



OFFICE OF THE POLICE COMMISSIONER  
ONE POLICE PLAZA • ROOM 1400

July 18, 2017

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Noel Damico**  
Tax Registry No. 951650  
75 Precinct  
Disciplinary Case No. 2015-14570

The above named member of the service appeared before Assistant Deputy Commissioner David S. Weisel on February 1 and 23, 2017, charged with the following:

**DISCIPLINARY CASE NO. 2015-14570**

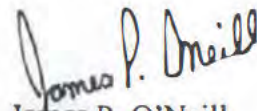
1. Said Police Officer Noel Damico, on or about May 12, 2015, at approximately 2330 hours, while assigned to the 75<sup>th</sup> Precinct and on duty, in the vicinity of the [sic] [REDACTED] Kings County, did wrongfully use force against Mark Diaz, in that he grabbed Mark Diaz and threw him to the ground, without police necessity.

**P.G. 203-11**

**USE OF FORCE**

In a Memorandum dated April 20, 2017, Assistant Deputy Commissioner David S. Weisel found Police Officer Noel Damico Guilty of Specification No. 1 in Disciplinary Case No. 2015-14570. Having read the Memorandum and analyzed the facts of this matter, I approve the findings but disapprove the penalty for Police Officer Damico.

I have considered the totality of the issues and circumstances in this matter, and deem that a greater penalty is warranted. Therefore, Police Officer Damico shall forfeit fifteen (15) vacation days, as a disciplinary penalty.

  
James P. O'Neill  
Police Commissioner

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POLICE DEPARTMENT CITY OF NEW YORK

April 20, 2017

**MEMORANDUM FOR:** Police Commissioner

Re: Police Officer Noel Damico  
Tax Registry No. 951650  
75 Precinct  
Disciplinary Case No. 2015-14570

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**Charges and Specifications:**

1. Said Police Officer Noel Damico, on or about May 12, 2015, at approximately 2330 hours, while assigned to the 75<sup>th</sup> Precinct and on duty, in the vicinity of the [sic] [REDACTED], Kings County, did wrongfully use force against Mark Diaz, in that he grabbed Mark Diaz and threw him to the ground, without police necessity.

P.G. 203 11 – USE OF FORCE

**Appearances:**

For the CCRB: Jeannie Elie & Raasheja N. Page, Esqs.  
Civilian Complaint Review Board  
100 Church Street, 10th Floor  
New York, NY 10007

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

**Hearing Dates:**

February 1 and 23, 2017

**Decision:**

Guilty

**Trial Commissioner:**

ADCT David S. Weisel



## **REPORT AND RECOMMENDATION**

The above-named member of the Department appeared before the Court on February 1 and 23, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Civilian Complaint Review Board called Mark Diaz and Rosa Torres as witnesses. Also presented as part of the CCRB's case was a cell phone video taken by a bystander to the incident in question. Respondent called Police Officer Matthew Demaio and testified on his own behalf. Also presented as part of Respondent's case was stipulated testimony of Sergeant Melissa Lynch. 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, the Court finds Respondent Guilty.

## **FINDINGS AND ANALYSIS**

### **Introduction**

It is undisputed that on May 12, 2015, Respondent and other officers assigned to the 75 Precinct took part in the arrest of Person A in front of [REDACTED] in Brooklyn after Person A was in an altercation with another individual. The complainant in the case before this tribunal, Mark Diaz, was a friend of Person A and was present at the time of arrest. Diaz approached the police vehicle into which Person A was being placed by Police Officer Matthew Demaio. A second officer pushed Diaz away from the vehicle. Respondent grabbed Diaz and pushed him to the ground. The issue in this case is whether Respondent's use of force was justified.

**MARK DIAZ** testified that on May 12, 2015, around 2330 hours, he was at the home of his friend, Person B on [REDACTED]. He had been there for several hours, beginning around



1500 hours. He admitted that he drank three or four large beers that day, but claimed that he stopped around 1700 hours and was not intoxicated at any time. Person B's grandfather, and grandmother Rosa, were there too. Diaz heard a commotion outside and saw that there was a fight. There were at least 15 people outside, as well as around 10 police officers. The officers were arresting Diaz's friend, Person A, who had been fighting with another individual from the neighborhood, although Diaz did not know this at the time. Other officers were keeping people separated (Tr. 16-20, 33, 44-46, 51-53, 68-70, 74-77).

Diaz testified that he went outside to find out why Person A was getting arrested so he could tell Person A's parents. Diaz questioned some bystanders as to why Person A was getting arrested, but they did not know. He also asked some officers but they ignored him. Diaz walked over "[i]n a normal way" to the officer that was arresting Person A. Diaz conceded that Person A was resisting somewhat by moving his body around and "gesturing." He also conceded stating at his CCRB interview, in contrast to his trial testimony, that Person A was yelling and cursing. Diaz, however, was not yelling, using profanity or threatening the officer and his hands were at his sides. The officer was by himself but there were two others on the sidewalk. Person A was seated in a police vehicle but the door was open. Diaz denied hearing any instructions to halt his approach. He was about two feet from the officer and the officer was brushed up against the vehicle. Diaz asked the officer with Person A, in the same tone as he was testifying, why he was being arrested (Tr. 21-24, 33-34, 40-43, 54-60, 62-65, 73)

Diaz contended that the officer with Person A turned around and shoved Diaz against a parked car. This officer then pushed Diaz into another officer, later identified as Respondent, who was standing behind the car. Respondent grabbed Diaz by the arm and "slammed" him onto the pavement by the edge of the sidewalk. He did not trip over the curb. Diaz hit face first, leading him to sustain wounds on his face, arms, wrist and knees. He then was arrested. Diaz



denied kicking at the windows of the police vehicle used to transport him (Tr. 24-33, 35-37, 43-44, 48, 65-68; see CCRB Exs. 2a-d, photographs of Diaz; Ex. 3, Diaz's hospital records).

Diaz testified that his criminal case subsequently was dismissed. He currently was suing the City of New York (Tr. 35, 70-71).

ROSA TORRES, Individual B's [REDACTED] testified, through an interpreter, that Diaz was in her home around the time of the incident. Torres contended that Diaz was there only for half an hour. He only drank one beer and was not drunk, Torres asserted. She testified that Diaz went outside. There was a fight outside and the police had arrested Diaz's friend (Tr. 81-84, 86-89).

Diaz asked the police why they had arrested his friend. He was not yelling, did not run toward them, and did not have anything in his hands. An officer told Diaz, "[Y]ou, get over there, because you are sticking your nose in. You are getting involved. . . . It has nothing to do with you." Diaz countered that he had to ask because it was his friend. Angered, the police officer grabbed Diaz and forcefully threw him. Diaz fell face down on the ground and "injured everything." When he got up, he was swaying and did not look well (Tr. 84-86).

A VIDEO taken by Individual B was admitted as CCRB Exhibit 1. At the outset of the video, police officers are seen arresting an individual. There is a crowd on the street, people are yelling, a car alarm is blaring. Around 31 seconds into the video, after the individual is handcuffed, Diaz approaches the group of officers with the arrestee. They interact as the arrestee is led away. Around 51 seconds, Diaz is seen walking toward the officer who was now handling the arrestee. Around 55 seconds, voices are heard saying, in sum and substance, "Get over there, man," "Yo, where you going?," and "No, no, no." Around 56 seconds, an officer pushes Diaz onto the trunk of a parked car. Around 59 seconds, an officer again pushes Diaz, this time into the arms of Respondent. Respondent, now grabbing Diaz, throws him to Respondent's right.



Diaz hits either the pavement or the sidewalk. After he gets up, he is arrested (Tr. 38-39, 48, 54-55, 88-89).

**POLICE OFFICER MATTHEW DEMAIO** testified that on the night in question, he and his partner, Respondent, responded to [REDACTED] on a 911 call for a male shot. There were many people on the street, on either side of a building. Diaz was one of them. Several other police units arrived as well, including patrol supervisor Sergeant Melissa Clark. It was clear to Demaio that there had been some kind of altercation. Demaio found the person described over the radio as the suspect – Person A – and Respondent spoke to the 911 caller. Respondent confirmed to Demaio that while there was no gunfire, Person A had assaulted the caller's son. At that, Demaio arrested Person A (Tr. 93-99, 110-11, 115, 120).

Demaio testified that the crowd was growing. Some were yelling at both Person A and the police. Demaio wanted to leave with Person A and Respondent as soon as possible. Inside the rear passenger seat of the police vehicle, Person A started banging his head against the window and kicking the door. When Demaio opened the door to stop him, Person A swung his feet out so that Demaio could not close the door. Demaio went to the other side of the car to pull Person A, who was yelling, back in and put his seatbelt on. Person A also tried to bite Demaio (Tr. 99-103, 111-13, 119).

Demaio stated that while he was trying to gain control of Person A, he was distracted by Diaz approaching the side of the car. Although Demaio did not know his exact intention, Diaz looked angry and was taking "bigger steps" toward the vehicle. Demaio identified this moment as approximately 56 seconds into the video. Demaio heard others officers yell "get back, what are you doing." Diaz was yelling as he approached. There was one officer near the rear door with Demaio. When Diaz got within a couple of feet of the door, Demaio saw an officer push him backward with two hands. As soon as Demaio secured Person A and Respondent returned,



they left. Demaio saw that Diaz was bleeding from the nose when he was processed in front of the desk at the command (Tr. 104-09, 113-21, 124-25, 127).

The parties agreed to stipulate to the testimony of **SERGEANT MELISSA CLARK**. Clark would have testified that she ordered the officers to remove Person A from the scene. The officers told her that while they were trying to put on Person A's seatbelt, he was fighting them "furiously" and trying to kick out the windows. Clark indicated that the crowd increased in curiosity when Diaz approached the police vehicle. Diaz was "pushed to the ground" and arrested. She observed that he was bleeding (Tr. 176-79).

**RESPONDENT** testified that once Person A was arrested, Clark instructed him and Demaio to transport Person A to the precinct because the crowds were becoming more hostile and tense. Respondent observed Diaz come toward Demaio quickly while Demaio was struggling with Person A. Respondent was about ten feet from the police vehicle at this time. Diaz was screaming loudly as he approached, in what Respondent "assumed" was a "violent and threatening manner." Diaz's fists were clenched and he said, "Fuck you, you're not taking my boy. I'll do what I want" (Tr. 142-44, 154-56).

Respondent testified that he ordered Diaz to get back but Diaz kept moving forward. An officer – neither Demaio nor Respondent – pushed Diaz back into a car. Diaz was about two feet from Respondent, and then Diaz got pushed into Respondent. Respondent now had the intention of arresting Diaz for obstructing governmental administration, disorderly conduct, and "resisting arrest." Respondent pushed Diaz, above the midsection and toward the shoulders, to create space between Diaz and Demaio because Diaz was interfering with Person A's arrest. Respondent denied that he grabbed Diaz and slammed him into the pavement. In any event, Diaz spun around and fell backward, hitting his face. It appeared to Respondent that Diaz tripped over the curb. It was not Respondent's intention to throw him to the ground. Had



Respondent wanted to take him to the ground, he would have done so by tackling him in accordance with his training (Tr. 145-47, 151, 155-58, 169, 172).

After other officers surrounded Diaz, Respondent checked with Demaio to make sure he was okay. Respondent then arrested Diaz. Diaz was extremely upset, cursing and screaming. He did not resist being placed in the police vehicle, but once inside he began kicking at the windows. The crowd situation was worsening. Other officers transported Diaz, and Respondent and Demaio transported Person A. Respondent was the arresting officer for both (Tr. 148-50, 158).

Respondent noticed Diaz's injuries when he picked him up from the ground, even though he admitted indicating on the arrest report that the prisoner's physical condition was "apparently normal." Respondent and Demaio took both prisoners to the hospital, where Respondent told medical personnel that Diaz tripped and fell on the pavement (Tr. 150, 159-60, 166-67, 175-76).

### **Analysis**

Without question, Diaz was interfering with the arrest of Person A. The scene was taut with tension. As the whole video shows, there apparently was an altercation between two sides in the neighborhood that erupted into a full-blown brawl after Person A and Diaz were arrested. The angry crowds at the outset of the video were the context in which Diaz approached the police vehicle. Diaz is seen walking stridently toward the police vehicle and did not follow instructions, audible on the video, to cease. His hospital records show that, contrary to his claims at trial, he was mildly intoxicated (Ex. 3, pp. 2, 4). Diaz, Demaio and Respondent all agreed that Diaz was saying something as he approached, although they disagreed about how civilly he did so. This all was occurring as Person A was resisting Demaio's attempts to secure him in the vehicle.



So police action was justified and necessary to stop Diaz. The question is whether the force Respondent used was excessive. The Court finds that Respondent's use of force against Diaz was unnecessary and thus without justification.

Pursuant to Patrol Guide § 203-11, effective at the time of this incident, officers were permitted to use "[o]nly that amount of force necessary to overcome resistance" to effect an arrest (p. 1, para. 2). The video contradicts Respondent's claim that he merely pushed Diaz, who accidentally tripped on the curb and fell. Rather, Respondent grabbed Diaz and flung him to the ground. Respondent stated that he already had determined that Diaz was to be placed under arrest. But if that was to be the case, there was no reason to violently fling Diaz to the ground, instead of taking him to the ground in a controlled manner. In fact, Respondent testified that he was trained to do so. His testimony on this point was therefore internally inconsistent and not credible.

This matter is similar to *Case No. 2015-13090* (Oct. 25, 2016). There, a suspect fled on foot after officers observed him holding what appeared to be a marijuana cigarette. The suspect also was throwing punches at one officer as the officer approached. That officer was able to grab the suspect's backpack. The suspect stopped and turned around, holding his hands limply at his sides. Two to three seconds later, the Respondent came from the pursuing police van, where he had observed what was going on, and punched the suspect in the head. The tribunal held that there was sufficient time for the Respondent to realize that amount of force was unnecessary to place the suspect in custody or to prevent him from fleeing once more. See 2015 13090, pp. 7-8.

Similarly, in the case at bar, it was unnecessary for Respondent to throw Diaz to the ground in order to stop him from approaching Person A and Demaio, or to take him into custody. Therefore, Respondent is found Guilty.

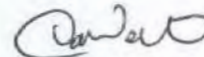


**PENALTY RECOMMENDATION**

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on January 9, 2012. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The CCRB recommended a penalty of the forfeiture of 15 vacation days but cited no authority. In the Court's view, the recommendation is excessive. Respondent was in the midst of taking police action but used excessive force to do so. Other cases where 15 days have been forfeited involved gratuitous uses of force untethered to any legitimate police action. See, e.g., Case No. 2014-12476 (Feb. 18, 2016) (15 vacation days for striking arrestee in the head after he perceived that arrestee had spit at him). The Court therefore recommends that Respondent forfeit 10 vacation days, see 2015-13090, Police Comm'r's Mem., *supra*.

Respectfully submitted,



David S. Weisel  
Assistant Deputy Commissioner







POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials  
To: Police Commissioner  
Subject: CONFIDENTIAL MEMORANDUM  
POLICE OFFICER NOEL DAMICO  
TAX REGISTRY NO. 951650  
DISCIPLINARY CASE NO. 2015-14570

Respondent was appointed to the Department on January 9, 2012. On his last three performance evaluations, he twice received 4.0 overall ratings of "Highly Competent" and once received a 4.5 "Extremely Competent/Highly Competent" rating. He has six medals for Excellent Police Duty and one medal for Meritorious Police Duty. [REDACTED]

Respondent has no prior disciplinary history.

For your consideration.

David S. Weisel  
Assistant Deputy Commissioner – Trials