



POLICE DEPARTMENT

August 4, 2023

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In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2022-27376
Police Officer Nicholas Hernandez	:	
Tax Registry No. 968487	:	
Housing PSA 9	:	

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At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Megan Forbes, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Eric Sanders, Esq.
The Sanders Firm, P.C.
30 Wall Street, 8th Floor
New York, NY 10005

To:

HONORABLE EDWARD A. CABAN
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Police Officer Nicholas Hernandez, while off-duty and assigned to the 94 Precinct, on or about October 27, 2022, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer engaged in a physical altercation with an individual known to the Department, causing injury.

A.G. 304-06, Page 1, Paragraph 1

PROHIBITED CONDUCT

2. Police Officer Nicholas Hernandez, while off-duty and assigned to the 94 Precinct, on or about October 27, 2022, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer damaged the glasses of an individual known to the Department while engaging in a physical altercation.

A.G. 304-06, Page 1, Paragraph 1

PROHIBITED CONDUCT

3. Police Officer Nicholas Hernandez, while off-duty and assigned to the 94 Precinct, on or about October 27, 2022, wrongfully failed to remain on scene of an off-duty incident involving an individual known to the Department.

P.G. 212-32, Page 1, Paragraph 1

OFF-DUTY INCIDENTS
INVOLVING UNIFORM
MEMBERS OF SERVICE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 29, 2023.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called NYPD Sergeant Victor Torres and Suffolk County Police Officer Louis Ignarro as witnesses, and introduced into evidence Body-Worn Camera footage from responding police officers, a recording of a 911 call, a Domestic Incident Report, photographs of the complainant's injuries, and a recorded interview of the complainant. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all of the evidence in this matter, I find Respondent Guilty, and recommend that he forfeit 30 days previously served on suspension

without pay, 20 additional vacation days, counseling, and that he be placed on one-year dismissal probation.

ANALYSIS

In the early morning hours of October 27, 2022, Respondent was involved in an altercation with his girlfriend (“the complainant”), inside the Nassau County apartment that they shared at the time. They had met about a year-and-a-half earlier, when the complainant and Respondent were both police officers assigned to the 94 Precinct. The complainant subsequently left the NYPD and joined the Suffolk County Police Department, with whom she was employed at the time of this incident. The parties offer conflicting versions of what occurred on October 27.

The complainant did not appear to testify at this trial, despite numerous phone messages and a subpoena requesting her to do so. Instead, the Department Advocate offered into evidence several prior statements made by the complainant, including some that were hearsay. It is well-settled that hearsay evidence is admissible in administrative proceedings, and may form the sole basis for a finding of fact. The hearsay, however, must be carefully evaluated to determine whether it is sufficiently reliable. It is preferable to have testimony from a live witness, where opposing counsel has the opportunity to cross examine, and the court can observe witness demeanor. In the absence of live testimony from the complainant here, this tribunal carefully considered her multiple prior statements in conjunction with the other evidence presented.

The Department Advocate offered into evidence a recording of the complainant’s 911 call, along with the accompanying transcript (Dept. Exs. 1A & 1B). In that call, the complainant states that she needs help because her boyfriend is hitting her. She is crying, and is difficult to understand at times. She also says that her boyfriend is hitting himself.

Police Officer Louis Ignarro of the Nassau County Police Department testified that he was one of multiple officers who responded to the 911 call. He arrived at the apartment within 10 minutes of the call, but it took about a half hour before the complainant agreed to open the door and let the officers inside. Officer Ignarro described her as quiet and soft-spoken, and recalled that she looked scared and upset. The complainant's lip was bleeding and swollen, she had small cuts to her face, and there was redness and bruising to her neck; she did not request medical attention, but Officer Ignarro had EMS come to the location to check her out. While at the scene, either Officer Ignarro or one of his colleagues took photographs of the complainant's injuries (Dept. Exs. 4A-4C), which show bruising, cuts, and scrapes to her lip, face, and neck area. (Tr. 50-52, 56, 73-74, 78-80)

The complainant initially did not want to provide the officers with her name or the details of what occurred. Officer Ignarro testified that he spent time developing a rapport with the complainant, and she eventually became more forthcoming. His interaction with her was captured by his Body-Worn Camera ("BWC") (Dept. Exs. 5A-5E), as well as the BWC footage of other officers at the scene (Dept. Exs. 5F-5H). Officer Ignarro testified that after her initial reluctance to speak about the incident, the complainant showed him her bullet-proof vest, and identified herself as a police officer with the Suffolk County Police Department. She stated that she and Respondent argued after he accused her of cheating on him. [The complainant got into bed, but an angry Respondent got on top of her and punched her in the face and neck. The complainant did not recall Respondent placing his hands around her neck, but she did have difficulty swallowing and breathing.] She stated that when she looked in a mirror afterward and saw the visible marks on her neck, she surmised that "maybe [she] was strangled." The complainant also stated that Respondent damaged her eyeglasses when he was punching her;

Officer Ignarro observed there was damage to the frame of the glasses, but he did not vouch for them, and no photographs of the glasses were provided to the Department Advocate. (Tr. 55-60, 69-73, 78-80, 88-93, 96)

Officer Ignarro testified that he sat at a table with the complainant and completed a Domestic Incident Report ("DIR"). (Dept. Ex. 3) He went through the form, line-by-line with the complainant, asking her for details of what transpired. Officer Ignarro filled out the "Supporting Deposition" narrative on page three of the report based on the information she provided; he testified that it was the policy of the Nassau County Police Department to complete the form in this manner. He then had the complainant read the statement to make sure it was accurate, and she signed it at the bottom attesting to its truthfulness. (Tr. 64-66, 71-73, 83-85)

In the "Supporting Deposition" portion of the report that was signed by the complainant, it states that she and Respondent were arguing over fidelity issues. Respondent punched her multiple times in the face and neck, causing pain and swelling. The complainant could not specifically recall Respondent placing his hands around her neck, but she did have difficulty breathing and swallowing. While she was being punched, her eyeglasses were damaged. The complainant called 911, and Respondent fled from the scene. (Dept. Ex. 3)

Sergeant Victor Torres of Brooklyn North Investigations was assigned to this incident. He testified that as part of the initial call-out, officers with Queens North Investigations interviewed the complainant by phone the same day of the incident; a recording of that interview, and the accompanying transcript, were admitted into evidence as Dept. Exs. 1A & 1B. In the interview, the complainant reiterated that Respondent suspected she was cheating on him, and then he became violent with her. As she was laying on the bed, Respondent got on top of her, and started hitting her with his fist, causing bruising and swelling to her face and neck. After he

got off of her, the complainant was able to call 911. According to the complainant, he saw that she was calling the police and he left. (Dept. Ex. 1B at 4-7) Sergeant Torres did not, himself, conduct a follow-up interview with the complainant, since he believed he already had enough information to proceed, and he felt that if he re-interviewed her it might bring back the trauma of the incident. (Tr. 26-27, 30-31, 35-36, 40-43)

According to Sergeant Torres, Respondent did not report the incident to the Department until approximately 0602, about three hours after it occurred. [REDACTED]

[REDACTED]

[REDACTED]

Respondent testified that earlier on the day of the incident, the complainant informed him that she and a female friend were going out for drinks; the complainant and the friend were both Suffolk County police officers. Respondent waited up, and when the complainant came home sometime after 0100 hours, she smelled like alcohol and appeared to be intoxicated. The complainant put her phone down on the kitchen counter, and Respondent observed a text message come through from a male individual, stating that he was leaving now and hoped the complainant had a good night. Respondent asked the complainant who was texting her, but she became angry and said it was nothing, and none of his business. Respondent told her if she was cheating he would leave; the complainant answered that he was crazy for accusing her. (Tr. 101-06, 118-20)

Convinced that she was cheating on him, Respondent decided to leave. Respondent testified that he was upset, hurt, and offended by the complainant's actions. He packed some clothing in a bag and attempted to exit the apartment, but the complainant positioned herself in front of the door blocking him. She told him not to leave, but Respondent told her there was

nothing more to speak about. According to Respondent, the complainant was grabbing onto his clothes and backpack strap, and so he extended his arms and pushed her to the side, using minimal force in order to get her away from the door. After 30-40 seconds, Respondent managed to move her aside and he exited the apartment, leaving his bag of clothing behind; he went to his car and headed for his parents' home in Queens. Respondent denied that he punched or choked the complainant during the altercation, insisting he merely extended his arms and shoved her in an attempt to move her aside. Respondent claimed that he suffered a cut on his lip and a scratch to his neck, though he did not take any photographs of these injuries, and during his official Department interview he did not mention being injured by the complainant. He also denied that he hit himself in the way described by the complainant in the 911 call. (Tr. 106-08, 112, 116, 121-35)

Respondent conceded that he did not remain at the scene or immediately notify the Department of the incident, though he maintained that he left before the complainant called 911 and did not realize she had called. A few hours after he exited the apartment, he called his command to request the next day off, and was informed that Nassau County had contacted them about the incident in his apartment. Respondent got off the phone, and then called the Department to make the proper notifications. A duty captain instructed Respondent to meet with investigators at the 104 Precinct; Respondent complied [REDACTED] [REDACTED]. (Tr. 109-13, 134-39)

Specification 1 charges Respondent with wrongfully engaging in a physical altercation with the complainant, during which he injured her. The complainant did not appear to testify, and the Department Advocate instead relied upon her prior statements. Counsel for Respondent argues that the statements provided by the complainant are not reliable, noting that if

Respondent, a trained martial artist, had really struck the complainant in the manner described, her injuries would have been a lot worse.

To be sure, it would have been useful to have the complainant testify at trial, where she could have been questioned more specifically about the details of the altercation. Nevertheless, the out-of-court statements provided by the complainant, coupled with the observations of the responding police officer, as well as the photographs of the complainant's injuries, amount to a credible version of what transpired. The complainant provided her account multiple times, to different law enforcement personnel, and her description of events remained essentially consistent and logical. First, she called 911 to report that her boyfriend was hitting her. Next, in an interview captured in the BWC footage, she provided Officer Ignarro, one of the responding officers, with the details of how Respondent accused her of cheating, and then physically attacked her. Those details were memorialized in a DIR prepared by Officer Ignarro, which the complainant read and signed. Later the same day, during a telephone interview with members of Queens North Investigations, the complainant again described how Respondent repeatedly punched her with his fist, causing bruising and swelling to her face and neck.

Photographs taken at the scene depict the injuries to the complainant's lip, cheek, and neck. Officer Ignarro confirmed that he observed these injuries as well, and that the complainant appeared to be visibly scared and upset. Officer Ignarro came across as professional and reliable on the witness stand, as he described his interaction with the complainant inside the apartment, including her demeanor and her initial reluctance to speak about the incident. Indeed, the BWC footage confirms how Officer Ignarro patiently reassured the complainant that the officers were there to help her, and she eventually told Officer Ignarro the details of what occurred.

Respondent, meanwhile, denied that he punched or struck the complainant. He claimed that he merely pushed her to the side of the door so he could exit the apartment. Respondent suggested that the injuries to her lip could have resulted from those pushes, and that the marks visible on her neck could have been caused by the zipper of her sweatshirt. However, after carefully listening to Respondent's testimony, and considering it in conjunction with the other evidence presented, I reject his version of events. Respondent's description of the incident appeared calculated to minimize his true culpability in this matter. I find it implausible that the injuries depicted in the photographs, and observed by Officer Ignarro, were caused in the manner described by Respondent. Rather, from the multiple statements of the complainant, and the supporting photographs, it is clear that Respondent did more than merely push the complainant aside. The record has established, by a preponderance of the credible evidence, that Respondent wrongfully engaged in a physical altercation with the complainant, during which he repeatedly struck her in her face and neck area, causing bruises, scrapes, and swelling to her lip, face, and neck. Accordingly, I find Respondent Guilty of Specification 1.

Specification 2 alleges that during the physical altercation, Respondent damaged the eyeglasses of the complainant. In her interview with Officer Ignarro, the complainant stated that in the course of punching her, Respondent broke her eyeglasses; the DIR specifically includes that allegation. Officer Ignarro testified that he recalled the complainant showing him the damaged eyeglasses.

Counsel for Respondent correctly points out that Officer Ignarro did not vouch for the eyeglasses, nor were any photographs showing damage to the eyeglasses introduced into evidence. Counsel also suggests that the injuries to the complainant's face are not consistent with having been punched in the glasses. Nevertheless, I reject the suggestion that the

complainant just made up the accusation regarding her eyeglasses. The complainant specifically stated to Officer Ignarro that her glasses were damaged by Respondent during the altercation, and she signed the DIR attesting to that fact. Officer Ignarro credibly testified that he observed that the frames of the glasses were damaged. As such, the record has established, by a preponderance of the credible evidence, that Respondent damaged the eyeglasses of the complainant. Accordingly, I find him Guilty of Specification 2.

Specification 3 charges Respondent with failing to remain at the scene following his physical altercation with the complainant. Section 212-32 of the Patrol Guide states that when an off-duty UMOS is at an unusual police occurrence in which the UMOS is a participant, the officer must remain at the scene when feasible and consistent with personal safety. The definition of "unusual police occurrences" includes domestic violence incidents. Where remaining at the scene is not appropriate, the UMOS must promptly notify the Operations Unit.

Here, it is undisputed that Respondent did not remain at the scene. As discussed above, he and his girlfriend, with whom he shared an apartment, were involved in a domestic dispute that became physical. Respondent was still inside the apartment when the complainant called 911; she said so during the call itself, and during her interviews with the police officers afterward. Rather than remain there, Respondent fled from the location. Even if Respondent felt it was unsafe to remain, he still failed to promptly notify the Department. It was not until hours later, when he called his command to request the next shift off, that Respondent was made aware that Nassau had already notified the Department of the incident, at which point he made the required notifications.

The credible evidence has established that Respondent ran afoul of the requirements of Section 212-32 of the Patrol Guide. Accordingly, I find him Guilty of Specification 3.

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent's employment history also was examined. *See* 38 RCNY § 15-07. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum. Respondent also submitted two letters attesting to his diligent work habits: Deputy Inspector Candida Sullivan, his Commanding Officer at PSA 9 Viper since November 2022, praised Respondent's positive attitude, integrity, and attentiveness, and described him as "extremely motivated," with the "potential for an exceptional career." Similarly, Lieutenant John Evans, who has worked with Respondent since March 2023, praised Respondent's intelligence, skills, motivation, and dedication, and described him as "one of the finest officers" he has had the honor of working with in his 23 years with the Department.

Respondent, who was appointed to the Department on October 7, 2019, and has no disciplinary history, has been found guilty of all three charges, the most serious of which is for wrongfully engaging in a physical altercation with the complainant, causing her injury. Respondent, who was upset because he believed his girlfriend was cheating on him, repeatedly punched her in her face and neck area, causing bruising, cuts, and scrapes. He also damaged the complainant's eyeglasses during the altercation, and failed to remain at the scene.

The presumptive penalty for a physical act of domestic violence is 30 suspension days, dismissal probation, and counseling. Nevertheless, the Department Advocate recommends that Respondent be terminated from the Department, arguing that as part of the altercation, Respondent "strangled" the complainant, which if proven would carry a presumptive penalty of

termination. "Strangulation" as defined by Penal Law sections 121.12 and 121.11 requires proof that the actor applied pressure on the throat or neck of a person, *with the intent to impede the normal breathing or circulation of the blood of that person.*

At trial, the Department Advocate failed to prove that Respondent acted with such an intent. As discussed above, the complainant stated that she had difficulty breathing and swallowing, but she could not specifically recall Respondent placing his hands around her neck. According to the testimony of Officer Ignarro, when the complainant looked in the mirror afterward and saw her injuries, she surmised that "maybe [she] was strangled." Even though there was credible evidence presented that Respondent punched the complainant in the neck area, the record did not establish that Respondent did so with the intent to obstruct her breathing. To be sure, Respondent's conduct, in repeatedly punching the complainant, was dangerous and unacceptable, and there must be appropriate accountability, involving a significant loss of days and a period of monitoring. But his actions did not constitute "strangulation," and so the penalty requested by the Department Advocate is not supported by the evidence.

Taking into account the totality of the facts and circumstances in this matter, I recommend as follows: for Specification 1, charging Respondent with wrongfully engaging in a physical altercation with the complainant during which he caused injury, I recommend that Respondent forfeit thirty (30) days previously served on suspension without pay, that he attend the mandated counseling, and that he be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one (1) year pursuant to Section 14-115(d) of the Administrative Code, during which time he remains on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. With respect to Specification 2, for damaging the eyeglasses of the complainant, I

recommend the presumptive penalty of an additional fifteen (15) vacation days, and for Specification 3, for failure to remain at the scene, I recommend the presumptive penalty of an additional five (5) vacation days, with those penalties to run consecutively to each other.

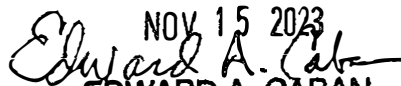
Respectfully submitted,



Jeff S. Adler

Assistant Deputy Commissioner Trials

APPROVED

NOV 15 2023

EDWARD A. CABAN
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER NICHOLAS HERNANDEZ
TAX REGISTRY NO. 968487
DISCIPLINARY CASE NO. 2022-27376

Respondent was appointed to the Department on October 7, 2019. On his two most recent annual performance evaluations, he was rated “Meets Standards” in 2021 and “Exceeds Expectations” in 2022.

Respondent has no disciplinary history. In connection with this matter, he was suspended without pay from October 27, 2022 through November 27, 2022. Respondent was placed on Level 2 Discipline monitoring on December 22, 2022; this monitoring remains ongoing.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials