

Fire Dep't v. Serrano

OATH Index No. 584/18 (Mar. 21, 2018), *adopted*,
Comm'r Dec. (May 24, 2018), **appended**

Emergency medical technician used unnecessary force against a patient and did not promptly report the incident. 60-day suspension without pay recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
- against -
ALEJANDRA SERRANO
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner brought this employee disciplinary proceeding under section 75 of the Civil Service Law, alleging that respondent, an Emergency Medical Technician (EMT), struck a patient twice in the head and failed to report this incident to a supervisor (ALJ Ex 1). Additional unrelated charges were withdrawn by petitioner prior to trial (Tr. 5). Respondent did not deny that she struck a patient and failed to notify a supervisor. However, she claimed that she acted reflexively and in self-defense when the patient spit in her face.

At trial on February 9, 2018, petitioner relied on surveillance video, documents, and testimony from two of its employees, EMT Cohan and Captain Saffon. Respondent testified in her own behalf and also offered documentary evidence. For the reasons below, I find that petitioner proved the charges and recommend that respondent be suspended without pay for 60 days, with credit for time served.

BACKGROUND

Petitioner hired respondent as an EMT in 2003. The charges stem from events that took place on August 12, 2016. According to petitioner, respondent intentionally acted with anger

when she used her hand to strike a patient in the head (Tr. 176). Respondent argued that she did not intend to cause any harm, she was trying to protect herself, and her conduct was a natural reaction after the patient spit in her face (Tr. 168, 170, 172). Though respondent may have been provoked, her violent response was unjustified. She also failed to report the incident as required. Thus, the charges should be sustained.

Except where noted, the material facts are undisputed. Near the end of their shift, respondent and her partner, Cohan, went to the 40th Precinct in the Bronx in response to a call regarding an emotionally disturbed person who needed medical attention (Tr. 6). At the precinct, the police led the EMTs to a cell where they found an intoxicated woman handcuffed on the floor (Tr. 6). She was uncooperative, cursing, and spitting (Tr. 6). The EMTs, accompanied by a police officer, drove the patient to Lincoln Hospital (Tr. 7). Shortly after 10:00 p.m., they wheeled the patient on a gurney into the hospital (Tr. 7).

Video evidence

Hospital surveillance video showed the EMTs entering the emergency room. Cohan led the way, respondent pushed the gurney from behind, and the escort police officer followed them (Pet. Ex. 9, Trauma Entrance at 1:10-1:19). The patient was strapped to the gurney at three locations: below the knees, at the thighs, and at the waist. She was handcuffed behind the back and it appeared that her ankles were also cuffed (*Id.* at 1:18-1:20). Despite the restraints, the patient was sitting up and swaying from side to side. The recording lacks audio, but the patient looks agitated (*Id.* at 1:20).

A second video showed the EMTs approaching the trauma nursing station. Approximately two dozen other people were in the crowded area, including three or four patients on gurneys, three or four EMTs, and various hospital staff (Pet. Ex. 9, Trauma Nurse Station at 1:38). Due to the camera location and the crowded conditions, the view of respondent and the patient was partially obstructed (*Id.* at 1:38-1:44). However, the video showed the patient sitting up, pushing back and forth in the gurney (*Id.* at 1:32-34).

Respondent made a hand signal to her partner and they began to wheel the patient back towards a side room (*Id.* at 1:38-1:40). The patient twisted her torso around in the gurney and appeared to be face-to-face with respondent (*Id.* at 1:40-1:42). Suddenly, respondent used her right hand to strike the patient twice in the face (*Id.* at 1:42-1:44). The interaction, from when

the patient faced respondent until the second blow landed, took two seconds (*Id.*). Cohan stepped between respondent and the patient, and wheeled the patient into the side room (*Id.* at 1:44-1:50). After the patient was moved to the side room, respondent walked in the opposite direction and off camera for about one minute (*Id.* at 2:23-3:23).

Petitioner's investigation and pre-trial statements by Cohan and respondent

Neither respondent nor Cohan reported the incident to a supervisor before the end of their shift. There was also no evidence of a contemporaneous report by any of the other EMTs who witnessed the incident. Instead, the next day, a nurse asked to speak to an Emergency Medical Services (EMS) supervisor about an allegation made by the patient. An EMS lieutenant went to the hospital and spoke with the nurse, who reported that a patient said that she had been assaulted by an EMT. The lieutenant attempted to speak to the patient, but she refused to answer any questions and said that her lawyer would answer for her. The lieutenant and another supervisor viewed the hospital surveillance video. Neither the lieutenant nor the other supervisor testified at respondent's trial, but according to the lieutenant's report, when he watched the video, he saw respondent punch the patient in the face with her "right fist" and the patient was "handcuffed" and "accompanied" by a police officer (Pet. Ex. 3).

Later that day, the lieutenant ordered Cohan and respondent to submit reports. In Cohan's report, he wrote that a police officer at the precinct said that the patient was "highly combative" (Pet. Ex. 6). Cohan noticed that there was "saliva all over" and the officer said that it was from the patient. The patient cursed at the EMTs, repeatedly tried to spit at them, and made "death threats" the "entire time" (Pet. Ex. 6). Cohan tried to put a mask on the patient but he was unsuccessful. In the emergency room, the patient spat directly and intentionally in respondent's face. Cohan wrote that respondent "had an instinctive knee jerk reaction" and she "slapped the patient." After moving the patient to the side room, respondent submitted an exposure report (Pet. Ex. 6).

One month after the incident, investigators questioned Cohan, under oath, in the presence of a union representative, pursuant to Mayoral Executive Order (MEO) 16 (Pet. Ex. 8). Cohan's interview mirrored his prior report. He noted that he had often worked with respondent during the preceding three years (*Id.* at 9). He recalled that when they arrived at the precinct on the night of the incident, the patient was in her underwear on the floor of the cell (*Id.* at 13). A

police officer told the EMTs that the patient had a psychiatric history and she was taken into custody after she became intoxicated and belligerent at a bar (*Id.* at 12). The officer warned Cohan, “Be careful, she’s a spitter” (*Id.* at 13).

When Cohan tried to calm the patient, she said “fuck you,” and he went to get a mask to prevent her from spitting (Pet. Ex. 8 at 11, 13). Respondent suggested to the police officers that they call their Emergency Service Unit (ESU), but that request was denied (*Id.* at 15). According to Cohan, the patient was “manic” and “unapproachable” (*Id.* at 16). With some resistance from the patient, who was loud, aggressive, and abusive, they escorted her to the ambulance and secured her to a stretcher (*Id.* at 17-18). Respondent drove the ambulance while Cohan tended to the patient (*Id.* at 21). At first, Cohan said that he did not try to put a mask on the patient because she was too erratic (*Id.* at 20). Later, he said that he got a mask on the patient but she moved it off by shaking her head (*Id.* at 24). He made no other attempts to put the mask on because it would have been fruitless (*Id.*). On route to the hospital, the patient continued to be abusive and threatened to kill the police officer, who was also in the ambulance (*Id.* at 22-23). The patient made several attempts to spit and may have spit once, but she did not persist after Cohan told her to stop (*Id.* at 23-25).

During the MEO 16 interview, Cohan said that he had heard about the hospital video of the incident, but he had not seen it (Pet. Ex. 8 at 41, 52-53). He recalled that as they were backing the gurney towards the side room, he heard a ruckus, looked at respondent, and “saw her hand come away from the” the patient, “I’m not sure what she had done. I just saw it leave her and then strike her face” (*Id.* at 30). Cohan did not recall whether respondent’s hand was open or closed (*Id.* at 31).

Though Cohan had previously written in his report that the patient “directly and intentionally” spit in respondent’s face and respondent “had an instinctual knee-jerk reaction and slapped the patient,” he conceded during the interview that he did not actually see the patient spit in respondent’s face (Pet. Ex. 8 at 54-55). He based his written report on what respondent told him immediately after the incident (*Id.* at 32, 38, 55). Cohan could not recall whether he saw any spit on respondent or whether she had wiped it off, but she left the area immediately after the incident and said that she was going to complete an exposure report (*Id.* at 35, 38, 45).

By the time they left the hospital, it was the end of respondent and Cohan’s shift, so they returned to their command (Pet. Ex. 8 at 38). Cohan told the interviewers that he should have

reported the incident, but it never crossed his mind to do so because it was late, he had never been through something like that before, and he wanted to go home (*Id.* at 46-48).

Petitioner also introduced the written report that respondent submitted the day after the incident and a transcript of respondent's MEO 16 interview, which occurred one month later (Pet. Exs. 10, 11). According to respondent's report, when she arrived with Cohan at the precinct, they were told by the police that the patient was aggressive, combative, and spitting at everyone. Respondent asked the police to contact the Police Department's Emergency Services Unit, but that request was denied. On the way to the hospital, the patient continued to make verbal threats and spit at Cohan and the escorting police officer. When they arrived at the emergency room, it was overcrowded and there was nowhere to put the patient. As the EMTs pushed the gurney, the patient turned around and spit in respondent's face. Respondent wrote that in an instant reaction she "smacked" the patient in the face. After they moved the patient to a separate room, the patient continued to spit at hospital staff and the police (Pet. Ex. 10).

At her MEO 16 interview, respondent, accompanied by her union vice-president, answered all of the interviewers' questions (Pet. Ex. 11). She noted that she had worked with Cohan on approximately 100 prior occasions (*Id.* at 8). At the precinct, respondent obtained pedigree information about the patient while Cohan entered the cell (*Id.* at 11). The patient, who had urinated on herself, was sitting on the cell floor "screaming and yelling" and cursing (*Id.* at 11). According to the police, the patient was uncooperative, combative, and spitting at officers (*Id.* at 13, 21). She also took off some of her clothes and threw them at the officers (*Id.* at 15). Cohan and the police removed the patient, who was handcuffed behind the back, and walked her to the ambulance (*Id.* at 17).

As respondent drove the ambulance to the hospital, the patient was combative, irate, cursing, and threatening everyone (Pet. Ex. 11 at 17, 28-29). The patient screamed things like "I'm going to hurt you" and "I'm going to get you" (*Id.* at 17, 22). Respondent had more interaction with the patient when they arrived at the hospital (*Id.* at 31-32). The patient was irate, out of control, and trying to wriggle off the gurney (*Id.* 33). She told respondent, "Fuck you, bitch. I'll spit at you, bitch" (*Id.* at 32, 60-61).

Because it was a "very hectic night" and the emergency room was overcrowded, respondent tried to back the patient towards a quieter room used by hospital staff to treat emotionally disturbed people (*Id.* at 33-35). Respondent said, "Let's put her in this room" (*Id.* at

38). Without warning, the patient turned her torso and spit in respondent's face (*Id.* at 38). A "fair amount" of saliva landed on respondent's left cheek (*Id.* at 40-41). There was not enough time or room for respondent to move out of the way (*Id.* at 39).

Respondent, who had previously been struck by a patient but never before been spit on, told the interviewers, "I reacted and slapped her in the face" with an open hand (Pet. Ex. 11 at 41-42, 61). It was a double hit, "a quick one, two" (*Id.* at 41). Respondent "caught" the patient on the cheek (*Id.* at 42).

After respondent struck the patient, Cohan and others intervened and moved the patient to the room (Pet. Ex. 11 at 44). Respondent went to wash her face and she filled out an exposure report that night (*Id.* at 48, 52). She conceded that it was an unusual event and it was her error not to call a supervisor (*Id.* at 52, 69).

When asked whether she thought that the patient would get off the gurney and attack, respondent replied, "It wasn't something that was thought of. It was—I just reacted to her actions" (Pet. Ex. 11 at 42). "Afterwards, yeah, I knew I messed up" (*Id.* at 42). Respondent conceded that she was upset, mad, and taken by surprise (*Id.* at 43). She also said that it was "scary," because she did not know whether the patient had HIV or hepatitis (*Id.* at 66). Denying that she intentionally hit the patient, respondent said that her "swing" was a reaction (*Id.* at 61). "I don't feel good about it . . . It was a bad reaction" (*Id.* at 65).

Respondent assured the interviewers that, given another chance, she "would definitely handle it differently" (Pet. Ex. 11 at 66). In the future, she would let the police take handle the situation (*Id.* at 66).

Trial testimony

At trial, Cohan reluctantly testified for petitioner (Tr. 65). Following this incident, he had been ostracized "to some degree" by colleagues and he said that he did not want to testify or see respondent disciplined (Tr. 65-66). For the most part, his testimony was consistent with his prior written report and the MEO 16 interview. However, he suggested that he did not see or could not recall whether respondent struck the patient (Tr. 54-55, 60-61, 64, 80, 92). But when he watched the video at trial he conceded that respondent pushed, punched, or slapped the patient twice (Tr. 78-79). He also testified that he did not notify a supervisor that night because "we have nasty patients like that all the time" and "it was not much of an incident" (Tr. 88).

Captain Saffon was not familiar with the facts of this case (Tr. 27, 36). He offered background testimony regarding petitioner's procedures (Tr. 18-19, 25-26). Acknowledging that EMTs are not trained how to use force to defend themselves, Saffon stressed that EMTs are required to remove themselves from potentially dangerous situations and request police assistance (Tr. 27-28, 34-35). In his 21 years of working for petitioner, Saffon saw patients assault EMTs approximately 20 to 30 occasions and has reviewed reports of a similar number of incidents (Tr. 28).

There was no specific policy on how to deal with a "spitter," but Saffon claimed that EMTs are "usually" trained to place an oxygen mask on the patient's mouth to prevent spitting (Tr. 23-24). It was inappropriate for an EMT to strike a patient who is rear-handcuffed and strapped to a stretcher, even if the patient spit at the EMT (Tr. 26). If an EMT slapped or punched a patient, that would be an unusual incident that must be reported to a supervisor at the scene or upon return to the EMTs' station (Tr. 19, 21, 40). The supervisor would interview witnesses, complete an unusual occurrence form, and make further notifications (Tr. 19-20).

For the most part, respondent's trial testimony echoed her previous written report and MEO 16 interview. She stressed that the patient had twisted around in the gurney and spit at her without warning (Tr. 132). Respondent testified that she blocked the patient in self-defense and "made contact" to prevent the patient from spitting at her again (Tr. 132). Insisting that she did not intend to slap or harm the patient, respondent said that, after the patient spit in her face and attempted to spit a second time, she tried to block the patient and cover her mouth, before Cohan intervened (Tr. 132-33, 147, 155). Respondent described her conduct as a "quick block reaction as a human being" (Tr. 139). Her hands were open with her fingers wide apart (Tr. 139-141).

Respondent was unsure whether the patient was still rear-cuffed or secure, but she did not think the patient was going to get off the gurney and punch her (Tr. 149, 158). Rather, respondent's main concern was that the patient was going to spit at her again (Tr. 159). Respondent also testified that, aside from being instructed to "retreat," she had received no training on how to defend against an attack by an emotionally disturbed person (Tr. 102-03).

In respondent's view, the incident was not an unusual occurrence because EMTs and police officers are very often threatened or assaulted by patients or prisoners (Tr. 133-34). However, she again admitted that her failure to notify a supervisor was a mistake (Tr. 151).

Respondent recalled that she was upset and disgusted; she just wanted to leave the area and wash up (Tr. 133).

ANALYSIS

The petition alleged that respondent violated six regulations: discourtesy (General Regulation 4.1.10); conduct tending to bring the City or petitioner into disrepute (General Regulation 4.2.1); conduct prejudicial to good order and discipline (General Regulation 4.2.48); conduct unbecoming an employee (General Regulation 4.2.49); failure to perform duties (General Regulation 4.1.1); and failure notify a dispatcher of an unusual occurrence (Unusual Occurrence Regulation 5.1.1) (ALJ Ex. 1; Pet. Exs. 1, 2). Prior to trial, petitioner withdrew three unrelated charges (Tr. 5).

To prevail, petitioner must prove “its case by a fair preponderance of credible evidence.” *Dep’t of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007). It is petitioner’s burden to persuade the trier of fact “that the existence of a fact is more probable than its non-existence.” Richardson on Evidence § 3-206 (Lexis 2008). To the extent that this case turns on credibility, relevant factors include demeanor, consistency of a witness’s testimony, supporting evidence, witness motivation, bias or prejudice, and the degree to which a witness’s 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).

Here, the credible evidence tended to show that respondent struck the patient twice in face after the patient spit in respondent’s face. The patient provoked respondent, but that did not excuse such a violent reaction. Among other things, respondent’s behavior was discourteous, unbecoming an EMT, prejudicial to good order and discipline, and it tended to bring the agency into disrepute.

I credited respondent’s claim that the patient spit in her face. Respondent was adamant and consistent on this point. On the night of the incident, well before respondent had any opportunity to view the video, she promptly told her partner Cohan that the patient had spit in her face. Respondent repeated that allegation the next day in her written report and the following month at her MEO 16 interview. Notably, petitioner did not charge respondent with making any

false statements in her written statement or MEO 16 interview, and at trial petitioner seemed to acknowledge that the patient spit at respondent (Tr. 7).

Though the video camera was positioned too far from the incident to show whether the patient spit struck respondent, the actions depicted are entirely consistent with respondent's version of events. As the patient entered the emergency room, she was talking non-stop and appeared quite agitated. Despite multiple restraints, the patient was swinging from side to side and pushing back and forth. When respondent began to back the gurney away from the nurse's station, the patient twisted her torso and was face-to-face with respondent (Pet. Ex. at 1:40-1:42). In the next two seconds, respondent struck the patient twice (Pet. Ex. 1:42-1:44). The speed and intensity of respondent's reaction was entirely consistent with her claim that the patient spit in her face.

Cohan did not recall seeing spit on respondent's face, but that does not change the analysis. He confirmed that the patient had been spitting at the precinct and she tried to spit on the way to the hospital. It is unclear whether he was looking at respondent's face when the patient spit at her and, immediately afterwards, he was too busy shepherding the patient into a room to focus on respondent. Moreover, petitioner not did attempt to rebut respondent's claim by calling the patient, the accompanying police officer, or any of the many other eyewitnesses who were present.

Though I credited respondent's claim that the patient spit in her face, I do not believe that respondent was justified in striking back. Nor do I credit respondent's assertion that she merely tried to block the patient. It was not clear whether respondent's hand was open or closed. But the video showed her right arm went straight across her body and her hand struck the patient with considerable force. Indeed, the patient's head seems to jerk back after each strike. It does not appear that respondent was merely blocking the patient.

After the incident, video from the entrance to the emergency room showed the reaction of two other patients, who seemed to be re-enacting the incident. I did not attach much weight to this evidence, because neither patient testified, but both patients made gestures as if respondent slapped the patient (Pet. Ex. 9, Trauma Entrance at 2:58-3:00, 4:01-4:07, 4:30-4:32). One of the patients also made a jabbing motion and he gave respondent a "thumbs up" as she left the emergency room (*Id.* at 3:47-3:51).

Respondent credibly testified that she did not intend to injure the patient. And there was no evidence that the patient sustained any cuts, bruises, or other injuries as a result of respondent's actions. However, respondent is an EMT in a public safety service; she is held to a high standard of professional behavior (Pet. Ex. 2 at 3.1). By her own account, respondent knew that the patient was irrational and had spit at or attempted to spit at others that night. When the patient spit in the emergency room, respondent had other reasonable options available to her besides striking the patient. For example, respondent could have turned away, stepped back, put her hands out in front of her, held her arms up in self-defense, or pushed the patient away. *See Dep't of Correction v. Hill*, OATH Index No. 109/04 at 3-4 (Apr. 23, 2004) (misconduct not proved where correction captain pushed inmate's neck and head away to prevent her from spitting at him). The emergency room was crowded and there was not a lot of space to maneuver, but respondent was much more mobile than the patient, who was handcuffed and strapped to a gurney.

Even if respondent's first strike was in self-defense, which I do not believe, there was no reason for respondent to hit the patient a second time. The most likely explanation for respondent's conduct is that she was angry. That anger was understandable. But that does not justify striking a handcuffed, strapped-down, patient twice in the face.

Respondent's counsel suggested that petitioner is partly to blame because it does not provide self-defense training to EMTs (Tr. 10). That argument lacks merit. Petitioner's rules are clear. Employees must treat members of the public with respect at all times and must not engage in conduct tending to bring the Department or the city into disrepute. An EMT, especially one as experienced as respondent, does not require special training to know that repeatedly striking an emotionally disturbed patient is completely contrary to the agency's mission. *See Fire Dep't v. Prosper*, OATH Index No. 294/08 at 8 (Nov. 28, 2007), *adopted*, Comm'r Dec. (Dec. 7, 2007) ("patient care is an EMT's highest responsibility").

As respondent also conceded, she was required to report a possible unusual incident to her supervisor and her failure to do so was a mistake. Though the Department's EMTs may observe a wide variety of behavior during an ordinary shift, this was not a close call. Striking a patient in an emergency room is precisely the type of incident that should be brought to a supervisor's attention to enable a prompt and thorough investigation. Respondent's failure to report this incident in a timely fashion was misconduct.

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent struck a patient twice in the face after the patient spit in respondent's face.
2. Petitioner proved that respondent's conduct was discourteous, tended to bring the city and the Department into disrepute, was prejudicial to good order and discipline, was unbecoming a member of the Department, and violated Department policy, as alleged in Charges 1, 2, 3, 4, 5.
3. Petitioner proved that respondent violated Department procedure and did not properly report an unusual incident, as alleged in Charges 5, 6.

RECOMMENDATION

After making the above findings, I requested and received respondent's personnel history. Petitioner hired respondent in 2003. She has been disciplined twice for excessive lateness, resulting in a reprimand and one-year probation in 2006 and a two-day pay fine and one-year probation in 2008. In 2014 she received a seven-day pay fine and loss of ten days' annual leave for failure to respond to a location request, incorrect signal status, and unspecified conduct deemed prejudicial to good order or in violation of rules and regulations. In August 2016, she accepted a penalty of seven days' annual leave and six months' probation for failure to remain within an assigned cross-street location during her tour and unspecified conduct deemed prejudicial to good order or unbecoming an employee.

Because of the present charges, respondent was placed on restricted duty and did not receive ratings in her 2016 or 2017 annual performance evaluations. Before that, however, respondent routinely received good or very good evaluations. For example, in 2013, 2014, and 2015, her supervisors consistently gave her "very good" ratings in assessing the conditions of patients and providing patient care.

Petitioner now seeks termination of respondent's employment (Tr. 8). Though the proven charges require a substantial penalty, termination of employment would be excessive.

Among the factors to be considered in determining the appropriate penalty are: the seriousness of the misconduct; the employee's background, including length of service, supervisory duties, disciplinary history, and performance evaluations; the impact of the misconduct on the agency's mission; the penalty imposed on others for similar misconduct; the presence of mitigation, such as provocation or unusual stress; and the adequacy of the penalty to

deter similar misconduct by the employee or others. *See, e.g., Health & Hospitals Corp. (Bellevue Hospital Ctr.) v. Lee*, OATH Index No. 1645/13 (July 1, 2013), *modified*, Hosp. Dec. (Sept. 20, 2013) (terminating employment of psychiatric health technician who hit psychiatric patient in the face after the patient spit in his face; though employee had eight years' experience and no disciplinary history, the record also indicated that employee "was very familiar" with this type of patient behavior, had been spat at numerous times by patients, and "had received extensive training on de-escalating agitated psychiatric patients"); *Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Castro*, OATH Index No. 462/13 (Mar. 20, 2013), *modified on penalty*, Sr. Assoc. Exec. Dir's Dec. (May 2, 2013) (60-day suspension imposed on hospital lieutenant, a 30-year employee with no prior disciplinary record, who slapped a partially restrained detainee in the face after detainee had spit in his face); *see also Dep't of Correction v. Simmons*, OATH Index No. 1352/01 (Sept. 5, 2001), *adopted*, Comm'r Dec. (Oct. 31, 2001), *modified on penalty*, Civ. Serv. Comm'n Item No. CD 03-43-M (Apr. 21, 2003) (suspension reduced from 25 days to 15 days, where correction officer disobeyed an order, failed to step back, and struck a handcuffed inmate in the face after the inmate spat at him).

Here, respondent committed serious misconduct. She used unjustified force against a patient and she failed to report the incident as required. The patient was particularly vulnerable because she was partly restrained, emotionally disturbed, and possibly intoxicated.

There is, however, mitigation. Respondent acted deliberately but she did not intend to cause harm and petitioner offered no evidence to show that the patient sustained any injuries. Though respondent has a prior disciplinary record, there was also no evidence that her prior misconduct directly related to patient care. In fact, she repeatedly received "very good" evaluations for assessing and treating patients.

Moreover, there was substantial provocation. Health care and public safety workers, including hospital staff, EMTs, and law enforcement personnel, who come in close contact with emotionally disturbed people, are held to a higher standard. It is expected, by virtue of temperament, training, and experience, that they will remain calm under similar circumstances. The vast majority of health care and public safety workers handle extremely stressful situations with a great deal of professionalism. But even the most highly-skilled professional might have a similar momentary lapse in judgment after getting spit at in the face. Respondent's actions fell

far short of what is expected of a skilled professional, but her response to being spit at in the face was somewhat understandable and should be given significant mitigating weight.

Another important consideration is whether respondent can be trusted to treat other patients in the future. As noted, respondent is an experienced EMT who has a history of treating patients with quality care. This incident appears to be an aberration. During the MEO 16 interview, respondent demonstrated that she appreciated the seriousness of her actions and she has the potential to be a valuable member of the Department. She candidly conceded that she “messed up,” she did not “feel good” about her reaction, and she insisted that she would “definitely” handle it differently the next time, by getting police assistance (Pet. Ex. 11 at 42, 61, 65-66). Under these circumstances, it seems unlikely that respondent would react the same way to another patient.

A very substantial penalty short of termination, resulting in loss of pay for two months, would give appropriate weight to the mitigating circumstance, but would also make clear to respondent, her colleagues, and the public that striking an emotionally disturbed patient and failing to report it are unacceptable. Accordingly, I recommend that respondent be suspended for 60 days without pay, with credit for time served.

Kevin F. Casey
Administrative Law Judge

March 21, 2018

SUBMITTED TO:

DANIEL A. NIGRO
Commissioner

APPEARANCES:

JOSEPH PALAZZOLO, ESQ.
BOBBY CODJOE, ESQ.
Attorneys for Petitioner

ERIC SANDERS, ESQ.
Attorney for Respondent

In the Matter of Disciplinary Charges by the
NEW YORK CITY FIRE DEPARTMENT
Petitioner

COMMISSIONER'S DECISION

-against-

ALEJANDRA SERRANO
EMT
Station 14

OATH Index No. 0584/18
FDNY No. 259/16D

Respondent

I have had an opportunity to review and consider the Report and Recommendation issued by Judge Casey, the transcript of the OATH trial and exhibits introduced at the trial. Additionally, I have had an opportunity to review the submissions from the Department's attorneys. The Respondent, and her counsel chose to rest on the evidence submitted at Trial and did not submit any further mitigation evidence. In Judge Casey's Report and Recommendation, dated March 21, 2018, he found the Department submitted sufficient evidence to establish that you struck a restrained patient twice in the head, and in doing so you violated six Department regulations. These violations include discourtesy; conduct tending to bring the Department into disrepute; conduct prejudicial to the good order and discipline, conduct unbecoming of an FDNY employee, failure to perform duties, and failure to notify a dispatcher of an unusual occurrence. I concur with the Judge's findings of fact and of guilt.

Judge Casey found that the Department's allegations were supported by substantial evidence; he found your claim of justification or self-defense unpersuasive. In his Report and Recommendation, Judge Casey stated "Here, the credible evidence tended to show that the respondent struck the patient twice in the face after the patient spit in respondent's face. The patient provoked Respondent, but that did not excuse such a violent reaction."

At the trial held on February 9, 2018, you admitted to striking a restrained patient twice in the head. All FDNY employees are expressly forbidden from engaging in any physical altercations with any patients they may encounter in their capacities as employees of this Department. The only justification for striking a patient would be to protect one's person from an imminent physical attack. Judge Casey found the self-defense claim you raised lacked merit and I fully concur with that finding. As Judge Casey stated in his Recommendation "Even if respondent's first strike was in self-defense, which I do not believe, there was no reason for the Respondent to hit the patient a second time. The most likely explanation for Respondent's conduct is that she was angry. That anger was understandable. But that does not justify striking a hand cuffed, strapped-down, patient twice in the face." Working as an EMT for the past 15 years, you are well equipped with the knowledge of how to properly engage and interact with patients that may be Emotionally Disturbed. There is no specialized training required to know that striking a strapped-down patient twice in the face is a gross deviation from the standards and expectations of an FDNY employee.

I fully concur with Judge Casey's recommendation to impose a penalty of sixty (60) days suspension without pay.

THEREFORE, on dates to be determined by the Department, a suspension without pay for sixty (60) days will be imposed, with credit for thirty (30) days previously satisfied by suspension.

By order of, [REDACTED]

[REDACTED]

Daniel A. Nigro
Fire Commissioner

Date: 24 May 2018