Decision - Police Department v. Smith

Police Department v. Smith and Revels

OATH Index Nos. 01/0345 & 0346 (May 23, 2001).

Summary:

1. This case involved excessive force charges brought against two police officers, stemming from an incident in 1993. Charges were not proffered against the two officers until March of 2000, at which time the petitioner alleged that they had committed a misdemeanor assault (assault in the third degree, as prohibited by section 120.00(1) of the Penal Law). Respondent asserted that because the criminal statute of limitations had run and the charges could not be currently prosecuted in a court of appropriate jurisdiction, the crimes exception to the statute of limitations would not apply. However, section 75 provides only that the eighteen month statute of limitations shall not apply where the incompetence or misconduct complained of would "if proved in a court of appropriate jurisdiction constitute a crime." Thus, in *Dati v. Gallagher*, 68 Misc.2d 692, 327 N.Y.S.2d 472 (Sup. Ct. Westchester Co. 1971), the Supreme Court expressly rejected the argument that disciplinary proceedings could be barred because of the tolling of the criminal statute of limitations. This reasoning was followed by OATH in *Transit Authority v. Morgillo*, OATH Index No. 1288/90, report and recommendation at 5 (Mar. 20, 1991) and *Board of Education v. Arena*, OATH Index No. 437/82, report and recommendation at 9-10 (Dec. 2, 1982).

2. ALJ discusses the Court of Appeals decision in *Montella v. Bratton*, 93 N.Y.2d 424, 691 N.Y.S.2d 372 (N.Y. 1999), which threw into doubt whether the statute of limitations contained in section 75 of the Civil Service Law pertains to police officers. *See*

report and recommendation at 19-20 (also discussing other OATH cases commenting on *Montella*). ALJ notes that the Court of Appeals made clear that New York City police officers are "disciplined pursuant to the Administrative Code, not Civil Service Law § 75." 93 N.Y.2d at 430, 691 N.Y.S.2d at 375. The Court further emphasized that the disciplinary provisions of the Administrative Code predated the applicable Civil Service Law provisions, and that section 76(4) of the Civil Service Law explicitly provides that Civil Service Laws sections 75 and 76 do not modify laws relating to the removal and suspension of officers or employees. Therefore, given the broad reasoning of the Court of Appeals in *Montella* that it is the Administrative Code, not section 75 of the Civil Service Law, which governs the discipline of police officers, ALJ finds that it is doubtful that the statute of limitations in section 75 of the Civil Service Law is applicable to police officers.

3. Nevertheless, ALJ finds that even if section 75 were to apply to disciplinary proceedings against police officers, the crimes exception to the statute of limitations contained therein would not bar this proceeding against respondents, because on this record, there is a preponderance of credible evidence establishing that respondents intentionally caused physical injury to the complainant, therefore committing misconduct, which would, if proven in a criminal court, constitute assault in the third degree, a misdemeanor under section 120.00(1) of the Penal Law, as alleged by petitioner in its specifications. ALJ notes that when an agency relies upon the crimes exception, it must establish all of the elements of the crime as defined in the Penal Law . Report and recommendation at 20, citing *Transit Authority v. Morgillo*, OATH Index No. 1288/90 (Mar. 20, 1991), *modified on penalty*, Authority Decision (Apr. 26, 1991), *aff'd*, 202 A.D.2d 431, 608 N.Y.S.2d 706 (2d Dep't 1994). ALJ then discusses the elements of assault in the third degree, Penal Law § 120.00 (1).

4. In this case, the complainant has a civil case pending against the respondents. Petitioner represented that the complainant's civil attorney had originally agreed to have the complainant testify in the administrative proceeding, but had advised the Advocate's Office just days before the administrative proceeding that the complainant would not testify herein because of the upcoming civil trial. Petitioner then moved to introduce the sworn deposition testimony of the complainant in the civil action. Respondents objected, stating that the complainant's willful absence should bar the admission of the transcript. However, when told that the ALJ was prepared to adjourn the matter so that the complainant could be subpoenaed, and the subpoena enforced, if necessary in Supreme Court, counsel for respondents as well as for petitioner indicated that they wanted to proceed.

Respondents withdrew their objection to the transcript coming into evidence. The transcript was taken into evidence. ALJ noted that while the decision of the complainant's civil attorney not to produce the complainant to testify at the administrative hearing deprived the respondents of their ability to cross-examine and confront adverse witnesses, *see, e.g., Hecht v. Monaghan,* 307 N.Y. 461, 121 N.E. 2d 421 (1954), respondents refused the opportunity to subpoena the complainant and withdrew any objection to the entry of the deposition testimony into evidence. ALJ also held that the deposition testimony has to be considered as hearsay, rather than an exception to the hearsay rule, because the complainant was never subpoenaed to testify in the administrative proceeding. *See* report and recommendation at 5, citing CPLR § 4517.

5. ALJ notes that this tribunal has many times held that a negative inference may be drawn against a party who chooses not to testify at trial. *See* report and recommendation at 22 (citing cases). In this case, however, the missing witness inference is not appropriate because: (1) it is the Police Department, not the complainant, who is a party to the proceeding, and (2) given that the complainant's civil attorney refused to permit the complainant to testify in the administrative proceeding, it can not be concluded that the complainant was within the Department's control. Thus, as Administrative Law Judge Fraser found in *Police Department v. Davila,* OATH Index No. 383/92 (Mar. 23, 1992), the missing witness inference, as articulated by the Court of Appeals in *Noce v. Kaufman,* 2 N.Y.2d 347, 161 N.Y.S.2d 1 (1957), would not be appropriate here. Additionally, it would be impermissible to infer from the civil attorney's strategic decision to shield the complainant from cross-examination prior to the trial of the civil suit that the complainant has withdrawn, recanted, or modified his complaint, such that an inference should be drawn against the petitioner and in favor of the respondents. *See* report and recommendation at 23.

6. ALJ discusses the standards to be used in evaluating hearsay (*see* report and recommendation at 23 - 24) and finds that the sworn deposition testimony in this case is largely corroborated by the medical records, including the ambulance call report, demonstrating that the complainant sustained serious physical injury, including a broken rib, a brief coma, a concussion, and multiple contusions; the admission of one respondent that he and his partner were the officers who had had interaction with complainant; and the statements of five hearsay witnesses that the complainant was in severe pain immediately after the police left the area, requiring that an ambulance be called. *See* discussion at 24 - 25.

7. ALJ also discusses testimony of the one respondent who testified, and finds that while some of the testimony was partially corroborated, respondent's denial that he ever struck the complainant was not persuasive. Most significantly, he utterly failed to explain how Mr. Lopez sustained the massive level of injury documented by the medical records. ALJ notes that this tribunal has held that the failure to explain such injuries leads to a negative inference against the respondent. *See Police Department v. Gallo*, OATH Index No. 1323/00 (Aug. 2, 2000); *Police Department v. Horgan*, OATH Index Nos. 443 & 446/97 (Feb. 4, 1997).

8. The specifications against respondents had alleged that they committed an intentional assault against the complainant. While this requires the specific intent to cause physical injury, ALJ notes that intent to commit an assault may be proved by circumstantial evidence, including the nature and circumstances of the violent act, whether a weapon was used, and what part of the body was assaulted. *See* report and recommendation at 28 - 29, citing W. Donnino, Practice Commentary, N.Y. Penal Law Art. 120 (McKinney CD-Rom 2000). ALJ finds that the evidence herein leaves no doubt that the assault was intentional, and that a "physical injury" within the meaning of the Penal Law was committed.

9. Given the nature of the force, ALJ finds that termination of respondents' employment is the only appropriate penalty.

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner pursuant to section 14-115 of the Administrative Code. Respondents, Police Officers Sheldon **Smith** and Terrence **Revels**, are each charged with intentionally causing physical injury to a person known to the Department, while on duty, at or about 4 p.m. on October 15, 1993, inside 945 Columbus Avenue, Manhattan, thereby committing the crime of assault in the third degree, as prohibited by section 120.00(1) of the New York State Penal Law. Additionally, each officer is charged with failing to notify his commanding officer or the internal affairs bureau action desk after having become aware of an allegation of corruption or serious misconduct involving a member of the service.

ANALYSIS

This is a disturbing case, for a number of reasons. The complainant, Hector Lopez, alleges that he was assaulted by two

police officers with nightsticks, fists, and kicks, and left lying unconscious in the hallway of an apartment building, leading to his hospitalization for five days with a broken rib, pain all over his body, and the inability to walk. The matter was referred immediately -- at 6 p.m. on October 15, 1993, less than two hours after the alleged assault -- to the Patrol Borough Manhattan North Inspections Unit for investigation. Less than half an hour later, two lieutenants and a Spanish- speaking detective went to the 24 th precinct station house and began to conduct interviews of purported witnesses. At 9 p.m. that evening, the investigators went to the hospital in an attempt to talk to Mr. Lopez, who indicated that the police hit him and that he did not want to make any other statement before speaking with an attorney (Resp. Ex. A - memorandum of Lieutenant Hendrickson to the Commanding Officer of the Internal Affairs Bureau, dated October 15, 1993). In this memorandum, the investigatory staff identified the police officers - - the respondents herein as well as two backup officers who responded -- who were said to have been in the apartment building at the time of the incident (Resp. Ex. A, at 2).

Notwithstanding the immediate nature of the investigation, it took the Department until March 2000, some six years and ten months, to serve charges on the two respondents. As the Department Advocate candidly admitted at trial, the reason for the delay was that the file, along with files of some 100 other substantiated CCRB cases, was in a box that was lost at CCRB. The box was only recently discovered and sent to the Advocate's Office, which dismissed most of the cases based upon the statute of limitations in section 75(4) of the Civil Service Law, but proceeded on cases, such as these, in which it felt that the crimes exception to the statute of limitations would apply. Unfortunately, the original tape-recorded interview of Mr. Lopez was also lost (Tr. 15).

When this case was finally brought to trial, seven years after the purported assault, petitioner did not produce a live witness to testify against the respondents. The Department Advocate represented that Mr. Lopez had agreed to testify at the administrative proceeding. The Advocate had met with Mr. Lopez and with the attorney whom Mr. Lopez had retained to represent him in the pending civil action arising out of the same incident. As a result, the Advocate had not subpoenaed Mr. Lopez to trial, relying upon his representations and those of his attorney that he would testify. However, three days before the trial, Mr. Lopez's attorney informed the Advocate that a senior partner in his office had decided that "it wouldn't benefit" Mr. Lopez to testify at the administrative proceeding because of the upcoming civil trial (Tr. 5). The Advocate asked for and received

confirmation of this position the day before the administrative trial. Not having the complainant present at trial, the Advocate stated that he would attempt to introduce into evidence a sworn deposition taken of Mr. Lopez by the Assistant Corporation Counsel representing the defendants in the civil case (namely, the City of New York, the Police Department, and Officers **Revels** and **Smith**) (*see* Pet. Ex. 1). [1] Respondents, by their attorney, initially objected, stating that the complainant's willful absence from this tribunal should bar the admission of the transcript (Tr. 11). Petitioner also did not produce in person any of the witnesses that the Inspections Unit had interviewed on the night of October 15, 1993, instead seeking to introduce a tape of the three witnesses. Petitioner did not present the tape to the respondents until the morning of trial (Tr. 17).

In response to respondents' initial objections to the introduction of the deposition transcript, I told counsel that I was prepared to adjourn the matter, should respondents want, so that petitioner could attempt to subpoena Mr. Lopez, and if necessary, go to Supreme Court to enforce the subpoena (Tr. 28). After discussing the matter with his clients, counsel for respondents stated that they were "extraordinarily anxious to have this day in court to go forward" and that they were therefore not seeking any adjournment (Tr. 28). Counsel further stated that his clients did not want to take any time to review the tape, indicating that they had done so already (Tr. 29). The Advocate also stated that the petitioner wished to proceed (Tr. 28). With the parties having taken these positions, the trial went forward.

Thereafter, when the deposition was offered into evidence, and respondents objected, I stated that I was not prepared to accept the deposition into evidence until I was satisfied that the complainant was unavailable in the legal sense of the word; that is, that he had refused to appear despite being subpoenaed. Since Mr. Lopez was never subpoenaed to testify at the administrative hearing, it could not be concluded that he was "unavailable" as defined by CPLR section 4517, such that his former testimony would be considered as an exception to the hearsay rule rather than as hearsay. *See Prince , Richardson on Evidence* , §§ 8-502, 8-503 (11 th Ed. 1995). Therefore, I indicated that I would give the Advocate the opportunity to reconsider not having issued a subpoena and would grant him a continuance to issue and enforce the subpoena. At that point, counsel for respondents argued that he would withdraw the objection and "not bring up as part of our Article 78" the issue of the transcript coming in to evidence (Tr. 39). The Advocate then represented that he did not even have the home address and telephone number of the complainant, that he had an "inability to locate" the complainant other than through the complainant's attorney, and that this

attorney had represented that he did not want the complainant to cooperate (Tr. 39). The objection to the deposition going into evidence having been withdrawn, and the Advocate having insisted that the Department did not have the wherewithal to locate and subpoena the complainant, I accepted the transcript of the deposition into evidence (Tr. 40).

Thus, at the hearing, held seven years after the date of the incident, the evidence of the Department consisted of: three taped interviews, taken the very night of the incident in October 1993; a transcript of the deposition of the complainant, taken in a civil suit, in 1996, three years after the incident; certified medical records from St. Luke's Roosevelt Hospital Center, to which the complainant was taken on October 15, 1993, and from which he was discharged on October 19, 1993; and the October 15, 1993 memorandum of Lieutenant Hendrickson, summarizing interviews with two other purported witnesses, Danny Rivera and Manuel Ramirez. Also introduced, by the respondent, was a report by CCRB summarizing a tape-recorded interview with Mr. Lopez (Resp. Ex. C) as well as the actual CCRB complaint filed by Mr. Lopez (Resp. Ex. D). Additionally, one of the respondents, Terrence **Revels**, testified.

The record was later reopened, *sua sponte*, because it was unclear from a review of the trial transcript whether a tape-recording of the interviews of Mr. Ramirez and Mr. Rivera was ever made (*see* Tr. 49 - Granville: he recalled interviewing Mr. Rivera but was unsure whether he had a microcassette player with him at the time; Tr. 21- representation by Department Advocate that microcassette existed in Lieutenant Granville's office). I therefore asked the Advocate to ascertain whether or not the tape-recording was in fact made and whether it was available. Neither party objected and the Police Department produced the microcassette (marked into evidence as Pet. Ex. 5a, with accompanying affidavit and tape log). However, while the Department asserted that the microcassette tape was "inaudible" (*see* letter dated May 3, 2001), it was in fact found to be audible and intelligible when the microcassette was recorded onto a standard tape cassette, and played at a slow speed (2.5 cm). Accordingly, the Department was asked to prepare a duplicate copy and transmit it to this tribunal. Unfortunately, the duplicate copy produced by the Department, which was enhanced but which had been speeded up so it could be played at a standard speed, was not intelligible. Therefore, so as to ensure a complete record, the duplicate copy produced by the Department was marked into evidence as Pet. Ex. 5b, while the duplicate copy prepared by this tribunal, copies of which were made available to petitioner and respondents, was marked into evidence as Pet. Ex. 5c. The tape-recorded interview constituted better evidence than the brief summary of the

interview which was prepared by Lieutenant Hendrickson, who was not produced at trial because he was on vacation pending terminal leave (Tr. 54).

The certified deposition transcript (Pet. Ex. 1) of Mr. Lopez indicates the following. He was born in the Dominican Republic in September 1962, and arrived in this country in 1990. He currently works as an office cleaner five nights a week and, prior to the incident on October 15, 1993, was self-employed as a mechanic, making repairs on cars in the street. On October 15, 1993, he was five feet six inches tall and weighed approximately 150 pounds. On that date, he arrived at the apartment building at 945 Columbus Avenue at about 2:00 or 2:30 p.m. to visit a family friend, Lulde Acevedo, who lived in apartment number 2, either 2A or 2C. He was in the apartment for about two hours, speaking to Ms. Acevedo and to another woman, Vanessa. He did not consume any alcohol, drugs, or any medication in the apartment, or at any time during the 24 hours prior to the incident.

At about 4:30 p.m., according to Mr. Lopez, he left Ms. Acevedo's apartment, walked through the hall, and started down the steps. At that point, " the two policeman came and they start hitting me without asking who I was. They didn't show any identification. I knew they were police because they were in a blue uniform" (Pet. Ex. 1, at 22). Mr. Lopez testified that he saw just two police officers hitting him, although "other people that were outside said that two more policemen came" (Pet. Ex. 1, at 22). He identified the two officers as "Rambo," or "something like that, **Revel**," and "the other one is **Smith**" (Pet. Ex. 1, at 24). Asked whether one or both officers hit him, he replied that it was both, and that they used a flashlight, a radio, a boot, and a club. Asked whether one or both officers used the flashlight, he indicated on two occasions that he saw both officers hitting him with the flashlight (Pet. Ex. 1, at 25, 27). He replied also that he did not know how many times he was hit with a flashlight, but that it was more than two times, but possibly less than five. His head, back, and left leg came into contact with the flashlight, and possibly other body parts as well. Mr. Lopez was also asked whether one or both officers used a club, and stated that it was both: "They hit me with everything they had" (Tr. 29). The officers hit him on the head with a club and also on his back and legs.

Mr. Lopez testified that he was lying face up on the floor when he was being hit, and that he came to be on the floor "from all the blows," because the officers "were hitting me so hard." He could not specify how many times he was hit by the officers with their hands or fists.

Asked which officer touched him first, Mr. Lopez replied,

"Rambo - - -I don't know." Asked if he touched the officer before the officer touched him, Mr. Lopez replied "never." He also denied that he had a weapon at the time, stating that he never used an "armed weapon" (Tr. 31). Asked what part of his body the officer touched, Mr. Lopez indicated that he was kicked in his left rib area with a booted foot and also hit on his head and his testicle. He indicated that he had "like a bone out" in his testicle (Pet. Ex. 1, at 26). Asked specifically about the boot, Mr. Lopez first testified, "There were boots. They kicked me. That's when my ribs were fractured" (Pet. Ex. 1, at. 27), but when asked, "Did both officers kick you with their boots or only one," he replied, "Just one" (Pet. Ex. 1, at 28). Asked who the officer was, he replied, "Rambo, something like that" (Pet. Ex. 1, at 28).

Asked whether his friend Ms. Acevedo saw the beating, Mr. Lopez responded, "I suppose she saw it, but she could not identify them. . .but everybody that was outside saw it." He added, "She saw they were hitting somebody, but she didn't know it was me" (Pet. Ex. 1, at 30). Asked what happened after the beating, Mr. Lopez stated that the police officers "left me there laying like a dog," on the second floor, until the ambulance came to get him (Pet. Ex. 1, at 31). Asked specifically what floor he was on at that time, he indicated that he was on the second floor when he was picked up. Asked how long he remained on the second floor before moving to another location, he stated, "There were a lot of people outside there. So immediately when I left there they came in and called in and called the ambulance" (Pet. Ex. 1, at 32). Asked where he was moved to, he said he was moved to Saint Luke's Hospital, by ambulance (Pet. Ex. 1, at 33). He acknowledged being unconscious when the ambulance picked him up but stated that he regained consciousness while en route to the hospital, when the paramedics were talking to him (Pet. Ex. 1, at 36).

Mr. Lopez testified that he knew the two officers worked in the area around the building, but he was not sure whether he had seen either of them prior to the date of the incident. He also stated that, apart from this incident, he had never had any problem with the police, either in the United States or the Dominican Republic.

Mr. Lopez spent approximately five days in the hospital, receiving x-rays and other tests, and therapy. His ribs were broken and he was in a lot of pain, all over his body, including his testicles, and he could not hold his urine. He was released wearing a collar and in a wheelchair, and with two crutches to use at home. He used the crutches for three or four months, because he was unable to hold himself well, and then used a cane to help him walk, for another four or five months. He used the

collar for a total of two or three months. He was unable to walk more than three to five blocks, and always had pain. Even at the time of the deposition, he professed that he was unable to sit straight and "have to . . .lay [sic] down a little bit" to rest (Pet. Ex. 1, at 41). [2] He still suffers from constant pain in his ribs and back and constant headaches, lasting about two hours. He can not hold urine, has constant headaches, can not bend a lot and can not play any sports. When he sits for a long time or when he walks fast, his left leg sometimes becomes numb. He can no longer lift heavy things and thus can not work as a mechanic, and loses his temper frequently. He went back to work as a cleaner shortly before the deposition. Prior to filing the civil lawsuit, he had never filed a claim against New York City.

Mr. Lopez's CCRB complaint (Resp. Ex. D), in which he was assisted by a Geoffrey S. Stewart, asserts that he was "exiting 945 Columbus Avenue when P.O.s **Smith** and **Revels** (Reynolds?) physically beat him in the lobby and second floor landings of 945 Columbus Avenues" [sic]." The complaint further asserts that two other officers then responded and took no action to halt the beating and that Mr. Lopez suffered broken ribs and other injuries. Further, the complaint identifies the four police officers at the scene: **Smith**, **Revels**, and two other officers whose names were not known but whose shield numbers were provided. The report stated that a civilian witness had provided the car numbers and shield numbers.

The CCRB interview report, which is a summary of a subsequently lost tape-recorded interview with Mr. Lopez (Resp. Ex. C), indicates that Mr. Lopez said that as he was coming out of 945 Columbus Avenue, where he "encountered" Officers **Revel** and **Smith.** He said that he was then grabbed by the shirt and pulled up to the second floor, in front of Ms. Acevedo's apartment, where he was struck by both officers, with their nightsticks and hands, in the ribs and head. Also, while lying face up on the ground, he was kicked by both officers. Even though both officers struck him, Mr. Lopez was unable to specifically identify how and where each officer struck him because he was covering his face with his hands. He described the encounter as taking approximately 20 to 30 minutes, during which time he was yelling out in pain.

The medical records (Pet. Ex. 2, collectively) document that Mr. Lopez sustained serious injuries. Indeed, as indicated on the ambulance call report, when the paramedics first arrived, Mr. Lopez's eyes were closed and he responded only to his name. The paramedics noted that he had been hit about the head and had tenderness to the back of his head and to both sides of his upper ribs and both knees. Mr. Lopez was taken by the ambulance to the St. Luke's-Roosevelt emergency room. The

emergency department records indicate that he complained that he was hit with nightsticks and fists all over his body, including his head and his legs, and that he sustained neck pain, pain to the left testicle, and bilateral rib pain. The preliminary diagnosis was blunt trauma. He was then admitted to the hospital, where he stayed until his discharge on October 19, 1993.

A computerized summary from the medical records department indicates that the diagnosis upon admission was multiple contusions and that the principal diagnosis was the fracture of one rib (which, from the history and physical examination notes, appears to have been the left rib). Other diagnoses included: concussion/brief coma; contusion of chest wall; contusion of abdominal wall; and assault-striking with object. The principal procedure indicated was a C.A.T. scan of the head, which was normal. A C.A.T. scan of the abdomen was also performed, which revealed no evidence of intra-abdominal injury. Additionally, a radiology screen of the testicles was performed, which revealed a cyst near the left testicle.

The hospital records, including the history and physical examination notes, further indicate that Mr. Lopez complained of headaches, left rib pain, and pain to his testicles. Mr. Lopez was initially provided with aerosol therapy through a mask, as well as oxygen therapy, and had a Foley catheter inserted as well. Moreover, he was largely unable to move when he first arrived at the hospital, and was initially considered bedfast, but at the time of discharge, he was able to move his upper and lower extremities, albeit slowly. Pain management and pain relief were provided throughout Mr. Lopez's hospital stay, through a variety of medications, including Tylenol # 3 and Demerol. Even at the time of discharge, pain medications were prescribed, and Mr. Lopez was told to notify a doctor if he suffered chest pain or shortness of breath.

The history and physical examination notes, as well as the admission nursing assessment/nurse's notes, demonstrate that Mr. Lopez told medical personnel that he was beaten by police officers. The nursing assessment/nurses notes indicate that Mr. Lopez stated that he was beaten by four policemen, while the history and physical examination notes indicate that Mr. Lopez reported that he was assaulted by police with nightsticks and fists about the head, torso, and extremities.

As noted above, petitioner produced three taped interview statements (admitted as Pet. Ex. 3), taken the night of the incident by Lieutenant James Hendrickson and Lieutenant Stromme J.C.Granville. The statements were of witnesses Carmen Aquino, Cecilia Suazo, and Lourdes Acevedo, all of

whom indicated that they were present outside the building at 945 Columbus Avenue and saw two police officers enter the building and exit about fifteen minutes later, after which time Mr. Lopez was found lying unconscious in the second floor hallway. Neither of these witnesses observed what the officers were doing inside the building. Ms. Aquino, who the investigators described as 36 years old in 1993 (Resp. Ex. A) related that she was in the beauty parlor directly across the street from 945 Columbus Avenue on October 15, 1993, at about 4:15/4:30 p.m., when she saw patrol cars pull up, two police officers exit, and immediately enter the building, closing the door behind them. About three or four minutes later, another patrol car pulled up, and two or three officers, including a female officer, entered the building. About fifteen minutes later, all the police officers left the building. Everyone from the beauty parlor went into the building. They came back and told her that a man she knew as "Perro" was lying on the floor, all "beaten up." She entered the building, and saw Perro lying on the floor, with his ribs hurt, unable to talk. Of the four officers, she indicated that she would only be able to identify the female officer.

Ms. Suazo, who was born in 1948, was interviewed with a Spanish-speaking detective, Detective Rivera, acting as an interpreter. Like Ms. Aquino, she stated that she was in front of 945 Columbus Avenue on the day in question, on her way to eat at a restaurant. She saw a police car pull up, police officers get out, and push a "kid" with the nickname "Perro" (she did not know his real name) into the building. About 12 to 15 minutes later, the police officers left the building, and the crowd of people who had gathered around, entered the building, and saw Perro lying on the floor, in the second floor hallway, unconscious. She left quickly because she thought that he was dead. She knows, however, that other people threw water on him and tried to stand him up but could not. He was crying and said he was in pain. An ambulance was then called. Ms. Suazo also recalled another patrol car arriving, before the first two police officers left the building. The police officers in the second car included a female officer. Ms. Suazo apologized to the two lieutenants who interviewed her if she had offended them "in any way," but said that "to beat up on someone that way is not right."

Ms. Acevedo, who was born in 1954, and who lives at 945 Columbus Avenue, apartment 1C, gave a similar account, also with Detective Rivera acting as an interpreter. She indicated that she saw two police officers pull up in a patrol car, enter the building at 945 Columbus Avenue, "push" the kid into the building, and come out about 15 minutes later, looking like they were tired. She and other people who had gathered around then entered the building where they found the "kid" lying in the

second floor hallway, in front of apartment 2C, unconscious. His shirt was all ripped up, as were his pants, and it looked like he had a broken left rib. It was apparent that he had been hit a lot. The group of people put a lot of water on him, and called an ambulance. When he was again conscious, he was crying and in "bad pain," and said that the police had hurt him. Ms. Acevedo, like Ms. Aquino and Ms. Suazo, said that two other police officers had also arrived and entered the building. She described the first two officers who arrived as one tall, Hispanic male, and one Black male. She believed that the Hispanic officer was named **Smith.** Unlike Ms. Aquino and Ms. Suazo, Ms. Acevedo stated that the last two police officers to arrive left the scene first, followed by the Hispanic and the Black officer. Both Ms. Acevedo and Ms. Suazo believed that the superintendent of 945 Columbus Avenue had seen the beating. Ms. Acevedo said that the superintendent was in the building at the time that the police entered. Ms. Suazo and Ms. Acevedo also agreed that the first two officers on the scene returned after the ambulance came, driving back and forth, looking at everybody and laughing. Ms. Aquino described "Perro" as living in the building, while Ms. Acevedo said that the "kid" used to live in the building, but now comes around and visits, and described him as "a calm and decent guy."

Additionally, petitioner produced a memorandum (Resp. Ex. A), written by Lieutenant Hendrickson on October 15, 1993, in which the lieutenant also described an interview of the superintendent, Danny Rivera, and of the building owner, Mamerto Ramirez. Lieutenant Hendrickson's synopsis of the interview indicates that the investigators interviewed Mr. Rivera and Mr. Ramirez at 945 Columbus Avenue, at 8:10 p.m. and that:

They state that they observed Mr. Lopez who regularly visits friends in the building run into the premise followed shortly thereafter by the police (**Revels** and **Smith**). All parties then proceeded to run upstairs to the upper floors causing a commotion. After a short time 2 additional officers (Schnelle and Bachiller) entered the building and proceeded to the upper floors. Mr. Ramirez states that he then saw the officers escorting Mr. Lopez to the street. After the police left the scene he then observed Mr. Lopez being carried back into the building and placed in the second floor hallway until the ambulance arrived and removed him to St. Luke's Hospital. The witnesses further state that they did not observe the police strike Mr. Lopez at any time

(Resp. Ex. A). A review of the interview that was secretively recorded on the microcassette worn by one of the investigators, which tape was taken into evidence post-trial as Pet. Ex. 5a,

confirms that the Lieutenant's summary was essentially correct, but not complete. For example, Mr. Ramirez told the investigators that he opened the door for the police, and that two more police officers later arrived, and went into the building, prior to picking up what looked like a vial of crack. He also stated "it all happened upstairs," but he did not see anything, and he does not know if "upstairs" meant the fifth floor or the roof. He mentioned the incident to a "Japanese guy" who lived in the building who alluded to the police taking someone to the roof. Most importantly, he said that "Perro" was taken out of the building by the police officers. He described the police officers as "carrying" Perro. The investigators asked him several times whether he saw if Perro was walking, and he replied that Perro was not walking, that the police officers had Perro under their arms, and put him outside. According to Mr. Ramirez, after the police took him outside, "a couple of guys, friends of his, bring him up here. And he lay down right here, on the second floor." Mr. Ramirez did not know who the friends were. He was specifically asked whether he had seen Perro walk upstairs with his friends, and replied that the friends had carried Perro, grabbing him under his arms, and that Perro had then lay down, in the second floor hallway, moaning, and asking for cold water. An ambulance was then called.

Mr. Rivera, whose command of English did not appear to be as good as Mr. Ramirez, in that the investigators' questions were sometimes translated into Spanish for him, stated that he had been in the building next door, 947 Columbus Avenue, immediately prior to the police arriving. There was an individual waiting by the steps to the door to the basement at 945 Columbus Avenue, who appeared to be involved in a drug transaction. Perro came into the building to talk to this man. Then the police arrived and Perro ran to 945, followed by the police. Mr. Rivera opened the door to the building to see what happened, and heard the police running up the stairs. He did not follow the police, although he heard noises like "boom, boom, boom." Mr. Rivera also alluded to a "Japanese guy" who lived in 945 Columbus Avenue who said that the police were upstairs in the building, chasing somebody. Mr. Rivera was asked if he saw the police walking Perro downstairs, and he replied that Perro had "come down." He also said that Perro was walking down, although when asked whether the police officers were "holding him up" or "just holding his arms," he replied, "I don't know exactly." Mr. Rivera stated further that "a couple of police" put him in the street, and that "a couple of people brought him in," where he lay down on top of the stairs, asked for cold water, and cried.

As respondents' counsel indicated that he would not be calling respondents to testify, petitioner called Officer **Revels.** He indicated that on October 15, 1993, he was working the 4 to 12

shift with Officer **Smith**, when they responded to 945 Columbus to a radio run call of a man with a gun (Tr. 59). Officer **Revels** did not recall being directed to any particular apartment in the building, but the stop and frisk report that he prepared (Pet. Ex. 4) indicates that he was responding to a radio run of a man shot at Apartment 4N. At the location, they parked the patrol car in front of the building, and entered the building through the front door, at which time a man they later learned was Mr. Lopez opened the inside foyer door.

Upon seeing the police, Mr. Lopez turned and ran into the building. Officers **Smith** and **Revels** followed him into the building, briefly grabbing hold of his jacket on the 4 th floor, but he pulled away and continued up the stairs until he burst through the door to the roof. Officer **Revels** was the first officer on the roof, four or five steps behind Mr. Lopez, and he found Mr. Lopez hiding, lying on his stomach on the roof between a lower wall and what appeared to be a heating vent. Officer **Revels** held Mr. Lopez in place until his partner arrived, "within seconds," and at that time he frisked Mr. Lopez's coat for a possible weapon (Tr. 65). Officer **Revels** testified that he did not conduct the frisk inside any of Mr. Lopez's clothing, but the stop and frisk form (Pet. Ex. 4) indicates that a search was made inside Mr. Lopez's clothes. [3] When shown that form, Officer **Revels** testified that the search inside the clothes would have been made to look for a weapon. Next the officers tried to talk to Mr. Lopez, to learn why he had run away, but he did not speak English.

Officer **Revels** testified that he then escorted Mr. Lopez down the stairs and out the building, after which he and his partner got in their RMP and left the area (Tr. 65, 73). He has no recollection of ever going up to apartment 4N (Tr. 73), although the stop and frisk form indicates otherwise, reading: "...while going into the building, M/H saw us ran back into the bldg and to bldg roof, person was stopped on roof by I/O and search for poss. weapon and then taken to apt 4N" (Pet. Ex. 4).

Officer **Revels** testified that he did not use any force other than the frisk, but on the stop and frisk form, he indicated that he "placed person against wall/stopped person from going over roof" (Pet. Ex. 4). He testified that the "wall" in question was the lower wall against which Mr. Lopez was hiding but that he did not recall Mr. Lopez trying to go over the wall (Tr. 67). He acknowledged that he and Officer **Smith** were the only two officers on the roof. According to Officer **Revels**, Mr. Lopez was not screaming at the time nor complaining of any pain. Officer **Revels** further acknowledged running into the back-up officers, Bachiller and Schnelle, at some point, but did not recall whether it was in the building or in front of the building

(Tr. 67). He further testified that Officer Bachiller speaks Spanish and that he translated for Mr. Lopez, in a conversation relating to information for the stop and frisk, which Mr. Lopez refused to give (Tr. 68). He did not recall Mr. Lopez falling to the floor at any point during the chase in the building, or banging against anything, like the walls or the handrail, and he did not hear any loud bangs or crashes on the roof (Tr. 62, 64).

Officer **Revels** denied that he or his partner ever struck Mr. Lopez and asserted that the only force that was used was to frisk him while he was on the roof (Tr. 74). He denied having his nightstick with him at the time (Tr. 75). He stated that, other than the instant charges, he has never been the subject of any substantiated CCRB charges, and that he has been on the job almost 13 years. In this time he has been promoted from patrol to the Community Policing Unit to the Community Affairs Unit, which increases his interaction with the public (Tr. 76).

As noted, the charges were served almost seven years after the purported beating, well beyond the eighteen month statute of limitations contained in the Civil Service Law. Thus, if the eighteen- month statute of limitations applies to police disciplinary cases, these charges could be sustained only if there were a preponderance of credible evidence which established that a crime (namely, the crime of assault in the third degree) had been committed by the respondents. [4] However, this tribunal has on several occasions noted that the Court of Appeals decision in *Montella v. Bratton,* 93 N.Y.2d 424, 691 N.Y.S.2d 372 (1999), threw into doubt whether the statute of limitations contained in section 75 of the Civil Service Law pertains to police officers. *See Police Department v. Muirhead,* OATH Index No. 1207/00 (Dec. 29, 2000); *Police Department v. Scott,* OATH Index No. 1327/00 (Oct. 19, 2000); *Police Department v. Calix,* OATH Index Nos. 2084, 2091/99 (Dec. 8, 1999); *Police Department v. Carpentieri,* OATH Index Nos. 1703/99 & 1812/99 (Aug. 10, 1999).

In *Montella,* the Court of Appeals held that the New York City Civil Service Commission lacked jurisdiction to hear and decide appeals by uniformed police officers disciplined pursuant to section 14-115 of the New York City Administrative Code of the City, because section 76(1) of the Civil Service Law authorizes the Commission to hear appeals by persons "aggrieved by a penalty or punishment . . .imposed pursuant to the provisions of section seventy-five." 93 N.Y.2d at 428, 691 N.Y.S.2d at 374. In discussing the appeal procedures of the Civil Service Law and of the Administrative Code (which gives police officers rights to review by the courts pursuant to CPLR article 78), the Court made clear that New York City police officers are "disciplined pursuant to the Administrative Code, not Civil Service Law §

75." 93 N.Y.2d at 430, 691 N.Y.S.2d at 375. The Court emphasized that the disciplinary provisions of the Administrative Code predated the applicable Civil Service Law provisions, and that section 76(4) of the Civil Service Law explicitly provides that Civil Service Laws sections 75 and 76 do not modify laws relating to the removal and suspension of officers or employees. According to the Court, this "evidences that the Legislature did not intend to supplant the long-established disciplinary provisions of the Administrative Code." 93 N.Y.2d at 432, 691 N.Y.S.2d at 376.

In this case, when asked to brief the issue of the applicability of the statute of limitations contained in the Civil Service Law to disciplinary proceedings brought against police officers, the Police Department acknowledged (*see* affirmation in response, dated November 26, 2000) that *Montella* contains broad language which "seems to say that Section 75 of the Civil Service Law is inapplicable to the disciplining of police officers," but at the same time asserted that the decision "merely addressed" the issue of the jurisdiction of the Civil Service Commission over appeals. The Department argued, therefore, that given the silence of section 14-115 of the Administrative Code on any limitation for bringing disciplinary charges against police officers, its position was that the eighteen-month statute of limitations found in the Civil Service Law should apply to the disciplining of police officers.

Given the broad reasoning of the Court of Appeals in *Montella* that it is the Administrative Code, not section 75 of the Civil Service Law, which governs the discipline of police officers, it is doubtful that the statute of limitations in section 75 of the Civil Service Law is applicable to police officers. Nevertheless, even if section 75 were to apply, the crimes exception to the statute of limitation contained therein would not bar this proceeding against respondents. That is the case because, on this record, there is a preponderance of credible evidence establishing that respondents **Smith** and **Revels** intentionally caused physical injury to Mr. Lopez, therefore committing misconduct, which would, if proven in a criminal court, constitute assault in the third degree, a misdemeanor under section120.00(1) of the Penal Law, as alleged by petitioner in its specifications.

When an agency relies upon the crimes exception to the limitation period, it must establish all of the elements of the crime as defined in the Penal Law . *See Transit Authority v. Morgillo*, OATH Index No. 1288/90 (Mar. 20, 1991), *modified on penalty*, Authority Decision (Apr. 26, 1991), *aff'd*, 202 A.D.2d 431, 608 N.Y.S.2d 706 (2d Dep't 1994). Assault in the third degree requires that a person cause physical injury to another person, either (1) with intent to cause physical injury; (2) with recklessness; or (3) with criminal negligence, and by means of a

deadly weapon or a dangerous instrument. With regard to an intentional assault, which is what specification one against respondents alleges, the Penal Law requires a specific intent to cause physical injury. *See* W. Donino, Practice Commentary, N.Y. Penal Law § 15.05 (McKinney CD-Rom 2000)(defining "intentionally"). The term "physical injury" means "impairment of physical condition or substantial pain." Penal Law § 10.00(9). The definition was intended to exclude such things as "petty slaps, shoves, kicks and the like." Staff Notes of the Commission on Revision of the Penal Law. Proposed New York Penal Law, McKinney's Spec. Pamph., at 330 (1964). The Court of Appeals has declined to find "physical injury" in cases involving solely a blackened eye, or a one centimeter cut above the lip, *see People v. McDowell*, 28 N.Y.2d 373, 321 N.Y.S.2d 894 (1971); *People v. Jiminez*, 55 N.Y.2d 895, 449 N.Y.S.2d 22 (1982). However, it has found "physical injury" in cases such as *People v. Greene*, 70 N.Y.2d 860, 523 N.Y.S.2d 458 (1987), an appeal of two consolidated cases, the first involving kicks to the ribs and knife wounds to the eye and hand, causing considerable pain, and the second involving grabbing and choking the victim around the neck, causing him to stop breathing, temporarily lose consciousness, and thereafter suffer from pain and experience difficulty swallowing for two days. *See also People v. Farnworth*, 138 A.D.2d 400, 525 N.Y.S.2d 684 (2d Dep't), *appeal denied*, 71 N.Y.2d 1026, 530 N.Y.S.2d 561 (1988) (evidence supported third degree assault conviction of police officer who struck handcuffed victim several times without justification, bruised victim's face, and fractured victim's nose). In this particular case, the most direct piece of evidence against the respondents is the deposition testimony of the complainant, Mr. Lopez. This tribunal has many times held that a negative inference may be drawn against a party who chooses not to testify at trial. *See, e.g., Human Resources Administration v. Aldamuy*, OATH Index Nos. 1172-74, 1177, 1180-81/91 (Jan. 17, 1992); *Department of Health v. Miss Saigon Restaurant*, OATH Index No. 2171/96 (Nov. 19, 1996). In so doing, we have followed the rule articulated by the Court of Appeals for use in civil cases, that is, "where an adversary withholds evidence in his possession or control that would be likely to support his version of the case, the strongest inferences may be drawn against him which the opposing evidence in the record permits." *Noce v. Kaufman*, 2 N.Y.2d 347, 353, 161 N.Y.S.2d 1, 5 (1957). In this case, however, it is the Police Department, not Mr. Lopez, who is a party to the proceeding. Moreover, given the Department Advocate's credible representations that Mr. Lopez's civil attorney had informed him just days before trial that he would not be permitting Mr. Lopez to testify in the administrative proceeding due to the pending civil trial, it can not be concluded that Mr. Lopez was within the Department's control. Thus, as Administrative Law Judge Fraser

found in a similar case, *see Police Department v. Davila*, OATH Index No. 383/92 (Mar. 23, 1992), the missing witness inference would not be appropriate here.

Additionally, in this instance, unlike other cases heard before this tribunal, the reason for the witness's absence is not unexplained. Thus, it would be impermissible to infer from the civil attorney's strategic decision to shield the complainant from cross-examination prior to the trial of the civil suit that the complainant has withdrawn, recanted, or modified his complaint, such that an inference should be drawn against the petitioner and in favor of the respondents. *Cf. Police Department v. Kelk*, OATH Index No. 540/00 (June 7, 2000) (complainant's agitated demeanor during his appearance at the hearing and his decision to storm out of the hearing room raised doubts about his credibility and undermined the reliability of his unsworn hearsay statement).

The question then becomes what weight to give the deposition testimony of Mr. Lopez. It should first be acknowledged that the decision of Mr. Lopez's civil attorney not to produce Mr. Lopez to testify at the administrative hearing deprived the respondents of their ability to cross-examine and confront adverse witnesses. *See, e.g.*, *Hecht v. Monaghan*, 307 N.Y. 461, 121 N.E. 2d 421 (1954). However, respondents were afforded the opportunity for a continuance, during which they could have tried to secure Mr. Lopez's attendance, and they chose to go forward. Their counsel withdrew any objection to the admissibility of the transcript, asking that this tribunal give it the weight the tribunal deems appropriate.

It is axiomatic that hearsay evidence, standing alone, may, if sufficiently reliable and probative, form the basis for a finding against a respondent in an administrative proceeding. *Lumsden v. New York City Fire Department* , 134 A.D.2d 595, 522 N.Y.S.2d 4 (2d Dep't 1987); *Yerry v. Ulster County* , 128 A.D.2d 941, 512 N.Y.S.2d 592 (3d Dep't 1987). However, hearsay must be carefully evaluated for its reliability and probative value. Factors to be considered include the declarant's personal knowledge of the facts, the independence or bias of the declarant, the detail and range of the hearsay, the degree to which it is corroborated, and the centrality of the hearsay evidence to the agency's case. *Police Department v. Ayala* , OATH Index No. 401/88, report and recommendation at 6 (Aug. 11, 1989), *aff'd. sub nom. Ayala v. Ward* , 170 A.D.2d 235, 565 N.Y.S.2d 114 (1st Dep't 1991); *Richardson v. Perales* , 402 U. S. 389, 402-06, 91 S.Ct. 1420, 1428-1430 (1971); *Calhoun v. Bailar* , 626 F. 2d 145, 149 (9th Cir. 1980), *cert. denied*, 452 U.S. 906, 101 S.Ct. 3033 (1981); *Police Department v. Digristina* , OATH Index Nos. 389-9/91, report and recommendation at 11 (May 30, 1991).

The more important the hearsay is to the proof of the case, the more critically it should be assessed. *Calhoun v. Bailar* , 626 F.2d 145, 150 (9th Cir. 1980), *cert. denied*, 452 U.S. 906, 101 S. Ct. 3033 (1981); *Transit Authority v. Maloney* , OATH Index No. 500/91, report and recommendation at 33 (Apr. 19, 1991), *aff'd sub nom. Maloney v. Suardy* , 202 A.D.2d 297, 609 N.Y.S.2d 179 (1st Dep't 1994) (where the statements of a hearsay declarant are central to the agency's case and there is some doubt as to the declarant's credibility "this tribunal has been loath to place much stock in those statements because they have not withstood the test of cross-examination").

In this instance, the sworn deposition transcript and other statements of Mr. Lopez are central to petitioner's case, since no one else witnessed the alleged assault and identified the respondents as the assailants. However, these hearsay statements are corroborated to the extent that: (1) the ambulance call report documents that, when the paramedics first arrived, Mr. Lopez had his eyes closed, responded only to his name, had been hit about the head and body, and had tenderness to the back of his head, both sides of his ribs and both knees; (2) the hospital medical records document that Mr. Lopez sustained serious physical injury, including a broken rib, a brief coma, a concussion, and multiple contusions, and was not ambulatory and in severe pain for some period thereafter; (3) the medical records further document that Mr. Lopez complained several times that he was assaulted with blunt instruments, by police officers; (4) Officer **Revels** admitted that he and Officer **Smith**, not the back-up officers, were the only officers who had physical contact with Mr. Lopez; and (5) all of the hearsay witnesses told the investigating lieutenants on the night of the incident that Mr. Lopez was in considerable pain immediately after the police left the building, requiring that an ambulance be called.

To be sure, there is an inconsistency between the hearsay statements of Ms. Suazo, Ms. Acevedo, and Ms. Aquino, on the one hand, and Mr. Ramirez and Mr. Rivera, on the other hand, in that the women assert that all police officers left the building and that Mr. Lopez was then found lying unconscious in the second floor hallway, while the men assert that Mr. Lopez was brought out of the building by the police and immediately carried back into the second floor hallway by his friends, where he asked for water and lay moaning in pain. However, Mr. Ramirez was quite clear that Mr. Lopez was carried out of the building by police, which is consistent with Mr. Lopez having been beaten prior to that time. Moreover, both Mr. Ramirez and Mr. Rivera indicate that they were present when Mr. Lopez was taken into the building and remained while he was placed in the second floor

hallway, and neither indicate that he was hit or punched by anyone who carried him into the building or who was present in the hallway. Therefore, regardless of whether the police left Mr. Lopez lying in the hallway or carried him down, it is apparent that he was beaten, just prior to the police leaving the building.

In further considering what weight to give Mr. Lopez's deposition testimony, it must be acknowledged that Mr. Lopez's sworn deposition testimony is consistent with the statement he initially gave to CCRB (Resp. Ex. D) and with the CCRB interview report (Resp. Ex. C), in that in the initial statement and interview, he describes being beaten with nightsticks and by hand, and being kicked, by Officers **Smith** and **Revels.** There are two minor differences that do not alter the essential facts of his account. First, in his deposition testimony, Mr. Lopez asserts that he was coming down the steps from the second floor when he encountered the two police officers who started hitting him, while in his CCRB statement and CCRB interview, he specifies that he was exiting the apartment building when he encountered the two officers. Additionally, the CCRB interview summary states that Mr. Lopez said he was kicked by both officers, while, in his sworn testimony, he first indicated that "they kicked me," referring to both officers, but when asked to specify, whether both officers kicked him or only one, he indicated that it was only one and that it was "Rambo," or "something like that."

As for the testimony of respondents, only one respondent, Officer **Revels** testified, after being called by petitioner. Some of Officer **Revels'** testimony was partially corroborated -- by Mr. Rivera's and Mr. Ramirez's statements that they saw two police officers taking Mr. Lopez outside of the building, and by Mr. Ramirez's allusion to a building resident who had seen the officers taking someone to the roof. Thus, I do not discredit Officer **Revels'** description of a chase throughout the building, although that is at odds with the deposition testimony of Mr. Lopez. Moreover, I do not credit Mr. Lopez's statement in his deposition testimony that he was assaulted by the police for no reason upon leaving Ms. Acevedo's apartment, since Mr. Rivera stated that Mr. Lopez was next door at 947 Columbus Avenue, not inside the building at 945 Columbus Avenue, and since Ms. Acevedo told the investigators that she saw the officers enter the building and push "the kid" into the building, which means that she was outside the building, not inside her apartment, as Mr. Lopez indicated. Thus, there is some doubt as to where Mr. Lopez was and what he was doing when he was first confronted by the police officers.

However, Officer **Revels'** denial that he ever struck Mr. Lopez was not persuasive. Most significantly, while

acknowledging that he and Officer **Smith** were the only two officers who had interaction with Mr. Lopez, he utterly failed to explain how Mr. Lopez sustained the massive level of injury documented by the medical records. We have in the past held that the failure to explain such injuries leads to a negative inference against the respondent. *See Police Department v. Gallo*, OATH Index No. 1323/00 (Aug. 2, 2000); *Police Department v. Horgan*, OATH Index Nos. 443 & 446/97 (Feb. 4, 1997).

Additionally, as noted above, there were a number of inconsistencies between Officer **Revels'** testimony and his notations on the stop and frisk report (Pet. Ex. 4) which cast doubt upon the reliability and credibility of the testimony. The two most significant inconsistencies are that Officer **Revels** testified that he did not use any force other than the frisk, but noted on the report that he "placed person against wall/stopped person from going over roof," and that Officer **Revels** testified that he had no recollection of ever going to apartment 4N, even though the stop and frisk report notes that the person who was frisked was stopped on the roof, searched for a weapon, and then taken to apartment 4N. The report also asserts that Officer **Revels'** initial response was to a radio run of a man shot in Apartment 4N.

A preponderance of the credible evidence has been defined as "the burden of persuading the trier of fact that the existence of a fact is more probable than its non-existence." Prince, Richardson on Evidence, § 3-206 (Farrell, 11 th ed. 1995). Even in a case where the crimes exception is invoked, it is the preponderance standard, not the higher standard applicable to criminal cases, that is applicable. *See Aronsky v. Board of Education*, 75 N.Y.2d 997, 557 N.Y.S.2d 267 (1990). So long as each and every element of the crime is proven by a preponderance of the credible evidence, the crimes exception applies. *See Triborough Bridge & Tunnel Authority v. McRae*, OATH Index No. 480/92 (Aug. 10, 1992); *Department of Correction v. Nee*, OATH Index No. 1226/97 (May 14, 1997) (charges dismissed as petitioner failed to prove elements of crime by a preponderance).

In this case, I am convinced that petitioner has established by a preponderance of the credible evidence that respondents **Smith** and **Revels** intentionally caused physical injury to Mr. Lopez, as alleged in specification one. I reach this conclusion considering the evidence as a whole: the description of Mr. Lopez's condition at the time that the ambulance first arrived to the building; the hospital records documenting that Mr. Lopez sustained a concussion and a brief coma, as well as a fractured rib and multiple contusions to his body, and that he was not ambulatory and in severe pain for a considerable period thereafter; the hospital records further documenting that Mr.

Lopez asserted that he was hit with nightsticks and fists by police officers; Mr. Lopez's unequivocal statement in his deposition testimony and in his initial CCRB complaint, as well as the interview with CCRB as reflected in the investigator's summary, that it was Officers **Smith** and **Revels** who assaulted him; Officer **Revels'** admission that he and Officer **Smith** had interaction with Mr. Lopez; and the tape- recorded statements of all the witnesses placing the respondents in the building with Mr. Lopez and indicating that Mr. Lopez was in severe pain and awaiting an ambulance shortly after the respondents left the building.

As noted above, the crime of assault in the third degree requires a specific intent to cause physical injury. Intent to commit an assault may be proved by circumstantial evidence, including the nature and circumstances of the violent act, whether a weapon was used, and what part of the body was assaulted. W. Donnino Practice Commentaries, N.Y. Penal Law § 120, at 123 (McKinney 1998). In this case, the use of nightsticks and fists by the officers to beat Mr. Lopez all over his body, such that his rib was broken and he was found by the paramedics to be barely conscious and was in considerable pain and not ambulatory when taken to the hospital, where he remained for five days, leaves no doubt that the assault was intentional. Similarly, the extensive and serious injuries to Mr. Lopez leave no doubt that a "physical injury" within the meaning of the Penal Law occurred.

Therefore, as to both respondents, I find that specification one, alleging that they intentionally caused physical injury to a person known to the Department is sustained.

Specification two, as to both respondents, alleges that each, "having become aware of receiving an allegation of corruption or serious misconduct involving a member of the service, did fail and neglect to notify his Commanding Officer and/or the Internal Affairs Bureau Action Desk, as required." I have found that both respondents participated in a brutal beating. I have not found, however, that they received or became aware of "an allegation" of serious misconduct or corruption. Therefore, as this charge appears inapposite to the conduct in issue, I recommend that it be dismissed.

FINDINGS AND CONCLUSIONS

1. As against Officer **Smith**, specification one, alleging that on October 15, 1993, he intentionally caused physical injury to a person known to the Department, is sustained. Specification Two, alleging that he failed to notify his Commanding Officer or

the Internal Affairs Bureau of an allegation of corruption, is not sustained, and should be dismissed.

2. As against Officer **Revels**, specification one, alleging that on October 15, 1993, he intentionally caused physical injury to a person known to the Department, is sustained. Specification Two, alleging that he failed to notify his Commanding Officer or the Internal Affairs Bureau of an allegation of corruption, is not sustained, and should be dismissed.

RECOMMENDATION

Having made the above findings, I requested and reviewed an abstract of the personnel records of Officers **Smith** and **Revels.** It reveals that both officers were appointed to the Department in January 1988. Both have no prior formal disciplinary record. Other information pertinent to respondents is discussed in a separate, confidential memorandum (*see* Civil Rights Law, section 50-a).

In this case, respondents have been found guilty of having intentionally and brutally assaulting a civilian, causing serious injury. Respondents did not offer any explanation for such behavior. Notwithstanding their lack of a prior formal disciplinary record, and the age of the incident, the nature of the beating is such that termination of their employment is the only appropriate penalty, and I so recommend. *See Police Department v. Torres,* OATH Index No. 2082/99 (Nov. 1, 1999); *Police Department v. Vargas,* OATH Index Nos. 787-88/98 (July 16, 1998) *aff'd sub nom. Vargas v. Safir,* _A.D.2d_, 717 N.Y.S. 2d 562 1 st Dept. 2000); *Police Department v. Ortiz,* Commissioner's Decision (Feb. 3, 1998), *modified on penalty,* OATH Index No. 1626/97 (Nov. 19, 1997) (ALJ had recommended termination, suspended judgment for one year (probation), but Commissioner imposed immediate termination for excessive force and false statement).

P R E S E N T: **FAYE LEWIS,** *Administrative Law Judge*

T O: **BERNARD B. KERIK** , *Commissioner,* New York City Police Department

A P P E A R A N C E S:

LT. DONALD CUSACK, *Attorney for Petitioner*

MICHAEL L. GALENO, *Attorney for Respondent* s

[1] The attorney for the respondents stated that they were not present when Mr. Lopez was deposed and that the interest of the Corporation Counsel may be antithetical to that of the officers, in

that the Corporation Counsel may try to demonstrate that the officers were acting outside the scope of their employment (Tr. 14). Nonetheless, the deposition transcript (Pet. Ex. 1) lists the Corporation Counsel as attorney for the defendants, which includes respondents. Moreover, at one point in the deposition, when asked to identify the height and weight of the African American officer who had hit him, Mr. Lopez stated, "He's there in front of you" (Pet. Ex. 1, at 23). The Assistant Corporation Counsel moved on to another question, never clarifying for the record who Mr. Lopez had identified.

[2] Indeed, after Mr. Lopez made this statement, the parties took a short break in the deposition, at his attorney's request.

[3] The form does not refer to Mr. Lopez by name, and indeed indicates that the man stopped refused to give his name and address.

[4] Respondents assert that since the crime alleged is a misdemeanor assault, bearing a two year statute of limitations, the crimes exception would not apply because the criminal statute of limitations had run and the charges could not be currently prosecuted in a court of appropriate jurisdiction. However, section 75 provides only that the eighteen month statute of limitations shall not apply where the incompetence or misconduct complained of would "if proved in a court of appropriate jurisdiction constitute a crime." Thus, in *Dati v. Gallagher*, 68 Misc.2d 692, 327 N.Y.S.2d 472 (Sup. Ct. Westchester Co. 1971), the Supreme Court expressly rejected the argument that disciplinary proceedings could be barred because of the tolling of the criminal statute of limitations. This reasoning was followed by OATH in *Transit Authority v. Morgillo*, OATH Index No. 1288/90, report and recommendation at 5 (Mar. 20, 1991) and *Board of Education v. Arena*, OATH Index No. 437/82, report and recommendation at 9-10 (Dec. 2, 1982).

prev decision | next decision | back to results | new search

back to top