



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

February 5, 2013

CHAN

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Heriberto Hernandez**
Tax Registry No. 932167
Police Service Area 1
Disciplinary Case No. 2010-2433

The above named member of the service appeared before Assistant Deputy Commissioner Claudia Daniels-DePeyster on April 27, 2012 and was charged with the following:

DISCIPLINARY CASE NO. 2010-2433

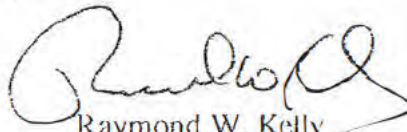
1. Said Police Officer Heriberto Hernandez, assigned to Housing PSA 1, while on-duty, at about 1357 hours on May 12, 2009, at West 9th Street and 86th Avenue, Kings County, did use physical force against Person A without having police necessity to do so, to wit: Said Police Officer Hernandez hit Person A on the head with an asp.

P.G. 203-11, Pages 1-2,

USE OF FORCE

In a Memorandum dated November 15, 2012, Assistant Deputy Commissioner Claudia Daniels-DePeyster found Respondent Hernandez Guilty of Specification No. 1, in Disciplinary Case No. 2010-2433. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

After considering all of the evidence presented and Respondent Hernandez's otherwise good service record with the Department, the disciplinary penalty shall be reduced to the forfeiture of five (5) vacation days.


Raymond W. Kelly
Police Commissioner



POLICE DEPARTMENT

November 15, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Heriberto Hernandez
Tax Registry No. 932167
Police Service Area 1
Disciplinary Case No. 2010-2433

The above-named member of the Department appeared before me on April 27, 2012, charged with the following:

1. Said Police Officer Heriberto Hernandez, assigned to Housing PSA 1, while on duty, at about 1357 hours on May 12, 2009, at West 9th Street and 86th Avenue, Kings County, did use physical force against Person A without having police necessity to do so, to wit: Said Police Officer Hernandez hit Person A on the head with an asp.

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

The Department was represented by Nancy Lichtenstein and Roger Smith, Esqs., Department Advocates Office, and Respondent was represented by Craig R. Hayes, Esq.

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

Respondent is found Guilty.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Sergeant Daniel Magee as its sole witness. The complainant in this case, Person A, refused to appear at this trial. The Department submitted in evidence a recording and transcript of his statements to the Civilian Complaint Review Board [Department's Exhibit (DX) 2 and 2A], as well as a recording of a 911 call from a witness to the incident (DX 1). This witness cannot be contacted as his cell phone number is no longer in service.

Sergeant Daniel Magee

Magee has been employed by the Department for approximately ten years and has been a sergeant since July 1, 2007. On May 12, 2009, Magee was assigned to the Conditions Auto covering the [REDACTED] Housed in Police Service Area (PSA) 1 with Police Officer Padillo and Respondent. Magee was in uniform and was the operator of their unmarked patrol car while Respondent, also in uniform, was seated in the passenger seat. Magee was in radio communication with Padillo, who was observing 86 Street from the roof of one of the buildings in the development looking for any quality of life issues with a focus on drug sales in particular.

At approximately 1:57 p.m., Padillo radioed Magee and informed Magee that he saw a hand-to-hand drug transaction occur in front of a bodega at West 9 Street, on 86 Street between Avenue V and Avenue X. Magee did not personally witness this transaction, but drove to the location immediately after Padillo radioed what he observed to look for a particular individual involved in the transaction who was later identified as Person A.

Person A was travelling down 86 Street when Magee approached him from behind in the unmarked car. Despite the unmarked car, Magee and Respondent were in uniform, and Magee wanted to ensure that Person A knew that the car approaching him contained police officers. When the car stopped in front of Person A, Magee noticed that Person A was “definitely clenching something in his hand.” Magee noted that Person A looked at the officers and continued to walk. Respondent exited the vehicle from the passenger side, instructed Person A not to move and informed him that the officers wanted to speak to him. Person A then approached Respondent just as he was exiting the vehicle and, according to Magee, pushed Respondent back, “trying to push him back into the vehicle to gain distance between him and [Respondent].”

Based on experience, Magee believed that Person A was going to attempt to run from the scene. Magee immediately opened his door and ran from the driver side of the vehicle to the passenger side to assist Respondent. Magee attempted to physically restrain Person A, as he believed Person A had committed an offense that would justify placing Person A under arrest. Respondent was having a little trouble restraining Person A, so after running over to the other side of the vehicle, Magee grabbed Person A from behind, and both were able to lean Person A on the hood of the vehicle. During this struggle, Magee felt that it would have been very difficult to get Person A’s hands behind his back in order to handcuff him, so Magee decided that the best course of action would be to place Person A on the ground. Magee pulled Person A off the vehicle and turned Person A around so that both he and Person A had their backs to the vehicle while Respondent stood directly in front of them.

At this point, Magee saw Respondent hit Person A on the leg with his ASP expandable baton “once or twice,” but could not recall the exact number of times

Respondent struck Person A. Magee recounted that he, being directly behind Person A, was fearful of his own legs getting struck by the ASP since he was standing so close to Person A, so he decided to place Person A on the ground. Magee pushed Person A forward and used one of his legs to block Person A's so that Person A would go down on the ground. As a result, Person A went "head first, front first to the ground." Person A ended up lying on his stomach on the ground and the officers were finally able to handcuff him.

It was not until Magee turned Person A over to his side after the handcuffing that he noticed that Person A was bleeding from his head. The injury was on the top front portion of Person A's scalp "around where the hairline would be by the forehead." Magee had employed a "bear hug type of hold" on Person A, and since Person A's height obstructed Magee's view of what was in front, Magee did not see if Respondent continued to use his ASP on Person A after Respondent had initially struck Person A.

Once Person A was at the command, Magee called for an ambulance to evaluate Person A's injury (DX 3, Person A's medical records). No drugs were ever found on Person A.

During cross examination, Magee indicated that he initially left the car to assist Respondent after he witnessed Person A push Respondent and saw the two of them were wrestling or fighting at that point. Magee noticed that Person A was actively trying to avoid being detained by Respondent by struggling. To assist Respondent, Magee approached Person A from behind and body-locked Person A from around the waist. Person A accused Magee of placing a chokehold on him, an allegation that Magee had to address at a Civilian Complaint Review Board (CCRB) hearing. After

hearing both Magee and Person A's testimony, CCRB unsubstantiated the allegation of Magee's use of a chokehold.

With Magee's assistance, Respondent was able to get Person A's hands on the car. Person A was still struggling with the officers and ignoring all their verbal commands to stop resisting and to give them his hands. Once Person A was on the car, Magee decided that the safer course of action would be to place him on the ground to gain control, so Magee pulled Person A off the car from behind. Person A was still fighting them and they had difficulty controlling him. Magee saw Respondent strike Person A on his legs with the ASP, which was why Magee testified to CCRB that he moved his legs away for fear of being hit with the ASP. As to why Magee employed the bear hug type hold on Person A, Magee testified that if he had let go, he believed that Person A would have ran away, or would have tried to physically assault the officers.

The officers were able to get Person A to the ground through a combination of Magee sweeping his leg to knock Person A off balance, Respondent's use of the ASP, and Magee's use of his body weight to pin Person A down on the ground. At this point, all the parties were on the street, so when Person A fell, he landed face down on the asphalt. There was nothing blocking Person A's fall nor was there anything to cushion his fall to the ground. It was after Person A was physically on the ground that Magee noticed a cut near Person A's hairline.

Regarding Respondent's use of the ASP, Magee felt, based on his training and experience as a sergeant, as well as his observations of Person A's actions, that Respondent had acted appropriately according to Department guidelines in the use of force against Person A. Magee never saw Respondent strike Person A on the head with the ASP.

During redirect examination, it was established that Magee did not have control of Person A's hands until Person A was placed on the ground and in handcuffs. Magee restated that he was unable to see exactly where Person A fell on the ground initially, but Person A's hands were not yet restrained by the officers until after he had made impact on the ground.

Upon questioning by the Court, Magee stated that he is five feet, seven inches and 155 pounds. According to the Assistant Department Advocate, Person A is about five feet, nine inches, and 165 pounds. Magee said that Respondent's ASP has been tested to see if it had contained Person A's DNA but he had no official knowledge of whether or not any DNA was actually found on it.

Respondent's Case

Respondent testified in his own behalf.

Respondent

Respondent was appointed to the Department in July 2003 and was assigned to PSA 2 upon graduation from the Police Academy. From PSA 2, Respondent was assigned to PSA 1, which is his current command. Respondent estimated that he has made about 131 arrests and has participated in about 400 arrests as an assisting officer.

On May 12, 2009, Respondent was working with the Conditions Team - which included Magee and Padillo. The team had been assigned to the [REDACTED] Houses, and their duties were to investigate "quality of life crimes and stuff like drug dealing; anything that is criminal related." Respondent was familiar with the [REDACTED] Houses

and knew it to be a high crime area with a drug problem. On that day, Padillo was observing the area with binoculars while on a roof in the development.

Padillo notified the team that he had seen Person A engaged in a hand-to-hand drug transaction. Based on Padillo's description, Respondent and Magee approached Person A by car. Respondent was the first one to get out of the car and he asked Person A, "Could I talk to you for a minute, could you stop?" which prompted Person A to respond, "You always stopping me for no reason, you got no reason to stop me." Respondent then informed Person A, "We know what you have been doing." At this point, Respondent stated, Person A "started back pedaling," which, in Respondent's experience, meant that Person A was going to try to run. Respondent went forward [toward Person A], and Person A took a swing at Respondent. Person A did not actually make contact with the Respondent, but the men began "tussling" and "wrestling" as Respondent unsuccessfully tried to restrain Person A while Person A's hands kept going within range of Respondent's firearm. Respondent was afraid that Person A would try to unholster his firearm and get the gun, since Person A's hands were "all over the place." Respondent kept instructing Person A, "You are under arrest, stop resisting." Respondent reported that it was difficult to control Person A in order to handcuff him. When Magee pulled Person A away from the car, Person A kept "flailing" his arms and Respondent recalled that he wrestled with Person A in an attempt to control him. Person A kept resisting the efforts of both Respondent and Magee to subdue him, so Respondent decided to use his ASP to strike Person A's legs. Respondent feared that Person A would get too close to Respondent's firearm due to the close proximity of the two men.

Respondent said he learned at Police Academy training to use an ASP to take someone down to the ground if that person was resisting. He was taught to use the ASP to strike “the lower body area like a meaty area” in order to take down an opponent and he was taught the times that he is allowed to use the ASP to defend himself. Respondent believed that Person A was resisting enough for Respondent to use an additional level of physical force. Respondent had tried to use his own arms and physical force prior to using the ASP in the attempt to gain control of Person A but that did not work. When Respondent’s individual attempts failed, Magee tried to assist the Respondent by adding in his own arms and physical force, but this combined effort did not stop Person A from struggling and flailing his hands and arms.

It was when Respondent feared that Person A was too close to his firearm that he decided to raise the level of physical force by using the ASP. Respondent hit Person A “numerous times” in the legs, which contributed to Person A eventually going down to the ground. In addition to Person A falling, Magee had also fallen on the ground on top of Person A. Respondent assumed that Person A fell head first onto the asphalt – there was nothing cushioning his fall to the ground. After handcuffing Person A, Respondent noticed that Person A was bleeding from the top of his head, near the hairline, which caused blood to come down the front of his face. However, there was no visible injury to the back of Person A’s skull. Respondent testified that he never struck Person A on the head or any part of his body above the waist with the ASP the only part Respondent struck on Person A was the lower part, and it was done in order to get Person A under control to be handcuffed.

After the incident, Respondent searched Person A, but did not find any narcotics. He did, however, find approximately \$200 on Person A. The cash was found

in “numerous spots” throughout Person A’s body, including “one that stood out...he had money stashed in the sole of his sneaker.” Respondent has been a police officer for nine years and has searched various individuals and found cash in strange locations such as the sneaker. In his experience, drug dealers hide money in their sneakers. According to the Respondent, “When somebody sells drugs and when they make a drug transaction, if they are working for another guy, they keep the profit that they made out of the sale and from other sales, the[y] will separate the profit so at the end of the day, they can give it to the main guy.” Person A had money in different locations on his clothes indicating that he could have been one of those drug dealers who kept money in separate locations to distinguish it from the money he owed to the supplier.

During cross-examination, Respondent restated that he has been a police officer for approximately nine years, since July 2003. Along the way, Respondent has also had experience in drug arrests in which the circumstances were similar to the present one in that the arresting officer was not the same officer that made the observation of the drug transaction, but a part of the field team.

Respondent and Magee located Person A within approximately a minute of receiving Padillo’s radio transmission of the drug transaction he observed and based on the description Padillo supplied. The officers spotted Person A initially walking up the block. When Respondent first approached Person A, he asked Person A, “Could I talk to you?” because he knew from experience that “When you run up on somebody that is selling drugs and stuff, they going to run.” Respondent’s tactic of approaching Person A did not work. Person A responded, “I ain’t got nothing, why you stopping me?” It was at that point that Respondent left the car and informed Person A, “We know what you been doing.” Person A began “back pedaling,” so Respondent “lunged

forward” at him. Person A then swung at Respondent, and the two men began wrestling. Respondent claimed, “I knew how to defend myself,” and did not let Person A come in contact with him. When Person A cocked back his arm to swing at Respondent, Respondent “went underneath him in case he would have went forward.” Respondent surmised that if he had stayed upright, Person A would have made a connection with his body, so he had to go forward and avoid the hit. As a result, Person A swung over Respondent’s head as Respondent ducked underneath.

Respondent was afraid that Person A was within reaching distance of Respondent’s gun during the physical struggle between the two men, and although Person A never actually reached for the gun, it was enough for Respondent to take out his ASP and use it on Person A. Respondent has been involved in close-contact encounters during arrests before, but does not take out his ASP every time someone gets too close. Respondent only takes out his ASP “if it is necessary, if I feel threatened” during a physical struggle.

In this current case, Respondent saw that Person A’s hand was close to his firearm and was at one point on Respondent’s waist. During his CCRB interview, when Respondent was asked if it appeared that Person A was reaching for his firearm or if his hand was merely close to it, Respondent had stated that he did not know if Person A was actually reaching for Respondent’s firearm, but that Respondent “wasn’t waiting for that” because he did not want to “give no perp no chance to go for my firearm that was too close.” He asserted that this was consistent with his description of Person A’s hand on his waist and close to his firearm.

Respondent did not recall how many times he actually struck Person A with his ASP, besides that it happened “numerous times,” enough times to get Person A on the

ground so that he could be restrained. Respondent was aware of where the blows he dealt with the ASP were landing on Person A. Respondent testified that while he was striking Person A with the ASP, he was focused on Person A's legs and getting him to the ground; he was not looking at his hands or head. Person A fell to the ground as a result of the blows, along with Magee, who was on top of him. After Person A fell, Respondent stopped hitting him with the ASP and handcuffed him.

Respondent reported that Person A did not have any weapons in his hands during the entire incident, nor were any weapons seen during that time. Person A did, however, smell of alcohol. Padillo had never indicated to Respondent that Person A was involved in any violent crimes. Once at the command, Respondent was able to observe Person A and saw that he was bleeding from the head. Respondent did not request medical treatment for Person A because Magee had called for an ambulance first. Respondent had not transported Person A to the command.

An arrest report was filled out concerning Person A's arrest but Respondent had not indicated on it that force was used against the prisoner. Respondent admitted that he made an error and that he should have checked the section indicating force was used but he had not. Respondent mentioned that he later spoke to an Assistant District Attorney and recounted the situation of how Person A was resisting and his own use of force. Respondent also did not indicate in his Activity Log (DX 4) that he had used force against Person A, nor did he make mention of injuries to Person A or the need for medical attention. Respondent did, however, fill out a report documenting the line of duty injuries that he received from this incident, which were a sprained wrist and back.

During redirect examination, Respondent asserted that if members of the service sustain any type of injury as a police officer, they are required to fill out a Line of Duty

Injury Report. However, members are not required to note every detail of arrests in their Activity Logs. Respondent did not receive any charges for filling out the arrest report incorrectly when he neglected to fully detail that he used force in the course of Person A's arrest. Respondent was only charged with using of his ASP to strike Person A on the head.

Respondent clarified that he used the ASP because Person A was "close and fighting with me." Respondent was not aware of any Department regulation or guideline that states that a member has to wait for his gun to be actually grabbed before he can raise the level of force he uses on someone. Respondent also has no knowledge of any Department regulation that states that a member can only take out his ASP and use it when confronted by a person who is armed with a weapon. In fact, members are trained to use the minimum level of force, and if someone is not being brought under control, the officer is allowed to escalate the force used. Additionally, there is no requirement or guideline set forth by the Department or the Patrol Guide that limits the number of strikes a member is allowed to give while using the ASP. Respondent admitted to using the ASP during the incident only on the lower portion of Person A's body, as per his Police Academy training, because Person A was out of control and Respondent could not physically restrain him despite his personal efforts combined with Magee's actions.

Upon questioning by the Court, Respondent testified that no point did he lose control of where he was striking Person A with the ASP and denied the possibility that he struck Person A in any place other than the lower part of his body. Respondent testified that he was aiming for Person A's legs, which was where he struck. Prior to employing his ASP, Respondent had not had an opportunity to pull out his handcuffs and did not do so until Person A was on the ground. Respondent testified that he was

unable to handcuff Person A while he was standing because he was swinging his arms, tensing, and grabbing on to the Respondent, so there was no way Respondent could have restrained him. Person A's hands were "tense" on top of the hood of the car and neither Respondent nor Magee were able to place Person A's hands behind his back.

Respondent noticed that Person A was bleeding only immediately upon handcuffing him and sitting him upright. As for the ASP that was used during the incident, it was tested by the Internal Affairs Bureau (IAB) on the same date as the incident, and returned to Respondent the next day. IAB did not inform Respondent of whether or not anything was found following the test performed on his ASP.

At the time of the incident, Respondent was five feet, eight inches in height and weighed approximately 145 to 150 pounds. Respondent testified that he and Magee were fighting to get Person A down to the ground and the level of force Respondent was using with only his hands was not enough to restrain Person A. As a result, Respondent used his ASP to strike Person A on the legs, which helped to get him on the ground. At no time did he hear Person A say that he was not resisting.

FINDINGS AND ANALYSIS

Respondent stands charged herein in that while assigned to Housing Police Service Area 1, while on duty at about 1:57 p.m. on May 12, 2009 at West 9th Street and 86th Avenue, Kings County, he did use physical force against Person A without having police necessity to do so, to wit: said Respondent hit Person A on the head with an ASP.

To support this allegation, the Department presented the hearsay statement of Person A (DX 2 and 2A). Person A stated that he had just exited a store where he

purchased a vitamin water. He was on his way to the gym and was waiting for a bus when an unmarked car pulled up to him and the officers said, "Put your hands up" and he complied. The next thing he knew one of the officers put him in a chokehold and he could not breathe. The other officer then walked over to him, pulled out his baton, hit him one time in the head and his head busted open. Person A said he did not go down to the ground despite hearing the officers telling him to get down because he did not know what he was going down to the ground for.

Person A said he continued to resist because he was being held in a chokehold and did not want to die. The officer with the ASP (identified as Respondent) began to beat him in the legs. Person A went on to describe how he threw an officer off of him and could not understand how he was charged with resisting arrest. He described using his "super powers" to get out of the "headlock" and then he pushed that officer while the other one continued to beat him with his baton. He described being held in a chokehold, being hit in the head with the baton and then wiggling his way out of the chokehold using his super strength from going to the gym. He was questioned about the use of the term, "headlock" as opposed to his initial term, "chokehold" and he said a headlock is when one is grabbed around the neck as he was.

Person A continued, "[He] hit me in my head one time...and I started bleeding, like blood coming down my face so I got out the headlock, and he beat me like, 'Get down, get down.' I'm kind of shocked because I've been arrested a million times before, but not like this because I never resist." It is clear from Person A's criminal convictions that he does, in fact, resist. He was convicted of resisting arrest twice. He even admitted on this occasion that he resisted because he did not want to die. He heard the officers telling him to get down and he refused because he did not know why he had to get down

to the ground. This is despite the fact that, according to his statement, he had been arrested many times.

Person A wanted one to believe that he was not engaged in any type of criminal activity and he had his hands up, not resisting, while one police sergeant put him in a chokehold where he could not breathe, and the other police officer, at the same time, hit him once in the head with an ASP splitting his head open all without ever telling him why he was stopped and that he was under arrest. Absent some type of corroboration, this accounts strains credibility.

In this instance, however, a 911 call was made and the Department presented it as additional evidence (DX 1). The male caller, identified as Person B, stated in sum and substance that he was in the vicinity of [REDACTED], West 9 and 86 Street when he observed two officers stop an individual and proceed to brutally beat him. Person B said that one officer struck the victim in the head with a "nightstick" and the victim was "gushing blood" from the head. Person B stated that he heard the victim [Person A] state that he was not resisting. Person B went on to say that the victim was on his knees and as he stood up, the victim was then hit in his shin. Person B said the officers used excessive force. Person B further indicated that other officers arrived on the scene, but the first two officers were the only ones beating the victim. The caller ended by saying the first two officers then took the victim away from the scene. A review of the SPRINT system confirmed Person B's call [was made simultaneous to the incident]. A unit that responded to the 911 call indicated that the victim was removed and taken to [REDACTED] Hospital.

To refute these charges, Respondent presented the testimony of Magee and testified in his own behalf. On May 12, 2009, Magee was the sergeant and his Conditions Team was assigned to the [REDACTED] Houses. Magee was in uniform and the

operator of the unmarked Conditions Auto. Respondent, also in uniform, was in the passenger seat and they were in radio communication with Padillo, who was doing rooftop observations for quality of life infractions. Padillo radioed that he observed a hand to-hand drug transaction on 86 Street across from the housing development and gave a description which turned out to be Person A.

Magee said they stopped the unmarked car in front of Person A. As Respondent attempted to exit the vehicle, Person A pushed Respondent as if to push him back into the car. Magee immediately exited the car and felt that Person A was going to attempt to flee. A struggle ensued as Magee and Respondent attempted to subdue Person A tried to grab onto the car, but Magee pulled him off. It was at this time that Respondent used his ASP on Person A's legs. Magee said he observed him strike Person A two or three times in the leg, but was unclear as to exactly how many times he struck him. Magee testified that Person A was resisting and he had trouble restraining him so he decided he would use one of his legs to block Person A's leg and get him to the ground. This resulted in Person A falling to the ground face first. They were then able to handcuff Person A. Once he was turned over, Magee saw the blood on Person A's head. Magee testified that he did not see if Respondent continued to use his ASP at the same time that he [Magee] used his leg to get Person A to the ground.

Respondent testified essentially the same as Magee that they were working the operation and that the car was driven to where Person A would be stopped. Respondent said that as he asked Person A if he could talk to him, Person A complained about being stopped and began to "back pedal." Respondent said he thought Person A was going to run. Person A instead took a swing at him but missed. They began to tussle and Respondent felt that Person A was in close proximity to his firearm and he feared

that Person A would take it. Person A was also flailing his arms and Respondent decided to raise the level of physical force and use his ASP. He testified that he struck Person A "numerous times" in the legs which contributed to Person A going down to the ground. Respondent said Person A fell head first onto the asphalt with nothing cushioning his fall. Respondent said he observed Person A bleeding from the top of his head causing the blood to stream down his face. Respondent denied that he ever struck Person A in the head with the ASP. He testified that he never struck him above the waist, only on the lower portion of the body to gain control of him so that he could be handcuffed. He said that he never lost control while using the ASP and that he was aware, at all times, where his ASP hit Person A. Respondent admitted that although he pulled out his ASP to strike Person A, he never pulled out his handcuffs until Person A was on the ground.

Respondent acknowledged that an arrest report was prepared concerning this incident and he failed to fill in the section in the report that noted that force was used against the prisoner. He also acknowledged that he failed to make an entry in his Activity Log concerning the use of force.

The accounts by Magee and Respondent are of concern. Magee testified that Person A's legs were swept from under him, causing him to fall to the ground face first. Since Person A was not handcuffed at the time, there is no valid reason why Person A would not have used his hands to break that fall, even if the motion used to drop him to the ground was spontaneous. If, in fact, Person A fell to the ground face first, it is unlikely that he would have been resisting arrest at that time given the fact that his face hit the asphalt; he should have been immediately placed in handcuffs at that time. Magee

testified that he was not sure if Respondent used his ASP once Person A was on the ground.

Respondent went on to testify that the first opportunity he had to pull out his handcuffs and place them on Person A was immediately after Person A was taken to the ground. He explained that prior to that time, Person A was resisting and he was unable to get control of his hands. This led him to decide to use his ASP in an effort to get him down to the ground so that he could handcuff him. The problem with this account is that Magee testified that he used his leg to knock Person A off of his feet causing him to fall to the ground. It was not Respondent's blows with the ASP that got Person A to the ground, but Magee's unexpected leg move. Magee tried to argue that it was a combination of the ASP and leg sweep that caused Person A to fall to the ground, but Magee testified that he only saw Respondent strike Person A with the ASP two or three times and that seems to be insufficient to get him to fall to the ground given the amount of resistance that was described.

Person B, in his 911 call, stated that while on the ground, at one point Person A was on his knees and proclaiming that he was not resisting. But as he tried to rise, he was struck in the shin. As stated, Person A should have been immediately handcuffed once his body was on the ground. Neither Person A nor Person B stated that Person A was struck multiple times in the head. Person A said that he was struck once and he began to bleed. Person B did not say how many times Person A was struck in the head, but he noted that Person A was struck with the "nightstick" in the head and was "gushing" blood from the head. I credit the 911 phone call and this portion of Person A's statement which is corroborative of one another. Even though there is no way to know

exactly when Person B began to observe the events, he observed in sufficient time to see Person A struck in the head with the “nightstick” as he described it.

Magee testified that he was behind Person A holding him in a bear hug at one point when the incident was occurring and some of his view was obstructed such that he could not see everything Respondent was doing, but he never observed Respondent strike Person A in the head with his ASP. However, this could have been the point that Respondent struck Person A in the head one time with the ASP.

Patrol Guide 203-11 enunciates the procedures to follow when the use of force is needed. It states in pertinent part:

All members of the service at the scene of a police incident must:

- a. Immediately establish firearms control*
- b. Use minimum necessary force*
- c. Employ non-lethal alternatives, as appropriate.*

It goes on to state that where it becomes necessary to take a violent or resisting subject into custody that, “[R]esponding officers should utilize appropriate tactics in a coordinated effort to overcome resistance.” In addition, “The patrol supervisor, if present, should direct and control all activity.”

In this instance, Magee (the supervisor on the scene) testified that he used his leg to get Person A to the ground so that handcuffs could be placed on him. That should have been sufficient force to end this incident. Instead, the 911 caller said Person A was on his knees and he was still being struck as he attempted to rise.

Magee testified that Person A was bleeding from the top front portion of his scalp “around where the hairline would be by the forehead.” Respondent testified that Person A was bleeding from the top of his head near the hairline which caused blood to come down the front of his face. This described injury would be consistent with a fall

face first on the concrete. Person A, however, had no injuries to the front of his head or face. Instead, according to the medical records, Person A sustained a 1.5 centimeter laceration to the left side of his head requiring sutures to close. This injury is not consistent with a fall to the ground face first.

Based on the above, I find that Person A resisted arrest, but that Respondent used unnecessary physical force which included striking Person A on the head with the ASP. Accordingly, Respondent is found Guilty.

PENALTY

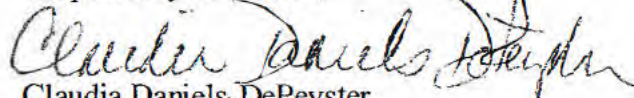
In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 1, 2003. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

Respondent has been found Guilty of using physical force against Person A without having police necessity, to wit: Respondent hit Person A on the head with an ASP. In Disciplinary Case No. 83809/08, signed June 9, 2009, a 15-year member with no prior disciplinary record forfeited 15 vacation days for carelessly punching a complainant in the face after stopping him to issue him a summons for riding his bicycle on the sidewalk. In Disciplinary Case No. 85339/09, signed April 5, 2010, an eight-year sergeant with no prior disciplinary record negotiated a penalty of 15 vacation days after striking an individual who was arrested, handcuffed and appeared out of control. In Disciplinary Case No. 2009-0483, signed August 31, 2010, a 20-year police officer with

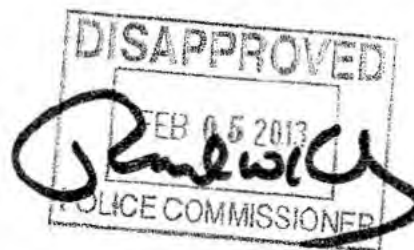
no prior disciplinary record negotiated a penalty of 17 vacation days for striking a prisoner with an ASP. The prisoner sustained a fractured arm.

Based on the above and Respondent's service record, I recommend that he forfeit 15 vacation days.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner Trials



POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER HERIBERTO HERNANDEZ
TAX REGISTRY NO. 932167
DISCIPLINARY CASE NO. 2010 2433

In 2009 and 2010, Respondent received an overall rating of 4.0 “Highly Competent” on his annual performance evaluation. In 2011, he received a rating of 3.0 “Competent.” Respondent has received two Excellent Police Duty Medals in his career to date.

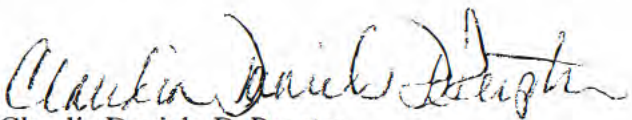
[REDACTED]

[REDACTED]

On June 9, 2009, Respondent was placed in Level I Performance Monitoring for receiving three civilian complaints in one year. On December 10, 2010, Respondent was placed in Level II Force Monitoring based on his overall record and receipt of additional civilian complaints.

Respondent has no prior, formal disciplinary record.

For your consideration.


Claudia Daniels-DePeyster
Assistant Deputy Commissioner Trials