

Dep't of Correction v. Santos

OATH Index No. 1349/15 (Oct. 26, 2015), *adopted*, Comm'r Dec. (Mar. 9, 2016), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2016-0207 (June 20, 2016), **appended**

Evidence established that intoxicated correction officer engaged in an altercation outside a restaurant/club during which he unholstered and brandished his gun and failed to cooperate with the police. Termination of employment recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
ERNESTO SANTOS
Respondent

REPORT AND RECOMMENDATION

ASTRID B. GLOADE, *Administrative Law Judge*

The Department of Correction (“Department”) commenced this proceeding pursuant to section 75 of the Civil Service Law. The Department alleges that Ernesto Santos, a correction officer, engaged in conduct unbecoming a correction officer and of a nature to bring discredit to the Department in that he was arrested after being involved in an altercation with bar patrons and members of the New York City Police Department (“NYPD”) during which he brandished his personal protection firearm while intoxicated (ALJ Ex. 1).¹

During a four-day hearing before me, petitioner presented three witnesses, documentary evidence, and video recordings. Respondent testified on his own behalf, presented the testimony of two witnesses, and submitted documentary evidence. For the reasons below, I find that petitioner has established that respondent engaged in an altercation during which he brandished his firearm while intoxicated and failed to cooperate with the police. I recommend that respondent’s employment be terminated.

¹ Petitioner withdrew a second specification at the start of the hearing (Tr. 9-10).

ANALYSIS

Just before midnight on Friday, March 30, 2012, respondent, who was off duty, went to Don Coqui, a restaurant/club in Queens, New York with his girlfriend at the time, Ms. Liberato, and their friend, Mr. Marin. They each had a drink at the bar while waiting to be seated in the restaurant. For reasons that remain unclear, someone hit Mr. Marin with a bottle as they walked across the dance floor. Mr. Marin was cut on the head and Ms. Liberato was injured by glass from the broken bottle. After Mr. Marin reached for respondent's weapon, the group was quickly ushered out of the establishment by its security staff ("bouncers"). Once outside, respondent made numerous attempts to reenter Don Coqui before police officers arrived and arrested him. Petitioner charged respondent with violating Department rules 3.05.170 (failure to notify Department of arrest), 3.20.010 (failure to act in a dignified manner), 3.20.030 (conduct unbecoming an officer), and 3.20.300 (conduct of a nature to bring discredit upon the Department).²

In a disciplinary proceeding, petitioner bears the burden of proving the charged misconduct by a preponderance of the credible evidence. *See Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008) (same). I find that petitioner has met its burden with respect to most of the charged violations.

Brandishing a Weapon While Intoxicated

Respondent and his friends decided to go to Don Coqui after meeting at respondent's home. They took a cab and arrived at Don Coqui close to midnight on March 30, 2012. After a brief wait, they entered the establishment (Tr. 250). Respondent, who is left-handed, carried his firearm in a waistband holster inside his pants on his left side (Tr. 200-01). As he went through a security checkpoint inside Don Coqui, respondent's firearm and handcuffs activated the magnetometer. Respondent identified himself to the bouncers as a member of law enforcement and was told to proceed through security. Because there was a wait to be seated for dinner, the group went to the bar and ordered a round of drinks, including a vodka and pineapple drink for

² Petitioner alleged that respondent violated rule 3.15.250, but I located no such numbered Department rule. Petitioner was provided an opportunity to supply a copy of the referenced rule, but failed to do so. Accordingly, there is no basis for the charged violation and it is dismissed.

respondent. Respondent and his friends talked among themselves then decided to look around the establishment because it was their first time there. As they walked towards the dance floor, someone hit Mr. Marin on the head with a bottle and glass from the bottle struck Ms. Liberato on the chin (Santos: Tr. 159-174, 252; Liberato: Tr. 339-40; Marin: Tr. 453-56).

After Mr. Marin was attacked, he reached for respondent's firearm. Respondent slapped Mr. Marin's hand away from his gun and told him to calm down (Santos: Tr. 175, 265; Marin: Tr. 457; Liberato: Tr. 339). People started to assault respondent and Mr. Marin, and they became separated from Ms. Liberato. Bouncers pushed respondent and Mr. Marin out of Don Coqui as respondent tried to explain that his friends had been assaulted and the assailant was still inside (Santos: Tr. 175, 268; Liberato: Tr. 341-42; Marin: Tr. 458-60). Respondent maintained that he repeatedly identified himself to the bouncers as a correction officer and asked to be permitted to apprehend the assailant (Tr. 174-75, 268-71).

Petitioner relied on video recordings made by three surveillance cameras maintained by Don Coqui (Pet. Ex. 2). One video recording shows respondent and his friends standing near the bar, drinking as they talk to each other. They then walk away from the bar to a dance floor area. Although it is difficult to discern precisely what occurred, the video shows that there was an altercation in the area where respondent and his friends are last visible on the dance floor (Pet. Ex. 2, camera 8).

The second video recording shows Mr. Marin and respondent being forcibly removed from Don Coqui by several bouncers (Pet. Ex. 2, camera 5). Respondent and Mr. Marin are pushed through a side door leading to a street where people are waiting to enter Don Coqui. Ms. Liberato exits behind them (Pet. Ex. 2, camera 5, 00.14 – 00.24).³ Respondent, who is outside on the sidewalk, is seen approaching the glass door to the establishment and pushing one of the bouncers (Pet. Ex. 2, camera 5, 00.52), then approaching the door a second time and pushing it (Pet. Ex. 2, camera 5, 01.07).

The third video recording provides a view of the events on the sidewalk outside of the same door through which respondent was ejected, in an area where patrons were waiting to enter Don Coqui (Pet. Ex. 2, camera 4). After respondent is pushed out of the door, he struggles with several bouncers as they try to move him away from the doorway. They fight, with Ms. Liberato

³ References to timestamps in the transcript do not correlate to those that were visible on my review of the videos. The timestamp references included in this decision reflect those that were obtained while viewing the videos using VLC media player software.

in the midst of the fray, until the bouncers push respondent away from the door towards a wall next to the door. Respondent stands with his back against a wall with Ms. Liberato in front of him as they are surrounded by bouncers. Respondent pushes Ms. Liberato away from him and continues to struggle with the bouncers as the group moves out of view of the camera (Pet. Ex. 2, camera 4, 00.10 – 00.29).

Respondent is out of view for several seconds; then, as Mr. Marin talks to one of the bouncers, respondent reappears. He walks behind that bouncer and puts his left hand near his left side, by his waist. He heads to the door to the establishment, where he is quickly surrounded by bouncers, Ms. Liberato, and Mr. Marin (Pet. Ex. 2, camera 4, 00.38 – 00.47).

The bouncers force respondent away from the door towards the curb, near a parked car. Ms. Liberato turns away from respondent to talk to some bouncers as respondent steps backwards. Although respondent is partially hidden from view of the camera by one of the bouncers, he can be seen reaching to his left side with his left hand. Respondent steps back and is visible as he holds what appears to be a gun in his left hand. The gun is just below respondent's left hip near his outer thigh. Respondent again steps back as a bouncer approaches him from the right side and a second bouncer stands in front of him. Respondent stands, holds his unholstered gun down at his left side close to his body and steps back. Respondent then raises his left arm about shoulder high with the gun pointed in the direction of bouncers near the door to Don Coqui. He then re-holsters his weapon. Ms. Liberato, who had been facing away from respondent, turns and moves towards him, as do several bouncers. By this time, the patrons waiting to get into the establishment have moved away from the area near the door. Respondent gets into a brief shoving match with Ms. Liberato as she and the bouncers struggle to keep him away from the door (Pet. Ex. 2, camera 4, 00:48 – 00:58).

Respondent rushes past Ms. Liberato and the bouncers and again approaches the door from which he was ejected. He pushes and kicks at the door before he is pulled away by about five bouncers. Ms. Liberato tries to restrain respondent by placing her hand on his chest, and he moves away from the door towards the curbside. She then pushes him along the sidewalk out of camera range ((Pet. Ex. 2, camera 4, 00:58 – 01:05). Respondent reenters the frame and, with Ms. Liberato and Mr. Marin, approaches the bouncers, who are standing near the door. Respondent stands by himself with his hands in his front pants pockets as his friends talk to the bouncers, and then he again tries to approach the door. As his friends push respondent away

from the door, the bouncers converge in front of it (Pet. Ex. 2, camera 4, 01:06 – 01:22). Respondent reaches towards his left hip with his left hand as Ms. Liberato and Mr. Marin wrestle him away from the door. Respondent repeatedly tries to approach the door to Don Coqui as Mr. Marin pushes him away from it (Pet. Ex. 2, camera 4, 01:23-01:53).

Respondent does not dispute that he removed his weapon from its holster twice while outside Don Coqui, but maintains that he did not point it at anyone (Tr. 199-201, 281-83). He testified that at least ten times he identified himself as a correction officer and stated that he wanted to reenter the establishment to arrest the person who had just assaulted his friends, but the bouncers locked the door (Tr. 193-95, 198-99). He also told them to call 911 (Tr. 199). They repeatedly told respondent to leave the vicinity (Tr. 204-05). According to respondent, he removed his weapon from its holster on his left hip inside his waistband, pointed towards the door with his right hand, and told the bouncers that he wanted to go inside (Tr. 201). Respondent maintained that his weapon was in his left hand near his waistband (Tr. 199-02). At the time respondent drew his weapon, a live round in the chamber, meaning that a bullet was loaded in the chamber and would be discharged if respondent pulled the trigger (Tr. 285-86, 306).

Ms. Liberato testified that she saw respondent lifting his shirt to show the bouncers that he had a gun and handcuffs and that he drew his weapon to show his firearm, but did not point it at anyone (Tr. 364, 374, 425). Similarly, Mr. Marin stated that although respondent identified himself and displayed his firearm, he did not see respondent point his gun towards anyone (Tr. 464, 506). However, the video is to the contrary. It shows that respondent lifted his weapon and pointed it in the direction of the door, where people were standing. At that time, Ms. Liberato was facing away from respondent and there was a large bouncer standing between respondent and Ms. Liberato. Similarly, Mr. Marin was facing away from respondent peering into the door through which they had been ejected (Pet. Ex. 2, camera 4, 00:50-52; Tr. 427-30). Therefore, when respondent pointed his weapon towards the door, his friends were not positioned to observe his actions.

Respondent's admission that he removed his weapon from its holster, coupled with the video evidence, establishes that respondent brandished his weapon during an altercation outside Don Coqui. Corroborating evidence in the form of recordings of 911 calls and a police dispatch record support this conclusion. The recordings and the dispatcher's Sprint printout indicate that

police officers were sent to the scene in response to reports of an intoxicated off-duty police officer with handcuffs who had unholstered his weapon and was waving it around (Pet. Ex. 5, track 7; Pet Ex. 6; Breen: Tr. 33-38; Kendall: Tr. 544-47).⁴ One 911 caller, who stated that he observed the incident while positioned across the street from Don Coqui, reported that he saw a guy “waving a gun” in front of the club, and the guy was “going crazy, screaming and he’s got a gun in his hand” while people were outside the establishment (Pet. Ex. 5, track 4).

Respondent sought to explain his actions by insisting that he was trying to effectuate an arrest. According to respondent, he identified the man who attacked his friends and wanted to arrest him, but the bouncers helped the assailant by directing him to leave through a different door (Tr. 185). Respondent was “very upset” because he saw the bouncers protecting the man who attacked his friends, while Mr. Marin was not offered medical attention (Tr. 219). However, the bouncers’ efforts to separate respondent and Mr. Marin from the assailant are not surprising given that Mr. Marin had immediately reached for respondent’s weapon inside the very crowded establishment when he was attacked. Efforts to defuse the situation to prevent further injuries were warranted.

Respondent’s assertion that he took the firearm out of its holster to effectuate an arrest “through the proper procedures” does not make sense (Tr. 205). When respondent unholstered his weapon, the person he purportedly wanted to arrest was inside the club behind a locked door while respondent was outside. Indeed, the only people who were in close proximity to respondent were his friends, the bouncers, and people waiting to get into Don Coqui. The more likely explanation is that respondent was, as he described himself, “very upset” that his friends had just been attacked and ejected from the establishment. Even more frustrating for respondent, the bouncers were physically preventing him from going back inside to confront the attackers.

It is significant that while respondent claimed that he unholstered his weapon to arrest the attacker, at no time during the approximately 15 minutes that he was outside Don Coqui did he call 911 to request police assistance, even though he had his cell phone with him (Tr. 279).

⁴ Respondent objected to the admission of recordings of 911 calls from onlooker witnesses on hearsay grounds, but did not object to admission of the recording made by the police dispatch unit, which summarized information relayed in those 911 calls (Pet. Ex. 5; Tr. 7-9). I admitted the recordings over respondent’s objection. *See S & S Pub, Inc. v. NYS Liquor Auth.*, 49 A.D.3d 654 (2d Dep’t 2008) (hearsay evidence is admissible at administrative proceeding and may even form the sole basis for adjudication); *Triborough Bridge and Tunnel Auth. v. Ferrer*, OATH Index No. 835/03 at 11 (Apr. 22, 2003), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 05-11-A (Mar. 14, 2005) (ALJ considered 911 calls from independent onlooker witnesses that corroborated other evidence against respondent).

Instead, respondent made repeated, violent efforts to reenter the club to confront the assailant and, when thwarted, he resorted to brandishing his firearm. Respondent, who described himself as “all the way upset” while trying to regain entry to the establishment, was so out of control that his injured friends urged him to calm down and to wait for the police to arrive rather than take matters into his own hands (Tr. 220, 222-23).

Respondent’s frustration and anger were, in all likelihood, compounded by his intoxication. While respondent and his witnesses maintain that he only consumed one drink that evening and was not intoxicated, three officers who responded to the incident and interacted with respondent described him as intoxicated. Although there is no independent evidence that respondent was intoxicated, such as a blood alcohol content reading, I found the officers’ observations to be more credible than the testimony of respondent and his witness.

In making credibility determinations, this tribunal may consider such factors as witness demeanor; consistency of witness’ testimony; supporting or corroborating evidence; witness motivation, bias, or prejudice; and the degree to which a witness’ testimony comports with common sense and human experience. *Dep’t of Sanitation v. Menzies*, OATH Index No. 678/98 at 2 (Feb. 5, 1998), *aff’d*, NYC Civ. Serv. Comm’n, Item No. CD 98-101-A (Sept. 9, 1998). While there were some inconsistencies in the officers’ accounts of other aspects of the incident, they credibly and uniformly described respondent as intoxicated.

Officers Kendall, Breen, and Brown, who at the time of their encounter with respondent had an aggregate of over 45 years of experience as police officers, have dealt with many intoxicated individuals during their careers and are thus familiar with the indicia of intoxication (Kendall: Tr. 538; Breen: Tr. 51-52; Brown: Tr. 116). They testified that respondent exhibited many signs of intoxication, including slurred speech; watery, bloodshot eyes; unsteadiness on his feet; and the “strong odor of alcohol” on his person (Tr. Breen: 52, 83; Brown: 102-03, 110, 115-16; Kendall: 577, 588-89). In addition, Officer Kendall, who arrested respondent, described him as “babbling” almost uncontrollably in the police car on the way to the precinct, which Officer Kendall ascribed to intoxication (Tr. 577, 666, 589).

Respondent’s behavior during the fracas lends weight to petitioner’s contention that he intoxicated. He was loud, belligerent, failed to comply with police orders, and scuffled with the police, bouncers, and his friends. Video recording shows him to be so out of control that he

pushed his girlfriend and his friend several times as they tried to restrain him (Pet. Ex. 2, camera 4). In sum, respondent's conduct was hardly that of someone in full control of his faculties.

Moreover, although respondent's witnesses maintain that he consumed only one drink in their presence, they cannot account for his actions during the six hours between when he arrived home from work and when Ms. Liberato met him at his home. Respondent left work at 3:00 p.m. and waited for Ms. Liberato to get off work at 9:00 p.m. so they could have dinner together. Mr. Marin joined them at about 9:30 p.m. (Liberato: Tr. 400; Marin: Tr. 481; Santos: Tr. 310-11). Thus, neither witness was with respondent in the hours leading up to their meeting at his home.

Accordingly, I find that respondent brandished his weapon during an altercation outside the Don Coqui restaurant/bar and that he did so while intoxicated.

Altercation with Police

During the approximately fifteen minutes that elapsed between respondent's removal from Don Coqui and the arrival of the police, respondent made several attempts to reenter the establishment. He remained visibly upset and had to be physically restrained by his friends and the bouncers (Santos: Tr. 203, 205; Liberato: Tr. 365-66; Marin: Tr. 463; Pet Ex. 2, camera 4).

Officer Kendall, who served 24 years as a police officer before he retired in 2014, testified that he and his partner, Officer Brown, were in a marked police car when they received a radio call that an intoxicated officer was on the street with a gun. The radio call was memorable because it was coded as an officer in need of assistance and the dispatcher indicated that the officer had pulled out a weapon and waved it at someone (Tr. 542-43, 547). They quickly arrived at Don Coqui because they were only a few blocks away (Tr. 544-548, 607).

As their patrol car pulled up, Officer Kendall observed two men trying to get his attention. The men ran to the police car, identified themselves as bouncers, and pointed to a group comprised of two men and a woman. The bouncers pointed to respondent and stated that he had pulled a gun on one of the bouncers (Tr. 548-49, 550-51).

Officer Kendall testified that respondent and his companion were moving away from him (Tr. 550-51; Pet. Ex. 12). He tried to catch up to them while identifying himself as a police officer and shouting at them to stop (Tr. 560-63, 610). Officer Kendall, who was in uniform, directed respondent to stop several times before respondent complied and turned towards Officer

Kendall (Tr. 564-65). When respondent reached towards his left hip his shirt moved and revealed a gun (Tr. 562-64). Officer Kendall testified that having seen the weapon, he was concerned for his safety and the safety of others in the vicinity (Tr. 562-63).

Officer Kendall quickly closed the distance between himself and respondent and tried to gain control of respondent's arms (Tr. 565). However, respondent, who Officer Kendall described as a "strong man," resisted the officer's efforts to restrain him (Tr. 567). Respondent tried to pull away from Officer Kendall, pushed the officer, and told him to "get the fuck away from me" and "leave me alone" (Tr. 566-67). As Officer Kendall tried to place respondent's arms behind his back to handcuff him, respondent pulled away from the officer (Tr. 567-69). Respondent resisted the officer's efforts to place him in handcuffs so vigorously that as he tried to walk away from Officer Kendall, he dragged the officer along with him (Tr. 570). Officer Kendall testified that respondent was "doing his best to resist" by swinging his arms and telling Officer Kendall to get away from him (Tr. 574-75).

The struggle between Officer Kendall and respondent, which had started in the street, ended up on the sidewalk. Officer Kendall finally gained control of respondent by placing him against a chain link fence, which prevented respondent from moving away. He was then able to handcuff respondent with the aid of other officers (Tr. 571, 573-75). According to Officer Kendall, respondent never indicated that he was trying to make an arrest; instead, he told the officers that there had been an incident inside the club during which people "were messing with" him and his friends (Tr. 597-99).

Officer Brown, like Officer Kendall, described respondent as noncompliant with Officer Kendall's orders to stop and efforts to restrain him. Specifically, Officer Brown testified that respondent cursed, told Officer Kendall to get off him, and refused to cooperate (Tr. 105-08). Ultimately, respondent was restrained only with assistance from another officer (Tr. 108-09).

Officer Breen, the patrol supervisor, helped Officer Kendall gain control of respondent. According to Officer Breen, he went to the location in response to a radio call that indicated an off-duty member of service was intoxicated and waving a gun around (Tr. 33, 38). When he arrived, Don Coqui's head of security informed him that respondent had a gun in his possession, which he had been waving around (Tr. 61-62). Officer Breen saw that Officer Kendall had placed respondent against a fence or wall and was trying to handcuff him. He described respondent, who was flailing his arms to evade restraint, as uncooperative (Tr. 81-82). It took

the efforts of both officers to wrestle respondent's hands behind his back to handcuff him (Tr. 40-42, 47).

Officer Kendall transported respondent to the 114th precinct, where he secured respondent and completed an arrest report (Tr. 592; Pet. Ex. 7). Respondent was initially charged with criminal possession of a weapon in the second degree, a felony, menacing in the second degree, resisting arrest, and harassment in the second degree (Pet. Ex. 13a). However, the Queens County District Attorney's Office dropped the felony weapons possession charge because respondent is permitted to carry his weapon (Tr. 234-37; Pet. Exs. 13b, 13c). On October 24, 2013, respondent pled guilty to disorderly conduct, a violation, for which he was sentenced to a conditional discharge (Pet. Ex. 16). As part of his plea agreement, respondent completed a 12-session anger management program in 2013 (Tr. 237; Resp. Ex. C).

Respondent's account of his detention and arrest differs dramatically from that of the officers. He described Officer Kendall as the aggressor in their encounter (Tr. 227-28). According to respondent, when Officer Kendall arrived, he immediately charged towards respondent and tackled him without identifying himself as a police officer (Tr. 225-27, 287). Respondent told the uniformed officer to "get the fuck off me" and explained that he was a member of the service and that his friends had just been assaulted. Respondent maintained that Officer Kendall directed him to calm down and he complied (Tr. 226). He denied swinging or flailing his arms and insisted that the officers did not tell him to stop as he was walking (Tr. 227-29, 298-99). Other than cursing at Officer Kendall when the officer tackled him, respondent denied that he was belligerent or resisted arrest (Tr. 299). Respondent's account is consistent with those of Ms. Liberato and Mr. Marin (Liberato: Tr. 381-83; Marin: Tr. 466).

Given the dramatically different versions of the encounter between respondent and the police, it is necessary to assess the witnesses' credibility to resolve these charges. In his closing, respondent's counsel sought to discredit Officer Kendall by pointing to discrepancies between his account of the events and that of Officer Brown (Tr. 704-05, 720). It is true that there were some variations in their accounts. Officer Brown testified that the officers took less than five minutes to respond to the scene (Tr. 92), while Officer Kendall recalled that it took less than a minute (Tr. 548). Officer Brown observed respondent coming towards the police car (Tr. 94), while Officer Kendall testified that respondent was walking away from their vehicle when they arrived (Tr. 559-60). In addition, Officer Brown testified that Officer Kendall tackled

respondent to the ground after he did not stop when directed to do so (Tr. 105, 143-44), while Officer Kendall did not remember tackling respondent (Tr. 618, 695-96). However, these inconsistencies do not detract from the officers' overall credibility; they have no stake on the outcome of this proceeding. In contrast, respondent has an obvious motive to describe his conduct in the most favorable terms. Furthermore, his witnesses' characterization of respondent's conduct before the police arrived is belied by credible evidence, including the video recordings and the contemporaneous report of an independent onlooker. This casts doubt on their testimony regarding respondent's conduct once the police arrived (Pet. Ex. 2, Ex. 5, track 4).

Respondent was out of control during the 15 minutes before the officers arrived: he charged towards the club's entrance, kicked the door several times, and struggled with everyone who tried to restrain him, including his friends. There is no reason to believe that he calmed down by the time the officers arrived; in fact, respondent's testimony indicates that he remained so angry that he hurled a profanity at the uniformed officer (Tr. 226, 305). Respondent's conduct on the video supports the officers' testimony that he remained belligerent and uncooperative when they arrived on the scene.

Although respondent's conduct occurred when he was off-duty, it is well-settled that a public employee may be disciplined for off-duty misconduct where there is sufficient nexus between the conduct to be sanctioned and the employee's job duties. *See Villanueva v. Simpson*, 69 N.Y.2d 1034 (1987); *Cromwell v. Bates*, 105 A.D.2d 699 (2d Dep't 1984); *Zazycki v. City of Albany*, 94 A.D.2d 925, 926 (3d Dep't 1983); *Dep't of Correction v. Colon*, OATH Index No. 229/14 at 14 (Feb. 24, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2014-0515 (Dec. 26, 2014).

Correction officers are peace officers charged with law enforcement responsibilities and it is incumbent upon them to uphold the law. Therefore, this tribunal has recognized a nexus between a correction officer's off-duty acts such as brandishing a firearm and failing to cooperate with the police and his or her official position. *See Dep't of Correction v. Ortiz*, OATH Index No. 986/07 at 4-5 (June 25, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-22-A (May 9, 2008) (nexus between correction officer's responsibilities and his failure to cooperate with police during his arrest for driving while intoxicated); *Dep't of Correction v. Akua*, OATH Index No. 1435/05, supplemental rep. and rec., at 2 (Jan. 30, 2006) (correction

officer committed misconduct where he failed to “comply promptly with lawful instructions” of police officers who responded to a dispute at a nightclub); *Dep’t of Correction v. Akua*, OATH Index No. 1435/05 (Dec. 6, 2005) (correction officer committed misconduct when he improperly handled and discharged his weapon without justification); *Dep’t of Correction v. Blair*, OATH Index No. 1176/05 (June 27, 2005), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 06-79-SA (Aug. 23, 2006) (correction officer committed misconduct when threatened a civilian by brandishing his firearm during a traffic dispute).

Accordingly, petitioner established that respondent committed misconduct when he brandished his firearm while intoxicated and failed to comply with police officers during an altercation outside a restaurant/club.

Petitioner also alleged that respondent violated Department rule 3.05.170, which requires an officer to timely notify the Department of his or her arrest. However, petitioner failed to present evidence to substantiate this claim.

FINDINGS AND CONCLUSIONS

1. Petitioner established that respondent engaged in conduct unbecoming an officer and of a nature to bring discredit upon the Department on March 31, 2012, when, while intoxicated, he brandished his firearm during an altercation outside a restaurant/club and failed to cooperate with the police, in violation of Department rules 3.20.010, 3.20.030, and 3.20.300.
2. Petitioner did not prove that respondent failed to timely notify the Department of his arrest in violation of Department rule 3.05.170.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent’s work history for purposes of recommending an appropriate penalty. Petitioner was appointed to his position as a correction officer on November 3, 2005. During his ten-year tenure, respondent has been disciplined twice: in 2006, he was suspended for 45 days and placed on a one-year probation for “use of force reporting” and in 2008 he forfeited 22 vacation days for an unspecified violation. Petitioner requests that respondent be terminated from his position as a correction officer.

Similar cases in which off-duty law enforcement officials brandished or displayed a firearm while off-duty have merited severe penalties, including termination. *See Akua*, OATH 1435/05 (60-day suspension recommended for correction officer with an unblemished disciplinary record who improperly handled and discharged his firearm while intoxicated and failed to cooperate with police officers); *Blair*, OATH 1176/05 (60-day suspension recommended for correction officer who, while off-duty, threatened and menaced a civilian by brandishing his gun and illegally renting out space in his home; ALJ considered in mitigation of the penalty respondent's 18-year tenure, that his prior discipline was imposed ten or more years prior to the decision, and that the most severe prior penalty was a forfeiture of 25 vacation days); *Triborough Bridge and Tunnel Auth. v. Ferrer*, OATH Index No. 835/03 (Apr. 22, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-11-A (Mar. 14, 2005) (termination recommended for officer with a clean disciplinary record who drew his gun and pointed it at the head of a civilian during a traffic dispute and was responsible for toll shortages); *Triborough Bridge and Tunnel Auth. v. Torrens*, OATH Index No. 1189/91 (Oct. 23, 1990), *modified on penalty*, Auth. Dec. (Nov. 2, 1990), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 91-73 (May 24, 1991) (officer terminated for unholstering his firearm and pointing it at civilians); *Dep't of Correction v. Flores*, OATH Index No. 146/82 (July 9, 1982) (correction officer with clear disciplinary record terminated for being intoxicated and pulling his firearm during a fight with a security guard who was trying to remove him from a fast food restaurant).

Respondent contends that prior recommendations in *Akua* and *Blair* do not support a recommendation of termination. However, those cases are distinguishable from the present case. In *Akua*, the respondent, who discharged his weapon outside a bar while intoxicated, had an unblemished disciplinary record, unlike respondent here. In *Blair*, respondent had an 18-year tenure and his disciplinary record, which while not exemplary, was over ten years old. Here, respondent's tenure is only ten years, during which he amassed significant prior discipline, including a 45-day suspension.

The appropriate penalty in this case is termination. Respondent's angry, aggressive conduct is troubling. He was uncontrollable and fought with everyone who tried to restrain him, including his friends and police officers. He unholstered and brandished his firearm after any threat to himself and his friends had abated in an effort to regain entry into a club from which he had been ejected. Furthermore, respondent's failure to comply with the officers' directives is

incompatible with his responsibilities as a correction officer. As this tribunal has stated, “as a law enforcement employee himself, respondent [a correction officer] bears a special responsibility to abide by the directions and commands of police officers even when he believes them to be wrong.” *Dep’t of Correction v. Dash*, OATH Index No. 336/06 at 9 (Mar. 28, 2006), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 07-66-SA (June 13, 2007) (termination recommended where correction officer with a significant disciplinary history was convicted of assault and resisting arrest).

Moreover, respondent’s lack of insight as to his misconduct, apparent several years after the incident occurred and after a 12-week anger management course, raises grave concern about his fitness to serve as a correction officer. Respondent’s testimony is startling in its failure to acknowledge his role in creating and prolonging a truly dangerous situation. For example, on direct examination, respondent testified as follows:

Q: Okay and after going through this whole process of the evening of March 31, 2012, is there anything that you felt that could have been done different with respect to the incident in the club?

A: I wish I would of, I would have liked for the bouncers to, assisted me in putting that individual in custody and we wouldn’t be sitting here having this conversation if it would of went down that way, but apparently there must have been something on the inside with that patron and security that we were just left out to get the short end of the stick.

Q: And as far as the police on the outside is there anything that you feel could have been done any, any differently with the police?

A: I think that they should of at least heard out my story before they tried to throw me on the floor and put handcuffs on me while I’m identifying myself and you already know who I am, you know; the bouncers are there telling them that’s the guy but I have handcuffs on my side, which are visible. You know, I don’t know too many guys who walk around with handcuffs and a gun unless you really are law enforcement.

(Tr. 238-39). When asked whether he believed he needed to undergo the anger management sessions, responded answered “no” (Tr. 241-42).

Respondent’s response to the attack on his friends created a dangerous situation in which members of the public were placed at risk. The very nature of respondent’s duties as a correction

officer requires that he remain calm and attempt to de-escalate volatile situations during which he, his fellow officers, and inmates may be in danger. Respondent's conduct during this incident and his subsequent failure to appreciate the impropriety of his actions suggest that he is ill-suited to the responsibilities of his position as a correction officer. *See Ortiz*, OATH 986/07 at 7 ("Respondent's failure to accept responsibility is an aggravating circumstance in assessing the appropriate penalty."). Similarly, respondents failure to obey police orders and his resistance when they tried to detain and arrest him are troublesome forms of misconduct as they call into question his ability to function in an organization such as the Department, where respect for law enforcement is a paramount concern. Finally, respondent's disciplinary record is an aggravating factor.

Accordingly, I recommend that respondent's employment be terminated.

Astrid B. Gloade
Administrative Law Judge

October 26, 2015

SUBMITTED TO:

JOSEPH PONTE
Commissioner

APPEARANCES:

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**THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION**

In the Matter of the Appeal of

ERNESTO SANTOS

Appellant

-against-

DEPARTMENT OF CORRECTION - DOC

Respondent

*Pursuant to Section 76 of the New York
State Civil Service Law*

CSC Index No: 2016-0207

DECISION

ERNESTO SANTOS ("Appellant") appealed from a determination of the Department of Correction - (DOC), finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of Termination following disciplinary proceedings conducted pursuant to Civil Service Law Section 75.

The Civil Service Commission ("Commission") heard arguments from the parties on 06/02/2016.

The Commission has considered the arguments presented on this appeal, and reviewed the record of the disciplinary proceeding. Based on this review, the Commission concludes that there is sufficient evidence in the record to support the findings of fact and the conclusions of law, and that the penalty is appropriate.

Therefore, the final decision and penalty imposed are hereby affirmed.

Nancy G. Chaffetz, Commission Chair
Rudy Washington, Commission Vice Chair
Charles D. McFaul, Commissioner

Dated: June 20, 2016