



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

August 5, 2008

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Matthew Cahill**
Tax # 932397
71 Precinct
Disciplinary Case No. 82418/06

The above named member of the service appeared before Deputy Commissioner Martin G. Karopkin on September 24, 2007 and was charged with the following:

DISCIPLINARY CASE NO. 82418/06

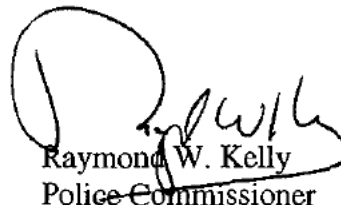
1. Said Police Officer Matthew Cahill, assigned to the 71st Precinct, while on duty, at or about 0330 hours, on June 14, 2005, in the vicinity of [REDACTED], Kings County, did use excessive force against an individual known to this Department, to wit: repeatedly striking him with an asp about the body and/or head without just cause.
(As amended)

P.G. 203-11, Page 1, Paragraph 2

FORCE

In a Memorandum dated December 14, 2007, Deputy Commissioner Karopkin found the Respondent GUILTY, in part, of the sole Specification. Having read the Memorandum and analyzed the facts and circumstances surrounding the alleged misconduct in this instant matter, I do not agree.

Respondent Cahill took necessary and appropriate action during this chaotic and evolving incident and used "force" in good faith, in a necessary manner, to ensure that the complainant would not enter into a fire-engulfed building and insert himself into harm's way. The Respondent's actions also protected the safety of those responders present whom would have thereafter entered into the conflagrated building to protect the complainant from his own highly dangerous, albeit emotionally-driven actions. Coupled with the certain serious evidentiary issues identified as shortcomings by Deputy Commissioner Karopkin, I therefore find Respondent Cahill **NOT GUILTY** of the sole Charges/Specification preferred against him in this matter.


Raymond W. Kelly
Police Commissioner



POLICE DEPARTMENT

December 14, 2007

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Matthew Cahill
Tax Registry No. 932397
71 Precinct
Disciplinary Case No. 82418/06

The above-named member of the Department appeared before me on September 24, 2007, charged with the following:

1. Said Police Officer Matthew Cahill, assigned to the 71st Precinct, while on duty, at or about 0330 hours, on June 14, 2005, in the vicinity of [REDACTED], Kings County, did use excessive force against an individual known to this Department, to wit: repeatedly striking him with an asp about the body and/or head without just cause. *(As amended)*

P.G. 203-11, Page 1, Paragraph 2 – FORCE

The Department was represented by Andre Applewhite, Esq., Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty in part.

EVIDENCE

The Department's Case

The Department called Alexander Faust DeSantis and placed into evidence a videotape¹ of part of the incident in question.

Alexander Faust DeSantis

DeSantis is an assistant supervising investigator at the Civilian Complaint Review Board (CCRB) and has been employed there for three years. He said that on June 24, 2005 he interviewed Kenneth Washington over the phone [Department's Exhibit (DX) 3A is the tape recording of this interview and DX 3B is the corresponding transcript]. He also conducted a second interview with Washington in person on July 1, 2005 (DX 4A is the tape recording of this interview and DX 4B is the corresponding transcript).

On cross-examination, DeSantis said that this case was referred to his office by the Internal Affairs Bureau (IAB) for reasons unknown to him, and agreed that he did not get this case because Washington had called CCRB. He also agreed that the tape was shown on Channel 4 news, that IAB wasn't taking any action on the case, and that there were not parallel investigations into it.

DeSantis acknowledged that he reached out to Washington by phone, and not the other way around, and that there were times when he and Washington were supposed to meet in person but Washington had broken those appointments. It wasn't until a few months and a couple of failed appearances later that they met. By then, he believed that Washington was looking to hire an attorney but when they met he did not have a lawyer

¹ Several copies of the videotape were put in evidence: DX 1 is a videotape; DX 2 is a DVD with several versions including several in slow motion. RX A is a television newscast in which a short version of the video is shown both at normal speed and in slow motion.

with him. DeSantis agreed that as part of his investigation he found out that Washington was suing the City for about \$2 million for false arrest, false imprisonment and things of that nature.

He conceded that he interviewed a lot of police officers who were on the scene but nobody from the Fire Department because he and his supervisors believed that the testimony of the officers and of the civilians that they obtained, combined with the video, was sufficient evidence to move forward with the case. He did not dispute that firefighters were injured and two were hospitalized at the scene.

DeSantis believed that Washington and his family lived on one side of a two-family home. The family who lived on the other side of the home was involved in a domestic dispute where the boyfriend of an occupant murdered her and subsequently started a fire on that side of the house which then burned the whole house. He said that it was possible that the first calls that came over to respond to that location were for the assault in progress.

He agreed that at some point he was given a copy of the videotape and said that a freelance photographer named Anthony South had taken the footage. He stated that he met him on October 12, 2005 but that South refused to be interviewed on tape, so he took a statement and some notes instead. DeSantis acknowledged that he took South's statement and his notes and reduced that to his summary and results of investigation portion. He said that South did not want to go on record or on tape because he didn't want to be "hassled down the line." He said he did not know where South is now or how much the newscast paid him for this footage.

DeSantis said that the whole interaction with Washington was not recorded and agreed that South didn't get the whole incident on tape. He agreed that from the video he saw, the first time one sees Washington, he is already in a struggle with numerous police officers, he is surrounded by police officers and firemen, he is standing in front of the building that's burning, on the stoop, and that there is no video footage taken of him before that.

DeSantis said that South had told him that he had seen some things that occurred with Washington that he didn't capture on video, and that "blows were thrown" between Washington and the police officers that weren't captured on tape. He said that he asked South to elaborate as to who threw what blows, but he wouldn't elaborate on it.

He concurred that South had said that at some point he had heard members of the Fire Department yelling "Mayday, Mayday," and that they started rushing inside the building after that. DeSantis also concurred that South had said that he saw Washington walk towards the building and up to its entrance for the first time and that he was visibly upset, while several firefighters were at the front door attempting to remove an injured firefighter. DeSantis believed that the injured firefighter could be seen on the video.

He also remembered South telling him that when the firefighters were trying to bring out the injured officer and Washington was standing in the way, that they started screaming "PD, PD, get this guy out of here," and that was when the police officers came to the front of the building. He acknowledged that South had told him that before that, there were no police officers standing in front of the building; it was only after the firefighters called for them to get "this guy out of here" did the officers approach. DeSantis admitted that the video did not capture the approach of either the police officers

or Washington to the front of the building, and that when the video is on, they are already there.

DeSantis confirmed that according to his investigation, Washington was initially arrested, brought to the precinct, and let go about 45 minutes later. He was charged with obstructing governmental administration (OGA), but the charges were dropped once they found out that his in-laws perished in the fire.

He also believed that Washington's sister-in-law was also arrested for OGA because she had tried to pick up some rescue equipment that was there and rush into the building. DeSantis agreed that she was restrained but the charges against her were dropped as well.

DeSantis said that Washington alleged that at the precinct, an officer asked if he needed medical attention while he was in the holding cell, and that he did not respond because his mind was elsewhere and the officer walked away after using some profanity. He said that even after his release from the precinct, Washington did not seek any medical attention that evening. DeSantis agreed that Washington had initially complained about some scrapes, bumps and bruises, and that on the video, Washington shows his knuckles were scraped.

DeSantis agreed that Washington was mad that an officer had hit him in the head with a radio, and that he had made several allegations against the officer who had the football jersey on. According to Washington, after he was taken to the ground and arrested, the officer in the "No. 7" jersey said: "If you want to be a hero – if you want to be a fucking hero go to fucking Iraq."

DeSantis said that CCRB recommended that the allegation of discourtesy be substantiated against the officer in the jersey in the video, but agreed that no charges concerning force were substantiated. He agreed it was Officer Houlihan wearing the football jersey that day, but no allegation of excessive force was substantiated against him.

DeSantis said that he has not followed Washington's lawsuit since he closed this case, and at that time, he believed that a Notice of Claim had been filed.

On re-direct examination, DeSantis confirmed that Washington did not seek medical attention right away, nor did he do so when he was released from the precinct. He said that Washington went back to the scene to try to locate his family members, and then later that evening he went to his mother's house and went to sleep. DeSantis believed that Washington found out that his in-laws had perished in the fire while he was in the holding cell at the precinct.

Upon questioning from the Court, DeSantis said that Washington learned that his child had survived when he went back to the scene of the fire and the mother of the child was there outside the building with the child.

The Respondent's Case

The Respondent called Police Officer Michael Houlihan and the Respondent testified in his own behalf.

Police Officer Michael Houlihan

Houlihan has been with the Department for almost 10 years and has worked in the 71 Precinct since 1999. He said that on June 14, 2005, when he responded to [REDACTED], he was assigned to the SNEU² team and was in plainclothes, wearing a "Michael Vicks football jersey, Atlanta Falcons, and Atlanta Falcons cap with blue jeans."

In reviewing the video (DX 2), Houlihan agreed that when the video starts off, he is already in a struggle with Washington. He said that initially he was staying as far away from the fire as possible because of the heat. He was standing in the middle of the street when a fire officer, who he assumed "was a chief," told him to take control of what was going on because numerous people were taking their tools, axes, and halogens and trying to run into the fire. During Houlihan's conversation with the fire officer, Washington ran past them and went running up the steps. The fire officer then told Houlihan to get Washington out of there.

Houlihan said he ran up the steps and asked Washington to come down the stairs, and Washington knocked his hand down. Meanwhile, two unconscious firemen, who Houlihan thought were deceased, were being brought out from the fire. He recalled the firemen carrying the injured screaming: "What the fuck are you doing, get him the fuck out of here."

At this time Washington was outside the doorway on the patio, where the injured firefighters were being brought out, and Houlihan said that with the two of them there, the firemen were not able to pass. Houlihan recounted that he pulled Washington down, telling him to go, and that Washington turned and punched him in the chest, sending him

² SNEU is the acronym for Street Narcotics Enforcement Unit

back into the stairwell of the next house. A fireman caught him and pushed him back up and that was when he and Washington began wrestling on the stairs. He said that there were approximately six fire hoses on the stairs and it was not tactical to be wrestling there, since it was not a safe spot.

In describing the resistance offered by Washington, Houlihan stated that first his hand was slapped down, and the next time he grabbed Washington, he was physically hit. Houlihan said that he weighed 260 pounds, had a black belt in two styles of karate and had wrestled in the past but that he had never been hit so hard in his life. Once he was propped back up by the firemen who were there, Houlihan re-initiated contact with Washington by grabbing him and trying to bring him down the stairs. At that time, he stated that other officers intervened because Houlihan was not able to get Washington down the stairs by himself. He stated that Washington was resisting, trying to get back up into the fire. Houlihan said that during this time, fire personnel were unable to get past the two of them because they were at the top of the stairs, blocking them. He denied that any of this is depicted in the video.

Houlihan said that some point after that he was joined by Police Officers Roth, Cahill and Gulizio, of the 71 Precinct, who came up the steps and helped bring Washington down the stairs. He said that to get Washington down the steps he grabbed him by his shirt and was escorting him down while the other officers grabbed onto him as well.

Houlihan admitted that he had his radio in his hand at that time. He did not know if he was listed as a subject at first when he was interviewed in this matter by CCRB. He agreed that they told him that an allegation was made that he hit Washington in the head

with the radio, but denied that he had done that, and denied that there was any contact made between his radio and Washington's head.

Houlihan concurred that if one were watching the video, when Washington goes down the stairs, he is no longer in the frame of the video. It was at this time that fire and police personnel were trying to subdue and handcuff him. He recalled that Washington was brought down to the ground but kept trying to get up. He said all he saw was people bouncing up, and that Washington was bouncing them up and down. He repeated that he had never seen anyone so strong before in his life. He reiterated that firemen, as well as police officers, were trying to subdue Washington.

In describing the protocol at fires, Houlihan explained that the Fire Department handles the fires and the Police Department handles what goes on outside in the street. He said that when he first arrived on the scene he stayed across the street, across from the front of the building. He agreed that he only went toward the fire when he was requested. He said there were approximately 100 civilians out in the street when he arrived.

Houlihan agreed that he has seen the video (DX 2) in its entirety, that he has never seen any of the struggling that Washington did once he was down the stairs depicted in the video, and that from the angle the video was taken, what was going on closer to the ground can't be seen.

Based on the video (DX 2), Houlihan said it is possible that Gulizio is the person whose back is towards the camera, who is shown reaching up and grabbing the chest area of Washington, grabbing a handful of his shirt. He described Gulizio as a "big, big guy." Houlihan agreed that in the video (DX 2), Gulizio sort of threw himself down while holding onto Washington, hanging onto him and bringing him down, and that

Washington ends up on top of Gulizio when they eventually get down the steps. He said that during the struggle that ensued in which the firefighters had to help subdue Washington, Gulizio was on the bottom. He denied that he was trained to take people down like that and said that Washington was one of the biggest and strongest persons he has dealt with. He admitted that he spoke to Washington when he stood up after being subdued and arrested, but denied having any conversation with him back at the command.

Houlihan stated that a minute and a half had elapsed from the time that Gulizio pulled Washington down to the ground before he was cuffed, and that there were three or four police officers and four or five firemen trying to subdue him. Houlihan denied knowing who actually put the cuffs on Washington and denied it was he who did it.

Houlihan denied that he had further contact with Washington after that day, but said that one of the firemen being removed unconscious from the fire thanked him months later for clearing the way for him to get out and said that he had saved his life. He said that the injured firefighters were in the hospital for a while but he did not know the extent of their injuries.

On cross-examination, Houlihan said that he has viewed the video (DX 2) once at CCRB and then again during the present trial. He agreed that he never struck Washington with his radio, and that Washington had punched him in the chest. When asked if Washington had pushed him in the chest instead of punching him, Houlihan said that it was an open-handed type of punch.

He agreed with the Court that Washington pushed him with his open hand, and that was when he went back into the next stairwell of the adjoining house. He confirmed

that when he approached Washington, the latter had his back toward him. He denied that Washington repeatedly told him that his family members were in the burning house, and he did not do so even once. He said that he could not assume at the time that Washington would have family members in a burning house if he was running up into the house.

Houlihan denied that he told the CCRB investigator that when he first approached Washington, Washington turned around and punched him with a closed fist in the face. In referring to the video (DX 2), Houlihan agreed that he observed Washington going down the stairs. At that point in time, Houlihan stated that he did not have an ASP³ on his person, and denied knowing if Roth or Gulizio had ASPs on their persons. He also said he did not see either Gulizio or Roth use an ASP. He agreed that Washington is depicted on the video being pushed or pulled down the steps, and that at some point he landed on the ground face down. He stated that despite all the firemen and police officers on top of Washington, he could tell that Washington was resisting as he was on the ground because he could see the body of the person on top of him going up and down.

Houlihan agreed that he had spoken to the CCRB investigator and had said that he did not know if Washington was resisting. He did not recall if Washington was yelling anything while he was on the ground, and denied knowledge of Washington's clothes being ripped at any time during this incident.

Houlihan concurred that there was water, broken glass, and fire hoses on the steps, and that Washington was making his way down the steps with the help of some officers. He denied that he found it necessary to strike Washington with any object after he started going down the steps, or while he was on the ground.

³ ASP is the name of a Department-issued baton which has two positions. First it can be described as closed or retracted and second as expanded in which it extends out to form a metal rod.

On redirect examination, Houlihan said that his radio appeared to be next to Washington's head because he was trying to grab him by his head to bring him down the stairs, saying: "Normal physics in wrestling, you control the body with the head. If you move your head to the left, you move to the left."

Houlihan stated that he considered himself to have been punched in the chest by Washington even though it was open-handed because of the amount of force that hit him and the way it knocked him back. He said he did not know what part of Washington's hand hit him but said it was the impact with Washington's hand as opposed to his hand pushing him back. He stated that he did not recall telling a CCRB investigator that he was punched in the face.

Houlihan denied that he ever got the impression Washington was walking down the stairs by his own volition; that he ever felt that if they walked in different directions that Washington was just going to proceed down the stairs; that Washington ever went down the stairs when he verbally told him to do so; that Washington ever went down the stairs without an officer at least pulling him down; nor that it was his impression that the reason Washington was taking so long to get down the stairs was because he was worried about stepping on broken glass or water. He said that Washington was resisting when he was trying to get him down the stairs.

On re-cross-examination, while looking at the video (DX 2), Houlihan agreed that when he first approached Washington, Washington had his back toward him and that he (Houlihan) was behind him. In explaining how Washington is turned around and facing the steps, Houlihan said that Washington was in the doorway area and he was behind him with one foot on a lower step and one on a higher step. He asked Washington to step

down and Washington knocked Houlihan's hand down. Washington then turned around and hit him, and Houlihan fell back. At the point when Houlihan got back up, everyone started pulling Washington down.

In clarifying how Washington was turned around to go down the steps, Houlihan explained that Washington turned around to hit him and was then facing down towards the bottom of the stairs, toward the sidewalk. At that time the officers started pulling him down.

Upon questioning by the Court, Houlihan recalled that when Washington went down to the sidewalk, there was a swarm of people on him and he could see that people were bobbing up and down. He said that Gulizio, who had pulled Washington down by his shirt, wound up on the bottom of the pile.

The Respondent

The Respondent has been with the Department for four years and is currently assigned to the 71 Precinct. He said that on June 14, 2005, he was working a midnight tour and partnered with Gulizio. He responded to [REDACTED] based on a radio run for a possible arson and assault with a knife inside the building, and a call for an "85" over the radio, meaning police needs assistance.

The Respondent stated that upon arriving on the scene, he saw hundreds of people in the street watching the fire, numerous fire and police personnel, and their vehicles, and flames coming out of the top story of the building. At that point, he explained that they tried to do crowd control, keeping people away from the general area where the firefighters were working, and where the police officers were trying to make a crime

scene. He revealed that he was about halfway in the street, right in front of the location. He stated that the crowd was, for the most part, standing, watching, trying to move closer, so he was constantly telling people: "Move back, move back, get back."

The Respondent testified that he heard yells of "PD, PD, get this guy out of here," and a high ranking firefighter told him, "Get that guy off the steps, get this guy out of here," referring to Washington. The Respondent said that when he turned to face the steps, he saw Washington struggling with firefighters, reaching over their shoulders, and the firefighters looked like they were trying to drag someone out of the doorway. He stated that Washington looked like he was trying to part the firefighters by placing his arms on their shoulders, trying to move them. He explained that the doorway's width was about the width of one person. He stated that Washington "looked pretty big," and he had never seen him before that day and did not know who he was at the time.

The Respondent testified that he observed Houlihan on the staircase struggling with Washington, and he could see Washington flailing his arms, swinging at Houlihan. The Respondent said that he rushed to the steps, approached Washington and told him three or four times to get off the steps. Washington didn't acknowledge him by looking at him or answering him. At that point, the Respondent said that he grabbed his arm to pull him, and Washington started to flail his arms at him and Roth. He stated that it looked like Washington took a swing at Roth. He acknowledged that he has seen a video (DX 2) in this case and that none of these actions are depicted on the video (DX 2).

The Respondent explained that his first attempt of physical force was to grab Washington's arm, to try to pull him down the steps, but that didn't work because Washington was a lot bigger than he. So he started swinging his arm, trying to sweep

Washington off the steps. He stated that he was hitting him with his forehand and fist in his shoulder, arm and chest area. He noted that this was not depicted in the video (DX 2) or that this had any effect on making Washington comply. He asserted that Washington didn't seem to acknowledge that the Respondent was trying to strike him to get him off the steps.

The Respondent said that he then removed his ASP expandable baton, which is a metal, telescopic baton that he got in the Police Academy. He stated that in order to carry an ASP, one would have to be specifically trained in its use, and agreed that he was trained in its use in the Police Academy. He explained that when he first took out his ASP, he kept it in its hilt. When he used it in this position to strike Washington, he saw that it had no effect, so he extended the baton and tried to swing it further. He agreed that what he was now describing is depicted on the video (DX 2).

The Respondent stated that he was trying to jab him in the shoulder, chest and arm area in an effort to get Washington to move down the steps. In describing the levels of confrontation that he was trained in to get a person to comply with an order, he began with verbal command, then physical force, then possible use of a baton or mace, but he didn't think mace would help in that situation because there were too many people in the area, and he believed that if he had sprayed Washington, he might have become confused and might have tried to get back into the building further.

He claimed that the jabs did not seem to have any effect, and that it didn't seem like Washington was acknowledging his presence on the steps. He said that at that point, Houlihan and Roth were attempting to assist him. He stated that the first time he saw Gulizio he was pulling Washington off the steps, and that it looked like Gulizio was

trying to use all his weight to have Washington fall forward against him. He explained that at the time it seemed to be Roth, Gulizio, firefighters and himself trying to pull Washington down the steps. He stated that while all this was going on, the firefighters were yelling: "PD, PD, get this guy out of here, get this F'n guy out of here."

The Respondent asserted that it was important for Washington to move because he saw firefighters trying to run a hose into the doorway and attempting to pull out what looked like an unconscious or deceased firefighter who was on his knees in the doorway. The Respondent denied that firefighters would have been able to get the injured firefighter out while Washington stayed at the top of the stairs.

In describing the setting of the fire, the Respondent said he could feel the heat from the middle of the street, he could see glass falling from the windows as the flames were coming out, and said the situation was "very chaotic." He denied that he had any kind of equipment to protect himself against flames or heat. He said the firefighters were wearing oxygen masks and helmets.

The Respondent described Gulizio as "very large" and "pretty built" and agreed he was a "weightlifter type." He stated that the video (DX 2) shows Gulizio pull or help pull Washington down, what happens next can't be seen on the video (DX 2): that Washington went down on top of Gulizio, and Gulizio was under a pile of firefighters, they were trying to subdue Washington to get his hands behind his back, and at the time he was flailing his arms and rolling on the ground with Gulizio and at one point Washington actually got back on one knee in an attempt to get back up and possibly return to the building.

The Respondent agreed that on the video (DX 2), which he has seen, he is seen extending the ASP and taking two swings after Washington had gone down the stairs. He said he did this because Washington still wasn't complying at that time, he was flailing his arms, and he was on top of Gulizio. He denied that those two strikes ended up hitting Washington and said that after those two swings, he put his ASP back in its hilt and attempted to get on top of Washington to cuff him. He agreed that the two swings did not connect with Washington and said that he put his ASP away because he felt that it would be reasonable to rear cuff him and get him to comply. He explained that it took three officers to cuff Washington because he kept trying to separate his arms, but they eventually did it using his cuffs. Then Washington was brought to the police car to be transported to the precinct for arrest processing, and he was going to be the arresting officer. He stated that the Desk Officer decided to release Washington, being that his family did perish in the fire, and the arrest was voided. The Respondent asserted that when he found out about Washington's family, he was very sympathetic to Washington and offered his condolences to him and he had no problem with his arrest being voided.

The Respondent said that he had asked Washington if he needed medical attention. He stated: "I asked Mr. Washington if he needed medical attention and basically I think he stated in the holding cell that his in-laws were inside that house, which I didn't know about previously." He stated that Washington seemed to have calmed down at the precinct and he guessed that Washington was glad to be released and returned to the scene to see if he could help his family. He denied that Washington had made any allegations against him at the time. He explained that he believed Washington had a scrape on his head but Washington said that he did not need medical attention. He

denied ever hitting Washington on the head with his baton or knowing how Washington got the scrape on his head.

The Respondent testified that at the scene, the protocol was for the Police Department to act as security while the Fire Department fought the fire. He agreed that at the time he did not know that Washington's family was inside, and denied that he had any idea that was the case upon seeing a civilian rushing into a burning building. He also testified that he would not have allowed Washington to run into the building even had he known that he had family members in there, because he would have become another casualty. He said that it would be misconduct on his part had he let him into the building.

With respect to the force used, using the closed ASP, first jabbing, then opening it and swinging it, the Respondent asserted that he used that force because he thought that would be the only way to get Washington off the steps and stop him from entering that building.

On cross-examination, the Respondent agreed that he was in charge of crowd control during this incident; that his job was to prevent people from going into a burning building; that when he first saw Washington, Washington's back was towards him; and that his superior, Sergeant Espinosa, was on the scene as well.

The Respondent denied that Washington was yelling repeatedly that his family, including his infant, was in the building and that he was trying to help. He also denied that during the entire time from the moment that he approached Washington to the moment that he was pulled down, that Washington ever mentioned that his family was in the building, that he ever opened his mouth to try to explain to him what was going on. He said that Washington didn't say a word to him until he was in the precinct cell.

The Respondent denied that Espinosa directed him to try to calm people down, but acknowledged that other police officers told him that Espinosa directed that they try to calm people down. He also agreed that the reason was because people were possibly upset. He denied that Espinosa specifically directed the officers to try to be politically correct because people were worried about family members inside the building; that he was given that directive; or that other officers told him that.

The Respondent stated that when he first approached the landing, there were approximately eight to 10 firemen there. He agreed that some of the firemen were assisting him in getting Washington off the landing and denied seeing any firemen use any kind of weapons against Washington. He agreed that they were pushing and pulling him, and said that some of them were trying to move him out of the way so that they could continue their attempt to rescue the firefighter. He agreed that with all the pushing and pulling, no one except himself took out an ASP and struck Washington. He denied that Washington was being pushed out of the way, and said "he was still in the way."

The Respondent acknowledged that there was some movement of Washington going down. The Respondent testified: "From my perspective, he was moving down the stairs because there was officers pulling him, pushing him, maybe being that I was striking him with my ASP."

The Respondent acknowledged that there were firemen and other police officers assisting him in moving Washington, but denied that there was movement of Washington getting from where he was originally at towards that staircase, saying that he was actively swinging and flailing his arms and standing still on the stoop. He agreed that when he struck him twice in the chest, there was movement of him going down those stairs.

The Respondent explained that Washington flailed his arms, and that when he went to grab his arms, Washington swung his arms upward. He denied that Washington had closed his fist and took a swing at him, but said that he swung his arm at him, and that he did see him swing at Roth. He concurred that he was afraid of Washington and that he thought Washington was going to do him some bodily harm, saying that Washington was a lot bigger than he.

The Respondent agreed that Washington's sole reason for being up there was to try to get into a burning building. He believed that if he grabbed onto Washington and Washington wanted to get into that building, and that was his only means to attempt him to stop him from going in, Washington would pull him in with him. He acknowledged that Washington's attention was not on any officer or fireman, but on the burning building.

The Respondent agreed that Washington was moving, but not fast enough. However, he said that that was not the sole reason why he decided to use his ASP and strike him repeatedly. He acknowledged that to speed Washington's progress, he struck him in the chest. He didn't believe that with the firemen and police personnel pushing and pulling Washington, he would have been removed from those steps without him hitting him with the ASP. He stated that at one point when Washington did get off the stoop, a firefighter came from the side and tackled him. He denied that this was when Washington fell face down to the ground, and said that Washington was still up and was in a motion of going down on Gulizio at the time. He agreed that Washington was falling face down.

The Respondent denied that Washington fell on his chest and said that he looked like he fell on top of another police officer. He stated that when Washington was down on the ground, he was flailing his arms in an attempt to prevent the officer from getting his arms behind his back to cuff him. He said that Washington was not trying to strike Gulizio, he was trying to flail his arms in an attempt to resist getting cuffed and he was trying to get back on his feet.

The Respondent agreed that as Washington was falling down, he found it necessary to strike him again with the ASP. The Respondent acknowledged that he struck Washington as he was in the process of falling down and was not on the ground yet because he was falling towards Gulizio and he still seemed like he was not complying. He stated that Washington was moving his arms. He further acknowledged that he thought that by hitting Washington with the ASP he would fall down to the ground faster.

Upon questioning from the Court, the Respondent agreed that in the video (DX 2) there are two instances where it looks like he was swinging at Washington with the ASP, but he did not recall if those swings connected with anything, and that the last two swings did not connect with Washington. He said that he knew that they didn't hit him because Washington seemed like he was rolling on the ground with Gulizio and the Respondent would have either struck asphalt from the street or it didn't come close enough. He stated he was not exactly sure what it hit, but it wasn't close enough to Washington. As for the purpose of the blows, he explained he was intending to strike Washington, but he didn't recall it connecting.

Kenneth Washington

Washington did not testify in this case; however, statements by him were put in evidence by both sides. A tape and transcript of a telephone call by DeSantis to him on June 24, 2005 as well as a tape and transcript of an interview of him by DeSantis and someone described as "Investigator Ho" on July 1, 2005 were entered into evidence as Department's Exhibits (DX) 3A, 3B, 4A, and 4B, respectively. Additionally, the Respondent placed in evidence a videotape copy of a television news program, part of which contained an interview with Washington (RX A).

Telephone call of June 24, 2005⁴

At the outset of the conversation DeSantis indicated that he has received a complaint which was filed on Washington's behalf regarding his arrest on June 14, 2005. Washington indicates that he is interested in pursuing the complaint. He stated that at that time he was living with his girlfriend and her parents and that her parents died in the fire. Washington stated:

The house was on fire. I just walked up to the steps and when I walked up to the steps I seen somebody like, you know, fall out the steps. And I am talking to them going you know like who's that? You know I am kind of hysterical, I am like who's that, who's that? And then the officer was like, he look at me first be he didn't see me. And then he looked at me again and then he goes who are you? And I say yo, I live here. You know my family lives here. Who is this? They are pulling somebody out of, you know, out the building and I am trying to help them pull him out the building and he turned around and looked at me like what the hell are you doing over here? I'm like yo, this is my family, man. This is my family. Who is this?

⁴ The transcript admitted into evidence contained conversations with an individual or individuals other than Washington. These portions of the transcript were not considered. The discussion with Washington also contained references to matters unrelated to the current charges which are not summarized herein.

What's going on? He turned around and he's like get the F out of here. And I am like yo, you know, and then while he was doing that he was trying to grab me and shoved me. But you know I am like 6'3" and you know like 280 pounds. So obviously I didn't move no where and I am like yo, what are you doing? And that's when he struck me with the radio. And when he struck me with the radio I kind of like backed up and kind of like bumped into the fireman and whatever. And then they all jumped on me.

Washington indicated that he was arrested and held at the stationhouse for about 45 minutes before the charges were dropped and he was let go. He also indicated that he had an interview with Melissa Russo of Channel 4.

With regard to the incident, Washington stated:

So when I am walking down the stairs they are all swinging like crazy and I'm not fighting them back because I didn't think they were going to go crazy like that... And then they take me and throw me down like three steps, throw me to the ground. And that's when all of them are just like jumping on me, beating on me in the head with the radio and all of that.

Washington indicated that all of this happened between three-thirty and four in the morning and that he had been out when the fire started. He stated that he received a call from his girlfriend, Tiffany Fredericks, who said that her parents were in the building and that his one-year-old son and Ms. Fredericks' five-year-old son were thrown from the window; then he clarified, stating they were helped out of the second floor window.

Washington further indicated that when he arrived he saw a fireman fall backwards and:

then they started pulling him. And I kept asking 'who's that? Who's that?' And then the cop was holding the door, it was a Detective...he had a number seven jersey on, I think like an Atlanta Falcon jersey...⁵ and then he turned around, and when he turned around and looked at me he

⁵ Houlihan was wearing a shirt fitting that description.

didn't say nothing at first. Then when he turned around the second time like a double take that's when he was like yo, get out, what you doing up here? I'm like yo, it's my family. What's going on? Who's this? And he was like yo, blah, blah and then he started swinging. And then after he beat me up and all that he....

Washington stated that the firefighters were having a hard time getting the individual out and that he was trying to help. He further indicated that he was told it was a fire captain and that he was to get the "F" out of here by the officer in the Atlanta Falcons jersey.

Washington stated that that person did not identify himself as an officer nor did he have his shield out, but Washington acknowledged that he knew he was an officer when he saw him with the radio.

Washington further indicated that after he told him to "get the fuck out of here" the officer grabbed his shirt and shoved him and swung at him and hit him with the radio. Washington stated: "He tried to push me out of there but I am way bigger...."

He stated that the officer hit him with the radio "right over my hairline in the front on the left side." Washington continued:

And when he did, I threw my hands up and as I am backing up I think I bumped a firefighter or I pushed him back and like what are you doing? You know this is my house. And he was like yo, I said to get out of here and boom, boom, there is a fireman injured and I was like yo, and then the next thing I know I started walking down the stairs and they all just jumped on me. And he was talking about yo, he was talking about you don't come up here pushing nobody. I was like I didn't push nobody.

He further stated:

they pulled me, they dragged me down the stairs, and when they dragged me we all fell on the floor....I was on the ground when I was handcuffed but I had my hands, like we

all fell and I put my hands to my back, I still had my cell phone in my hand...and they like, stop resisting, stop resisting. And I was like I am not resisting. I'm like yo, that's my family, I am just trying to help. So he, they kneeling me. One officer is stepping on the side of my face. He's got his knee and he is trying to pin my head down and I'm still telling him I am trying to help. And then one of them hit me with a baton, or a radio, I don't know what it was because I was on the floor...They jumped on my ankles, my legs. They were just trying to pin me down, but I wasn't fighting. I wasn't resisting.

Additionally he said that he had been contacted by Sarah Wallace of Channel 7 and Melissa Russo of Channel 4 and that he had been interviewed by Ms. Russo and had the tape of that interview.

Interview of July 1, 2005

In this interview Washington stated:

Okay, I got a call that the house was on fire from my girlfriend. She called me and she said the house was on fire. I was maybe like two blocks, two blocks down. When I got there I see that the house was on fire you know, a few firemen were there, they were breaking windows and whatever. So I walked up to the building it's three steps. I walked up to the three steps and there was another three steps. I stood there and I ask you know, you know what is going on? And then when I asked what was going on everybody ignored me. So there was gentleman standing to my left, he was holding the door. When I stepped to the side of him I was asking him what was going on he ignored me.

And then I seen somebody fall backwards outside of the burning building. So when he fell out the burning building I was asking who is that? I am like yo, who is that? Who is that? I was thinking maybe it was my mother-in-law, my girlfriend. You can't tell because it's dark, you know smoke. So he turned around and looked at me and he didn't say nothing....He turned around and he looked at me and he didn't say nothing. Then he turned around again, he like double taking looking like what the fuck you doing up here? When he said that I said yo, this is my house, my family you know, my family inside, my family so help them. He said get the fuck from up here. What are you doing up here? And I told

him I said yo, that is my family. And then when I told him that he was like yo, and get the fuck out the way and he shoved me. He shoved me with his left hand. And when he was shoving me with his left hand I was going why are you pushing me and I smacked, pushed his hand down and that's when he hit me with the radio. And when he hit me with the radio I kind of like moved back a little bit and as they was pulling the person out that is when I seen it was a firefighter.

They were pulling the firefighter and he was like get fuck, you know there was a whole bunch of chaos and then the next thing I know everybody, just a whole bunch of officers just jumped and grabbed me and pulling me and then I am walking down the stairs, and as when I was walking down the stairs he kind of like, when he came at me again I like pushed him back. And when I am trying to get out of the way and go down the stairs they all hitting me on the side of my neck and my head and then I just felt like you know just a lot of hands, and you know hitting and going down the stairs and then I fell and then when I fell they all just jumped on me.

I had my cell phone in my hand. That's why my hand scraped up and I fell like you know. And then there were like put your hands to your back, but there were like two cops pulling each arm, each way, so when I got my hands behind my back one officer, I couldn't tell who it was cause I was kind of dizzy because of all the hitting, I put my hand behind my back and I seen one cop he tried to knee me and pinned my head down to the ground, because I am still going up like this. It's my family. It's my family. What are y'all going? I am trying to help. Then he, then after he pulled he pinned my head down. One of them struck me in the head with something, I don't know, and busted my head right on the left side.

Then I just laid there. Then when he picked me up like sliding, I slipped, I fell back on the ground. They lifted me back up. That's when the officer with the seven jersey, the one who first struck me he ran up to me and said what are you doing? He said you just hurt this firefighter. I said I hurt a firefighter? I said I didn't touch nobody, I am trying to help. He said you hurt the firefighter. I said I didn't hurt no one. I said yo I am just trying to help. He said you just hurt this firefighter. All his injuries we are going to charge you with it. I said charge me with it? He said charge with it. I said I didn't touch no one. He said, I am just trying to help. He said trying to help? He said you want to be a fucking hero, go to fucking Iraq. And then he said get this piece of shit out of here. They dragged me off to the corner of Kingston and Midwood. They put me in a police car. When they put me in the police car they took me to the precinct.

Washington indicated that he was in a vehicle a few blocks away and on his way home when he received a call from his girlfriend who told him the building was on fire. He stated: "It sounded like she said she was about to jump out the window, or we got to jump out the window or we had to jump out the window. I wasn't sure which one she said because she was screaming." He then went directly to [REDACTED].

Washington further stated:

I got out of the car towards like the corner when all the fire trucks start coming. So I start, I ran down half way down the block and then I stopped and I am looking around and then I just walked right up to the building. It was on fire. And I was looking up most of the time, you know, because I seen the fire and I was just looking up and when I looked up and that's when I looked back down, and then I stepped to the side, cause it's like some garbage cans right here, the officer was standing holding the gate and I stepped right next to him on his right shoulder. And I just stood there, I didn't move....

Washington continued:

Well, basically I just wanted to see what was going on. I know what was going on with the fire but I wanted to know if they were out, or who was that, you know there weren't a lot of firefighters, maybe like one with his back to me and like two on the side and the rest were like standing at the door and the officer was standing on the left side.

Washington stated that he did not see any uniformed police officers and that before he was confronted by Houlihan no one told him to get back or get away or anything like that. He stated that he just walked up to the burning building.

Washington acknowledged that although the man in the Atlanta Falcon's jersey did not have a badge or identify himself, he surmised that this man was a police officer. Washington also acknowledged that the radio in the man's right hand clued him into the fact that the man possibly could have been a police officer.

Washington additionally stated:

Yeah, but the radio, how he was holding the door this way you couldn't really see the radio. Cause he, but then when he turned around and started screaming and I was like going yo and he was like move, move and pushing and I'm like yo, stop pushing, pushing. And then when he kept pushing me I was like I pushed his hand down and I was like yo, what are you doing? And that is when he swung the radio.

When asked if the officer pushed him, Washington stated:

He shoved me, like, as a matter of fact he shoved me with the radio hand, you know cause he is holding the door....He shoved me with the right hand and that is he like let the door go and he turned around and he was pointing and when he was pointing I was going yo, I am just trying to help. That's when he struck me with the radio. As you can see on the film that I wasn't fighting him because I was basically, I was trying to get out of the way. I wasn't swinging or nothing. I wasn't (inaudible) yo, you don't come up here and I'm like yo what are you talking about? I am trying to help.

Washington continued: "I just like stepped back. When I stepped back and I like put my hands up. And then when he came again he wasn't coming to like you know grab me or nothing, he was just coming shoving, he like had my shirt and he ripped my shirt on up."

Washington stated that he was just trying to help, that his family was inside and that the officer just yelled for him to get out of there. He also stated that the officer struck him with the radio. He stated that he was struck "towards like the side of the face" but when asked if it was towards the left side he stated:

Let me see, I can't remember cause we were standing this way. He struck me, I was standing this way, and he struck me on this side. He swung the radio like this. You know, he did like, he shoved me, and when he shoved me then, cause I am on this side of him he shoved me and then after

he shoved me I moved back and I was like yo, what are you doing man? I was like what is that? He was like this is a fucking fire. Get the fuck, and then I moved and that's when he struck me and I am like yo, and I pushed back, and when I pushed back, I pushed him back up off of me, I must have like bumped into another firefighter who was coming up.

He then identified the point of impact as the "temple" and said

The only thing that really saved me, saved me was because of my hair. It was like this...and they were like hitting my neck and my head really and when they got me on the floor that's when they really started busting me on the head. If I had a low cut like you I would have been finished, finished.

Investigator DeSantis then stated: "So he hit you with the radio and that's when you said you stepped back and that's when you pushed him back..." and Washington responded: "Cause he was coming at me again. He was coming, I didn't know if he was coming with the radio or he was, what he was doing."

Washington asserted that he only put his hands on the officer one time and then stated: "You know when you first grab somebody, you know he just turned around and he was like his hand, yo what are you doing? And then he hit me, bing, he hit me with the radio and then he came back again and I put my hands up and I was like yo, what are you doing?" He also stated that at that time he backed up and bumped into someone who he believed was a firefighter. He also indicated that the area where this occurred was small and there were garbage cans there as well.

He also stated:

I was trying, I was just trying to help them. I wasn't trying to get in nobody way. I was just trying to help....Because I didn't know who it was. If I had known that it was a firefighter I would have stepped to the side. But if I had known that my son and all of them were out of the house... I wouldn't have even stepped up to the building... you

know. I didn't if her mother was up in the apartment. I didn't know who, what was what, but it was just so quick. Everything was so fast.

Washington acknowledged that after he bumped into somebody, he was then pushed forward. He stated:

I turned around. I spun around and I started to walk down the stairs...and that's when they all started hitting on me. It was more like I just spun around and after they did all that and I tried to get down. I had my cell phone in my right hand and I holding the rail with my left hand and they are just whacking away.

He also stated that someone just ripped his shirt off. When asked if he realized at that point that he needed to leave the area he stated:

Yeah, get out of the way because when I turned around, it's like a turn around, spin around at the same time, you know they are still pulling...you doing a whole lot at one time, but I am going down the stairs. And there's no, I'm now swinging at them. I not fighting them. I not holding no one....

I'm just trying to get down. When I am going down, you see them, they're hitting, they're pulling. You see⁶ one other gentleman he is poking me in the chest...and then when we get to the last step you see them all just like pull all at the same time and we all fall."

I knew it was officers, because they were all cursing and screaming and hitting and I am trying to go down going yo, I am helping, I am only trying to help. They are like get the fuck in and throwing me on the floor. And once they threw me on the floor I didn't know who was on me.

Washington also acknowledges that even with the videotape you cannot see everything that happens because there are so many people around.

⁶ It is apparent that Washington and the interviewers were viewing the videotape.

Television News Interview⁷

The news clip was narrated by Melissa Russo. It starts off with Washington stating that, "I was just saying that's my family in there." He goes on to say: "I was only trying to help. I didn't know it was a firefighter I thought it was a family member and I was trying to help them pull him out because it looked like they were having a hard time."

Russo comments that Washington claimed the man in the white jersey struck him in the chest with a hand held radio right before the taping started. Washington then says: "I was asking this like, who is that? Who is that?"

"The cop didn't ask me nothing. He said, 'what are you doing up here? Get the F out.' I said, 'Yo that's my family man, I am trying to help.'"

Russo commented that Washington admitted he struck back and when asked if he became involved in an altercation with the police, Washington said; "I kind of --- I think I pushed back when he hit me the first time -- what are you doing that's my family and then I just seen cops from everywhere. I'm just walking and they throw me on the floor -- that was it."

Russo stated: "The police say you were somewhere you were not supposed to be." Washington responded: "I mean that's my family, what are you going to do?"

Russo further noted that Washington asked why the police continued to hit him after he was down in the street and out of the way."

Washington also showed various injuries he claimed were the result of the police action that day. The most significant of these was a cut on the center of the forehead just

⁷ The exact date of this interview is unknown but it occurred prior to the CCRB telephone interview of June 24, 2005

above the hairline. He also showed a scraped knuckle and a scraped knee and a darkened area on the side of his face.

FINDINGS AND ANALYSIS

The Respondent is charged in a single specification with using excessive force. To engage in any analysis of the force used in this case the first task is to attempt to get a full and complete understanding of the facts. That task is hampered to some extent because of a number of missing witnesses.

The main Department witness, Washington, did not appear at trial. Although tapes and transcripts of interviews, one on the telephone and one in person, by the CCRB investigator were entered into evidence, they provided a limited picture. All of the questioning is friendly and non-confrontational so there is no test of his recollection of events, let alone his credibility. Further, we lack basic facts that we would ordinarily learn about any witness such as his occupation, background and experience. There is also a television news broadcast which was placed in evidence (RX A) during which he was interviewed and during which he displayed injuries he said he received as a result of his contact with the police at the time of the fire.

While we know from his statement that he was out somewhere when he received a call telling him about the fire sometime after 3:00 in the morning, we do not know where he was and what he was doing and what impact, if any, that might have had on his mental state before the incident.

Although a videotape has been entered into evidence, (DX 1 & 2) it is clearly and concededly not complete. There are three versions of the video: a long version, another

version described as the “short clip,” and a replay of the short clip on a television news broadcast. The long version has gaps where the cameraman turned the video on and off as he moved about. It does, however, capture the street scene and the burning buildings before and after the incident with Washington. The “short clip” is part of the long version and captures just the scene involving Washington, the Respondent and other police officers. However, it is agreed by the parties and clear from the clip itself that the initial portion of the incident involving Washington is not on the tape.

The third version is a replay of the short clip as shown on a television news broadcast which has an interview with Washington as well as pictures of injuries he claims were incurred at the scene. There are also multiple slow motion versions of the “short clip” on a DVD disc (DX 2) highlighting the various police officers and what was shown on the television news videotape.

The cameraman did not appear at trial nor did he consent to be interviewed on the record by CCRB. Thus, we do not know how far he was from the building, nor we do not know what drew his attention to the scene at the door with Washington. We do not know how long into the incident he first noticed it or how long it was going on before he was able to set his camera up.

No firefighter was called by either side to testify. DeSantis testified that he never interviewed any of the firefighters and it is not clear if anyone else did so. This is significant because we do not know exactly what was going on in the building or in the doorway at the time of the incident with Washington, nor do we know how long it took for the police to respond.

Perhaps most significantly, several firefighters and a fire officer can be seen on the video watching the scene unfold on the stairway and on the ground after Washington was pulled off the stairs and we have no idea of what they saw or heard. Notwithstanding these shortcomings, using the facts that are available, this Court is able to make its findings.

Both Houlihan and the Respondent testified that before the incident with Washington began, they were across the street away from the burning building. Although they were not together, at some point, they were asked to deal with the security issue at the fire scene as civilians were getting in the way of the fire operation.

Washington describes arriving on the scene and going up the stairs to the doorway. He said that he was somewhat surprised that no one intervened. This would indicate that he knew he did not belong on the stairs or in the doorway at that time.

Houlihan, who acknowledges that he is the man in the Atlanta Falcons jersey, described a scene in which Washington ran past him up the stairs while he was talking to a fire officer about the security problem. Washington claimed that Houlihan was at the doorway when he got there and did not pay attention to him at first. This seems less credible than Houlihan's statement that he followed Washington up the stairs and immediately ordered him to leave.

Both Washington and Houlihan describe a scene at the door in which firefighters were struggling to get at least one and possibly more persons who had been injured out of the building. Washington indicated that he was trying to find out who this person was as he had family in the building. He also said that he was trying to help the firefighters.

While Washington's concern is understandable it is clearly misplaced at that time and location. When a rescue is underway it does not make any difference what human being is being rescued. The kind of inquiry he made only served to slow things down. Clearly, whatever his intention, Washington was interfering with the rescue operation.⁸

Washington's statement also indicates that he was not attuned to, or fully apprehending, the situation he was in the midst of; indeed, in one of his statements he said he was there just trying to find out what was going on.

The videotape of the front of the building shows a serious fire with flames shooting out of the front windows. But as the video continues it becomes apparent that just looking at the front of the building does not give a full picture of what was going on. A scene in the long video, apparently taken a few minutes later from an elevated position across the street, shows the roof of the building. It can be seen that the main body of the fire was further back in the building and that there was a raging inferno far larger than was visible from the street.

Washington complained that Houlihan ordered him out of the area and pushed him. Houlihan agreed that he pulled Washington down and ordered Washington to leave. Houlihan said that, in response, Washington hit him in the chest with an open punch, throwing him backwards. Houlihan testified that he had never been hit so hard in his life.

Washington gave somewhat conflicting accounts of his pushing or hitting Houlihan. During his CCRB interview Washington said he "only put his hands on him one time." Yet, at other points in the interview Washington says he "smacked, pushed his hands down." At another point, Washington stated that he pushed Houlihan and that,

⁸ As Washington is being removed from the stairs, a firefighter, covered in soot and apparently suffering from smoke inhalation, can be seen on the video moving out of the doorway. The news clip indicates that a number of firefighters were injured fighting that blaze.

as a result, Washington bumped into a firefighter. This apparent confusion was not clarified during the interview; however, Houlihan testified that Washington both pushed his hands down and punched him with an open hand.

Washington was asked more pointedly about his conduct by Russo in the television news clip. In that clip he admitted that "I kind of --- I think I pushed back when he hit me the first time," and demonstrated an open-handed pushing motion very much like the one described by Houlihan, only without the force Houlihan said was used. However, in his first interview with DeSantis, over the telephone, Washington indicated that he is 6'3" and weighs 280 pounds and when Houlihan tried to grab him and shove him he did not move.

From all of this, it is clear that in the period of time before the videotaping began Washington was told to leave, resisted doing so and struck Houlihan, who he acknowledged he believed was a police officer.

As the video of the incident starts Washington is facing down the stairs. Based on the testimony of Houlihan and some of the statements of Washington, this occurred just after Washington pushed Houlihan.

Washington next complained that he was struck by Houlihan with his radio. Houlihan stated that he was just bringing the radio down next to Washington's head to guide him and force him down the stairs. He stated that with the other hand he further directed his motion by holding his head. On the videotape, Houlihan can be seen bringing the radio down to the side of Washington's head with one hand and holding the back of his head with the other hand. Whether Houlihan struck him or merely brought his radio down as a guide is not before this Court, but it should be noted that in the video

of the news report Washington displays injuries he claims he incurred that day and none of the injuries he displayed corresponds with this incident with the radio.⁹

As noted above, Washington was at that point in time facing down the stairs. He claimed that he was moving on his own while Houlihan said he was not. The Respondent, in his testimony, acknowledged that Washington was moving, but not fast enough.

In the video, two uniformed officers can be seen starting to take action at this time. From the front, Gulizio can be seen reaching up to grab Washington's shirt. Washington rears up, possibly in response to Gulizio's action. As Gulizio starts to pull him down, the Respondent, who is lower down on Washington's right side, can be seen striking Washington twice in the chest with the closed ASP.

Next, the Respondent can be seen bringing the now extended ASP down in a forceful motion from over his shoulder. At the same time, Gulizio's efforts (he is, at this point, being assisted by a firefighter) begin to succeed and Washington starts to fall forward. The Respondent's blow appears to have missed Washington as he fell.

It is clear from both the video and the testimony that Gulizio caused Washington to fall to the ground pretty much on top of him. The view of Washington, in the video, at this point is somewhat obstructed by firefighters who are apparently watching events unfold. The Respondent can be seen raising the extended ASP two more times and bringing it down forcefully. Where these blows land cannot be seen.

Looking at the incident on the stairs, considering the testimony, the video and even the statements of Washington himself, it is clear that the use of some level of force

⁹ Washington does point to a darkened area on the side of his head but he attributes this to scraping on the ground.

was appropriate because Washington was either not moving off the stairs or not moving fast enough given the exigent circumstances.

Having established that, a detailed look at the Respondent's acts is required. The Respondent testified that his initial contact with Washington began before the videotape started. He claims to have rushed to the stairs and told Washington three or four times to get off. He says he then pulled on Washington's arm, but to no avail. He said Washington started to flail his arms at him and Roth, and it looked like Washington took a swing at Roth. Additionally, the Respondent said that he had been swinging his arms trying to sweep Washington off the steps and that he was hitting him with his forehand and fist in his shoulder, arm and chest area. Given his position, away from and below Washington at the start of the video, it seems unlikely that he engaged in all of these acts or that he did so from a distance and from a point below Washington.

As noted, when the videotape begins Washington is facing down the stairs and the Respondent is standing further below and to the side of him. After a short delay, the Respondent can be seen taking the ASP from his side and then striking Washington with it in a pushing or jabbing motion. The blow goes from front to back in the opposite direction from the way Washington is being encouraged to move, apparently striking him in the area of the upper chest. There is a second similar blow that follows, striking closer to the neck.

The Respondent testified that the purpose of these blows was to get Washington to comply. But these blows, coming from the front seem to serve no purpose in getting Washington to move down the stairs. Indeed, coming as they do from the front, they discourage him from moving forward and off the stairs.

Following this, the Respondent extended the ASP and struck a blow at Washington, bringing the ASP down in a swinging motion from over his shoulder.

The Respondent testified that the purpose of this blow was to get Washington to fall to the ground faster. The Respondent did not explain how this was to be accomplished. Moreover, looking at the video this does not seem to be what he had in mind at the time as the blow swept past Washington's head and back in the place he would have been had he not been pulled down by Gulizio. Looking at the video, it appears that the Respondent did not realize that Washington was falling and simply missed hitting him. Whatever his purpose, had the blow actually connected with Washington it would have accomplished nothing beyond hurting Washington. Fortunately, the Respondent missed.

Any person using force must consider the ramifications; this is particularly true of a police officer armed with a weapon capable of causing physical injury and possibly serious physical injury.

The Respondent states that he thought about his actions beforehand. He testified that he did not use mace because it might have confused Washington, yet the first two blows with the closed ASP had just that effect.

These first two jabbing blows, with the closed ASP, are not actionable. While they were not productive and indeed were counterproductive it is unreasonable to expect that every action an officer takes in the heat of a fast moving situation will be the best of all possible actions. Further the potential for injury using the ASP in this fashion was minimal. However, in the context of the incident as a whole these blows demonstrate

that the Respondent was prepared to use force without considering its appropriateness to the circumstances.

The third blow, with the now extended ASP, constitutes the use of excessive force. The extended ASP is a different weapon than the closed ASP. Used as it was, it was readily capable of causing significant physical injury and possible serious physical injury. Washington was unarmed and not fighting; indeed, he was moving, according to the Respondent, but too slowly. The blow served no purpose in getting Washington off the stairs and was therefore gratuitous. Indeed other police action, which the Respondent was apparently not attuned to, was accomplishing that goal.¹⁰

As to the two blows by the Respondent after Washington was on the ground, the Respondent contends that Washington was continuing to struggle; indeed, the Respondent stated that Washington was rolling around on the ground with Gulizio. The Respondent also asserts that neither of these blows actually struck Washington.

There is no testimony to contradict the Respondent's contention that these blows missed hitting anyone. Further, Respondent's testimony that he did not hit Washington with either of these blows seems credible as Washington does not complain of any injury that would correspond with these blows.¹¹ The Respondent also noted that Washington at that point was rolling around with Gulizio. Houlihan describes the scene with

¹⁰ Lost in all of the discussion of this incident are the actions of Gulizio who appears to have successfully removed Washington from the stairs by pulling Washington down on top of him – at some measure of risk to his own safety.

¹¹ In the news clip Washington displays several injuries: a darkened area on the right side of his face which he attributes to being scraped on the ground; scrapes to his knees and knuckles which are clearly unrelated to the Respondent; and a cut over his forehead. It seems unlikely that the Respondent caused the forehead injury as Washington was facedown and the Respondent appears to have been positioned lower down Washington's body. Moreover, Washington seems to attribute this injury to being hit by Houlihan with the radio, which, as has been discussed, is not the case.

Washington on the ground as a pile up with Gulizio on the bottom and with several firefighters and police officers trying to subdue him.

As with the third blow, described above, the Respondent used the extended ASP with forceful swinging blows. Careful consideration needs to be given before that level of force is used. The fact that the last two blows, by the Respondent's own account, missed, indicate that they were not carefully considered, particularly in the close quarters that can be seen on the video and under circumstances where a fellow officer is in such close proximity to the intended target. Nor is there any clear indication from the Respondent as to how these blows would have aided in getting Washington handcuffed. These two blows therefore also constitute a use of excessive force under the circumstances.

In his testimony, the Respondent explained how he went through a series of steps regarding the escalating use of force: from verbal instruction, to use of his hands, to the compacted ASP, and finally to the extended ASP. What was missing was consideration of the need for force at the escalated level, in this case the use of the extended ASP in a swinging fashion.

The single specification presented to this Court alleges that the Respondent used excessive force against Washington, "repeatedly striking him with an asp [sic] about the body and/or head." The findings of this Court relate only to the three blows with the extended ASP, none of which actually connected with Washington. The fact that these blows missed does not detract from the fact that they constituted an excessive use of force as they created the very real potential for injury. Consequently, the Respondent is found Guilty in part of the specification.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974).

The Respondent was appointed to the Department on July 1, 2003. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty in part of using excessive force. There is no doubt that the events in this case present a series of difficult dilemmas. In his opening statement, the Department Advocate noted that the Respondent might claim that he saved the lives of firefighters. He might even claim, the Advocate asserted, that he saved Washington's life. And those claims, the Advocate noted, might be true. Washington, concerned about his loved ones, two of whom died in this fire, placed himself in a position where he represented a danger to himself and firefighters struggling to rescue those who were injured.

Washington clearly understood that he was ordered to leave and forcefully resisted doing so. There is no evidence that the actions of the Respondent caused any injury. Balancing all of this against the seriousness of the charge against the Respondent, the Court recommends a penalty of the loss of five vacation days.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner-Trials

