



POLICE DEPARTMENT CITY OF NEW YORK

July 25, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Kevin Dominicci
Tax Registry No. 952693
Transit Division District 12
Disciplinary Case No. 2016-15122

Police Officer Michael Daly
Tax Registry No. 952635
Transit Division District 12
Disciplinary Case No. 2016-15121

Charges and Specifications:

Disciplinary Case No. 2016-15122

1. Police Officer Kevin Dominicci on or about March 14, 2015, at approximately 2030 hours, while assigned to Transit District 12 and on duty, in the vicinity of Jacobi Medical Center Adult Emergency Room, Bronx County, wrongfully used force, in that he punched Person A without police necessity.

P.G. 203-11 – USE OF FORCE

Disciplinary Case No. 2016-15121

1. Police Officer Michael Daly, on or about March 14, 2015, at approximately 2030 hours, while assigned to Transit District 12 and on duty, in the vicinity of Jacobi Medical Center Adult Emergency Room, Bronx County, wrongfully used force, in that he hit Person A's head against a window without police necessity.

P.G. 203-11 – USE OF FORCE

2. Police Officer Michael Daly, on or about March 14, 2015, at approximately 2030 hours, while assigned to Transit District 12 and on duty, in the vicinity of Jacobi Medical Center Adult Emergency Room, Bronx County, abused his authority as a member of the New York City Police Department, in that he threatened Person A with the use of force without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 1 – PUBLIC CONTACT – PROHIBITED
CONDUCT

3. Police Officer Michael Daly, on or about March 14, 2015, at approximately 2030 hours, while assigned to Transit District 12 and on duty, in the vicinity of Jacobi Medical Center Adult Emergency Room, Bronx County, spoke discourteously to Person A.
P.G. 203-09, Page 1, Paragraph 2 – DISCOURTESY

Appearances:

For CCRB-APU: Raasheja Page, Esq. & Timothy Jones, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

For the Respondents: Michael Martinez Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

Hearing Date:

May 10, 2017

Decision:

Case No. 2015-15121: Guilty, Specifications 1 and 2; Not Guilty, Specification 3.
Case No. 2016-12122: Guilty

Trial Commissioner:

ADCT Paul M. Gamble

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on May 10, 2017.

Respondents, through their counsel, entered a plea of Not Guilty to the subject charges. CCRB called Zachary Leopold as a witness. Respondents called Sergeant Luis Delgado as a witness and testified on their own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Daly Guilty of Specifications 1 and 2; I find him Not Guilty of Specification 3. I find Respondent Dominicci Guilty of the sole specification and charge.

FINDINGS AND ANALYSIS

The following is a summary of the facts which are not in dispute.

On March 14, 2015, at approximately 2000 hours. Person A was placed under arrest by Respondents Kevin Dominicci and Michael Daly outside the Pelham Bay Park subway station. Sergeant Luis Delgado, the Patrol Supervisor in Transit District 12 that evening, also responded to the station (T. 62). Upon his arrival, Sergeant Delgado observed two men in police custody, one of whom was Person A, and several police officers, including Respondents (T. 62-63). While standing next to Respondents' patrol car, in which Person A was seated, Sergeant Delgado observed him screaming and behaving erratically (T. 65, 73). Based on these observations, Sergeant Delgado instructed Respondents to transport him to Jacobi Medical Center ("JMC") for observation in accordance with the NYPD emotionally disturbed person ("EDP") protocol (T. 65-66).

Respondents transported Person A to JMC and brought him into the Emergency Room ("ER") area handcuffed. Prior to being seen by medical staff, Person A had a physical altercation with Respondents, the nature of which is in dispute. Person A was subsequently evaluated by medical staff, treated and released to the Department.

Zachary Leopold testified that he is a Staff Nurse at Jacobi Medical Center ("JMC") and has been so employed for six years (T. 14). On March 14, 2015, he was working in the hospital's ER (T. 14-15). At approximately 2030 hours, Leopold returned to the ER from a break (T. 15). Around this time, Leopold observed Respondents escorting Person A into the ER (T. 15-16). Leopold testified that Person A was walking between the two officers with his hands cuffed behind

his back (*Id.*). Person A appeared upset and was yelling "I didn't do anything, why am I under arrest, somebody threw bleach on me" (*Id.*).

Leopold testified that Person A and Respondents were walking towards the Nurses Station, where he was standing (T. 15-16, 25-26). The three men reached a point seven to ten feet away from Leopold when he observed Respondent Daly grab Person A's head and slam it into a plexiglass window (T. 15, 17, 26). Leopold testified that Respondent Daly verbally threatened Person A prior to accosting him, stating "If you spit on me, I will fuck you up" (T. 15-16). Person A slumped down to the ground after being hit, crying (T. 15, 18). Respondent Dominicci then knelt down and punched Person A in the stomach (T. 15, 17-18). Leopold estimated that less than a minute had passed from the time that he initially observed Respondents and Person A until the time that the alleged assault took place (T. 20).

According to Leopold, after Respondent Dominicci punched Person A, approximately three to four members of the hospital staff, including Leopold and Dr. [REDACTED] rendered assistance to him (T. 21, 24-25). Person A was then taken to a treatment room in the hospital's trauma bay where JMC staff performed a full triage and medical assessment (T. 21). Leopold testified that the confrontation took place in full view of approximately eight to ten people, including staff, patients and guests (T. 24). He described the confrontation as violent and inappropriate (T. 21). Leopold testified that prior to having his head slammed into the plexiglass window, the only thing he saw Person A doing was yelling (T. 20). Similarly, Leopold saw Person A doing nothing more than lying on the floor and crying prior to being punched (*Id.*).

On March 15, 2015, Leopold contacted CCRB to report Respondents' alleged misconduct (T. 21). He later provided a sworn, written statement to CCRB detailing his observations (*Id.*). Leopold stated that this was his first time filing a complaint of this nature (*Id.*). He explained that

he was motivated to file the CCRB complaint based on the unpleasant and disturbing nature of Respondents' actions (T. 21-22).

On cross-examination, Leopold acknowledged that there were moments when Respondents had to push Person A along while the three men traveled down the hallway (T. 25-26, 42-43; *c.f.*, T.16). Leopold asserted that he was certain that Person A did not spit at Daly while he was observing the three men walk down the hallway (T. 29, 31-32). Leopold denied witnessing Person A kick a nurse (T. 45). Leopold confirmed that Person A was sedated after he was struck, although he did not personally observe Person A engage in conduct that would warrant sedation (T. 33, 37-38).

Leopold also acknowledged that he did not file a formal complaint against Respondents with either the hospital or the Department (T. 38-39). Leopold did not believe he was required to formally report the incident to the hospital since Person A was not his patient, but he did bring his concerns about Person A's safety to Dr. Jones' attention (T. 47, 49-50).

Sergeant Luis Delgado proceeded directly to JMC from the arrest scene (T. 66-67, 73, 76).

By the time he arrived at the hospital and entered the room where Person A was being treated, Sergeant Delgado observed him strapped to a hospital gurney kicking and screaming (T. 67). Sergeant Delgado observed that Respondents and members of the hospital staff were present (*Id.*). He described Person A as moving his head around, spitting and upset (T. 68). Sergeant Delgado inquired about Person A's condition and estimated that he spent approximately 10 to 15 minutes talking to the staff (T. 67-68). Sergeant Delgado testified that neither Person A nor any other civilian complained about Respondents' alleged improper use of force while he was at JMC (T. 69).

On cross-examination, Sergeant Delgado clarified that when he observed Person A in Respondents' patrol car, he appeared aggressive, but not violent (T. 72). Sergeant Delgado conceded that he neither observed Person A banging his head against the windows of the patrol car nor observed Person A attempting to kick out the windows of the patrol car during the time he observed him (T. 72-73).

Respondent Dominicci testified that on March 14, 2015, he and Respondent Daly responded to a "radio run" of an assault in progress taking place at the Pelham Bay Park train station (T. 79). Once on the scene, Respondent Dominicci observed several officers from another sector within Transit District 12 talking to a man in the front of the train station (T. 80-81). Shortly thereafter, he was informed by the responding officers that Person A had assaulted another man with bleach—once on the train platform and again in the station's mezzanine (T. 81-83). Respondent Dominicci testified that Person A's victim sustained pain, irritation, swelling in his eyes, and a strong odor of bleach emanated from his clothes (T. 82).

Respondents next conducted a brief investigation into the reported assault (T. 80). After interviewing several witnesses, Respondents determined that Person A was the initial aggressor (T. 82). Person A was then placed under arrest and charged with assault in the second degree (T. 82- 83). Though Person A initially attempted to walk away from Respondent Dominicci when he called out to him, he was successfully handcuffed shortly thereafter (T. 83-84). Once Person A was handcuffed, Respondents walked him over to their RMP (T. 84). Respondent Dominicci testified that Person A was screaming, "They're going to kill me, they're killing me" (T. 84).

According to Respondent Dominicci, once Person A was inside of the RMP, he began kicking the rear door window (*Id.*). He then smashed his head against the window on the other side of the vehicle (*Id.*). Respondent Dominicci testified that he was concerned for Person A's

safety; for this reason, he opened the rear door of the RMP nearest Person A's head (T. 85). Person A nevertheless continued to kick his feet against the window of the opposite rear door (T. 86).

Respondents requested assistance from the patrol supervisor, Sergeant Delgado (T. 86). Once on the scene, Sergeant Delgado observed Person A's behavior and opined that he was most likely an emotionally disturbed person (T. 86). Sergeant Delgado instructed the Respondents to transport Person A to JMC for treatment (*Id.*).

Respondent Dominicci drove the RMP to JMC while Respondent Daly sat in the passenger seat (T. 87). Respondent Dominicci estimated that JMC was a 10 minute drive from the arrest location (*Id.*). During the prisoner transport, Person A continued to kick and smash his head against the rear passenger window (*Id.*). Respondent Dominicci also observed Person A spitting, flailing, screaming and yelling (*Id.*)

Respondent Dominicci parked near the public entrance of the ER and attempted to remove Person A from the back seat but he resisted by making his body go limp several times, as well as swinging his arms, shoulders and head (T. 87-89). Respondent Dominicci testified that he was "afraid" he was going to get hit in the head (T. 89). Since Person A was recalcitrant, Respondents had to carry him from the RMP to the ER entrance (*Id.*). Respondent Dominicci hooked Person A's right arm with his left arm while Respondent Daly hooked Person A's other arm (*Id.*).

Once the three men entered the ER, Respondents escorted Person A to the ambulance entrance on the other side of the emergency room (T. 90). The three men traveled approximately 75 to 100 feet down a hallway (*Id.*). During this time, Person A was swinging his body and head (*Id.*). Respondent Dominicci positioned Person A against a wall in the hallway while Respondent Daly tried to locate a member of the hospital staff (*Id.*).

Respondent Dominicci then heard a sound that he associated with someone spitting (T. 91).

He testified as follows:

At one point I'm looking around to my right, Person A is to my left, Officer Daly is furthest to the left. I'm looking around to see if anyone is on their way, and then I hear someone spit. I didn't see it but I heard it. And I heard Officer Daly shout something to the effect basically alerting me that [Person A] spit. I looked over to my left, and I observed Person A swinging his body.

At that point we pushed him further against the wall, and that was it. At that point – at some point because of the way he was acting, very difficult to maintain him, I figured the best position for him to be in would be on the floor. While he's on the floor, he can't run, he can't hurt anybody in that position from what I thought. So we placed him onto the floor.

(T. 91). When asked to explain how he placed Person A onto the ground, Respondent Dominicci testified that, while he faced Person A, he used his right leg to sweep Person A's feet as he supported him through his arm in an effort to get Person A into a seated position on the floor (T. 92). Respondent Dominicci carried Person A down to the ground to prevent him from falling (*Id.*). Once on the ground, Person A extended his legs into the middle of the hallway (*Id.*).

Respondent Dominicci next observed a group of hospital staff to his right (T. 92). He testified that the staff did not appear to be focused or attentive to Respondents' situation in regards to Person A until one nurse passed by (*Id.*). Respondent Dominicci stated that "as the nurse passed by, Person A intentionally struck her in the shin" (*Id.*). Respondent Dominicci testified that he personally observed Person A pull back his feet and then extend them forward striking the nurse in her shin (T. 92-93). Respondent Dominicci heard the nurse let out a shriek prompting him to crouch down to the ground and push Person A's torso with his open hand so that it was flush with the wall (*Id.*; T. 108, 111-112). Respondent Dominicci did this so that Person A was parallel with the wall and his feet were no longer extended into the hallway (T. 93).

Shortly after Person A kicked the nurse, members of the hospital staff rushed over to the scene (T. 93-94). Respondent Dominicci testified that JMC staff lifted Person A onto a hospital stretcher; he then removed the handcuffs from Person A's hands (T. 93-94, 97). Person A was brought to an examination room and was strapped down to a hospital bed (T. 94). Respondent Dominicci recalled that Person A's treating physician directed the staff to sedate the patient (T. 97).

Once Person A was taken to a treatment room, and the situation was under control, Respondent Dominicci approached the nurse that Person A had kicked, but she insisted she did not want to press charges against Person A (T. 94).

On direct examination, Respondent Dominicci was asked whether he observed Respondent Daly slam Person A's face against a wall or plexiglas while they were in the hallway (T. 95). Respondent Dominicci replied, "I don't even recall there being [p]lexiglass. I just know that once he spit, he got the way he did, we pushed him against the wall some more to redirect him and restrain restrict him from motion" (*Id.*). Respondent Dominicci also denied observing Respondent Daly strike Person A at any point while they were in the ER (*Id.*; T. 96). Respondent Dominicci further denied punching Person A in the stomach (*Id.*). Respondent Dominicci also testified that he did not recall seeing Leopold at the hospital on the date of the underlying incident (T. 97-98). Respondent Dominicci did not recall hearing Respondent Daly say "If you spit at me, I'll fuck you up" (T. 96).

Respondent Dominicci testified that Sergeant Delgado arrived at the hospital approximately ten to fifteen minutes after he and Daly arrived with Person A (T. 97). Respondent Dominicci observed Sergeant Delgado talking to hospital staff. (T. 97). Thereafter, Sergeant Delgado directed Respondent Dominicci to guard Person A while he was at the hospital until he

was relieved (T. 98). Respondent Dominicci was relieved sometime around midnight (*Id.*). Respondent Dominicci testified that Person A was still at the hospital when he left (*Id.*).

On cross-examination, Respondent Dominicci conceded that he did not actually observe Person A spit at or near Respondent Daly, as he was looking in another direction (T. 103). Respondent Dominicci further conceded that he did not see any spit on Respondent Daly's face (T. 104-105).

Respondent Daly testified that he was working with Respondent Dominicci on March 14, 2015, when they received a radio run at approximately 2000 hours concerning a dispute in progress at the Pelham Bay Park train station (T. 115-116). While Respondents were en route to the train station they received an update that the dispute had progressed into a possible assault and both parties were still at the station (*Id.*).

Upon their arrival, Respondents detained both individuals and conducted a brief investigation; as a result, Person A was placed under arrest (T. 116-117). Respondent Daly acknowledged that he was Person A's arresting officer (T. 117). After Person A was handcuffed and placed inside of the backseat of the RMP, Respondent Daly observed Person A repeatedly striking his head against the rear window (T. 118). Person A was also screaming "They're trying to kill me, I can't breathe. I'm dying" (*Id.*). According to Respondent Daly, Person A engaged in this conduct for approximately ten minutes (*Id.*). Sergeant Delgado, who was also on the scene, observed Person A's behavior and directed Respondents to transport him to JMC (T. 119). Respondents drove Person A directly to JMC (*Id.*). Respondent Daly testified that Respondent Dominicci drove the RMP to the hospital while he sat in the passenger seat (*Id.*).

Once they arrived at JMC, Person A refused to get out of the RMP (T. 119). Person A repeatedly went limp and dragged his feet as Respondents brought him into the hospital through

the public entrance (T. 119-120). Respondents were able to get PersonA into the ER by "flanking" him, one on each side (T. 120).

Respondent Daly testified that as they approached the triage area, PersonA spat on him (*Id.*). Respondent Daly saw Person A cock his head back and felt Person A's spit land on his cheek (T. 120-121). Respondent Daly acknowledged that he was concerned that PersonA spit might contain a communicable disease (T. 121). According to Respondent Daly, he shifted Person A's body so that they were no longer facing each other (*Id.*). When asked if he told Dominicci that Person A had spit on him, Respondent Daly answered "No. I didn't - we - at that point we kind of - to further restrain him, we did kind of hold him up against the wall. Officer Dominicci was able to sweep out Person A's legs and we could guide him down to the ground" (*Id.*).

When Respondent Daly was asked whether he told Person A "Don't - don't fucking spit on me" or "You better not spit on me," he responded, "I don't recall exactly what I said. I just know it was - it was probably like, 'Please, don't spit at me,' but it was very emphasized" (T. 121-122). Respondent Daly conceded that he yelled at Person A but denied using profanity or threatening him (T. 122, 126). Respondent Daly further denied slamming Person A's head into either a plexiglass window or a wall (T. 126, 135).

Respondent Daly testified that he was on Person A's left when Dominicci swept Person A's legs from underneath him and placed him onto the ground (T. 122). Once Person A was on the ground, Respondent Daly left to find someone from the hospital staff and obtain some hand sanitizer (T. 122-123). Respondent Daly testified that as he was looking for a member of the staff he heard someone shriek (T. 123). Respondent Daly went back to the location where he left Respondent Dominicci and Person A and observed Respondent Dominicci pinning Person A against the wall (*Id.*).

Shortly thereafter, JMC staff responded and helped Respondents get Person A onto a hospital gurney (T. 126). While Person A was on top of the hospital gurney he flailed around, screamed and kicked until he was sedated (T. 127). Respondent Daly was present when Person A was sedated (T. 126-127). Respondent Daly testified that he had an opportunity to speak with the nurse about the incident although she indicated that she did not want to pursue charges against Person A (*Id.*).

After Person A was sedated, Respondent Daly left JMC and reported back to Transit District 12 to complete the arrest paperwork (T. 127). Respondent Daly stated that Person A was treated and released from JMC into his custody the following morning (T. 128). Respondent Daly then transported him to Transit District 12 for photographing and fingerprinting (*Id.*). Respondent Daly testified that Person A did not have any reported injuries (*Id.*).

On cross-examination, Respondent Daly testified that Person A's spit landed on his right cheek (T. 133). Respondent Daly acknowledged that Person A's spit remained on his right cheek for approximately 30 seconds to a minute and was eventually removed using hand sanitizer that he located in the hospital (*Id.*). Respondent Daly conceded that he did not complete any paperwork regarding possible exposure to a communicable disease because spit did not enter any openings, including Respondent Daly's eyes, mouth or nose (T. 134).

Respondent Daly testified that after he and Respondent Dominicci "repositioned" Person A against the wall, Respondent Dominicci swept Person A's legs from underneath him and then guided him down to the floor to a seated position (T. 137). Respondent Daly denied observing Respondent Dominicci bend down and punch Person A in the stomach, stating, " That never happened" (T. 138). Respondent Daly conceded that he was not present when Respondent

Dominicci allegedly placed his open hand on Person A's torso to reposition him against the wall for a second time following the incident with the nurse (*Id.*).

Respondent Daly admitted that as Person A was being discharged, he told the attending physician "I want to stay here at the hospital because officers roughed me up" (T. 139). Respondent Daly conceded that punching Person A in his stomach would have been an inappropriate response, assuming he had actually kicked a nurse (T. 141). Respondent Daly further conceded that slamming Person A's head into a wall or plexiglass window would also have been an inappropriate response to Person A him spitting on him (*Id.*).

Respondents offered the November 13, 2015, telephone statements of Doctor [REDACTED] into evidence (Resp. Ex. A, B). Although Dr. [REDACTED] recalled that he worked that day, he had no independent recollection of Person A being treated on March 14, 2015. Dr. [REDACTED] read notations from JMC medical records to the CCRB investigator indicating that Person A was aggressive and attempting to kick and spit on staff (Resp. Ex. A, p. 14). Dr. [REDACTED] did recall that Leopold was upset by something he had witnessed that day regarding a scuffle with a patient (*Id.*, p. 20). Dr. [REDACTED] stated that he considered Leopold trustworthy and that he would believe Leopold's account of what he witnessed (*Id.*).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account (*Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 [1st Dep't 1994]).

I find Leopold to be a disinterested witness whose testimony was clear and concise. The substance of his testimony and his demeanor at trial were consistent with what one could

reasonably expect from a person of his education and professional experience. I further found no indicia of undue bias against police. I further find his report of the incident to Dr. [REDACTED] his immediate supervisor, and then to CCRB the day after the incident, imbues his testimony with an additional indicium of reliability. While Respondents challenged his veracity by suggesting that he was merely mistaken in reporting what he thought he observed, the detail in Leopold's testimony leaves little room for ambiguity. Finally, Dr. [REDACTED] statement that he found Leopold to be a trustworthy person and that he would rely upon his description of events is admissible as reputation testimony, an additional factor in favor of Leopold's veracity.

In contrast, both Respondent Dominicci and Respondent Daly are interested in the outcome of this litigation. Their respective testimonies were similar in that they used euphemistic language, such as "re-position" to describe their use of force. Finally, there are irreconcilable contradictions between their testimony and that of both Department witnesses. I therefore find that Respondents exaggerated their description of Person A's behavior after his arrest to paint a self-serving scenario in which they would be justified in using force against him, even though they each denied the specific allegations of force. Two portions of their respective testimonies are illustrative of the insurmountable challenges to their veracity.

First, in describing Person A's behavior at the time of his arrest, Respondent Dominicci testified that Person A screamed "They're going to kill me," as he was being handcuffed; screamed inside the police car; banged his head repeatedly against the windows of the police car; and tried to kick the police car's windows out. Respondent Daly similarly described Person A banging his head against the windows of the police car. While Sergeant Delgado testified to similarly erratic behavior consisting of Person A yelling and moving about, he did not observe Person A repeatedly banging his head into the car windows or attempting to kick the windows

out. It is unlikely that three individuals perceiving the same event would omit the portion regarding the head-banging and kicking. In this case, the discrepancies between Respondents' testimonies and Sergeant Delgado's testimony are more likely an embellishment by Respondents than a lapse in recollection by Delgado.

Second, Respondent Dominicci testified that Person A kicked a nurse, but that the nurse refused to press charges. Respondent Daly affirmed that Dominicci informed him that Person A had kicked a nurse but that the nurse refused to press charges. As with the allegation of Person A spitting on Respondent Daly, it is odd that Person A was not charged with an additional count of Harassment in the Second Degree. Any prosecution of such charge would not depend on obtaining the testimony of the nurse since Respondent Dominicci claimed to have witnessed it. Moreover, if the incident had occurred as Respondent Dominicci testified, it is likely that Leopold would have witnessed the kick as well. Leopold would arguably have just as strong an incentive to report the wrongful conduct of Person A striking one of his co-workers as he did to report the wrongful conduct of Respondents toward Person A. What is more likely is that the entire nurse scenario is a purposeful deflection calculated to distract the finder of fact from the central allegation of wrongful use of force by Respondents.

Thus, I find both Respondents to be unreliable witnesses.

While I find that Person A was likely uncooperative and even combative during his encounter with Respondents, I did not consider Respondents' proffer of his arrest history (Tribunal Ex. I). Since Person A did not testify and Leopold was credible, Person A's arrest record is not probative.

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1. Wrongful Use of Force

I find, by a preponderance of the relevant, credible evidence, that Respondent Daly forcibly pushed Person A's head away from him and slammed it into a plexiglass window without police necessity. Leopold's testimony on this point was clear and persuasive, notwithstanding Respondent Daly's self-serving recollection of events.

Based upon the foregoing, I find Respondent Daly Guilty of Specification 1.

2. Threatening Use of Force

I find, by a preponderance of the relevant, credible evidence, that Respondent Daly threatened Person A with the unlawful use of force when he stated "If you spit at me, I will fuck you up." I do not credit Respondent Daly's testimony that he professed to have no recollection of what he said but that he probably said, "Please don't spit on me," with "emphasis." An objective observer would likely construe this language as a threat of retaliation. While Respondent Daly would have had an absolute right to file an additional charge of Harassment in the Second Degree (Penal Law §240.26) if Person A had spat on him, no police officer has the right to use force in a punitive manner.

Based upon the foregoing, I find Respondent Daly Guilty of Specification 2.

3. Discourtesy

I find that CCRB has failed to prove by a preponderance of the relevant, credible evidence, that Respondent Daly was discourteous to Person A in stating, "If you spit on me, I will fuck you up." Although I find Respondent Daly to be an unreliable witness, I found Leopold credible with respect to his testimony that Respondent Daly stated, "If you spit at me, I'll fuck you up." Based upon that factual finding, corroborated by Respondent Dominicci's testimony

that he heard Person A make a spitting sound, it was reasonable for Respondent Daly to fear that he was about to be spit upon. Based upon that apprehension, the use of foul language is excusable.

Accordingly, I find Respondent Daly Not Guilty of Specification 3.

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I find by a preponderance of the relevant, credible evidence, that Respondent Dominicci punched Person A without police necessity. As set forth above, Leopold's clear and persuasive testimony established that Person A slumped to the floor in apparent pain after having his head slammed into a plexiglass window, after which Respondent Dominicci went to his knee and punched him in his stomach. There was no credible evidence offered before the Tribunal to support Respondent Dominicci's assertion that Person A kicked a nurse and that he had to press him against a wall while on the floor to immobilize him.

Based upon the foregoing, I find Respondent Dominicci Guilty of the charged misconduct.

PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. *See Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Both Respondent Dominicci and Respondent Daly were appointed to the Department on July 11, 2012. Information from their personnel records that was considered in making these penalty recommendations is contained in attached confidential memoranda.

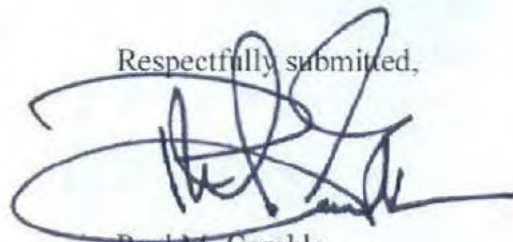
CCRB has requested forfeiture of 15 vacation days for Respondent Dominicci and 20 vacation days for Respondent Daly. Respondents in previous cases have forfeited from 10 to 15 days for striking handcuffed prisoners (*Disciplinary Case No. 2016-15759* [March 27, 2017])[Fourteen-year detective with no prior disciplinary history negotiated a penalty of 10

vacation days for using force against an individual without justification. During the transport of a violent prisoner to the hospital for psychiatric evaluation, said individual spat at Respondent. In response, Respondent punched said individual in the face two times while the individual was rear cuffed and strapped to a hospital gurney]; *Disciplinary Case No. 2015-14073* [December 19, 2016][Five-year police officer with no prior disciplinary record forfeited fifteen (15) vacation days for wrongfully using force without police necessity in that he struck an individual in the face. Respondent responded to a call from a group home for adolescents with mental health issues regarding an aggressive sixteen year old resident. After agreeing to bring the resident to a hospital for a psychological evaluation, Respondent punched the resident in the face several times while he was being restrained by two other police officers. There was no evidence in the record to support a finding that the resident's resistance was so protracted and violent that a resort to physical force to compel his acquiescence was warranted. ADCT found that the Respondent did not "demonstrate the discrimination expected of a trained, experienced police officer" in a situation with "an emotionally disturbed individual whose actions may be motivated, at least in part, by forces beyond his control"]; *Disciplinary Case No. 2015-14379* [May 23, 2017][Seventeen-year detective, with one prior adjudication, forfeited 15 vacation days for striking an individual in the face without police necessity. After pushing the individual down to the ground, and placing one handcuff on his left wrist, Respondent repeatedly ordered the individual to give him his right arm. When the individual did not comply, Respondent punched him once in the face to try to gain compliance. The individual was not engaging in any active aggression or active resistance at the time he was punched and Respondent had obtained control over him. Thus, Respondent's punch to the face was in violation of the Patrol Guide which demands that MOS use the minimum force necessary. Respondent was found Not Guilty of speaking discourteously to the individual in

stating, "Turn the fuck around," and threatening an unknown individual with the use of force without justification in stating, "You want to get fucked up." The use of profanity by an officer during a stressful street arrest does not constitute actionable misconduct. Further, Respondent was concerned that a person in the growing crowd was moving too close to him while he was trying to effect the arrest. Likewise, the use of profanity for the purpose of gaining control of people in a crowd does not constitute actionable misconduct]).


It is aggravating in this case that the wrongful conduct of which Respondents have been found guilty involved a handcuffed prisoner and occurred in a hospital they brought him to for treatment. The force utilized by each Respondent lacked any connection with furthering a legitimate police purpose. These acts were committed in a public space and were of such character to reflect negatively on this Department as a whole. Moreover, the acts did not reflect the judgment and discretion expected of a trained police officer. Accordingly, I recommend that Respondent Dominicci and Respondent Daly each forfeit 20 vacation days.

Respectfully submitted,



Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

NOV 09 2017

JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER KEVIN DOMINICCI
TAX REGISTRY NO. 952693
DISCIPLINARY CASE NO. 2016-15122

Respondent was appointed to the Department on July 11, 2012. On his last three annual performance evaluations, beginning with the most recent, Respondent received a 4.5 "Extremely Competent/Highly Competent," 4.0 "Highly Competent," and a 3.5 "Highly Competent/Competent." He has received two medals for Excellent Police Duty and two medals for Meritorious Police Duty.

[REDACTED]

He has no prior formal disciplinary record.

For your consideration.

Paul M. Gamble
Assistant Deputy Commissioner Trials