

***Dep't of Social Services (Human Resources Admin.) v.  
Greenfield***

OATH Index No. 2742/18 (July 26, 2019)

Special Officer used excessive force by kicking a client hard in the face while the client was held in a prone position on the floor by other security personnel, and by pulling on the client's arm. Termination of employment is recommended.

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

*In the Matter of*  
**DEPARTMENT OF SOCIAL SERVICES  
(HUMAN RESOURCES ADMINISTRATION)**  
*Petitioner*  
*- against -*  
**LEVARR GREENFIELD**  
*Respondent*

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**REPORT AND RECOMMENDATION**

**NOEL R. GARCIA**, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Human Resources Administration ("HRA") under section 75 of the Civil Service Law. In its petition, HRA alleges that respondent, Special Officer Levarr Greenfield, violated various sections of the HRA Code of Conduct and the HRA Police Patrol Guide by using excessive force against a client at an HRA facility on July 28, 2016 (ALJ Ex. 1).<sup>1</sup>

During the four-day trial, petitioner called seven witnesses and offered documentary evidence. Respondent called three witnesses, testified in his own behalf, and offered documentary evidence. For the reasons below, HRA proved that respondent used excessive force. Termination of respondent's employment is recommended.

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<sup>1</sup> Petitioner also alleges that respondent violated other provisions of HRA's Code of Conduct, including rules pertaining to discourteous conduct and insubordination, and requiring that employees refrain from conduct prejudicial to good order and discipline of the agency. However, unlike the use of excessive force allegations, HRA never specified in its petition or at trial how respondent violated these rules. Therefore, these charges will not be considered. To the extent the charges stem from the same conduct that gave rise to the use of excessive force charges, the charges are duplicative.

## ANALYSIS

HRA alleges that on July 28, 2016, respondent was on duty at the St. Nicholas Job Center located at 132 West 125<sup>th</sup> Street in Manhattan. On that day, a member of the public, J.J.<sup>2</sup>, visited the center to apply for benefits. At some point, J.J. began banging on a service window. An HRA clerical associate informed J.J. that his “number had not been called yet.” Respondent approached J.J. and ordered him to have a seat, but J.J. refused. Respondent told J.J. to leave the facilities or he would be detained. As J.J. was exiting the building, he stated “fuck outta here, just don’t fucking touch me” (ALJ Ex. 1).

Petitioner charges that as J.J. was leaving, respondent “suddenly and unjustifiably grabbed him from behind and pushed him.” J.J. turned around and hit respondent in the face. Security personnel intervened and J.J. was taken to the ground. HRA alleges that while J.J. was on the ground, respondent “purposefully kicked him with force in the face,” and then “aggressively twisted and pulled” on his right arm (ALJ Ex. 1). Based on testimony at trial, petitioner amended the charges to conform to the evidence and alleged that respondent kicked J.J. in the head more than once (Tr. 526-28).

Petitioner offered the testimony of J.J.; respondent’s supervising officer, Sergeant Erica Otero; Special Officer Valerie Sutton; Senior Investigator Annes Castillo; and the testimony of three contracted security guards; Narell Gardner, Dominique Smith, and Kevin Shand.

Respondent testified in his own behalf, and offered the testimony of Special Officer Blount and contracted security guard Wilson Sanabria. Sergeant Taman Paisley testified on respondent’s behalf as a character witness only.

### Petitioner’s evidence

Ms. Gardner testified that on July 28, 2016, she was a security guard assigned to the St. Nicholas Job Center (Tr. 23-24). She noticed respondent and J.J. “having words with each other” near a service window on the second floor of the center, and heard respondent tell J.J. to leave the building (Tr. 27-28). Ms. Gardner approached J.J. and told him he should leave “because it wasn’t worth it” (Tr. 28). As J.J. was walking towards the exit, he stated “just don’t

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<sup>2</sup> The names of “persons applying for or receiving public assistance and care” are to be withheld from publication. Soc. Serv. Law § 136(1) (Lexis 2019); *see also* 18 NYCRR §357.1(a) (Lexis 2019) (“[i]nformation to be safeguarded includes names and addresses . . . information contained in applications and correspondence; reports of investigations”). Thus, the initials of the clients’ first and last names will be used to maintain confidentiality.

fucking touch me” (Tr. 28). Respondent attempted to grab J.J. from behind, but J.J. “turned around and swung and he hit” respondent, sending him falling to the floor (Tr. 28-30).

Ms. Gardner stated that a nearby security guard came over and brought J.J. to the ground, and that various other HRA police officers and security guards came to “assist with the arrest” (Tr. 31-32). At this point, she saw J.J. face down on the floor with about five or six officers on top of him attempting to detain him. She described that J.J. was “giving a very good struggle” (Tr. 32-33). She heard J.J. say that he could not breathe because he had asthma (Tr. 33). Ms. Gardner noted that the officers and guards were slipping on the floor, and that J.J. had a book bag that contained a squirt bottle with water that appeared to have opened during the altercation (Tr. 42-43).

Subsequently, as officers and guards were holding J.J.’s limbs while he was still face down on the floor, Ms. Gardner saw respondent walk around to where she was standing and kick J.J. “very hard” in the face (Tr. 33, 45). J.J. attempted to “ball up” to cover his face, but was unable to do so because he was being restrained by the other officers (Tr. 33-34). After kicking him, respondent grabbed J.J.’s right arm and “pull[ed] [it] very hard,” while repeatedly screaming “stop resisting” (Tr. 33-35, 61). J.J., in turn, was still resisting, screaming and cursing (Tr. 61).

Ms. Gardner explained that one officer who was down on the floor had control of J.J.’s left arm, which was in handcuffs and bent behind J.J.’s back in a position to be handcuffed to his right arm (Tr. 48-54). Respondent, however, was pulling on J.J.’s right arm from a standing position (Tr. 50). Respondent did not attempt to bend the arm or bring it down (Tr. 50-55). Another guard or officer told respondent to let go of J.J.’s arm, which he eventually did. J.J. was then handcuffed (Tr. 35, 55, 62). According to Ms. Gardner, at the end of the incident J.J. appeared to be bleeding a little from his mouth and nose and was escorted to an elevator (Tr. 36).

On the same day, Ms. Gardner wrote a report regarding the incident, which was consistent with her testimony at trial (Pet. Ex. 1). In her report, Ms. Gardner noted that when J.J. was “walking out” and stated “fuck out of here, just don’t touch me,” respondent “rushed the boy from behind with no warning.” She also wrote that when J.J. was face down on the ground, she saw that respondent “cocked his leg back and kicked [J.J.] in front of his face.” Lastly, she wrote that when respondent was pulling on J.J.’s arm, respondent was “screaming to the point where he couldn’t even speak.”

Sergeant Otero was respondent's supervising officer on the day of the incident (Tr. 67). She testified that while on patrol with Officer Sutton she received a radio transmission about an incident occurring on the third floor, later corrected to the second floor. When she arrived to the correct location, she observed multiple HRA officers and security guards on top of J.J., who was face down on the ground, and saw respondent standing near J.J.'s right side (Tr. 76-78). She then saw respondent kick J.J. "extremely hard" in his facial area (Tr. 78-80). She stated that the kick was unwarranted because an officer is not allowed to kick a person in the head while the person is on the ground (Tr. 80).

After the kick, Sergeant Otero saw respondent grab one of J.J.'s arms "extremely hard" while continuously yelling "stop resisting, stop resisting" (Tr. 80, 82). She described respondent's appearance as "not normal" and that he was "foaming through the mouth" (Tr. 81). Sergeant Otero testified that she told respondent to let go of J.J.'s arm and that other officers and security guards were also telling him to let go of the arm (Tr. 82). Respondent did not immediately follow her directive, and had to be told at least three times to let go before he finally did so (Tr. 82).

Sergeant Otero stated that during the encounter, she heard J.J. say that he could not breathe, and that she immediately screamed out "pick him up, pick him up" (Tr. 86). At this point, J.J. was in restraints. Subsequently, she saw J.J. escorted to an ambulance, and observed that he was bleeding from the nose and face area (Tr. 86-87). She recalled that after the incident, Officer Blount told her that respondent had kicked J.J. (Tr. 87).

Sergeant Otero conceded that she was required to write a report about the incident, but failed to do so. While she claimed that she wrote about the incident in her memo book, she admitted that she no longer had the book in her possession, even though she has a duty to retain such books for several years (Tr. 101-102, 104).

Sergeant Otero acknowledged that during an interview with HRA's Special Investigation Division ("SID"), she stated that she did not see respondent kick J.J. in the face, contrary to her testimony at trial. She testified that at the time of the SID interview, she was having issues with HRA because she was demoted to peace officer and that she also did not want to get respondent in trouble (Tr. 135-36). She added that during the interview, she did not remember respondent's kick, but remembered it later after playing the incident back over in her mind (Tr. 144-45). She

further testified that in August 2016, respondent and Officer Blount filed EEO charges against her (Tr. 137-40).

Officer Sutton confirmed that on the day of the incident, she was on patrol with Sergeant Otero when they responded to a call of an altercation on the second floor (Tr. 150). Upon arriving to the location, she saw J.J. on the floor with several officers attempting to place him in handcuffs, and heard J.J. yell "I can't breathe" (Tr. 152-53). Officer Sutton observed respondent, who was standing, kick J.J. "hard" in his side around his stomach (Tr. 153-54).

After the kick, Officer Sutton testified that Sergeant Otero screamed for everyone to get J.J. up off the floor because he was saying he could not breathe. As J.J. was being picked up by the officers, she saw respondent kick J.J. again, this time to the face with a lot of force. She stated that J.J. was already handcuffed when respondent kicked him for the second time (Tr. 154-55).

Officer Sutton testified that she saw the officers take J.J. to the elevator. Afterwards, she accompanied J.J. to the hospital, where she heard him say that his head and stomach hurt (Tr. 155-56). Officer Sutton later told Sergeant Otero that she had witnessed respondent kick J.J. twice, but stated that she did not make a written report because she went with J.J. to the hospital after the incident (Tr. 178-79).

Ms. Smith, a security guard posted to the second floor on the day of the incident, testified that she observed respondent and J.J. "going back and forth," and that respondent told J.J. to leave the building (Tr. 277, 281-82). As J.J. began walking towards the exit, she heard him call respondent names while using profanity, but did not hear J.J. make any threatening statements (Tr. 282, 291-92). Before J.J. was able to exit, however, respondent grabbed him from behind. J.J. turned around and punched respondent, causing respondent to fall to the floor (Tr. 282-84). J.J. was quickly brought to the ground by other security personnel (Tr. 284).

While J.J. was on the ground face down, Ms. Smith estimated that eight or nine officers were on top of him. J.J. was resisting and yelling things such as "get off me," "don't touch me," "you're hurting my arm," and that "he couldn't breathe" (Tr. 284). She saw respondent "forceful[ly]" kick J.J. in the face, and then grab one of J.J.'s arms (284-86).

Ms. Smith described respondent as appearing to have "black[ed] out," by which she meant that respondent "had a breakdown," and that "no matter if anybody said something to him, he didn't hear us" (Tr. 286). She observed respondent screaming and pulling on J.J.'s arm "in a

hard enough way I wanted him to stop” (Tr. 286). The other security personnel present were trying to get respondent’s attention “but he [was] not there. He [was] not there at all” (Tr. 284-85). Ms. Smith testified that she and two other security guards stopped helping with the detainment because “[i]t was outrageous. It was excessive. I felt like that shouldn’t have went that way and it shouldn’t have carried on as it carried on because he was leaving” (Tr. 286).

The incident disturbed Ms. Smith and she testified that at her request, she has not been assigned to the St. Nicholas Center since the altercation occurred (Tr. 286, 292). Ms. Smith’s written report, which she drafted shortly after the incident, was consistent with her testimony, including recording that respondent “kicked [J.J.] in his face with force” and that respondent “pulled” on J.J.’s arm while telling him to “stop resisting” (Pet. Ex. 5).

The last of the security guards to testify for petitioner was Mr. Shand (Tr. 294). On the day of the incident, he was on the second floor of the center when he observed respondent tell J.J. to leave the facility (Tr. 298-99). As J.J. walked towards the exit, Mr. Shand heard J.J. make a comment, but did not hear what he said. Respondent then “charged” J.J. from the back (Tr. 302). While Mr. Shand did not see J.J. punch respondent, he did see respondent fall to the floor (Tr. 302, 307, 310).

In response, a team of security personnel took J.J. to the ground (Tr. 302-03). Mr. Shand estimated that about five to ten officers were attempting to restrain J.J. while he was on the floor face down (Tr. 303, 312). The officers were able to place handcuffs on one of J.J.’s arms, but struggled for a while to “get his [other] arm” (Tr. 303-04). Mr. Shand then saw respondent kick J.J. in the face (Tr. 304). Mr. Shand noted that at the time of the kick, J.J. was “pretty restrained” except for the one arm. He described respondent as “pretty out of it” when he kicked J.J. (Tr. 304).

After the kick, Mr. Shand saw respondent grab J.J.’s arm and pull on it “very, very, very hard” to the point that it appeared that the arm could be pulled out of its socket (Tr. 305). While pulling on his arm, respondent was shouting “stop resisting” very loudly. He subsequently saw J.J. placed in restraints and escorted to an elevator (Tr. 305-06).

Mr. Shand submitted a written report on the day of the incident which was mostly consistent with his testimony (Pet. Ex. 6). Mr. Shand’s written report included that he saw respondent kick J.J. “hard in the face” and that he told respondent to loosen up on J.J.’s arm “before he pop[ped] it out of [its] socket” (Pet. Ex. 6).

J.J. testified via videoconferencing (Tr. 195). He stated that on the day of the incident, he was 20 years old and had just moved to New York from Atlanta (Tr. 197, 211). He went to the St. Nicholas Center to apply for benefits, and was given either a purple or blue sheet of paper. After waiting between 30 minutes to an hour without being called, he approached the customer service window (Tr. 197-98, 211). J.J. claimed that the employee behind the window had an “attitude” when she told him that she did not handle service for his color paper and that he needed to go to another window (Tr. 198, 424). He told the employee that he did not know where to go and that it was his first time at the center. J.J. stated that respondent approached him and said “you heard what the lady said. You need to shut the fuck up and sit down or you’re going to get the fuck out of my building” (Tr. 198, 424).

J.J. decided to leave. He testified that as he left, he was holding two phones in one hand and an asthma pump in his other hand (Tr. 199). He then felt respondent either touching or grabbing his shoulder. When he “spun around,” J.J. saw respondent “drop” to the floor (Tr. 200, 425). He denied hitting respondent (Tr. 439-40). Nevertheless, he heard someone yell that he had punched respondent. Security personnel approached and told him to put his hands behind his back, but he protested that he had not “do[ne] anything” (Tr. 200). He put his hands up and was grabbed and tackled to the floor (Tr. 200). He claimed that his phones went “flying” one way and his asthma pump went the other way (Tr. 425).

J.J. stated that while he was on the floor face down, initially there were about 10 officers trying to detain him, but ultimately there were “like 30 officers” (Tr. 200, 426). The officers placed his hands behind his back and were restraining his feet and punching his legs. He claimed that respondent walked up to him and said “yea, nigga, what’s up? Talk that shit now,” before proceeding to kick, stomp, and punch him for at least five minutes (Tr. 201).

J.J. testified that he specifically remembered respondent kicking him in his face, lips, eye, and stomping on his head when “they already had [him] in handcuffs” (Tr. 202, 427). J.J. admitted resisting, stating “[M]y only reaction was to resist. Because if you punching me and I’m getting punched in the ribs and I’m supposed to sit there and take it, like, what you expect me to do? Just stay there?” (Tr. 427). J.J. stated that after the incident he was taken to the hospital and that his whole body was in pain (Tr. 203-04).

Senior Investigator Castillo conducted an investigation into the incident based on a referral from the HRA Office of Police Operations (Tr. 338-40). After interviewing witnesses

and reviewing a security incident report, Investigator Castillo drafted a report summarizing her findings (Pet. Ex. 7). The witness interviews were conducted between two weeks to a month after the incident. As discussed in Investigator Castillo's report, three of the witnesses said that they saw respondent kick J.J. in the face: Mr. Shand, Ms. Smith and Ms. Gardner. Another witness, job opportunity specialist Anarosa Peguero-Miles, submitted an e-mail stating that she saw respondent kick J.J. in his face and stomach while he was being detained on the floor. In addition, five witnesses said that they saw respondent pull on J.J.'s arm with excessive force: Sergeant Otero, Sergeant John Lugo, Mr. Shand, Ms. Denise Love, and Mr. Gardner. Investigator Castillo conceded that she did not interview J.J. or respondent (Tr. 380).

### Respondent's evidence

To rebut the charges that he used excessive force on J.J., respondent relied on the testimony of Officer Blount and Mr. Sanabria, and testified in his own behalf.

Mr. Sanabria testified that on the day in question, he observed J.J. by the customer service window on the second floor. An HRA employee told J.J. that he needed to wait for his MetroCard request to be approved by a supervisor (Tr. 215-16). J.J. banged on the window while loudly complaining and using profanity, making comments such as "that's fucking bullshit" (Tr. 217-18).

Mr. Sanabria asked J.J. to calm down and to stop using profanity (Tr. 218). Respondent approached and told J.J. to calm down and to have a seat. When J.J. refused, respondent told him that while he did not have to sit down, he needed to go to the waiting area. J.J. said "who's going to fucking make me?" and looked at Mr. Sanabria and respondent "up and down . . . with aggression almost" (Tr. 218-19). Respondent told J.J. that because he had refused to be quiet and to stop using profanity, his services were being terminated, and that he had to leave. J.J. replied "who's going to make me?" (Tr. 220).

Mr. Sanabria testified that J.J. began to leave, and that he and respondent walked behind him (Tr. 220). As he was exiting, J.J. looked back at them and said "I'm going to wait for y'all outside. How you like that?" (Tr. 220, 259). Respondent told J.J. that he was going to be detained and reached to grab him from behind (Tr. 220, 259). In response, J.J. spun around and punched respondent on his chin, sending him falling to the floor (Tr. 220, 260).



Mr. Sanabria testified that after the punch, various officers and guards brought J.J. down to the ground (Tr. 221, 264). Mr. Sanabria attempted to hold J.J.'s legs. He explained that J.J. was kicking and moving his arms frantically, trying to fight the detainment (Tr. 221-22). During the struggle Mr. Sanabria noted that J.J. was wearing a book bag with a straw and that water must have been pushed out, causing a few of the guards to slip and fall (Tr. 222).

Mr. Sanabria claimed that he saw respondent handcuff J.J.'s right arm, while another officer had his left arm. After both hands were handcuffed, J.J. was brought to his feet and was escorted to the elevator (Tr. 222). Mr. Sanabria testified that in the elevator, he saw J.J. attempt to "head butt" his supervisor, and that J.J. also hit his own head against the elevator wall (Tr. 225-26).

Mr. Sanabria stated that he did not observe respondent kick J.J., but admitted that he did not keep his eyes on respondent throughout the entire incident (Tr. 268). He added that he did not recall hearing any officers tell respondent to stop pulling on J.J.'s arm (Tr. 269). Lastly, he claimed that he did not see J.J. bleeding from his face and that respondent did not use profanity while addressing J.J. during the incident (Tr. 230, 256).

Mr. Sanabria drafted two witness statements regarding the incident: one statement dated July 29, 2016, and the other statement undated (Pet Ex. 4; Resp. Ex. A). He did not recall when he drafted the undated statement. Both statements were generally consistent with his testimony.

Officer Blount testified that on the day of the incident, in response to a radio call, she went to the second floor (Tr. 389-90). When she arrived, she saw J.J. punch respondent, and respondent fall to the ground (Tr. 390). The other officers in the area attempted to detain J.J. and brought him down to the floor. She saw J.J. resisting detainment by kicking and "trying to punch," but the officers were holding his arms (Tr. 390-91).

As the officers attempted to detain J.J., Officer Blount first tried to "help [respondent] off the floor," and she then started "running around . . . doing crowd control" (Tr. 390-92). She estimated that there were about 15 to 20 people in the crowd (Tr. 394). Officer Blount stated that she closed doors to "keep people detained," and that she went over to the "HCU Unit" to help Officer Sutton. She claimed that respondent did not kick J.J. because she saw "the whole situation" as she stood with arms outstretched holding back the crowd while facing towards the ongoing altercation (Tr. 391-92, 403-04). She also alleged that Officer Sutton could not have

seen what was happening when J.J. was on the floor because Officer Sutton was behind her in the crowd (Tr. 393-94).

Further, Officer Blount asserted that during the altercation J.J. started screaming that he could not breathe, and that Sergeant Otero began screaming to “get him up” (Tr. 392). The officers lifted J.J., who was by that point in handcuffs, up from the floor (392-93). J.J. was taken towards the elevator, and later placed in an ambulance (Tr. 393, 410).

On cross-examination, Officer Blount admitted that when she walked towards the HCU Unit, her back was “towards the incident” (Tr. 405). She conceded that she did not see who put the handcuffs on J.J. because “there were too many bodies” (Tr. 408). Officer Blount claimed that respondent provided assistance with J.J.’s detention by screaming at him to “stop resisting,” but that respondent did not touch him (Tr. 406, 408, 410). Lastly, Officer Blount denied telling Sergeant Otero that respondent kicked J.J. (Tr. 405-06).

Respondent testified that he was appointed as an HRA police officer in 2011 (Tr. 455). On the day in question, he was sitting in a cubicle on the second floor of the St. Nicholas Center when he heard J.J. “yelling and cursing at the top of his lungs” (Tr. 456, 497-98). At first he observed J.J. “screaming and ranting” in the waiting room about not being called (Tr. 498). Subsequently, he saw J.J. banging on one of the windows in the customer service area. An HRA employee came to the window and told J.J. that he would eventually be called (Tr. 456-58). J.J. started yelling and cursing again, stating “that’s why I hate fucking coming here, fucking bitch” (Tr. 458).

Respondent approached J.J. and told him to calm down and to stop cursing. J.J. told respondent to “shut the fuck up because I wasn’t even talking to you” (Tr. 458). Respondent replied that if he did not calm down he would be escorted out of the building. J.J. walked very closely towards respondent with both of his fists balled up and said “why don’t you make me leave?” (Tr. 458-59). A security guard, Mr. Sanabria, told J.J. that it would be better for him to leave. J.J. began cursing again and making threats by stating “no . . . I’ll fuck you up . . . I’ll get you after work, that’s what I need to do, fuck you up after work” (Tr. 459). As J.J. began walking towards the exit, he continued making threats (Tr. 459-60).

At some point while he was leaving, J.J. stopped and asked “how come the fuck you’re not saying anything now? Like, what’s up? How come you not saying anything, huh? You’re not saying anything” (Tr. 461). Respondent explained that because J.J. stopped walking and

continued to curse, he attempted to detain J.J. (Tr. 461, 500). He did not remember telling J.J. he was going to be detained (Tr. 502). Respondent attempted to grab J.J.'s hand, but J.J. pulled his hand away and threw a punch at respondent with his other fist. Respondent was hit on the right side of his face in the temple area (Tr. 462-63).

Respondent testified that the punch knocked him to the floor and that it seemed like the entire room was spinning after he was hit (Tr. 463). As he was falling to the ground, he observed J.J. throwing punches at any guard who attempted to get close to him (Tr. 464). Respondent stated that he was dazed, felt "out of it" for a few seconds, and was in a tremendous amount of pain. Eventually he was able to stand but he noticed that he could not lift his right arm (Tr. 464-65). Respondent's shoulder was dislocated as a result of the fall (Tr. 503; Resp. Ex. C). He also hit his head on the floor after landing on his shoulder (Tr. 505). However, respondent testified that the pain was not so intense as to require immediate medical attention, but instead he sought to help with detaining J.J. (Tr. 503).

Respondent saw that security personnel had J.J. on the floor, but that he was "still fighting . . . resisting violently" and "moving his body all over the place" (Tr. 465, 506). He estimated that between 10 to 15 officers and security guards were on top of J.J., but that some of the officers and guards were slipping because J.J. had a bottle that was squirting water (Tr. 466, 506-07). Respondent testified that he approached J.J. to help with the detainment and that he slipped "on some water," but did not fall (Tr. 467-68, 507).

Respondent denied kicking J.J., but admitted that at some point J.J.'s head came in contact with his leg near his shin (Tr. 468, 508, 524). He claimed that he was not sure if the contact occurred because J.J. head-butted him in the leg, or because his foot slipped on the water (Tr. 507). Respondent stated that any contact between his leg and J.J.'s head happened only once, and that the contact "felt hard . . . [be]cause it hurt" him (Tr. 508).

Respondent testified that he tried to assist with rear-cuffing J.J. by holding on to one of J.J.'s arms while Officer Lugo held on to the other (Tr. 509-11). J.J. continued resisting, but respondent did not recall pulling on J.J.'s arm. He also did not remember hearing anyone tell him to ease up on the arm (Tr. 511). He admitted yelling at J.J. because he was in pain and J.J. was resisting (Tr. 468). He denied, however, being discourteous, losing his voice, or using profanity when he spoke to J.J. (Tr. 469, 499).

Respondent alleged that the written statements by Mr. Shand, Ms. Smith, and Ms. Gardner were false because he did not kick J.J. in the face (Tr. 485, 508-09). He claimed that the witnesses who testified against him invented the story that he kicked J.J. in the face because Sergeant Otero did not like respondent, and because many of the security guards were her friends with whom she would associate with after work. He also argued that Officer Sutton could not have seen him allegedly kicking J.J. because she was in the back doing crowd control (Tr. 486). Respondent also testified that he had “written up” Ms. Smith in the past for making inappropriate comments, lateness, and other misconduct (Tr. 489).

### Analysis

HRA’s main charge against respondent is that he used excessive force by kicking J.J. in the face more than once, and by “aggressively twist[ing] and pull[ing] his right arm.” The petition also states that as J.J. was leaving the facility, respondent “suddenly and unjustifiably grabbed [J.J.] from behind and pushed him” (ALJ Ex.1). Respondent denied the charges.

A credibility determination is required where, as here, the parties have presented conflicting testimony on relevant facts, and such facts cannot be determined by other evidence alone. 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 2-3 (Feb. 5, 1998), *aff’d*, NYC Civ. Serv. Comm’n, Item No. CD 98-101-A (Sept. 9, 1998).

The credible evidence established that respondent used excessive force by kicking J.J. in the face once and excessively pulling on his arm. Sergeant Otero, Officer Sutton, Ms. Gardner, Ms. Smith and Mr. Shand all testified in a clear and consistent manner that they each observed respondent kick J.J. in the face “hard” or “with force.” Ms. Smith and Mr. Shand specifically and credibly testified that each saw respondent pulling on J.J.’s arm in a manner that was “very, very, very hard” and excessive. Ms. Gardner, Ms. Smith and Mr. Shand each wrote a report on the same day of the incident that corroborated their testimony. Ms. Smith noted that she wrote her report approximately 10 minutes after the incident occurred (Tr. 280). *See Transit Auth. v. Victor*, OATH Index No. 799/11 at 4 (Mar. 3, 2011), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD-11-52-A (Aug. 9, 2011) (“contemporaneous statements evince reliability”).

Respondent testified that petitioner's witnesses fabricated their testimony against him, and that he had "a good idea of why" they did so (Tr. 486). Respondent alleged that Sergeant Otero "did not like him" and that she would "hang out" with the security guards after work, including Ms. Gardner, Ms. Smith and Mr. Shand, thereby insinuating that Sergeant Otero and these three guards conspired to make false statements against him (Tr. 486-87).

Yet apart from respondent's speculative and self-serving testimony, very little evidence was offered to show that Sergeant Otero or the guards disliked respondent, or that any alleged animosity towards him rose to such a level that they would falsely accuse him of using excessive force. For instance, Sergeant Otero acknowledged that in August 2016, Officer Blount and respondent filed an EEO complaint against her (Tr. 137-41). But since the EEO complaint was filed after the date of the incident, the complaint provided no motive for Sergeant Otero to conspire with the guards to make false allegations against respondent on the date in question. Also undercutting respondent's claim that Sergeant Otero made false accusations against him was her admission that during her SID interview in August 2016, she erroneously denied that respondent kicked J.J., in part because "she did not want to get respondent in trouble."

Moreover, Mr. Gardner and Ms. Smith credibly testified that they never had a negative interaction with respondent (Tr. 24-25, 278-79). Respondent claimed that he "wrote up" Ms. Smith about six times for making inappropriate comments, lateness, and other misconduct, but conceded he was ordered to do so by Sergeant Otero. This uncorroborated testimony was unpersuasive as respondent never provided dates for these alleged "write-ups," and never provided any evidence that Ms. Smith had any resentment towards him for actions ordered by Sergeant Otero. Further, respondent never provided any reason as to why Officer Sutton would falsely testify against him. Rather, he unpersuasively argued, apparently based on Officer Blount's testimony, that Officer Sutton could not have seen the incident because she was "in the back" doing crowd control (Tr. 486).

Respondent also failed to show that, even if motivated to do so, Sergeant Otero and the guards had the opportunity to invent false allegations against him on the day of the incident. The evidence established that the incident was witnessed by many individuals, and that the three security guards wrote contemporaneous reports, including Ms. Smith who wrote her report approximately 10 minutes after the incident. Under these circumstances, it does not comport with common sense that Sergeant Otero had the time to conspire with Ms. Smith, Ms. Gardner

and Mr. Shand, and concoct a false narrative alleging that respondent kicked J.J. in the face and excessively pulled on his arm. Nor was there any evidence presented to show that others, such as Officer Sutton and J.J., were also recruited to make such false allegations. While J.J.'s testimony strained credulity because portions appeared exaggerated and against the weight of the evidence, his testimony that respondent kicked him in the head was consistent with that of Sergeant Otero, Officer Sutton and the three guards. Therefore, respondent did not establish that petitioner's witnesses plotted to provide false testimony against him.

The testimony of respondent's two fact witnesses also failed to rebut the evidence that respondent used excessive force. In particular, Officer Blount's testimony was not credible. Officer Blount first testified that respondent did not kick J.J. because she had seen "the whole situation" (Tr. 391-92, 403-04). But in fact she was forced to admit that she did not see the whole incident because at times her back was "towards the incident" or because "there were too many bodies" in the way (Tr. 405, 408). Tellingly, Officer Blount's testimony contradicted respondent's testimony. While Officer Blount claimed that respondent never touched J.J., respondent admitted that his leg came into contact with J.J.'s head, and that he held one of J.J.'s arms in an alleged attempt to handcuff him.

Similarly unconvincing was Mr. Sanabria's testimony. While he testified that he did not see respondent kick J.J., Mr. Sanabria admitted that once J.J. was on the ground he attempted to hold J.J.'s legs as J.J. continued to resist, and that he did not keep his eyes on respondent throughout the entire incident (Tr. 220-21, 268).

Lastly, respondent's own testimony was unpersuasive, as it did not comport with common sense and seemed carefully tailored to avoid any admission of misconduct. For instance, respondent's testimony that he attempted to detain J.J., in part, because J.J. stopped walking towards the exit was against the weight of the evidence. All the witnesses who testified on this point stated that respondent attempted to detain J.J. as he was walking towards the exit and his back was towards respondent. Further, respondent's testimony that after being punched and injuring his arm he had to assist with restraining J.J. because the other officers were unable to do so did not comport with common sense. Respondent admitted that by the time he stood up, J.J. was on the floor with 10 to 15 officers and security guards on top of him, with some other officers performing crown control (Tr. 390-94, 465-67).

On the key issue of whether he kicked J.J., respondent denied the allegation, but implausibly testified that he was not sure if the contact, which he described as “hard,” occurred because J.J. head-butted him in the leg, or because his foot slipped on water (Tr. 507-08). Respondent did not deny pulling on J.J.’s arm, but instead dubiously testified that did not recall doing so, and that he did not remember hearing anyone tell him to stop (Tr. 511). Respondent’s counsel argued that after being punched respondent was “out of it” and may have suffered a brain injury, suggesting this may explain his conduct (Tr. 554-56). But respondent did not admit to kicking J.J. or pulling on his arm, did not claim that he lost control of his emotions or his faculties during the incident, and presented no proof of a brain injury. While respondent did state that he was initially dazed after being punched, and that he felt pain in his arm, he essentially argued that his further attempt to restrain J.J. was appropriate, and did not claim that any of his actions were due to any loss of control (Tr. 464-67).

In sum, the testimony of Sergeant Otero, Officer Sutton, Ms. Gardner, Ms. Smith and Mr. Shand, and the corroborating reports, were more credible than the testimony of respondent, Officer Blount and Mr. Sanabria. The credible evidence established by a preponderance of the evidence that respondent used excessive force by kicking J.J. hard in the face while J.J. was face down on the floor, and then pulling on his arm excessively. As J.J. was the only witness who testified at trial that respondent kicked him more than once in the head, and his testimony was not corroborated by any of the other witnesses, petitioner did not prove that respondent kicked J.J. in the head multiple times.

Petitioner also did not prove that respondent “suddenly and unjustifiably grabbed [J.J.] from behind and pushed him,” as stated in the petition (ALJ Ex. 1). The evidence established that despite security personnel first speaking to him, J.J. engaged in disorderly conduct by yelling, banging on the service window, using profanity, refusing to return to the waiting area, and by making threatening statements as alleged by Mr. Sanabria and respondent (Tr. 88, 93-94, 215-20, 277, 281-82). While the better course of action may have been to allow J.J. to leave, under these circumstances, petitioner did not prove that it was misconduct for respondent to attempt to detain the client. Further, the evidence established that respondent attempted to grab or hold J.J., and not that respondent pushed him.

### **FINDINGS AND CONCLUSIONS**

Petitioner proved by a preponderance of the credible evidence that on July 28, 2016, respondent used excessive force by unjustifiably kicking a client hard in the face while the client was held prone on the floor by other security personnel, and by excessively pulling on the client's right arm. Petitioner did not prove that respondent kicked the client more than once, or that he unjustifiably grabbed the client from behind and pushed him.

### **RECOMMENDATION**

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel file for purposes of recommending an appropriate penalty (ALJ Ex. 2). The abstract indicates that respondent began his employment with HRA in May 2011, and holds the title of Special Officer with HRA's Police Operations. He also received an overall rating of "Good" for his 2015 performance evaluation. In 2015, respondent accepted a 25-day penalty for conduct that occurred in 2014, including behaving in a hostile or aggressive manner towards a client, making false entries in a log book, and engaging in conduct prejudicial to good order and discipline.

In this matter, the evidence established that respondent committed serious misconduct by kicking J.J. in the face with force and excessively pulling on his arm. Factors to be considered in determining the appropriate penalty include: the seriousness of the misconduct; the employee's background, including length of service; disciplinary history; the impact of the misconduct on the agency's mission; the penalty imposed on others for similar misconduct; the presence of mitigation; and the adequacy of the penalty to deter similar misconduct by the employee or others. *See Dep't of Correction v. Pelle*, OATH Index No. 1410/07 at 7-8 (May 22, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-11-SA (Feb. 20, 2008).

Petitioner requested a penalty of termination. That request is appropriate. Particularly troubling is that respondent kicked the client in the face with force. First, that action was undoubtedly punitive. At the time of the kick, J.J. was on the floor face down with several officers on top of him or holding his limbs. While J.J. was resisting detainment, he was in no position to cause immediate serious harm to any security personnel. Respondent tried to conceal his intent to inflict punishment upon J.J. by claiming that he was only attempting to help detain him. But with several officers and guards already engaged in restraining J.J., his assistance was



not required. Instead, the evidence established that respondent took advantage of J.J.'s vulnerable position to retaliate against him by deliberately and forcefully kicking him in the head.

Second, respondent's kick to J.J.'s head was an unnecessary use of deadly force. HRA's Police Patrol Guide defines deadly force as "force capable of causing serious injury or even death," and prohibits the use of force "to retaliate, punish or discipline an individual" (Pet Ex. 3 at 2, 4). While slaps or strikes to the head might also be considered deadly force, kicks or stomps to the head are of a different, inherently more dangerous nature, and merit a different penalty assessment. *See Dep't of Correction v. Agbai*, OATH Index No. 156/14 at 8-9 (Nov. 25, 2013), *adopted*, Comm'r Dec. (Jan. 2, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2014-0064 (June 3, 2014), *aff'd*, 150 A.D.3d 443(1st Dep't 2017) (finding stomps on the head, when an inmate was lying on the ground and subdued, to be particularly grievous, and recommending termination of employment); *Dep't of Correction v. Victor*, OATH Index No. 388/15 (Apr. 2, 2015), *adopted*, Comm'r Dec. (June 4, 2015), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2015-0794 (Aug. 20, 2015) (finding that stomps on the head, while inmate was on the ground, merit a different penalty assessment, and recommending termination of employment). While the evidence did not establish that J.J. suffered significant injuries, that fortuitous outcome does not change the fundamental, inherently dangerous nature of the kick which respondent administered to the client's head.

Lastly, there was no indication that respondent regretted or felt any remorse about the incident. Instead, while respondent's counsel argued that respondent did not kick J.J. or that respondent acted "erratically" because he was punched in the face, respondent himself carefully but unpersuasively testified that although his leg did make contact with J.J.'s head, he did not use excessive force (Tr. 468, 507-08, 524, 553-55).

Similarly, respondent testified that he did not remember pulling on J.J.'s arm, while his counsel argued that pulling on the arm was a reasonable use of force (Tr. 511, 555). But the testimony of multiple witnesses established that respondent was pulling up on J.J.'s right arm, an action that would not allow for J.J.'s arms to be joined and placed in handcuffs (Tr. 50-55). Instead, respondent's repeated yelling at J.J. to stop resisting while pulling on the arm proves that respondent was inflicting pain in order to force J.J.'s compliance, in violation of HRA's use of force policy (Pet. Ex. 3 at 4). While his actions alarmed many of his colleagues, which they

expressed in their testimony, respondent never expressed any misgivings regarding his actions on the day in question (Tr. 82, 286, 305). Moreover, respondent portrayed himself, through his counsel, as a victim of an overzealous enforcement action based on personal dislike, a depiction unsupported by the evidence and offering no assurance that respondent would not behave in a similar fashion in the future (Tr. 543).

For mitigation purposes, respondent offered the testimony of Sergeant Paisley, who was respondent's supervisor from February 2, 2018 to July 2018. He testified that respondent was "a very good worker" and a "very good officer" (Tr. 321-22). Sergeant Paisley's testimony was of little value, however, as he supervised respondent for only a short time.

Respondent also submitted nine commendation e-mails he received for the period of December 9, 2014 to November 5, 2018 (Resp. Ex. C). The commendations congratulate respondent for actions such as being present at work during a storm and for making progress with dealing with difficult clients. Of note, one commendation states that respondent's "speedy intervention" saved a client's life, while another reports that respondent saved the life of a client who was lying down in the street in oncoming traffic. A newsletter article dated July/August 2016 recognized respondent for intervening when a client attempted to stab another officer (Resp. Ex. E). Such actions are admirable, and have been given due consideration.

Upon review of the totality of the circumstances, however, I find that these laudable actions do not negate respondent's deliberate use of unjustified deadly force against the client, his prior disciplinary history that includes aggressive and hostile behavior towards a client, and his lack of remorse and reflection regarding the events in question.

Therefore, respondent's employment should be terminated.

Noel R. Garcia  
Administrative Law Judge

July 26, 2019

SUBMITTED TO:

**STEVEN BANKS**  
*Commissioner*

APPEARANCES:

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**MARTIN DRUYAN, ESQ.**

*Attorney for Respondent*