



POLICE DEPARTMENT

April 11, 2014

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Paule Rivera
Tax Registry No. 942442
6 Precinct
Disciplinary Case No. 2013-09278

The above-named member of the Department appeared before the Court on January 9, 2014, charged with the following:

1. Said Police Officer Paule Rivera, assigned to the 42nd Precinct, while off-duty, on or about March 18, 2013, within the confines of the 26th Precinct, in New York County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer was involved in a physical altercation with Dorril Semper.

P.G. 203-10, Page 1, Paragraph 5 - GENERAL REGULATIONS

2. Said Police Officer Paule Rivera, assigned as indicated in Specification #1, while off-duty, on or about March 18, 2013, did wrongfully and without just cause engage in off-duty employment as a security guard for [REDACTED], without authority or permission to do so.

P.G. 205-40, Page 1, Paragraph 1 - OFF-DUTY EMPLOYMENT

The Department was represented by Christine Maloney, Esq., Department Advocate's Office. Respondent was represented by Stuart London, Esq., Worth, Longworth & London LLP.

Respondent, through his counsel, entered a plea of Not Guilty to Specification No. 1. He pleaded Guilty to Specification No. 2 and testified in mitigation of the penalty. A stenographic transcript of the trial-mitigation record has been prepared and is available for the Police Commissioner's review.

COURTESY • PROFESSIONALISM • RESPECT

DECISION

Respondent is found Not Guilty of Specification No. 1. Having pleaded Guilty to Specification No. 2, he is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Dorril Semper as a witness.

Dorril Semper

On March 18, 2013, around 1300 to 1400 hours, Semper was at the [REDACTED] Market in Harlem to do some shopping. He was there for 20 to 25 minutes. As he was leaving, he observed three children standing at the door with a security guard, Respondent. Semper estimated the oldest child to be about 12 years old. Respondent was "really talking belligerent" and "getting really loud" with them, saying, "What's in your f'ing bag." Semper stopped and listened to what was going on.

Semper told Respondent, "There's no reason for you to be speaking to the kids that way." Respondent told Semper to "get the F out" and "got loud" with him. Semper did not leave because he was a paying customer and did nothing wrong.

As Respondent approached Semper, Semper warned him, "If you touch me, I'll call the cops on you." Respondent pushed him against the glass of the entry/exit atrium and started swinging at him (see Department's Exhibit [DX] 2a & 2b, photographs of [REDACTED] post-cashiers area and glass-enclosed entry/exit area, respectively). Semper "defended myself" in that "We had a fight." Respondent hit Semper and pulled his dreadlocks out of his scalp.

At one point, the confrontation ended and Semper gathered his belongings. But he and Respondent "started to go at it again" back inside the store. Semper indicated that even though he raised his hands in submission, Respondent kept punching him.

Semper indicated that once the fight finally ended, the police arrived and he was arrested. He was not arraigned and the case was dismissed. (Both Semper and Respondent were arrested and issued desk appearance tickets [DAT] at the 26 Precinct after an investigation by the Patrol Borough Manhattan North Investigations Unit. The DATs later were dismissed by the District Attorney's [DA] Office). It was about three minutes from the end of the fight to the police's arrival. Semper waited at the site because he did not feel that he did anything wrong.

DX 1 was store surveillance video of the incident. Semper asserted that the video captured most of the event, except for when he raised his hands and told Respondent, "I'm not here to fight." This occurred off-screen.

DX 3 were a set of photographs depicting Semper's injuries. These included bruises to his head and eye area. He was treated at [REDACTED] Hospital and suffered a severe headache as well.

On cross examination, although Semper denied that he smoked marijuana, he admitted that he twice was arrested for buying it, both times in the past two years and both times a \$25 purchase. He also had been arrested for driving without a license.

Semper agreed with counsel's statement that because objective evidence indicated that the incident occurred at 1600 hours, he could not have arrived at [REDACTED] at 1300 or 1400 hours. He had lunch that day at a restaurant with his brother and consumed two margaritas. Semper characterized the glasses as "small" or "regular-sized." He did not recall when he met his brother or how long lunch lasted.

Semper asserted that he did not have a problem with [REDACTED] searching the children's bags and asking for receipts. He only objected to the way that Respondent was speaking to them. One of the children was carrying a backpack. They said, "I have my receipt and I already showed you my receipt." Respondent answered, "I don't give a damn, I want to see it." They opened the bag and there was nothing there other than what they had purchased. After the guards (there was someone else with Respondent, Semper indicated) searched the bags and saw the receipts, the children were allowed to leave.

Semper agreed that he "interjected" himself into the situation and began speaking to Respondent as he was speaking to the children. He stated that he would pay for "any items they may have stolen."

Semper admitted that when Respondent told him, in sum and substance, to "get the fuck out," he responded, "[M]ake me." Semper did not consider that to be antagonistic. Semper did not remember Respondent gesturing with his arms that he should leave. Semper nevertheless was on his way out when Respondent followed him. Respondent was "getting very loud" and repeated to Semper to "get the F out."

Semper did not recall Respondent putting his hand on his shoulder. Rather, Respondent pushed him in an effort to push him onto the floor. Semper flew into the glass. Semper asserted that he only punched Respondent after Respondent had punched him first. Semper might have punched Respondent in the face. Both of them used closed fists.

Although Semper denied approaching Respondent in any way, he agreed that he had Respondent in a headlock at one point in the atrium. They briefly had separated but began fighting again. This spilled back into the store itself.

Semper testified that after he and Respondent separated from each other a second time, Semper raised his hands and said, "I'm not here to fight." Yet Respondent continued to punch him. Semper began picking up his items that had fallen to the ground and called 911. He waited for the police just outside the parking lot. He did not tell anyone from the store that was where he would be.

Semper agreed that he did not break any bones. He was given § [REDACTED] at the hospital.

Upon examination by the Court, Semper explained that his brother took the DX 3 photographs after Semper arrived home from the precinct and hospital the next morning.

Respondent's Case

Respondent testified on his own behalf.

Respondent

Respondent graduated from the Police Academy in July 2006. He originally was assigned to the 42 Precinct but was transferred to the 6 Precinct after the incident in question.

Respondent testified that he previously applied for authorization to work off-duty employment at [REDACTED]. This request was approved. When the approval expired, however, he did not renew the application. Respondent said that this was "[m]y mistake" and agreed with counsel that he "just forgot."

At approximately 1600 hours on the day in question, Respondent was working at the [REDACTED] as a security guard. He was unarmed and not in any special uniform. He was positioned at the exits. He observed a couple of children coming in and out of the store. The

youths were in their early teens, perhaps 12 or 13 years old. One of them had an open bookbag. Respondent told him to close it, but the youth said that the zipper was broken. Respondent saw the child again, but this time the bag was closed. Respondent approached a colleague and explained the situation. He came with Respondent to stop the youths and ask to search their bags. This was past the cash registers.

Respondent denied cursing at the children and said that he was not rude to them. He told them that he worked for [REDACTED], observed them coming in and out of the store with an open bookbag, and needed to see their bags and receipt. Although one of the youths was giving Respondent a hard time, it was "nothing big." He did not have to touch them or "verbally yell" at them. The children produced receipts and Respondent searched the bag. The receipts corresponded to the items purchased and Respondent did not find anything amiss. Respondent told the children, "Have a nice day."

Respondent observed Semper during the conversation with the children. He offered to pay for anything they stole. Semper also told Respondent to let the youths go and not to speak to them.

When asked if he "engage[d] in a conversation" with Semper, Respondent answered, "The first time I did, but, like, he kept going." Respondent began "exchanging words with him" but denied cursing. The children still were standing there. Respondent told Semper that the matter had nothing to do with him and that they only were doing their job. Respondent's co-guard alerted Semper to the sign that said the store had the right to search bags. Semper responded, "You can't do that, they're kids, let them go."

After the children left, Respondent implored Semper to leave as well. He gestured toward the exit with a long wave of his hand. Semper retorted, "Make me leave." Respondent

repeated his request for Semper to leave the premises. Respondent attempted to "escort" him by placing his hand on his shoulder. Semper pushed Respondent's hand away and said, "If you touch me again, I'm going to knock your teeth out of your mouth." Semper was "aggressive" and "too close" to Respondent, not even an inch. Respondent pushed him to make room between them. Semper came back toward him and put his clenched hand up to fight. Semper struck him, and that was when the fight started.

Respondent smelled alcohol on Semper's breath during the fight. They fought for less than a minute when Semper got Respondent in a headlock. They came back into the store from the atrium, Semper let go, and they separated. But Semper threatened, "I'm going to get you" and came swinging at Respondent again. They began punching each other again "in a little scuffle." Semper then "ran away."

Respondent denied that Semper's hands were up when Respondent walked back into the store, or that he punched Semper while his hands were in the air. He did not recall Semper's hands ever being in that position. The second portion of the fight took less than a minute.

Someone called 911. The police arrived about two or three minutes after Semper exited the store. Respondent did not see Semper after that but knew he got arrested. Respondent was not arrested at the scene but received a DAT at the station house.

Respondent indicated that he also went to [REDACTED], a few hours after the incident. He suffered a broken bone in his right hand, swelling to his left hand, and lacerations to his face and leg (see Respondent's Exhibit [RX] A, photographs depicting Respondent's injuries).

After the DAT was issued, Respondent met with members of the DA's Office and gave them his account of what occurred. His case was dismissed and he did not have to go to court.

On cross examination, Respondent admitted cursing at Semper, but it was during the fight, “[n]ot at the beginning.”

Upon examination by the Court, Respondent asserted that he originally applied for off-duty employment permission in 2011 or 2012, but did not remember which. The authorization was for a one year period and he had to re-apply each year. He did not know when the authorization in question expired.

Respondent conceded that although he stopped the youths after he observed them going in and out of the store, there was food for sale outside this [REDACTED] location.

Respondent stated that his wife took the RX A photographs the following day at his house.

FINDINGS AND ANALYSIS

On Monday, March 18, 2013, Respondent was working as a security guard at the [REDACTED] in Harlem. Respondent previously had authorization for this off-duty employment. He originally applied in 2011 or 2012, but the authorization had lapsed by the date of the incident. Respondent claimed that he “just forgot” to re-apply for permission.

At approximately 1600 hours, Respondent was present at the store. He testified that he observed something suspicious. Several children, no older than their early teens, entered the store. One of them had an open backpack. Although children with backpacks are a common sight on a school day around 4 p.m., Respondent recognized this one as a possible aid to shoplifting. Respondent instructed the youth to close the backpack, but the youth answered that the zipper was broken. Respondent later observed, however, that the child was walking around

with a closed backpack. He also observed the group going in and out of the store, although he conceded that there was merchandise for sale outside as well.

Respondent and another guard stopped the group after they passed the registers. This area was shown in the DX 2a still photograph and the DX 1 video surveillance. Respondent described the youths as not necessarily happy to be stopped but basically compliant. They produced a receipt for all of their items and left the store.

A man, Dorril Semper, was at the side closely watching all of this. He apparently already had checked out at the registers and was leaving the store too. He was angry at the fact and manner that the youths had been stopped and searched. He began arguing with Respondent. According to Semper, Respondent was speaking angrily and profanely both to the children and to him. Respondent testified that he was courteous at all times. Respondent nevertheless told Semper in sum and substance that he merely was doing his job, the matter was none of his business, and Semper needed to leave. Semper refused.

Semper alleged that Respondent pushed him into the glass atrium surrounding the interior entrance doors to [REDACTED] (see DX 2b, still photograph). Respondent testified that he only put his hand on Semper's shoulder to guide him out of the store. He also pushed him toward the exit. At that point, the brawl began, with punches thrown and injuries suffered (see DX 3 & RX A, photographs of each individual after release from station house documenting their injuries). Police officers responded and both Semper and Respondent were taken into custody. After an investigation that included interviews by Manhattan North Investigations, both men were issued desk appearance tickets. The DA's Office later declined to prosecute both cases.

Regardless of the spin placed on the events through the testimony of each man and the arguments by counsel, the surveillance video captured the event pretty much in its entirety.

Semper was leaving the store behind the children. He argued with Respondent and his co-worker immediately, pointing his finger at them. As the guards finished with the youngsters, the other guard escorted the children away from the scene but Semper and Respondent kept arguing. Several times, Respondent motioned toward the exit with a long wave of his arm. Eventually, Semper began to leave, but when Respondent followed behind, Semper turned and the men continued arguing. Respondent placed his hand around Semper's upper arm, and Semper resisted. Respondent motioned several more times with his arm but Semper refused to move. Finally, Respondent pushed Semper with both hands. At that point, the physical brawl began.

Specification No. 1 alleges that Respondent was "involved in a physical altercation" with Semper. Obviously that is not questioned. Respondent contended, however, that he merely used an acceptable amount of force to induce Semper to leave the store. Any further force was used justifiably in response to Semper's attack. The Department countered that Respondent was the initial aggressor in all of this because he pushed Semper.

A person in possession or control of any premises may use physical force upon another when he reasonably believes it necessary to prevent or terminate the other person's criminal trespass upon the premises. Penal Law § 35.20 (2). This would include a retail security guard ejecting a trespasser. See People v. Deis, 97 N.Y.2d 717, 719-20 (2002) (viewed in light most favorable to defendant grocery store worker, complainant entered store as licensee but entry became unlawful when he refused defendant's lawful order to leave); see also Penal Law § 140.00 (5) (criminal trespass is constituted by entering or remaining unlawfully upon premises without license or privilege, and although license and privilege exists when a person enters or remains in premises that are open to the public, that license and privilege ends if he defies a lawful order to leave, personally communicated to him by the owner or other authorized person).

As a security guard employed by [REDACTED], Respondent was in control of the premises. At the moment that Respondent pushed Semper, the latter was trespassing because Respondent had instructed him to leave several times, thus ending Semper's license as a member of the public to enter the supermarket. Contrary to Semper's view, he did not have some kind of absolute right as a paying customer to remain in the store and bicker with employees over their practices. Semper was arguing with Respondent on the matter for over a minute. For at least 45 seconds Respondent was motioning and telling Semper to leave. Semper admitted that he refused to leave, saying, "Make me." Respondent's order to depart was lawful.

Further, it was reasonable for Respondent to believe that physical force was necessary to eject Semper from the store. He had refused to leave several times and putatively was standing his ground. The force used by Respondent grabbing and pushing Semper toward the exit doors was reasonable, measured, and necessary to complete the objective. *Cf. Case No. 82994/07*, p. 13 (Apr. 22, 2010) (even if Court were to credit officer's assertion that complainant threw first punch, officer nonetheless "exercised a level of force that went above and beyond what was warranted" and excluded himself from claiming self-defense).

The Department and Semper asserted that Respondent was the initial aggressor in the incident because he gratuitously pushed Semper into the glass atrium and threw the first punch. The initial aggressor doctrine, however, applies only to situations where the defendant uses physical force upon another person to defend himself or a third person from what he reasonably believes to be the imminent use of unlawful physical force by that other person. *See* Penal Law § 35.15 (1). Here, Respondent was using physical force in defense of premises. Penal Law § 35.20 (2) contemplates that a person in Respondent's position may have to make the first physical contact.

Even if the developing physical fight is seen as one in which Respondent simply was fighting with Semper and not trying to eject him from the supermarket, Semper was the initial aggressor in that encounter. The initial aggressor is the party who first uses or threatens to use physical force. See Penal Law § 35.15 (1)(b); People v. Baez, 118 A.D.2d 507, 508 (1st Dept. 1986). Here, Semper refused the valid demands of Respondent to leave the store and implicitly threatened Respondent with violence if he persisted in those demands, saying, “Make me.” Respondent’s placement of his hands on Semper and pushing him toward the exit thus did not make Respondent the initial aggressor. See People v. Coleman, 256 A.D.2d 473, 473-74 (2d Dept. 1998) (even according to defendant in assault case, he gained access to victim’s building by preventing the door from closing, and when victim protested, defendant tried to evade him; thus, notwithstanding victim throwing first punch, defendant did not act to avoid injury that was imminent through no fault of his own); People v. Soriano, 188 A.D.2d 420 (1st Dept. 1992) (legally sufficient evidence to find that defendant was initial aggressor and victim initially was unarmed); cf. People v. McGee, 173 A.D.2d 861, 862 (2d Dept. 1991) (viewed in light most favorable to defendant, jury could have concluded that Respondent was not initial aggressor because his use of force was preceded by offensive use of unnecessarily violent force by complainants, ostensibly to repel trespassing defendant).

In any event, the video belies Semper’s assertions about Respondent’s use of force. Respondent’s push was not excessive and did not appear to send Semper into the glass. Additionally, Semper, not Respondent, can be seen throwing the first punch.

In sum, Respondent legitimately used a reasonable amount of physical force to eject Semper from the supermarket. This was consistent with his duties as a security guard, the law,

and the Patrol Guide. As such, he is found Not Guilty of Specification No. 1, being involved in a physical altercation.

Having pleaded Guilty to Specification No. 2, engaging in off-duty employment without permission, Respondent is found Guilty.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 10, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

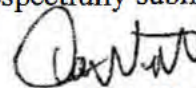
Respondent has been found Guilty of engaging in off-duty employment as a security guard at the [REDACTED] in Harlem without permission. He previously had authorization to work there. He testified that he first applied in 2011 or 2012. The Department did not provide any evidence to dispute this. Respondent could not give a reason when asked why he did not re-apply for permission. His attorney had to suggest to him that he "just forgot."

The Advocate recommended that Respondent forfeit the 20 days he previously served on suspension in this matter. Respondent was arrested after a physical altercation with a [REDACTED] customer. This Court, however, has found that Respondent acted with justification and did not violate the Patrol Guide.

With regard to the off-duty employment, there is no reason to believe that had Respondent properly reapplied, he would not have been approved. It was an act of omission. Consequently, a lower penalty than the Advocate's recommendation is proper and the Court recommends that Respondent forfeit 10 vacation days. See Case No. 2010-1811 (Apr. 5, 2011)

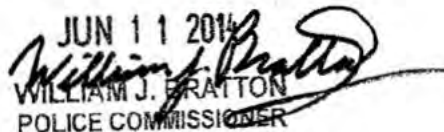
(13½-year sergeant with no prior disciplinary record negotiated penalty of 10 vacation days for engaging in unauthorized off-duty employment as unarmed security guard at The Children's Place); *Case No. 2009-2555* (Mar. 15, 2011) (10 days for 3½-year police officer with no prior record who worked as school custodian without authorization). The 20 suspension days should be returned to him.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner - Trials

APPROVED

JUN 11 2014

WILLIAM J. BRATTON
POLICE COMMISSIONER

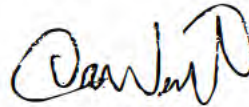
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER PAULE RIVERA
TAX REGISTRY NO. 942442
DISCIPLINARY CASE NO. 2013-9278

In 2013, Respondent received an overall rating of 3.0 "Competent" on his annual performance evaluation. He was rated 4.0 "Highly Competent" in 2011 and 3.5 "Highly Competent/Competent" in 2012. He has been awarded one medal for Meritorious Police Duty.

[REDACTED]
[REDACTED] s. Respondent has no prior formal disciplinary record.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner – Trials