POLICE DEPARTMENT CITY OF NEW YORK

June 22, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Tatiana Cruz
Tax Registry No. 950253
46 Precinct
Disciplinary Case No. 2015-13936

Charges and Specifications:

1. Said Police Officer Tatiana Cruz, on or about July 3, 2014, at 0240 hours, while assigned to the 46th Precinct, and on duty in the vicinity of the [redacted] Avenue, Bronx County engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that she arrested Valeriano Cortes without sufficient legal authority.

   P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

2. Said Police Officer Tatiana Cruz, on or about July 3, 2014, at 0240 hours, while assigned to the 46th Precinct, and on duty in the vicinity of the [redacted] Avenue, Bronx County engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that she arrested Valeriano Alvarez without sufficient legal authority.

   P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

3. Said Police Officer Tatiana Cruz, on or about July 3, 2014, at approximately 0240 hours, while assigned to the 46th Precinct and on duty in the vicinity of [redacted] Avenue, Bronx County, wrongfully used force in that she hit Valeriano Cortes in the wrist and about the body with an asp, without police necessity.

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

4. Said Police Officer Tatiana Cruz, on or about July 3, 2014, at approximately 0240 hours, while assigned to the 46th Precinct and on duty in the vicinity of [redacted] Avenue, Bronx County, used excessive force in that she unnecessarily used pepper spray against Valeriano Cortes.

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

5. Said Police Officer Tatiana Cruz, on or about July 3, 2014, at approximately 0240 hours, while assigned to the 46th Precinct and on duty in the vicinity of [redacted] Avenue, Bronx County, used excessive force in that she unnecessarily used pepper spray against Valeriano Alvarez.

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

6. Said Police Officer Tatiana Cruz, on or about July 3, 2014, at approximately 0240 hours, while assigned to the 46th Precinct and on duty in the vicinity of [redacted] Avenue, Bronx County, improperly used pepper spray against Valeriano Cortes. *(As amended)*
P.G. 212-95, USE OF PEPPER SPRAY, Page 1, Paragraph 1

7. Said Police Officer Tatiana Cruz, on or about July 3, 2014, at approximately 0240 hours, while assigned to the 46th Precinct and on duty in the vicinity of [redacted] Avenue, Bronx County, improperly used pepper spray against Valeriano Alvarez. *(As amended)*
P.G. 212-95, USE OF PEPPER SPRAY, Page 1, Paragraph 1

Appearances:

For CCRB-APU: Suzanne O'Hare, Esq.
Civilian Complaint Review Board
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New York, New York 10007

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

Hearing Dates:
March 2 and April 7, 2016

Decision:
Not Guilty- Specifications 1, 2, and 3
Guilty- Specifications 4, 5, 6, 7

Trial Commissioner:
DCT Rosemarie Maldonado

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on March 2 and April 7, 2016. Respondent, through her counsel, entered a plea of Not Guilty to the subject charges. CCRB called Valeriano Cortes and Valeriano Alvarez as witnesses. Respondent called Police Officer Daniel Madden and Respondent testified on her own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Not Guilty of Specifications 1, 2 and 3 and Guilty of Specifications 4, 5, 6 and 7.

FINDINGS AND ANALYSIS

The following is a summary of the facts not in dispute. On July 3, 2014, Respondent and Police Officer Daniel Madden were assigned to the 46 Precinct's Conditions Unit. (Tr. 111, 148) At approximately 0240 hours, Respondent observed that the driver of a Hyundai on Sedgwick Avenue was not wearing a seatbelt. Officer Madden activated the RMP lights and sirens and pulled the vehicle over. (Tr. 113, 148) The driver was Valeriano Cortes. His son, Valeriano Alvarez, was in the passenger seat. (Tr. 15) Officer Madden approached the driver and Respondent approached the passenger. (Tr. 113, 149) Both officers observed a knife dangling from the set of keys in the ignition. (Tr. 16, 118, 149-50)

Officer Madden requested the driver's license and the vehicle registration. Cortes's wallet was in a bag in the rear seat area. (Tr. 18, 113-14, 151) When Cortes reached back to retrieve it, Alvarez activated the mechanism under his seat to move it forward. Respondent directed him to stop and place his hands where she could see them. (Tr. 43-44, 67-69, 152-53) Shortly thereafter, Respondent opened the car door and directed Alvarez to step out. (Tr. 71, 116-17, 153-55) Alvarez objected and repeatedly asked what he had done wrong. (Tr. 70-72)

After Alvarez exited the vehicle, Respondent frisked him and attempted to place his hands behind his back to handcuff him. (Tr. 71-73, 155-57) Alvarez pulled away and a struggle ensued which resulted in Respondent biting Alvarez's arm. (Tr. 73, 82, 154, 156-57) Madden came to Respondent's assistance and, in an effort to subdue him, punched him. (Tr. 75, 118-19,

158) Alvarez was handcuffed and taken to the police van where he sat in the rear middle row.[1] (Tr. 76, 102, 121, 162)

At some point during this altercation, Cortes exited the Hyundai. (Tr. 24-25) What transpired next is disputed, but Respondent admits that she struck Cortes's arms with her expandable baton. (Tr. 26-29, 52, 160-61) With Madden's assistance, Respondent handcuffed Cortes and brought him to the van where he sat in the rear middle row with his son. (Tr. 29, 56, 124, 162-63)

While in the van, Alvarez continued to vehemently protest and demand an explanation for their arrest. (Tr. 29, 58, 78-79, 193) Though her reasons for doing so are controverted, Respondent discharged pepper spray into the area of the van where the men were seated. (Tr. 30, 79, 126, 164-65) Alvarez and Cortes were then transported to the precinct. Respondent issued desk appearance tickets to hoth for possession of an illegal gravity knife. She also issued Cortes a second summons for not wearing his seatbelt.

While in custody Alvarez and Cortes declined to have EMS transport them to the hospital, but sought medical treatment soon after their release. (Tr. 32-33, 60, 81-82) Cortes's medical records indicate that he complained of left arm and wrist pain after being "hit by police baton to left forearm and back and anterior chest wall." The documents further specify that there were abrasions to his left wrist and "multiple contusions to [Cortes'] body" including his left forearm, mid back and lower back. He was deemed "stable, ambulatory with steady gait," prescribed lbuprofen and discharged to his home. (CCRB Exhibit ("CCRBX") 2) There are no medical records in evidence for Alvarez.

[1] Respondent explained that the van had bucket seats for the passenger and driver with three rows behind the buckets. (Tr. 143) Madden testified that the van did not have a protective "cage" separating the driver from the passengers. (Tr. 124)

The Bronx District Attorney's office declined to prosecute Alvarez, noting that Cortes was in the driver's seat, the knife was attached to a set of keys in the ignition and Respondent "failed to question [Alvarez] or . . . Cortes as to who was the owner of the gravity knife." (Respondent's Exhibit "RX" A; Tr. 169) Cortes pled guilty to disorderly conduct on the knife charge, receiving a one year conditional discharge. (Tr. 62-63) After a traffic court trial, Cortes was also found guilty of the seatbelt violation. (Tr. 60-61, 168)

In dispute is whether Respondent was justified in arresting Cortes and Alvarez. Cortes and Alvarez both testified at trial, asserting that they were arrested unjustly and that the force Respondent used was unwarranted. Below is a summary of their accounts.

At trial, Cortes recounted that at 0230 hours on the date of the incident, he was looking for a parking space on [redacted] Avenue, near his son's home. Cortes acknowledged that he had unbuckled his seatbelt but explained that he had done so to exit the vehicle and scan the block for open parking spots. He also conceded that a "small," "four-finger" knife was hanging from the ignition key. He asserted, however, that the knife required the use of two hands to unfold the blade (Tr. 15-17, 39)

A police van pulled up behind the Hyundai flashing the turret lights. Officer Madden approached his window and asked for his license and registration. He recalled telling the officer that his wallet was in a small drawstring knapsack behind the passenger seat. Cortes told the tribunal that he had placed the wallet there because he was wearing shorts with "big open pockets" and was concerned his items might fall out. (Tr. 18, 41) He contended that the officer was "fine" with him retrieving the bag from the rear seat and denied being told not to reach back. (Tr. 42-43) He was, however, unable to reach it because his son had moved the passenger seat

back to accommodate his six-foot frame. (Tr. 18, 43) His son attempted to assist by reaching under his seat to move the seat forward. (Tr. 18, 44)

Respondent asked Alvarez, "what are you doing down there?" Though his son stopped moving the seat, Respondent became vulgar, calling Alvarez a "lowlife piece of a shit" and ordering him to "stay still." Cortes recalled Alvarez asking why she was speaking to him like that and Respondent replying that she did not have to "explain herself" and that she would "rip him out of the car if she had to." (Tr. 20-21, 45-46) According to Cortes, Respondent opened the door and physically pulled Alvarez from the car. Alvarez asked why he was being arrested and they got "into like a scuffle-type of thing, where . . . he's just trying to talk to her and she just didn't want to hear him." (Tr. 22) Cortes testified that Respondent was trying to handcuff Alvarez but he "wasn't complying." This, Cortes asserted, made Respondent angry and she began "punching him in the head with the handcuffs." He then heard his son scream that Respondent had bit him. (Tr. 23-24, 48-50)

Cortes testified that he got out of the vehicle and began recording the incident on his phone, remaining at the back of the vehicle. He observed Respondent and Officer Madden punch Alvarez in the head, cuff him, pick him up and put him in the van. (Tr. 24) Respondent then grabbed his phone and erased his recording. (Tr. 25) According to Cortes, when he asked for his phone, Respondent struck him with her baton,[2] breaking his watch and "hitting me all over, calling me a lowlife piece of shit" and directing him to get on the ground. He specified that Respondent hit his arms, chest, back and legs. (Tr. 26, 52) She then grabbed him and pulled him up by his shirt "choking [him]" and "ripping" his shirt. On cross-examination, Respondent

[2] Cortes clarified, with prompting from the APU prosecutor, that he did not know the difference between a baton and an expandable baton. He explained that the item he was hit with was one that snapped and then folded out, an expandable baton. (Tr. 26)

agreed that he had told CCRB investigators that Respondent hit him while he was recording. (Tr. 54) He asserted, however, that his account at trial was correct.

According to Cortes, he was handcuffed and placed in the police van next to his son. (Tr. 29, 56) He did not recall either officer directing him or his son to move to the back row of the van. (Tr. 59) In the van, his son continued to insist on an explanation for their arrest. He agreed on cross-examination that Alvarez may have been screaming, and that he too began asking in a "stern" voice "what was all this bullshit being done to us for." (Tr. 29, 58) He alleged that Respondent told them "shut up, you lowlife pieces of shit and if you don't I'll pepper spray you." Respondent then pepper sprayed both Cortes and his son for about three to four seconds. (Tr. 30) He recounted, "I can't describe how I felt, it's the worst. It went down my nose - - up my nose, down my throat, in my ears, in my eyes. It went everywhere on my skin. I was literally drooling and everything and they were making fun of it . . . ." (Tr. 31)

EMS responded to the precinct and offered to take Cortes and Alvarez to the hospital but they declined because "other officers" had advised that this might significantly delay their processing and release. Cortes acknowledged on cross-examination that he was taking [redacted] and [redacted]. He testified that he informed the officers that he needed his medication, but did not recall him or his son telling anyone that he could not spend the night in jail for that reason. (Tr. 32, 34-35)

Cortes admitted at trial that he had been previously arrested "many times" during the 1990s and 2000s. He also spent approximately a year in prison after pleading guilty to a felony, attempted sale of narcotics. Most recently, in 2008, he was arrested for hopping a subway turnstile. (Tr. 36)

Valeriano Alvarez also testified at trial. His account differed from his father's testimony regarding the moments leading up to the incident. He testified that they both had their seatbelts on when they were stopped by the police and that they were pulling up to ask someone if they were leaving a parking spot. (Tr. 87) He stated that his father did not suggest that he was going to get out of the vehicle to look for open spots. (Tr. 88)

According to Alvarez, he "remained calm" while his father tried to reach for his knapsack and recalled that Officer Madden asked him to move his seat to facilitate access. (Tr. 67, 90-91) As he complied, Respondent "came out and in a bit of a derogatory manner," asked what he was reaching for and ordered him to keep his hands where she could "fucking see them." (Tr. 67-69) He explained that although he felt intimidated, he related what Officer Madden had told him and continued to move the seat forward. (Tr. 70) Respondent then instructed him to get out of the vehicle. Alvarez asked what he was doing wrong but she repeated that he should "get out of the fucking vehicle." Alvarez again asked why he was being directed to do so. According to Alvarez, this prompted Respondent to threaten to "fucking rip [him] out of the car." He told her to "relax" and she proceeded to open the door, "forcefully" removed him, and had him put his hands on the hood of the car. (Tr. 71, 94)

Alvarez admitted that when Respondent attempted to handcuff him, "out of instinct," he pulled away and again asked what he had done wrong. Respondent replied, "I don't need to tell you shit you fucking lowlife . . . ." He acquiesced on cross-examination that he was too strong for her to overpower him and that she bit his right arm below his shoulder. Feeling "highly intimidated and actually afraid for [his] life and [his] wellbeing," he "ripped" his arm away again and "kept pleading" for her to tell him why he was being arrested and "attacked." (Tr. 71-73, 95)

Alvarez asserted that Respondent then used handcuffs to punch his head. (Tr. 73) He could not recall how many times he was hit but noted being left with "marks and bruises and lumps." (Tr. 74) Respondent's partner assisted by punching him in the ribs and face. According to Alvarez, he did not ask his father to intervene, but after he was handcuffed and before he was in the van, did tell him to record the incident. (Tr. 75-76, 87, 96-97)

The officers handcuffed Alvarez and moved him to the police van. Alvarez sat in the second row of the rear van and denied being directed to move to the last row. (Tr. 76, 96, 102) While sitting in the van, he observed Respondent hit his father with a baton at least three times. (Tr. 76-77) On cross-examination he added that he observed Respondent stop to "snatch" his father's phone and "fiddled" with it as she was walking him to the van. (Tr. 97-99)

Alvarez recalled "pleading to find out why we were being arrested . . . or . . . attacked" while Respondent stood outside the van near the passenger door. One sliding door was open allowing Alvarez to see Respondent. He acknowledged feeling "fairly angry" and admitted voicing his emotions in a "vulgar manner." He did not recall the exact words used but suggested it was along the lines of "what happened, did you walk in on your husband cheating on you or something . . . you fucking bitch, why the fuck did you attack me, this is fucking wrong . . . ." Alvarez stated that Respondent then leaned into the van and pepper sprayed him in the face and mouth. (Tr. 77-79)

On cross-examination, Alvarez agreed that he resisted Respondent's efforts to arrest him because he believed his rights had been violated. Alvarez further testified that he would have complied if Respondent had given him a "valid reason" for her actions. He denied, however, having grabbed Respondent's gun. (Tr. 84-86)

At trial, Respondent and Madden testified that during this traffic stop they were forced to navigate a chaotic and potentially dangerous situation with two agitated, non-compliant individuals. Officer Madden explained that Cortes, upon being asked for his license and registration, reached behind the passenger seat for a bag. (Tr. 113-14) In contrast to Cortes' account, Madden testified that he asked Cortes to refrain from making this movement because it was unsafe to allow a driver to reach into an "unknown" part of the vehicle. (Tr. 115) He also noted enhanced safety concerns because there was a knife hanging from the ignition. (Tr. 118) Officer Madden did not recall testing the knife but noted it is standard procedure for a test to be conducted at some point. (Tr. 130)

Officer Madden's recollection is that Alvarez also reached around sparking an argument with Respondent. He remembered hearing Respondent direct Alvarez out of the vehicle and then observed him turn to face her. At that point, he felt the situation was "unsafe" and went to assist, instructing Cortes to remain in the vehicle. Madden directed Alvarez to place his hands on the Hyundai but Alvarez refused, throwing his elbows and twisting around. When Madden directed Alvarez to put his hands behind his back, he resisted. Madden acknowledged striking Alvarez in the head once, after which they were able to handcuff him. (Tr. 116, 118-19)

As he was walking Alvarez to the van, he briefly noticed Cortes exit the Hyundai and walk toward the rear of the car. Madden testified that he did not recall whether Cortes carried anything or whether he made threatening motions. As he walked Alvarez to the police van, he also observed objects being thrown from nearby buildings -- a practice referred to as "airmail." According to Madden, Alvarez remained argumentative as they walked and refused to sit in the van row farthest from the doors telling Madden, "[t]his is bullshit, why are you doing this?" (Tr. 120-121, 134-138)

Madden was unable to challenge Alvarez about the van seating because he heard a "commotion" between Cortes and Respondent and noted that she was instructing Cortes to get on the ground. He closed the van doors to safeguard the prisoner and assisted Respondent in getting Cortes into custody. When he got there, Cortes was already on the ground. He did not hear Cortes say anything. (Tr. 120-24,137)

According to Officer Madden, Cortes also refused to sit in the rear row of the van and sat next to his son. Madden again asked them both to move but they did not comply. (Tr. 124) He explained that given the airmail coming from nearby buildings, he felt it was unsafe to remain at that location. However, because the van did not have a cage, and Cortes and Alvarez refused to sit in the last row, Madden believed it was also unsafe to transport the prisoners alone. He opted to sit in the driver's seat and await backup. (Tr. 124-25)

Madden testified that while sitting in the driver's seat he heard a bang and then observed one of the prisoners "attempt" to kick the van doors. When asked how many times the door was kicked, Madden responded, "I can't say. Possibly—probably once." Officer Madden also explained that he was uncertain whether the "bang" was actually someone kicking the door from the inside or from some exterior source. The detainees were told not to kick the doors. (Tr. 125-26, 140) The prisoners, however, continued to be "argumentative." Therefore, "to gain compliance" Respondent deployed her pepper spray. (Tr. 126, 142) Shortly thereafter, a second police unit arrived and Madden drove the van back to the precinct. He had no further interaction with Cortes or Alvarez. (Tr. 127)

At trial, Respondent recalled approaching the passenger window and immediately observing a gravity knife hanging from the key chain in the vehicle's ignition. She asserted knowing it was an illegal gravity knife based on her training and prior arrest experience,

including the confiscation of a gravity knife that was similar in shape and size. (Tr. 149-50, 177-78)[3] Her safety concerns became heightened due to the presence of this knife, which she deemed easily accessible to both driver and passenger.

Respondent testified that Alvarez was "verbally aggressive right off the bat" before she even spoke to him, saying, "What the fuck? Why are we being pulled over?" (Tr. 150) According to Respondent, she heard her partner tell the driver to stop moving and, at the same time, observed Alvarez reach under his seat. This made her "really nervous" that he may be reaching for a weapon. (Tr. 151-52) She told him to stop, to which he responded, "No." She then repeatedly told him to place his hands where she could see them but he did not comply. Respondent denied that he said anything to her about trying to move his seat so his father could reach for the bag containing his license. (Tr. 153)

Respondent then opened the car door and, placing a hand on Alvarez's shoulder, asked him to step out of the vehicle. She did not recall whether she threatened to rip him from the vehicle but explained that he was "a big guy" and there was "no way" she could have forced him out of the vehicle. After being given the directive to step out twice, he complied but when she began patting him down, he jerked away and turned to face her. Respondent grabbed Alvarez's right hand in an attempt to place it behind his back but he ripped it away. It was then that Respondent felt a tug on her gun belt at the butt of her gun. Respondent recalled feeling "frantic" as she tried to gain control and protect her firearm. In what she characterized as a "desperate act," with both her hands on her firearm over Alvarez's hand, she bit his arm.

[3] On cross examination, Respondent testified that she did not recall whether she or Madden tested the knife. (Tr. 176-81) However, an affidavit signed by Respondent indicated that she had tested the knife herself. (Tr. 183-84, CCRB 4). Respondent contended on redirect that she would not have signed the affidavit if it was not accurate that she tested the knife. (Tr. 202)

Respondent contended that after she bit Alvarez, he immediately released her firearm. (Tr. 153-56, 184)

They continued to struggle as Respondent attempted to grab his arms but she denied hitting Alvarez with her handcuffs. After her partner assisted by striking Alvarez in the head one time with a closed fist, they were able to gain control and Respondent handcuffed him. She recounted that as Madden walked Alvarez to the van, she observed Cortes near the rear of the vehicle, "coming at [her] fast" and "in a very aggressive manner." She directed him to get back in the vehicle but he continued to come at her with his hand raised toward her. Not knowing whether he had the knife, she struck his forearms twice with her expandable baton. Respondent did not recall striking him in the back but suggested he could have moved while she was hitting his arm. Agreeing that her second strike could have hit Cortes' back, she stated this was not her intent. She denied observing Cortes record with his cell phone, but acquiesced on cross-examination that it was dark and she could not see what, if anything, was in his hand. Respondent insisted, however, that she did not delete any videos from his phone. (Tr. 158-161, 187-92, 201)

As she brought Cortes to the van, Alvarez kept yelling, "Why are you doing this?" Respondent believed it was not the time to explain the situation as she was in "the process of defending [her]self and [her] partner." Like Madden, Respondent testified that both Cortes and Alvarez were instructed several times to move to the last row of the van but they refused. Respondent then closed one of the van doors because both individuals were being loud and Alvarez was being "verbally aggressive." As she was attempting to close the second door, one of the prisoners kicked the door of the van several times, within striking distance of her face. She recalled that as she directed him to stop kicking, airmail in the form of a glass bottle hit the top

of the van. Feeling uncertain as to whether the prisoner was trying to kick her or kick the door and flee, and believing that she had no other option to contain the situation, she discharged her pepper spray through the open van door. (Tr. 162-65, 171, 193-96) Respondent agreed that she was in close proximity to Cortes and Alvarez when she sprayed. Once she had discharged the spray, the kicking ceased. (Tr. 164, 195)

At the precinct, Respondent conferred with her sergeant and then with the defendants, who by then had calmed down. (Tr. 166) Because Cortes informed her that he needed multiple medications, and Alvarez pleaded with her to let his father go so he could take his medication, Respondent, upon obtaining supervisory approval, opted to release them with desk appearance tickets for criminal possession of a weapon. She explained they were both issued tickets as it was unclear if the knife was in the sole possession of either Cortes or Alvarez. (Tr. 167, 180)

Specifications 1 and 2: Unjustified Arrests

Respondent has an obligation to act reasonably and exercise good judgment while performing her duties as a member of service. To impose a disciplinary sanction there must be some showing of fault on the officer's part, either that she acted intentionally, unreasonably or negligently. *See McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949 (1979); *Reisig v. Kirby*, 62 Misc. 2d 632 (Sup. Ct. Suffolk Co. 1968) *aff'd*, 299 N.Y.S.2d 398 (2nd Dep't 1969). Mere errors of judgment, lacking in willful intent and not so unreasonable as to be considered negligence, are not a basis for finding misconduct. *See Ryan v. New York State Liquor Auth.*, 79 N.Y.S.2d 827 (3d Dep't 1948). It is well established law that to satisfy this burden of proof APU must prove that Respondent intentionally violated a procedural rule or was careless in her duties in some respect. As to allegations of negligence, the degree of carelessness must be more than *de minimis* to rise to the level of sanctionable misconduct.

The pivotal issue in this case is whether Respondent had probable cause to make these arrests. After carefully considering the testimony, I find that Respondent did not engage in misconduct when she arrested Cortes and Alvarez.

It is well established law that the existence of probable cause serves as legal justification for an arrest. *Rivera v County of Nassau*, 83 A.D.3d 1032, 1033 (2d Dep't 2011), citing *Broughton v State of New York*, 37 N.Y.2d 451, 456 (1975). A probable cause determination, however, "does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed." *Nolasco v. City of New York*, 131 A.D.3d 683 (2d Dep't 2015), quoting, *People v Bigelow*, 66 N.Y.2d 417, 423 (1984); *see also Colon v City of New York*, 60 N.Y.2d 78, 82 (1983). An officer's probable cause determination, however, must be *objectively* reasonable. *See Molina v. City of New York*, 28 A.D.3d 372, 373 (1st Dep't 2006) (affirming dismissal of false arrest claim where undisputed facts indicated officers' probable cause determination was reasonable); *Batista v. City of New York*, 15 A.D.3d 304, 305 (1st Dep't 2005). For the reasons set forth below, I find that the basis for these arrests meets this standard.

A conclusory statement that a knife is illegal does not alone meet the probable cause requirement. In *People v Dreyden*, 15 N.Y.3d 100 (2010), the Court of Appeals determined that to satisfy the reasonable or probable cause requirement, an officer should "explain briefly, with reference to his training and experience" how he or she formed the belief that the object observed in defendant's possession was a gravity knife as opposed to a pocket knife or other item that does not fit the definition of a per se weapon as defined in Penal Law §265.[4] *See also People v*

[4] While the APU pointed to *People v Octavio*, 34 Misc.3d 790 (Sup. Ct., Richmond Cnty., July 5, 2011) where the Criminal Court held that testing a knife is a more conclusive way to establish probable cause than observations based on training and experience, this case did not override the above stated tenet.

Brannon, 16 N.Y.3d 596 (2011) ("A detaining officer must have reason to believe the object observed is a gravity knife, based on his or her experience and training and/or observable, identifiable characteristics of the knife."). It is important to note that the operability of a gravity knife, which is an important element of a case, has also been proven where a police officer testified at trial that he tested the knife *after* an arrest and described the manner in which the knife opened. *See People v. Octavio*, 34 Misc.3d 790 (Sup. Ct., Richmond Cnty., July 5, 2011), citing *People v. Birth*, 49 A.D.3d 290 (1st Dep't 2008). Courts have further noted that police testing can be given probative weight even if the officer in question did not possess any specialized knowledge or training in how such weapons work. *See id* at 793-94.

It is undisputed that during this car stop, a knife was visibly hanging from the key ring in the Hyundai's ignition. It is further uncontested that the knife was in plain view of the officers as they interacted with the driver and passenger. Respondent convincingly attested before this tribunal that based on her training and past experience with gravity knives, on sight, she believed the knife to be illegal. Specifically, she explained that the knife looked "exactly the same" in shape and size as another gravity knife she had confiscated during a prior arrest. Furthermore, although testimony on who tested the knife was inconclusive, the information contained in CCRB Exhibit 4 supports a finding that a test was conducted and the confiscated item was found to be a gravity knife as defined by Penal Law § 265.01(01). Accordingly, inasmuch as Respondent credibly asserted that, based on her training and experience, she believed the knife to be a gravity knife due to its size and shape, she articulated a reasonable basis upon which to believe that Penal Law § 265.01(01) had been violated.

The question then turns to whether Respondent was justified in arresting both Cortes and Alvarez for the gravity knife. N.Y. Penal Law § 265.15(3) states in relevant part:

> The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, ... incendiary bomb, bombshell, ***gravity knife***, switchblade knife ... *is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein* . . . . [5]

New York courts have consistently applied this statutory presumption to allow an officer to arrest all passengers in the vehicle, except where the weapon is observed in the exclusive possession of any one person immediately prior to or at the time of arrest. *Matthews v. City of New York*, 889 F. Supp. 2d 418 (E.D.N.Y. 2012) ("It is well-settled under New York law that this presumption may provide probable cause for the arrest of all occupants of a vehicle."); *People v. Williams*, 17 A.D.3d 1043 (4th Dep't. 2005) (finding probable cause for vehicle occupant's arrest pursuant to the Automobile Presumption where police officers observed a handgun in plain view on a minivan seat); *People v. Gordon*, 282 A.D.2d 868 (3d Dept. 2001) (affirming denial of motion to suppress because the Automobile Presumption "provided probable cause for defendant's arrest"); *see also Ramos v. Police Dept. of the City of N.Y.*, 2013 N.Y. Misc. LEXIS 2744 (Sup Ct., Queens County, 2013) (declining to invoke the presumption for a machete knife, noting that it is not one of the specifically enumerated types of knives in the statutory presumption). It is then for the trier of fact to determine whether each passenger did, in fact, possess the weapon. *People v. Miller*, 237 A.D.2d 535 (2d Dep't 1994), citing *People v Lemmons*, 40 N.Y.2d 505, 511-512 (1976).

[5] The subsection states in its entirety: "The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, large capacity ammunition feeding device, defaced firearm, defaced rifle or shotgun, defaced large capacity ammunition feeding device, firearm silencer, explosive or incendiary bomb, bombshell, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, dagger, dirk, stiletto, billy, blackjack, plastic knuckles, metal knuckles, chuka stick, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his or her trade, then such presumption shall not apply to the driver; or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his or her possession a valid license to have and carry concealed the same."

Although the District Attorney chose not to prosecute the case against Alvarez, given the statutory presumption above, the failure of Alvarez to peacefully comply with police orders and his active resistance to further investigation, Respondent did not engage in misconduct by arresting both occupants of the vehicle. This ruling applies even if Respondent mistakenly applied Penal Law §265.15(3) to a knife that was in the ignition but within reachable distance of the passenger. Accordingly, she is Not Guilty of Specifications 1 and 2.

Specification 3 - Use of Force (EXPANDABLE BATON)

Respondent is charged with having improperly used force by striking Cortes with an expandable baton. As set forth in Patrol Guide Procedure 203-11, all uniformed members of service are "responsible and accountable for the proper use of force under appropriate circumstances" and should use only "minimum necessary force." Courts have held that the threshold question for this type of charge is whether there was cause for force to be used. "If there was not, any force used was unjustified. If there was cause, then the inquiry focuses on whether the amount of force exercised by Respondent was reasonable." *Police Dep't v. Sisto*, OATH Index No. 1886/99 (Aug. 3, 1999), citing *Police Dep't v. Giglia*, OATH Index Nos. 1197-98/90 (Nov. 8, 1990), *aff'd sub nom, Gatto v. Brown*, 234 A.D. 2d 22 (1st Dep't 1996).

The standard for making this assessment within the context of federal litigation is objective reasonableness. *Koeiman v. City of New York*, 36 A.D.3d 451 (1st Dep't 2007), quoting *Passino v. State*, 260 A.D.2d 915 (3d Dep't 1999); *see also Kingsley v. Hardwick*, 135 S.Ct. 2466, 2470-73 (2015). Reasonableness must be judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989), citing *Terry v. Ohio*, 392 U.S. 1 (1968). Furthermore, the "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make

split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

Respondent has admitted that she struck Cortes with an expandable baton after he exited the Hyundai, but explained that she did so because Cortes came toward her in an "aggressive manner" with his arm raised in her direction and failed to obey orders to return to his vehicle. Cortes alleges that this was an unjustified assault precipitated merely by his attempt to record Alvarez's arrest. Thus, to determine whether force was justified requires an assessment of witness credibility.

Few things are more difficult, yet more fundamental to the role of a trier of fact, than the task of attempting to reconstruct the most probable nature of a past event on the basis of contradictory testimonial accounts. In making such judgments, the trier of fact should consider a wide range of factors, including the degree to which the witness' account is logical and comports with common sense and general human experience. For the reasons set forth below, I find that the use of the expandable baton was reasonable and not misconduct.

It is important to underscore that the car stop in question occurred in the middle of the night and escalated into an intense physical struggle with an admittedly recalcitrant passenger who was the driver's son. Within this context, I credit Officer Madden's testimony that before he assisted Respondent with Alvarez's arrest, he ordered Cortes to remain in his car. Such a directive would only make sense given that Madden would want to prevent another person from interfering with Alvarez's arrest or facilitating his resistance. I further find that Cortes disobeyed the officer's instruction and, as he admitted at trial, walked toward the rear of the Hyundai. Given the highly volatile fight that had just occurred in which Respondent had taken the

extraordinarily rare measure of biting a suspect, there is little doubt that the "fast" approach of that suspect's father was threatening to Respondent. Her apprehension was compounded by Respondent's knowledge that Cortes had access to a knife and that his hand was raised toward her as he advanced.

Although Cortes claims that he was merely recording with his phone, his account of his own physical movements corroborates, in part, Respondent's version of events. In sum, he testified to exiting the vehicle with a phone in his hand and walking to the rear of his car in the direction of both the police officers and the van to which his son was being transported. He also stated that he was recording. Given the circumstances, it is logical to infer that Cortes walked quickly and with a raised hand so as to capture the incident he alleges to have taped. As noted in the above-cited case law, an analysis of these facts must take into account Respondent's perspective. It is within this context that I credit Respondent's testimony that she ordered Cortes to return to his car, that he failed to do so, and that his continued advance was the basis for striking him with an expandable baton. Her split second decision to use the expandable baton for protection against a perceived threat during a volatile situation was objectively reasonable under these tense circumstances.

I note that, although I reached this conclusion, I credited Alvarez's statement that he asked his father to record his arrest and his acknowledgment that Cortes may have exited his vehicle with the sole intent of doing so. The record is also devoid of evidence that Cortes and Alvarez filed a lawsuit, and therefore it is unlikely that they have a monetary interest in the outcome of this case. Nonetheless, on balance, I find that the testimony of both Cortes and Alvarez on critical points was not sufficiently reliable. Cortes's account of what transpired was particularly inconclusive. For example, at trial Cortes testified that Respondent first grabbed his

phone and erased his recording. It was only after he asked that the phone be returned that Respondent struck him with the expandable baton. On cross-examination, however, it was established that Cortes had told CCRB investigators that Respondent hit him with the expandable baton while he was recording. Although he insisted that his account at trial was accurate, it strains credulity to believe that he would be struck when he asked for the phone after the supposedly incriminating video had already been erased. During cross-examination Alvarez also alleged that as Respondent walked him to the van, she stopped to snatch Cortes's phone and "fiddled" with it. As with Cortes's statement on this point, it seems unlikely that she would have done this while guarding a prisoner who had just resisted arrest.

CCRB also sought to discredit Respondent's testimony by suggesting that, even though it was 2:00 a.m., the immediate area around the Hyundai was illuminated. Although it is undisputed that the van was parked behind the Hyundai with its headlights on, there was insufficient evidence to prove that the area was bright enough to see what Cortes had in his hand. More precise information would be needed concerning Cortes's exact location on the street to determine whether it was well-lit.

This tribunal also examined the evidence presented at trial concerning the extent of force that was exerted. The medical records and photographs indicate injuries to Cortes's left arm, and separate injuries to his left mid back and left lower back. Respondent testified that she recalls striking Cortes twice on his arm. I credited Respondent's testimony that she struck Cortes's arm twice but did not recall striking his back. At trial she acknowledged the injuries, credibly stated that it was not her intent to strike his back and stated that the injuries could have occurred when Cortes moved. The evidence does support a finding that Cortes was likely struck more than twice. The location of the back injuries, however, do not support a finding that those blows were

deliberately aimed at that location or excessive. It is important to note that the back injuries and the arm injuries are on the same side of Cortes's body and thus could have resulted from a protective movement to shield against the baton. Medical tests also document Cortes's discomfort, but do not find extensive damage. In fact, he was discharged with a recommendation to take ibuprofen.

Accordingly, Respondent is found Not Guilty of the charge set forth in Specification 3.

Specifications 4, 5, 6, 7- Use of Force (O.C. Spray)

Respondent is charged with unnecessarily using excessive force when she discharged her pepper spray against Cortes and Alvarez. She is also charged with improperly using her pepper spray. For the reasons set forth below I find that Respondent's testimony was unreliable and that she engaged in misconduct when she deployed pepper spray.

Patrol Guide procedure 212-95 designates the use of pepper spray as physical force. This provision states in relevant part:

When necessary to use pepper spray device:

> Hold pepper spray in an upright position, aim and discharge pepper spray into a subject's eyes for maximum effectiveness, using two one second bursts, at a minimum distance of three feet, and only in situations when the uniformed member of the service reasonably believes that it is necessary to:
>
> a. Protect self, or another from unlawful use of force (e.g., assault)
> b. Effect an arrest, or establish physical control of a subject resisting arrest
> c. Establish physical control of a subject attempting to flee from arrest or custody
> d. Establish physical control of an emotionally disturbed person (EDP)
>
> *Note: In addition, avoid using pepper spray in small contained areas such as automobiles . . . .*

Claiming that it was her "only" option, Respondent testified that she used her pepper spray "to gain compliance" because one of the prisoners repeatedly kicked the van door in an attempt to flee or assault her with a kick to the face. Specifically, Respondent claimed that she

was standing by the van door, attempting to close it, when one of the prisoners began kicking it "several times" preventing her from securing the van. Respondent further claimed that after she discharged the spray toward the individual closest to the door, the kicking ceased. Cortes and Alvarez agreed that they were yelling in a vulgar manner. Specifically, Alvarez admitted yelling, in sum and substance: "what happened, did you walk in on your husband cheating on you or something . . . you fucking bitch, why the fuck did you attack me, this is fucking wrong."

Respondent's narrative, however, was not materially corroborated by her partner. Although, like Respondent, he noted that both prisoners continued to be "argumentative" in the van, he did not testify that they kicked the van door multiple times and tried to assault Respondent by striking her face. Specifically, Madden testified that he was sitting in the driver's seat of the van when he heard a "bang." He could not determine whether the noise came from within the van or from items being thrown at it from outside. When he turned around, Madden saw one individual "turned in his seat" with his leg "outstretched," "attempting" to kick the door open. Madden confirmed that Respondent then used the O.C. spray "to gain compliance." When asked, however, he estimated that there was "probably" only one kick to the door.

The discrepancies between Respondent's and Madden's accounts give this tribunal pause. I found Madden to be a credible witness who did not have a motive to lie. In fact, he was quite candid about events, including the force he himself used in attempting to subdue Alvarez. It is difficult to fathom that if, as Respondent contends, the door was kicked "several times" Madden would not have heard and/or observed this as he sat in close proximity to the prisoners. Moreover, Madden had already come to Respondent's assistance twice as she struggled with Alvarez and then with Cortes. It seems highly likely that if one of those same prisoners was again trying to strike Respondent or flee, as Respondent claimed, Madden would have

immediately gotten out of the vehicle to assist. As Respondent is the one facing disciplinary action and has far greater motivation to testify to a scenario that would justify her use of pepper spray, I am inclined to discredit Respondent's assertion that there were several, pronounced kicks, some aimed near her face, and credit Madden's assertion that there was "probably" one kick as Alvarez and Cortes yelled and cursed at Respondent. Finally, I note that the undisputed fact that these prisoners were handcuffed in a police van further undercuts Respondent's contention that this level of force was justified.

Based on the above, I am unpersuaded that Respondent was justified in discharging pepper spray as a means of defense to an assault or to establish control of a handcuffed prisoner sitting in a police van. One possible kick combined with the prisoners crudely voicing their displeasure and insulting Respondent is not adequate justification for discharging pepper spray. I therefore find that Respondent's use of pepper spray was unjustified, and therefore, constituted excessive force in violation of P.G. 203-11. The preponderance of the credible evidence also established its improper use under P.G. 212-95. As such, Respondent is Guilty of Specifications 4, 5, 6 and 7.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 6, 2011. Information from her personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB sought a penalty of twenty-five (25) vacation days for the misconduct set forth in the seven specifications. Such a penalty would be excessive under the circumstances. First, Respondent was found not guilty of all but the pepper spray charges. This alone would warrant a

reduced penalty. Second, in a recent disciplinary case a sergeant was issued a penalty of two vacation days for the unjustified discharge of his O.C. canister. *See Case No. 2014-12024 (November 2015)*

On the other hand, this case involves the unjustified use of force against two handcuffed prisoners sitting in a police van. Penalties in recent disciplinary cases where officers improperly used force against handcuffed prisoners have varied depending on the relevant facts and the circumstances, including the nature of force used. In *Case No. 2014-12487* (September 10, 2015), a five-year police officer with no disciplinary record forfeited fifteen (15) vacation days for punching a prisoner who was handcuffed and breaking his jaw. In *Case No. 2014-12476* (February 16, 2016), a four-year police officer with no disciplinary record forfeited fifteen (15) vacation days for striking the head of a prisoner who was handcuffed in the backseat of a police vehicle resulting in minor injuries. *See also Case No. 2015-13146* (March 9, 2016) (thirteen year sergeant negotiated a penalty of twenty (20) vacation days for pushing and kicking a handcuffed prisoner in the back before stepping over him); *Case No. 2013-10481* (November 12, 2014) (five-year police officer with no disciplinary record negotiated a penalty of ten (10) vacation days for punching a handcuffed individual who had spit in his face).

While pepper spray does constitute physical force, it is a lesser form of force. Taking into account Respondent's otherwise positive employment history with the Department, I find that the forfeiture of seven (7) vacation days reasonably and adequately addresses the charged misconduct.

APPROVED

SEP 13 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

Respectfully submitted,

Rosemarie Maldonado

Rosemarie Maldonado
Deputy Commissioner Trials

POLICE DEPARTMENT CITY OF NEW YORK

From: Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER TATIANA CRUZ
TAX REGISTRY NO. 950253
DISCIPLINARY CASE NO. 2015-13936

Respondent was appointed to the Department on July 6, 2011. Her last three annual performance evaluations were 4.0 overall ratings of "Highly Competent" in 2014 and 2015 and a 4.5 rating of "Extremely Competent/Highly Competent" in 2013. She has six medals for Excellent Police Duty.

Respondent has no prior formal disciplinary history. [redacted]

For your consideration.

Rosemarie Maldonado

Rosemarie Maldonado
Deputy Commissioner Trials