respondent struck and pushed one carwash employee. The Department failed to establish that respondent committed misconduct by drawing his weapon, menacing the carwash employees, failing to identify himself as a peace officer, failing to display his identification, and making false statements during an investigative interview. I recommend that respondent be suspended for 30 days.

ANALYSIS

Petitioner did not call any eyewitnesses to the incident. They relied on video and witness statements made to the investigators. On April 6, 2012, respondent was off duty and running errands with his nephew. At some point during the day, respondent took his car, a 2012 BMW four-door sedan, to a carwash in the Bronx. Respondent gave the keys to a carwash attendant who drove it onto the guide rail while respondent went to pay the cashier. Afterwards, while the carwash employees were drying his car, respondent noticed damage to one of his custom-made wheel rims, which cost $1,500 each. Respondent testified that he pointed out that his rim had been damaged during the carwash, but the carwash employee was dismissive and said that it must have been damaged while respondent was driving the car. After respondent drove his nephew home and dropped off his groceries, he examined the rim closely and saw a "one-inch divot into the rim" with a yellow paint streak from the carwash guide rail (Pet. Exs. 1, 2; Tr. 24, 151, 305-08).

Respondent testified that he returned to the carwash with the intention of speaking to the manager about the damage to his rim. He parked his car off to the side, so as not to block other patrons and approached the carwash attendant who had driven his car into the carwash. The incident was captured on security video from two of the carwash cameras. Respondent testified that the carwash attendant denied damaging his car rim and asserted that cars are driven through the carwash all of the time and are not damaged. Respondent demanded to speak to the manager and the carwash attendant kept saying that they were not responsible for the damage. The carwash attendant, who was Latino, initially spoke to respondent in English but switched to Spanish. He pretended not to understand English the more respondent insisted that the carwash was responsible for the damage. The carwash attendant told respondent that there was no manager and repeated that the rim was not damaged at the carwash. Respondent admitted that he became more "insistent" or "assertive" and pushed the carwash attendant (Pet. Exs. 1, 2, 13; Tr. 24-25, 151, 309-312).

Another carwash employee approached to see what was happening. Respondent testified that he "was somewhat frustrated" because he was not getting a satisfactory response so he shoved the carwash attendant again. At approximately the same time a patron pulled up to where they were standing because he wanted to get his car washed. He asked what was going on and respondent explained that they damaged his rim but the carwash employees were denying that

they caused the damage and would not get the manager. Meanwhile, the carwash employee kept repeating that respondent's car was not damaged at the carwash (Pet. Exs, 2, 13; Tr. 25, 151, 313-14). Respondent started to walk back to his car when the carwash attendant started cursing at him in Spanish, calling him "puta" and "maricon" (Tr. 314).

The carwash attendant continued to speak derisively about respondent in Spanish to the second carwash employee. Respondent was so aggravated that he turned around and walked quickly back towards the carwash attendant. Respondent stated, "you think people don't understand the shit you all talk" and "mushed" the carwash attendant in the face, which he described as an open-handed shove to the head (Tr. 406). The video showed that respondent mushed the carwash attendant hard enough for him to lose his balance and stumble backwards into a parked car (Pet. Exs. 1, 2, 13; Tr. 151-52, 260-61, 315, 407).

As soon as he recovered his footing, the carwash attendant rushed over to a bucket containing cleaning fluids used on the tires before cars are driven into the carwash. The attendant grabbed the bucket and threw the contents of it on the respondent, dousing him with the liquid. The video reflects that respondent was surprised and stepped back, before looking down at his clothes. Respondent stood in place motionless. Meanwhile, several other carwash employees approached in what appeared to be an effort to help their co-worker (Pet. Exs. 1, 2, 13; Tr. 25, 152, 261, 316, 355).

At this point, respondent was standing still facing the carwash attendant who was holding the bucket and the second carwash employee was standing slightly to respondent's right side, closer to respondent's car. A third carwash employee rapidly approached on respondent's left side and as he neared a pile of carwash supplies, he picked up a long broom-like stick with a brush on the end that is used to clean the wheels on the cars. The third carwash employee grabbed the stick with his left hand and swung it up and over the other carwash supplies. It appeared in the video that the carwash employee with the stick tried to get a better grip by swinging it in a semi-circle downward to his right side so that he could grab it with his right hand. At one point the stick was straight up in the air. After he got two hands on the stick, he held it at a downward angle like a hockey stick and approached respondent in an offensive stance with his knees bent. He appeared to be ready to swing the stick at respondent (Pet. Ex. 13; Tr. 25, 153, 261, 318, 344, 355).

Respondent turned slightly to his left when he noticed the attendant with the stick rushing at him and immediately drew his firearm from its holster with his right hand. As soon as respondent drew his weapon, the carwash attendant with the stick, stopped approaching and lowered the stick. Respondent steadied his gun with his left hand and stepped forward, pointing the gun at the attendant with the stick and told him to back up. As the attendant with the stick retreated, respondent lowered his gun and started walking towards him in an effort to reach the cashier's office. Meanwhile, another carwash employee, who was larger than respondent and the others, appeared from the other side of the pile of carwash supplies and started to approach respondent. As the larger carwash employee got closer he picked up a spray bottle from the pile of supplies. Meanwhile, the first attendant was still holding the bucket and started approaching respondent from behind. Respondent pointed his gun at the attendant with the bucket and lowered the gun when the attendant stopped advancing. Respondent then pointed his gun a third time at the big carwash employee, who was standing across from him and told him "to back the fuck up" (321). Respondent lowered his gun, turned and walked towards the office with his back to the carwash employees who were standing in somewhat of a semi-circle around him (Pet. Exs. 1, 2, 13; Tr. 25, 153, 211-12, 261, 318-22, 347-48, 356, 411, 445-46).

As respondent re-holstered his weapon, the carwash employees stood still watching him. The attendant with the bucket stepped closer and the one with the stick pulled his cell phone out of his pocket and made a phone call. The carwash employee standing furthest away from respondent, but closer to respondent's car, also took out his cell phone and made a phone call. Respondent at this point was either completely out of frame of the video or stepped forward barely enough to see the top of his head. He was facing the carwash employees while he was standing at the doorway of the cashier's office. The carwash employees were staring at respondent without showing any fear at all and started walking towards him. Respondent testified that after he re-holstered his weapon, he used his right hand to pull his shield and identification out of his right pocket. He held it in his right hand, down by his leg. The carwash employees started milling around. Some of the attendants congregated together and had a conversation, while others returned to work (Pet. Exs. 1, 2, 13; 25, 154, 156, 235, 267, 324, 326, 352, 357-58, 415).

Respondent testified that he went into the cashier's office and asked to speak to a manager, but there were no managers working at the time. Respondent felt that there was no

longer a threat and seeing that there was a clear path to his car, returned to his vehicle. He took out his cell phone and placed a call to 411 to obtain the telephone number for the nearest precinct. Respondent testified that he did not call 911 because it was not an emergency, but he wanted to report that he had displayed his weapon. While respondent was on the phone with information, the police reported to the scene in response to the 911 calls placed by the carwash employees. Respondent testified that he identified himself as the person with the firearm and explained to the police officers what had happened. Respondent fully cooperated with the police. He turned over his firearm and went to the precinct. He was never arrested or criminally charged as a consequence of this incident (Pet. Exs. 1, 2, 6, 13; Tr. 25, 157, 262-63, 327-29, 331-32, 360). Police Lieutenant Anand Bohj submitted a report to the chief of patrol stating that it was his opinion that respondent, "was the primary aggressor in this incident, by pushing two employees at this location. However when he was surrounded and faced with a potential threat of a weapon against him he did not commit any crime when he pulled out his lawfully possessed firearm and proceeded to exit the location." (Pet. Ex. 6).

The Authority notified Captain Catrina Booker and Investigator John Moakley that respondent was involved in an off duty incident and was being detained at the 47th Precinct. Captain Booker and Investigator Moakley conducted the investigation. They went to the carwash and discussed the incident with Police Lieutenant Bhoj. After reviewing the carwash video, they interviewed three carwash employees separately with the assistance of a Spanish speaking police officer acting as an interpreter. None of the carwash employees sustained any injuries during the incident. In addition, Captain Booker went to the precinct and took respondent's statement, in the presence of Wayne Joseph, president of the Bridge and Tunnel Officer's Benevolent Association (Pet. Exs. 1, 2, 4; Tr. 22-23, 26-27, 36-37, 62-63, 69-70, 77-78, 86, 93, 96-98).

Respondent cooperated and explained what had happened when he returned to the carwash to complain about the damage to his rim. He acknowledged initiating the physical contact by pushing the carwash employee. He related that one of the carwash attendants threw a bucket of cleaning fluids on him. Respondent further admitted that he drew his weapon and pointed it at the carwash employees because he felt physically threatened by the employee wielding the stick and surrounded by the others. Respondent also stated that he took out his shield and identification after he re-holstered his weapon. Captain Booker and Investigator

Moakley concluded that there were inconsistencies between respondent's statement and the video. As a consequence, they secured respondent's firearm (Pet. Exs. 1, 2, 4; Tr. 24-25, 36-37, 47).

The agency's official investigation was initially assigned to William D'Amora but was subsequently transferred to Richard Cummins. When the case was transferred to Investigator Cummins, the file had already contained memoranda from Investigators Moakley and D'Amora, including interviews done with three carwash employees and the cashier. Investigator Cummins conducted respondent's official interview on July 13, 2012, in the presence of Mr. Joseph. Respondent fully cooperated with the investigation (Pet. Exs. 8, 14, 15; Tr. 117-19, 124, 185, 192).

During the official interview, respondent once again explained that his car rim had been damaged and he returned to the carwash to speak to a manager. He again admitted to initiating the physical confrontation by pushing and mushing the carwash attendant. Respondent further told Investigator Cummins that the carwash attendant then threw the contents of a bucket of cleaning fluid on him. Respondent further admitted to drawing his firearm in response to a physical threat when another carwash employee came at him with a stick. During the interview, respondent acknowledged that he did not verbally identify himself, but maintained he did display his shield and identification after he re-holstered his weapon (Pet. Ex. 16, 17; Tr. 150-54, 235, 260-62).

Investigator Cummins concluded that respondent was the primary aggressor in this incident because he initiated the physical confrontation and he pointed his weapon at the employees. He further concluded that respondent did not display his shield, did not appear threatened, and the cleaning fluids from the bucket did not hit him. In Investigator Cummins' opinion respondent acted improperly by drawing his firearm and pointing it at the carwash employees because he had a chance to withdraw from the situation. As a consequence, disciplinary charges were proffered against respondent (Pet. Ex. 19; Tr. 159, 165-66, 182).

Physical Confrontation

Respondent was charged with striking and/or pushing a carwash employee (ALJ Ex. 2). It is undisputed that respondent pushed or shoved the first carwash attendant twice and then mushed him in the face. Not only is it evident from the security video, respondent readily

acknowledged that he initiated the physical confrontation with the carwash employee in his statements to the police, Captain Booker, Investigator Cummins, and during his testimony at this hearing. Indeed, respondent admitted the physical confrontation prior to even viewing the videotape of the incident (Tr. 260, 334, 353). Respondent took responsibility for the physical confrontation and admitted that he was wrong to physically engage with the carwash attendant by pushing and mushing him (Tr. 336-37).

Although this incident occurred while respondent was off-duty and not on Authority property, it is still permissible for the agency to discipline respondent for his misconduct. *See Comwell v. Bates*, 105 A.D.2d 699 (2d Dep't 1984); *Dep't of Correction v. Griffith*, OATH Index No. 669/01 at 3 (Apr. 3, 2001), *penalty modified*, Comm'r Dec. (June 28, 2001); *Dep't of Environmental Protection v. Tosado*, OATH Index No. 311/83 at 13-16 (Sept. 2, 1983). As a prerequisite, the agency must establish some relationship between the conduct sought to be sanctioned, the agency's mission, and the employee's position. *Triborough Bridge & Tunnel Auth. v. Christiano*, OATH Index No. 493/12 at 9 (Mar. 21, 2012), *aff'd*, Comm'r Dec. (Apr. 11, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-34-SA (July 24, 3012), *citing Furst v. NYC Transit Auth.*, 631 F. Supp. 1331, 1338 (E.D.N.Y. 1986).

By virtue of his position with the authority, respondent is a peace officer. As a peace officer, respondent is constrained to protect the peace and order of a civil society. *Dep't of Correction v. Parrish*, OATH Index No. 1386/03 at 2-3 (Aug. 6, 2003), *aff'd*, Comm'r Dec. (Sept. 23, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 04-37-SA (July 8, 2004). *See also, Dep't of Probation v. Dixon*, OATH Index No. 156/11 at 6 (Nov. 30, 2010). Even though respondent was off duty and this incident did not occur within the scope of his employment, he is still a peace officer. Initiating a physical confrontation with a carwash attendant by pushing and shoving him is contrary to protecting the peace and order of a civil society. Accordingly, respondent committed misconduct by pushing and shoving the carwash attendant.

Firearm Charges

Respondent was charged with failing to conceal his weapon at all times, unholstering his firearm and pointing it at three carwash employees, intentionally placing three carwash employees in fear by displaying a deadly weapon, and violating the Authority's off-duty firearm

protocol (ALJ Ex. 2). It is undisputed that respondent removed his firearm from its holster and pointed it at three carwash employees. The issue is whether his actions constituted misconduct.

Respondent admitted that he initiated the physical confrontation, but argued that it was reasonable for him to draw his weapon when the incident was escalated by another carwash employee wielding a stick.[1] Respondent maintained that he felt physically threatened and needed to defend himself from physical injury. Petitioner argued that respondent initiated the incident and had a duty to retreat rather than draw his weapon.

Petitioner asserted that respondent violated section 120.14(1) of the Penal Law, Menacing in the second degree. This tribunal, however, does not have jurisdiction to determine whether or not the Penal Law has been violated, except as necessary to resolve a legal issue such as whether the crimes exception to the statute of limitations applies. *Dep't of Correction v. Roman,* OATH Index Nos. 1026/05, 1296/05 at 8 (Feb. 10, 2006), *app dism,* NYC Civ. Serv. Comm'n Item No. CD07-22-D (Mar. 5, 2007); *Bd. of Education v. Forde,* OATH Index No. 491/95 at 24-25 (Mar. 29, 1995); *see also Dep't of Education v. Robles,* OATH Index No. 2275/09 at 13 (Oct. 19, 2009), *adopted,* Chancellor's Dec. (Nov. 16, 2009) (where misconduct charges allege a crime, the tribunal cannot determine if a crime has been committed, but can only make a determination as to whether respondent engaged in misconduct by referring to the Penal Law for guidance).

Petitioner further asserted that respondent violated the Authority's Use of Force Procedure and Firearms Policy. Despite petitioner's insistence to the contrary, on its face, the Authority's Use of Force Procedure indicates that it is applicable to Authority employees while they are on duty and on Authority property. Section 1.0 of the Use of Force Procedure, entitled Purpose, states: "Peace Officer personnel are required to preserve human life and safeguard the lives and property of the Authority's customers and employees and all others who utilize the Authority's facilities." OPS-155, RNM07-007 (Aug. 16, 2007) (Pet. Ex. 22). This section not only sets forth the purpose of the policy it limits its applicability to on-duty activity.

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[1] The parties submitted post-hearing briefs regarding the defense of justification. Both petitioner and respondent argued that justification for drawing a firearm was an inappropriate test in determining whether respondent committed misconduct because this defense is primarily a criminal defense. I agree with the parties' assessment. *See Police Dep't v. Conlin,* Comm'r Dec., (May 6, 1991), *rev'g, Police Dep't v. Conlin,* OATH Index No. 529/91 (Feb. 22, 1991) (the standard for determining when drawing and pointing a weapon is misconduct is "reasonableness under the circumstances," not the justification standard set forth in Penal Law section 35.15).

As petitioner aptly noted, respondent was not only off-duty, he was out of uniform, and at a location that was not an Authority facility (Pet. Brief at 5). There is no reference to off duty conduct in the Use of Force Procedure which suggests that it does not apply to off-duty conduct. Indeed, the policy is completely focused on use of force procedures when a Bridge and Tunnel Officer is acting within the scope of his employment and while working at the Authority facilities. Consequently, the Use of Force Procedure does not apply in this case.

In contrast, section 7.4 of the Firearms Policy references off duty conduct. It states:

> Except when on duty and in uniform, the firearm is to be kept concealed at all times (unless superseded by local law) and any careless or willful display or misuse of the firearm is prohibited and will result in disciplinary action.

OPS-150 (Sept. 20, 2012) (Pet. Ex. 21). Even though this policy applies to off duty conduct, the issue remains whether respondent violated this policy by drawing his weapon during the incident.

This tribunal has employed a reasonableness test in evaluating the propriety of the display of a weapon. In reviewing the propriety of an officer's display of a firearm, this tribunal must determine whether the officer reasonably feared for his or another's safety and, thus, whether his conduct would be considered "reasonable in the circumstances." *Police Dep't v. Bynoe*, OATH Index No. 2433/00 at 15 (May 24, 2001), *citing Transit Auth. v. Dabulis*, OATH Index No. 627/92 (Sept. 8, 1992). This is consistent with the standard the courts have applied in criminal cases in assessing the propriety of protective action (*i.e.*, drawing a weapon) taken by police officers during the stop of a criminal suspect. *See People v. Mondello*, 191 A.D.2d 462 (2d Dep't 1993). While the standard is ultimately an objective one – what a reasonably prudent officer in the same circumstances would have done – due deference should be given to the judgment of the officer at the time and scene of the incident. *Police Dep't v. Losado*, OATH Index No. 1035/93 at 12-13 (Oct. 29, 1993). *See also, Triborough Bridge & Tunnel Auth. v. Bell*, OATH Index No. 1635/08 at 7 (June 3, 2008), *adopted*, Acting President's Dec. (July 11, 2008).

In *Transit Authority v. Dabulis*, an off duty police officer working a part-time security job at a grocery store improperly hit and kicked a youth that he was trying to evict from the store. When the 12-year old returned to the store with his mother, an altercation ensued in which the mother punched the officer in the face and several other family members joined in. The officer

was charged with misconduct for pursuing the family outside of the store with his gun drawn and then pointing it at the mother to detain her until other officers arrived. Administrative Law Judge Raymond E. Kramer noted that the test to evaluate whether it was proper to point a weapon at another is not whether deadly physical force would have been able to be used but simply whether respondent had a reasonable fear for his safety or the safety of others at the time. *Dabulis*, 627/92 at 23. Judge Kramer found that the officer did not have a reasonable fear for his safety once the family attempted to leave the scene. He concluded that, at that point "no one in the group was armed, nor did respondent claim that he feared otherwise. No one in the group menaced or advanced on him, and [the mother] offered no resistance." *Dabulis*, 627/92 at 23.

In this case, respondent initiated the physical confrontation with one of the carwash employees. Respondent was forthcoming and took responsibility for his actions, expressing remorse during the hearing. At the start of the confrontation he was irritated and frustrated, pushing and shoving the carwash employee, but he did not pull his weapon until he felt physically threatened. Indeed, even after the carwash attendant had doused him with the contents of the bucket respondent said something but did not take out his gun. An inordinate amount of time was wasted during the hearing on whether the contents of the bucket even touched respondent. Petitioner persistently maintained that the liquid did not hit respondent, but by some inexplicable force went completely around his body without touching him (Tr. 36-37, 152, 204, 243-44, 277-78, 316, 335, 355, 434, 476, 487, 489-90). Not only is this contention absurd, it is dispelled by the video itself, which shows the liquid bouncing off respondent's torso and left arm which he raised defensively before splashing on the ground around him (Pet. Ex. 13, camera view 16 at 17:39:31). Despite being doused by the liquid, which respondent may have deserved for initially pushing and shoving the carwash attendant, respondent did not escalate the situation by drawing his weapon.

While respondent was recovering from being doused with the cleaning solution, another carwash attendant grabbed a stick with a brush on the end and swung it in a semi-circle over his head from his left to his right to get a better grip. Once he had the stick in his right hand, he held it like a hockey stick and advanced on respondent in a very offensive stance. It was at this point that respondent drew his firearm, adjusted his grip, and pointed the gun at the individual with the stick to stop him from advancing. A rather large carwash employee approached and picked up a spray bottle as he stepped closer to respondent. Meanwhile the first carwash attendant never

retreated and still had the bucket in his hand. If respondent, at the moment, had a reasonable fear for his safety, it was not misconduct to draw his weapon. *See Transit Auth. v. Campbell*, OATH Index No. 315/93 at 9-10 (Jan. 7, 1993). Respondent credibly testified that he felt surrounded, feared for his safety, and believed that the stick or the bucket could have been used as a weapon (Tr. 318, 321, 347-48, 381). Furthermore, the video very clearly shows that respondent did not draw his firearm until he felt physically threatened.

Another important factor to consider is that it was only 11 seconds from the time respondent drew his firearm to the time he re-holstered it. Moreover, during that brief period of time he did not uncontrollably wave his gun around or even point it at someone for an extended period of time. To the contrary, once respondent steadied his weapon in his hand, he pointed it at the carwash employee with the stick. Once the gun was pointed at him, the employee with the stick retreated and respondent lowered the weapon. Next, respondent raised his weapon and pointed it at the carwash attendant with the bucket who took a few steps closer to him. Once he stopped advancing, he lowered the gun again. Respondent raised his firearm a third time and pointed at the large carwash attendant who had just picked up a spray bottle. When this individual stopped approaching, he lowered the gun again. Each time the gun was raised for one second or less. Respondent made a split-second decision which was reasonable. None of the carwash employees looked fearful and when respondent lowered the weapon and walked to the cashier's office some of them actually followed him. As soon as respondent felt safe, respondent re-holstered his weapon.

Petitioner correctly noted and respondent fully acknowledged that he was the initial aggressor by pushing and shoving the first carwash attendant. Nonetheless, even when he was confronted by two carwash employees and being doused with the cleaning fluids, respondent did not escalate the situation. Quite the opposite, another carwash employee who was not initially involved, escalated it by picking up a stick and approaching respondent, while another carwash employee also joined the group. The carwash employees increased the threat of force by including additional people, two of whom had a weapon of some sort, and by surrounding respondent. Even though he struck the first blow, respondent was still entitled to defend himself when four carwash employees surrounded him, especially when it appeared that some of them were prepared to use deadly force. Despite respondent's initial aggression, which he should be penalized for, drawing his firearm was a proportionate response to the carwash employees

escalating the incident by introducing weapons. At the point that respondent was reasonably in fear of his safety, it was permissible to draw his firearm whether he was the initial aggressor or not.

Petitioner further argued that respondent should have withdrawn from the location and retreated to his car rather than draw his weapon. Respondent credibly testified that his car keys were in his pocket and the car doors were locked (Tr. 330). Respondent felt surrounded and reasonably feared turning his back on the group to let himself into his car (Tr. 362, 397-98, 456, 459). The video shows that the employees are in a loose semi-circle standing around respondent. There were two employees to his right, one of whom was holding the bucket. The large carwash attendant with the spray bottle was standing across from him and there were two employees, one of whom was holding the stick standing to his left. The two employees to his right were not blocking his path to the car but they were closer to his car than he was. It is understandable that respondent should fear repercussions from the gathering carwash employees. *Cf. Bynoe*, 2433/00 at 15 (officer could readily have ended the fight by simply stopping his aggressive conduct and withdrawing from the fight and retreating).

I find that respondent did not commit misconduct by drawing his weapon and pointing it at the carwash employees. Using a reasonableness standard, the display of respondent's weapon in this particular circumstance was proper because respondent was in reasonable fear for his safety. *See Campbell*, 315/93 (Judge found no misconduct when a transit officer drew his weapon after two individuals aggressively exited their car and approached him because, at the moment, he had a reasonable fear for his safety).

Respondent was additionally charged with failing to keep his weapon concealed. Since I deem that drawing his weapon was proper in this instance, this charge should be dismissed. I further find that respondent did not intentionally place the carwash employees in reasonable fear of physical injury. Not only did the carwash attendants not look frightened, respondent's intent at the time of drawing his weapon was self-defense. Finally, I do not find that respondent violated the Authority's Firearms Policy because respondent was not careless in the display of his weapon and it was not a misuse of his firearm. Although he willfully drew his weapon, it was in self-defense because he reasonably feared for his safety. Moreover, respondent credibly testified that he did not have his finger on the trigger during the entire incident (Tr. 320, 335, 348, 373, 465), which is in accordance with section 7.1.11 of the Authority's Firearms Policy,

which states that "[a]n Officer should keep his finger outside the trigger guard until they are on target and a decision has been made to fire." Respondent did not place his finger on the trigger because he did not make a decision to fire his weapon. Instead, he saw that the threat was discontinued and re-holstered his weapon.

Accordingly, all of the charges regarding respondent's firearm should be dismissed.

Failure to Identify Himself as a Peace Officer

Respondent was charged with failing to identify himself as a peace officer and failing to display his shield and identification. Respondent represented to Captain Booker when she took his statement and to Investigator Cummins during the official interview that he took out his shield and identification after he re-holstered his weapon while he was standing in front of the cashier's office.

Respondent acknowledged that although he did not verbally identify himself as a peace officer, he did display his shield and identification because he had just pulled a weapon (Tr. 154, 262). After respondent drew his weapon and felt that there was no longer a threat from the carwash employees he walked towards the cashier's office. While he was standing in front of the cashier's office he re-holstered his gun and pulled out his shield and identification. Respondent credibly testified that he carried his shield and identification on his right side, which is also the side in which he holds his firearm. As a consequence, respondent was unable to pull out his shield and identification until after he re-holstered his weapon. Once he took out his shield and identification he held it down by his right side. It would have been better to display and announce that he was a peace officer, but display was sufficient.

Investigator Cummins testified that he was trained to carry his shield on his non-dominant side so that his dominant hand would be free to draw if his weapon if necessary (Tr. 268). Since respondent stated that he carried his shield and identification on his right side or dominant side, Investigator Cummins surmised that respondent was being untruthful about displaying his shield and identification. Yet, petitioner presented no evidence that respondent was trained to carry his shield on his non-dominant side or how to display his shield. Indeed, Respondent testified that he never received training on how to display his shield and knows of no Authority directive on the proper way to display a shield (Tr. 325, 351).

Petitioner submitted a summary of witness interviews of the three carwash employees that were drafted by Investigator Moakley. The interviews were conducted in Spanish, with an officer from the 47th Precinct providing translation. All three carwash employees stated that respondent never identified himself or displayed a shield. They also said, however, that they did not remember any of the carwash attendants holding a brush, which was contrary to the video (Pet. Ex. 4, 13; 69-70, 77-78, 80, 83, 85-86). It is unclear how accurate the police officer's translation was or the quality of Investigator's Moakley's summaries. Furthermore, the carwash employees were not called as witnesses and they never submitted sworn statements. I found that the interview summaries drafted by Investigator Moakley were unpersuasive and unreliable.

Finally, Investigator Cummins testified that he concluded that respondent never identified himself or displayed his shield because it was not reflected in the video. There were two video camera views from the carwash, neither of which directly shows the cashier's office. After respondent walked towards the cashier's office, he stopped and was facing the carwash employees. Respondent testified that it was at this point that he re-holstered his weapon and pulled out his shield and identification to display it. One of the camera angles periodically showed the top of respondent's head as he stepped in and out of the frame in front of the cashier's office. It was impossible, however, to see from the video whether respondent re-holstered his weapon or showed his shield and identification.

In a disciplinary proceeding, petitioner bears the burden of proof by a preponderance of the credible evidence. *Foran v. Murphy*, 73 Misc. 2d 486, 489 (Sup. Ct. N.Y. Co. 1973); *Antinore v. State*, 79 Misc. 2d 8, 12 (Sup. Ct. Monroe Co. 1974), *rev'd on other grounds*, 49 A.D.2d 6 (4th Dep't 1975), *aff'd*, 40 N.Y.2d 921 (1976); *Osoba v. Bd. of Education*, NYC. Civ. Serv. Comm'n Item No. CD92-127 (Nov. 19, 1992). Petitioner failed to meet this burden. The witness statements were unreliable, the video was inconclusive, and Investigator Cummins' conclusory testimony was insufficient to establish the charge by a preponderance of the evidence. Moreover, I credit respondent's testimony that he displayed his shield and identification after he re-holstered his weapon. Consequently, the charges alleging respondent's failure to identify himself as peace officer and failure to display his shield and identification should be dismissed.

False Statements

On July 13, 2012, respondent was officially interviewed by Investigator Cummins regarding this incident. Respondent is charged with making false statements during the interview. Specifically, petitioner deemed respondent's responses to whether he displayed his shield and identification during the incident and at what point in time he displayed it to be false. When the questions were posed during the interview, respondent replied that he took out his shield from his right front pants pocket and held the shield down to his side after he re-holstered his weapon.

As previously discussed, Investigator Cummins concluded that respondent was prevaricating because the video did not reflect respondent displaying his shield. The video, however, is not determinative as to whether respondent displayed his shield. Respondent credibly testified that he displayed his shield and identification when he was standing in front of the cashier's office, which for some inexplicable reason is not in the camera view. It is significant that respondent gave his statement to the police, Captain Booker, and Investigator Cummins before he viewed his videotape. Even without knowing what was on the carwash video, he nevertheless consistently maintained that he pulled his shield and identification out while standing in front of the cashier's office. Moreover, respondent was very forthcoming about the series of events as they unfolded from the start. He took responsibility for initating the physical confrontation and drawing his weapon. On the whole, I found him to be a credible witness.

Investigator Cummins further concluded that respondent was untruthful because he, himself, had been trained to keep his shield on his non-dominant side. Investigator Cummins, however, is a 20-year veteran of the New York City Police Department (Tr. 114-15). His training was provided by the Police Department. The Authority's training may be quite different and may not include instruction on which pocket to keep a shield and identification. Although it is logical, there is nothing in the record to indicate that respondent was trained to keep his shield and identification on his non-dominant side. Investigator Cummins prior training at another agency is irrelevant and insufficient to establish that respondent was making a false statement.

Accordingly, petitioner failed to establish that respondent made false statements during the investigative interview and these charges should be dismissed.

FINDINGS AND CONCLUSIONS

1. Petitioner established by a preponderance of the credible evidence that on April 6, 2012, respondent, while he was off duty, pushed and shoved a carwash employee.

2. Petitioner failed to establish by a preponderance of the credible evidence that on April 6, 2012, respondent, while he was off duty, committed misconduct by unholstering his firearm and pointing at three carwash employees.

3. Petitioner failed to establish by a preponderance of the credible evidence that on April 6, 2012, respondent, while he was off duty, placed three carwash employees in reasonable fear of physical injury, serious physical injury or death by displaying his firearm.

4. Petitioner failed to establish by a preponderance of the credible evidence that on April 6, 2012, respondent, while he was off duty, committed misconduct by failing keep his firearm concealed at all times.

5. Petitioner failed to establish by a preponderance of the credible evidence that on April 6, 2012, respondent failed to identify himself as a peace officer.

6. Petitioner failed to establish by a preponderance of the credible evidence that on April 6, 2012, respondent failed to display his shield and identification.

7. Petitioner failed to establish by a preponderance of the credible evidence that on April 6, 2012, respondent, while he was off duty, misused his firearm by pointing his weapon at three of the carwash employees.

8. Petitioner failed to establish by a preponderance of the credible evidence that respondent made false statements during an official interview conducted on July 13, 2012.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record. Respondent was appointed to his position as a Bridge and Tunnel Officer on June 17, 2002. During his 11-year tenure with the Authority, he has never been

formally disciplined.[2] Respondent received a commendation on October 7, 2004, for his actions which led to the arrest of an individual who was in possession of more than 600 pounds of marijuana with an estimated value of more than $1.2 million.

Petitioner requested that respondent be terminated from his position as a Bridge and Tunnel Officer if the charges were sustained. None of the charges relating to respondent drawing his firearm at the carwash were sustained nor were the charges regarding false statements. The only charges that petitioner established was the pushing and mushing of the carwash attendant.

In prior cases involving a physical altercation for law enforcement personnel while off duty, the penalties have ranged from eight days to termination depending on the extent of the physical altercation, other unrelated sustained charges, lack of remorse, length of tenure, and prior disciplinary history. *See Dep't of Correction v. Parrish*, OATH Index No. 1386/03 (Aug. 6, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD04-37-SA (July 8 2004) (termination recommended for off duty correction officer who punched his sister so hard in the face he broke her orbital bone and failure to notify the Department; ALJ found officer's failure to accept responsibility and lack of remorse were aggravating factors); *Dep't of Correction v. Boyce*, OATH Index No. 789/97 (July 9, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 99-75-SA (July 19, 1999) (45-day suspension recommended for an off-duty correction officer who participated in a beating and then left the scene while the victim was lying on the ground in the middle of the street); *Police Dep't v. Decio*, OATH Index No. 1072/91 (July 30, 1991) (8-day suspension recommended for an off-duty police officer who punched a civilian following a road rage incident; ALJ found incident to be an aberration in light of the officer's excellent record); *Police Dep't v. Ariza*, OATH Index No. 527/89 (Nov. 20, 1989) (30-day suspension recommended for an off-duty police officer who pointed a revolver at a neighbor without just cause and pushed a 12-year old neighbor causing him to fall); *Dep't of Correction v. Gaines*, OATH Index No. 486/89 (Sept. 14, 1989) (30-day suspension recommended for an off-duty correction officer misrepresenting himself as a police officer and initiating a physical altercation by pushing and swinging at a movie theater employee).

[2] Petitioner provided 25 conduct memoranda that were placed in respondent's personnel file, none of which resulted in formal discipline. I did not consider these documents in making the penalty recommendation.

Respondent has worked for the Authority for 11 years and has an unblemished disciplinary history. He took full responsibility for pushing and mushing the carwash attendant and conceded that he was wrong to initiate the physical confrontation. There were no physical injuries sustained by the carwash employee. Respondent was never arrested or charged regarding this incident and he cooperated with the police and Authority investigators. Moreover, the more serious misconduct charges regarding drawing his firearm and making false statements during an official interview were not sustained.

Nevertheless, respondent can not escape the reality that this entire incident could have been avoided if he went directly to the cashier's office to speak to a manager rather than take his frustration out on the carwash attendant. Respondent should take heed to control his temper in the future and comport himself in a manner befitting a peace officer.

Accordingly, I recommend that respondent be suspended without pay for 30 days.

Kara J. Miller
Administrative Law Judge

October 10, 2013

SUBMITTED TO:

JAMES FERRARA
President
APPEARANCES:

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Attorney for Petitioner

DAVID McGRUDER, ESQ.
Attorney for Respondent