The City of New York

POLICE DEPARTMENT

July 15, 2011

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Gabriel Baaith
Tax Registry No. 942970
46 Precinct
Disciplinary Case No. 86358/10

Police Officer Travis Brinson
Tax Registry No. 939940
Police Service Area 9
Disciplinary Case Nos. 85780/09 & 86357/10

The above-named members of the Department appeared before the Court on March 30, 2011, charged with the following:

Disciplinary Case No. 86358/10

1. Said Police Officer Gabriel Baaith, assigned to the 46th Pct., while on duty on or about 0530 hours on October 28, 2008, in the vicinity of [redacted], wrongfully and without just cause used force against Marciana Simmons-El, to wit: Said Police Officer Baaith pushed Ms. Simmons-El against a wall.

P.G. 203-11, Page 1 FORCE

2. Said Police Officer Baaith, assigned as indicated in Spec. #1, at the time, date and location indicated in Spec. #1, abused his authority as a member of the New York City Police Department in that he wrongfully and without just cause held Marciana Simmons-El against a wall and handcuffed her.

P.G. 203-10, Page 1, Paragraph 5 – ABUSE OF AUTHORITY

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3. Said Police Officer Baaith, assigned as indicated in Spec. #1, at the time, date and location indicated in Spec. #1, abused his authority as a member of the New York City Police Department in that he wrongfully and without just cause entered Marciana Simmons-El's private building.

P.G. 203-10, Page 1, Paragraph 5 – ABUSE OF AUTHORITY

Disciplinary Case No. 86357/10

1. Said Police Officer Travis Brinson, while assigned to the 46th Pct., while on duty on or about 0530 hours on October 28, 2008, in the vicinity of [redacted], abused his authority as a member of the New York City Police Department in that he wrongfully and without just cause questioned Marciana Simmons-El.

P.G. 203-10, Page 1, Paragraph 5 – ABUSE OF AUTHORITY

2. Said Police Officer Brinson, assigned as indicated in Spec. #1, at the time, date and location indicated in Spec. #1, abused his authority as a member of the New York City Police Department in that he wrongfully and without just cause seized Marciana Simmons El's house keys.

P.G. 203-10, Page 1, Paragraph 5 – ABUSE OF AUTHORITY

3. Said Police Officer Brinson, assigned as indicated in Spec. #1, at the time, date and location indicated in Spec. #1, abused his authority as a member of the New York City Police Department in that he wrongfully and without just cause entered Marciana Simmons-El's private building.

P.G. 203-10, Page 1, Paragraph 5 ABUSE OF AUTHORITY

4. Said Police Officer Brinson, assigned as indicated in Spec. #1, at the time, date and location indicated in Spec. #1, failed and neglected to make Activity Log entries regarding his encounter with Marciana Simmons-El.

P.G. 212-08, Page 1, Paragraph 1 ACTIVITY LOG

Disciplinary Case No. 85780/09

1. Said Police Officer Travis Brinson, assigned to 24 Precinct, while off-duty, on or about May 7, 2009, at a location known to the Department, Bronx County, did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department, in that said officer engaged in a physical altercation with Person D by grabbing her arms and pushing her to the ground, causing redness to her chest.

P.G. 203-10, Page 1, Paragraph 5 GENERAL REGULATIONS

The Department was represented by Hiram Lopez, Esq., Department Advocate's Office. Respondents were represented by Craig Hayes, Esq.

Respondents, through counsel, entered pleas of Not Guilty to the subject charges. Two separate trials were held consecutively on a single day, the first concerning both Respondents in the Civilian Complaint Review Board (CCRB) case (Case Nos. 86357/10 & 86358/10), and the second with only Respondent Brinson concerning the domestic incident case (Case No. 85780/09). A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

In Case No. 86357/10, Respondent Brinson is found Guilty of Specification Nos. 2-4, and Not Guilty of Specification No. 1. In Case No. 86358/10, Respondent Baaith is found Guilty. In Case No. 85780/09, Respondent Brinson is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

Case Nos. 86357/10 & 86358/10

The Department's Case

The Department called Marciana Simmons-El as a witness.

Marciana Simmons-El

Simmons-El had owned the apartment building [redacted] for 40 years, and resided in the building for that entire time period. She was retired from working as a nurse's attendant at Montefiore Hospital.

On October 28, 2008, Simmons-El woke up around 5:00 a.m. She entered the bathroom and turned on the heat. There, she observed a police vehicle in front of the neighboring building, [redacted]. She testified that a police officer (subsequently identified as Respondent Brinson) exited the vehicle, flashed a light on the neighboring building, then approached her own building. Respondent Brinson flashed a light on Simmons-El's building, saw her in the window, and pointed her out to his partner, Respondent Baaith. Simmons-El testified that, although the window was closed, she could hear Respondents' voices through the window. She asked them why they needed to speak to her so early in the morning, and Respondent Baaith answered that they needed to ask her some questions.

Simmons-El's building had an entrance door, a vestibule, then an interior door leading into the residential area. She opened the exterior door and Respondent Baaith stepped inside the doorway. He held the door open with his back, facing Simmons-El. Meanwhile, Respondent Brinson stood outside, on the steps (see Department's Exhibit [DX] 1, photograph of front door; DX 2, vestibule; DX 3, hallway past second door).

Respondent Baaith asked Simmons-El if she knew a person named Person A, to which she replied that she did not and that he did not reside in the building. While they were talking about the building's residents, Respondent Brinson "jump up" from outside to the inside door in an attempt to open it and gain entry. The inside door was locked, so Respondent Brinson could not gain entry. Respondent Baaith then pushed Simmons-El against the wall, where the mailboxes were located, and told her that he was going to handcuff her. Simmons-El told Respondent Baaith that he was "abusing" and "hurting" her and that she intended to complain. His response was, "Complain." Respondent Brinson then grabbed her shoulder, pushed her against the wall, grabbed her hand and folded it backwards, removing the keys from her hand. Respondent Brinson then told Respondent Baaith to handcuff her, which he did.

Respondent Brinson asked Simmons-El which of the keys opened the door. She said, "Turn me lo[o]se and I tell you which one of the key it is." Respondent answered, "You lost your time, no." Respondent Brinson went through each key on the set until he found the correct one and then opened the inside door. He knocked on the door of the apartment where Simmons-El's cousin, Person B, lived. Person B opened the door. Respondent Brinson asked him if he knew who had resided in the apartment before him, and Person B answered that he did not. Respondent Brinson gave Simmons-El's keys to Person B and removed Simmons-El's handcuffs. Respondent Baaith then wrote Simmons-El's name and telephone number on a piece of paper and both Respondents left the premises.

After Respondents left, Simmons-El called 311 and asked for the number of the 45 Precinct. She explained that she waited until 2:00 or 3:00 p.m. to call the 45 Precinct because she was so upset about the situation. Simmons-El then filed a complaint against Respondents, the first time she had ever filed a complaint. She testified that she had never been arrested, nor

had any prior trouble with the police. Simmons El stated that she had a pending lawsuit against Respondents.

Simmons-El went to the Montefiore emergency room with complaints of head pain. Test results were negative for any head injuries. She then went to her personal physician, Person C, who sent her to therapy for a swollen arm and shoulder.

On cross-examination, Simmons-El stated that she went to the emergency room on October 29, 2008. Two days later, on October 31, 2008, Simmons-El visited Person C, to whom she complained of pain in her left shoulder and arm. Following Person C's advice and diagnosis of a sprained shoulder, Simmons-El attended therapy for treatment of her arm and shoulder until November 2010. She acknowledged that she did not complain of back, neck, face, tooth or hand pain or injuries in either the emergency room or to Person C (these were alleged in the initial pleading of her lawsuit). Although Simmons-El complained of left shoulder injuries, she was able at the hearing to raise her left arm "at the level of the top of her head," but "did not completely raise her shoulder above her head."

Simmons-El testified that she hired an attorney, Allen, who filed a lawsuit on her behalf. After refreshing her recollection with the first pleading in her lawsuit, Simmons-El claimed that she did, in fact, have injuries to her teeth, and that she visited a dentist after complaining of tooth pain resulting from her altercation with Respondents. She admitted that she did not have any pain in her back, neck or hands.

Simmons-El stated that she told Respondents she owned the building "as soon as they came in." She denied raising her voice to Respondents, stating, "I do have respect for them." She testified that she held the keys "like a bunch in [her] hands," and denied swinging them at Respondents. Simmons-El did not know what either Respondent said immediately before

handcuffing her. She stated that she was only standing there, and "physically . . . doing nothing" else, before Respondents placed her against the wall in handcuffs. She was not arguing with Respondents.

On re-direct examination, Simmons-El testified that it took approximately ten to twenty minutes from the time that she opened the first door until Respondent Brinson opened the second door. She further testified that it took an additional five to ten minutes for Respondents to question Person B before they departed.

Upon questioning by the Court, Simmons-El stated that it was "weeks" after the incident that she first contacted an attorney.

Respondents' Case

Respondents testified on their own behalf.

Respondent Baaith

Respondent Baaith was assigned to the 46 Precinct, where he had worked on patrol. On October 28, 2008, Respondent Baaith stopped a male with an open container of alcohol. The man did not have identification present, so Respondent Baaith and his partner, Respondent Brinson, brought him back to the station house to run his name for warrants. It turned out that the man had been named as a suspect on an open complaint report for the theft of a cell phone. Because there was no indication of how the suspect had been identified, Respondents wanted to get in touch with the complainant, Person A.

Respondent Baaith explained that there was a cell phone number for the complainant, which he and Respondent Brinson called "a couple times," but were unable to reach the

complainant. The complaint stated [redacted] for the address of the complaining witness, which was not an actual number [redacted]. Thus, Respondents "went out and looked for an address that was similar to that address," eventually arriving at [redacted].

Upon arrival, Respondent Baaith testified that Respondent Brinson saw Simmons-El and signaled with a flashlight for her to come downstairs to "help us out and to open the door." They did not speak through the window while it was closed.

Respondent Baaith testified that Simmons-El opened the front door without any knocking or banging, and a conversation ensued regarding Person A. Respondent Baaith told Simmons-El that they were looking for Person A, who, he explained, was a complainant in an ongoing investigation. Respondent Baaith described Simmons-El's response as "belligerent and sort of angry at the fact that . . . we were talking at five in the morning." She stated that she knew each person in the building and refused Respondents entry in an angry and belligerent manner. He explained to her that they intended to conduct an investigation, and mentioned the possibility that someone may be living or doing something in the building without her knowledge. Simmons-El ignored the question, restated that she knew everyone in the building, and denied them entry. Simmons-El never said that she was the superintendent or manager of the building, nor did she claim that she owned the building.

During the conversation, Respondent Baaith noticed keys in Simmons-El's fist. He noted that they were sticking out between her thumb and forefinger, pointing the keys while she spoke. When asked "what happened next after she indicated she didn't know who he was and she knew everyone that lived there," Respondent Baaith answered that Respondent Brinson "approached her and said: Give me the – Like he reached out to her to acquire the keys." Then, Simmons-El

"began getting into a physical altercation with him by biting and kicking and scratching him." Respondent Baaith entered the vestibule in an attempt to stop her without the use of handcuffs, and she responded by kicking and scratching him, "trying to scratch the skin off of my hand." Once he grabbed her wrists, she began to jerk her shoulders and tried to scratch both Respondents' hands. He then handcuffed her and placed her on the wall. Once Simmons El was in handcuffs, she stopped moving after Respondent Baaith instructed her to stop resisting.

Respondent Baaith testified that he believed Simmons-El to have been a threat when she was biting, kicking and scratching. He stated that not much force was required to grab and handcuff Simmons El because she was an older woman. He denied throwing her into the wall or that she hit the wall with any force.

Respondent Baaith testified that once Respondent Brinson had the keys in his hand, he used one to open the door. They went to the apartment with the number that corresponded to that on the complaint report, where they spoke to Person B. At this time, Simmons-El was still in the vestibule. Respondent Baaith explained that they were looking for Person A, the victim of a cell phone snatching, to which Person B responded that Person A no longer resided there but was still receiving mail.

Respondent Baaith took down Simmons-El's information to prepare a Stop, Question and Frisk Report (UF-250) after she told him she did not have identification on her at the time. Respondent Baaith testified that the reason he filled out a UF-250 was because he handcuffed her.

Respondent Baaith explained that he and Respondent Brinson returned the keys to Simmons-El after filling out the report, and unhandcuffed her. He denied that she ever

complained of any pain or requested medical assistance during the incident. He conceded that Simmons-El was not arrested or charged with a crime.

On cross-examination, Respondent Baaith disputed Simmons-El's testimony that he held the door open with his back. Rather, he remained on the steps during the initial questioning. He first went up the steps into the building when he noticed the physical altercation between Simmons-El and Respondent Brinson. He did not recall how many times he or Respondent Brinson asked Simmons-El to enter through the second door, but estimated that it was two or three times. She denied them entry each time.

Respondent Baaith clarified that Simmons-El did not actually make oral contact with Respondent Brinson. Simmons-El tried to bite Respondent Baaith when he put her up against the wall, although she was not facing him. Additionally, she was scratching Respondent Brinson at the time that Respondent Baaith handcuffed her.

Respondent Baaith estimated the time period from the opening of the first door until both Respondents entered the second door to be five to seven minutes. He acknowledged that Simmons-El remained in the vestibule while Respondents spoke with Person B. He denied that Simmons-El stood near the apartment door and yelled into the apartment.

Respondent Baaith stated that it was appropriate to take Simmons-El's keys and enter the building based on the circumstances. Simmons-El never stated that she was the lawful owner of the building, so the entry was not tantamount to entry of a private home, which would require a warrant or exigent circumstances.

Upon questioning by the Court, when asked why Simmons-El was not arrested, Respondent Baaith answered, "A police officer has discretion according to misdemeanors and violations." However, in his view, she should have been arrested for obstructing governmental

administration or second-degree harassment. Of him and Respondent Brinson, the latter was the more senior of the two.

Respondent Brinson

Respondent Brinson testified that he was involved in the incident testified to by Respondent Baaith. He stated that "we explained to her the situation and the reason that we were there. . . . We explained the reason why she was there." Simmons-El "started saying things along the line of I know everyone in the building, which is like a common phrase where we work," although it was often not true. "It's just kind of a way to shu [sic] you off and get you out of the area."

Respondent Brinson testified that Simmons-El had keys in her hand, interlocked in her fingers, and waved them in Respondents' faces. Respondent Brinson described Simmons-El's demeanor as "irate, angry, aggressive," and said that he found her to be a threat. While holding the keys, Simmons-El attempted to kick and bite Respondents. Respondent Baaith placed her against the wall and handcuffed her, with Respondent Brinson's assistance.

Respondent Brinson testified that Simmons-El told him what key to use to open the door, and that this key worked. Respondents interacted with Person B, but Respondent Brinson could not recall where Simmons-El was located during this conversation. He also could not recall who removed Simmons-El's handcuffs, but testified that by this time she had calmed down and that he felt comfortable returning the keys.[1]

On cross-examination, Respondent Brinson disputed the fact that Simmons-El was holding the keys between her thumb and inside palm. Rather, he stated the keys were

[1] Respondents' counsel stipulated that Respondent Brinson did not make Activity Log entries for this incident.

"interlocked in her hands." This threat, and not his desire to enter the building, was the reason Simmons-El was handcuffed.

According to Respondent Brinson, Simmons-El never indicated that she was the owner of the building. He reaffirmed his recollection that Simmons-El told him directly which key opened the second door, but it was possible that Respondent Baaith did not hear this (Respondent Baaith's testimony was that Simmons-El did not tell them which key opened the door).

Upon questioning by the Court, Respondent Brinson explained that he decided not to arrest Simmons-El due to her age and the fact that no one was injured. He estimated the time from when he took the keys until he returned them to be around five minutes.

Case No. 85780/09

The Department's Case

The Department called Sergeant John Blandino as a witness.

Sergeant John Blandino

Blandino was assigned to the Bronx Investigations Unit. In May 2009, he worked on a case involving Respondent Brinson. The matter involved an off-duty domestic dispute. Blandino responded to an apartment complex [redacted] Upon entering the building, Blandino testified that he observed clothing strewn in the hallway outside the apartment to which he was directed. Inside the apartment, he observed a shattered television. A female, subsequently identified as Person D, informed Blandino that she had a child in common with Respondent Brinson. Blandino observed Respondent Brinson at the location, but could not recall if he was in the apartment or downstairs, on the street.

Blandino interviewed Person D on the date of the incident and recorded the interview (see DX 2 & 2a, recording and transcript). He also spoke to her informally at the scene of the incident. Person D stated that Respondent Brinson came to the apartment to remove some personal items and bags of clothing. He began to remove a television that belonged to their daughter, who lived in the apartment. Person D admitted that she shattered the television with a ceramic cup. She followed Respondent Brinson outside, throwing his clothing there. Person D said that Respondent Brinson grabbed her, slammed her to the ground, crossed her arms across her chest, pinned her, and put his knee in her abdomen. He then dialed 911, and after personnel from the 4 7 Precinct responded, the two were separated. Person D admitted to Blandino that she slapped Respondent Brinson.

Department's Exhibit (DX) 1 was the Domestic Incident Report (DIR) completed by Person D regarding the incident. In the DIR, Person D stated that she and Respondent Brinson got into an argument about taking care of their child and paying rent. Person D "pushed his clothes to the door he push me into the hallway and thr[ew] me down to the steps where he put his knee's [sic] on my stomach and held my hands down." Person D asserted that Respondent Brinson had slapped her the previous day. The responding officer on the DIR noted that no injuries were claimed by or observed on Person D.

On cross-examination, Blandino testified that the only injury he noticed on Person D was the red mark on her stomach. He did not observe, nor did Person D complain of, any injuries to her back, the back of her arms or the back of her head. Person D admitted that she was angry and yelling, and that she intentionally broke the television that Respondent Brinson was attempting to remove from the apartment. Person D claimed that she did not slap him until after the uniformed

responding police officers arrived on the scene. Neither Person D nor Respondent Brinson was arrested.

On re-cross-examination, Blandino testified that Respondent Brinson told him that his reason for grabbing Person D was to prevent her from hitting him.

Interview of Person D (see DX 2, recording; DX 2a, transcript)

On May 7, 2009, Person D was interviewed by Blandino and two other investigators. Person D stated that she had physical altercations with Respondent Brinson regarding e-mails she received from women on several occasions. On one such occasion, Respondent Brinson slapped Person D twice while she held their daughter. On May 6, 2009, Respondent Brinson slapped Person D across the face. She did not sustain injuries as a result. Person D did not report several of these incidents.

Person D stated that on May 7, 2009, at approximately 9:45 a.m., Respondent Brinson and Person E made "little comments" as they placed his personal items in a bag, to remove them from the apartment. Although Person D told them to leave, Respondent Brinson entered the room where Person D and their daughter were located, and began to remove a television. Person D requested that he leave the television for the girl. According to Person D, Respondent Brinson pulled the television and cords out, and was "[t]hrowing the cords" at her.

Person D stated that she was angry and yelling as Respondent Brinson attempted to remove the television. She explained that she was angry because she previously had recanted statements alleging Respondent Brinson hit her after he promised Person D he would provide for her and their daughter if he were back on full duty. She also noted that she was not receiving as much in child support as she wanted. She began pushing his personal belongings towards the door.

Respondent Brinson then slammed Person D onto the floor and put his knees on her abdominal area. Person D admitted that she slapped Respondent Brinson across the face in the presence of the officers who arrived on the scene.

Respondent Brinson's Case

Respondent Brinson testified on his own behalf.

Respondent Brinson

Respondent Brinson testified that prior to May 7, 2009, the date of the incident, he was involved in a relationship with Person D. The two had a child together, a two-year-old daughter. Respondent Brinson lived with Person D [redacted].

On May 7, 2009, Respondent Brinson decided to move out of the apartment because Person D was becoming progressively more belligerent and argumentative. He believed that he made a mistake allowing Person D to live with him. As Respondent Brinson was gathering his belongings, Person D hindered his attempt to leave by standing in front of him and telling him he should not leave. She was "trying to attack my ego and saying I'm a coward and things like that." He testified that she was irate and aggressive. Person D broke the television by picking up a cup and smashing it into the television. Respondent Brinson called 911, which Person D could both see and hear.

After Respondent Brinson hung up the telephone, Person D again started to attack him, slapping and hitting him. To prevent the attack, he held her by the wrists, across her chest, but only after she made contact with him. She hit him a few more times with an open hand. Respondent Brinson testified that that he never raised his hands and hit Person D, kicked her,

or

threw her down. Respondent Brinson and Person D ended up in the hallway and fell while he was still holding her. He did not recall how they fell, but testified that he never intentionally took her to the ground. Rather, he believed that it was because he lost his balance.

Respondent Brinson testified that he received a telephone call informing him that the police were present on the scene. Person D calmed down for "a couple seconds," but was still visibly angry. In the presence of the police officers who had arrived at the apartment, Person D again slapped Respondent Brinson.

On cross-examination, Respondent Brinson described the damaged television as an approximately 40-inch flat-screen unit. He acknowledged that Person D's actions and comments during the incident made him angry. He denied, however, that he became angry, grabbed her, and threw her to the ground.

Upon questioning by the Court, Respondent Brinson could not recall whether it was he, Person D, or both that lost their balance. Neither one landed on top of the other, but Respondent Brinson was still holding Person D's arms when they fell.

On re-cross-examination, Respondent Brinson explained that the reason he did not leave the apartment once Person D began to slap him and throw his clothes around was that he wanted to finish removing his personal items and clothing from the apartment.

FINDINGS AND ANALYSIS

Case Nos. 86357/10 (Respondent Brinson) & 86358/10 (Respondent Baaith)

Specification No. 1 Against Respondent Brinson Questioning Simmons-El

Respondent Brinson is charged with abusing his authority by questioning Simmons-El about the location of Person A, the complaining witness on an arrest that Respondents had made

earlier. Respondents were outside Simmons-El's building and got her attention. She came downstairs and opened the outer door. Respondents asked her about Person A, and Simmons El replied that she knew everyone in the building and no one by that name lived there. Respondents replied that it was possible she was unaware of his presence and that they needed to conduct an investigation.

The gravamen of the Department's case is not that it was per se improper for the officers to seek information from Simmons-El about Person A. The Department argued, however, that once she said she knew everyone in the building and there was no Person A, the questioning had to cease. Instead, Respondents "continued to ask her questions and insist on entering the building," for as much as ten minutes (it is unknown why only Respondent Brinson was charged with improper questioning).

Respondents' counsel addressed the issue from the perspective of People v. De Bour, 40 N.Y.2d 210 (1976), which governs generally street encounters between police officers and citizens. He stated that Respondents "had a common law right for inquiry. They were allowed to ask her if this person lived there and who he was." This was a reference to the De Bour doctrine that an officer may interfere with a citizen to gain explanatory information, short of a forcible seizure, only if there is "a founded suspicion that criminal activity is present." This sometimes is known as a Level II inquiry, or the "common law right to inquire."

In fact, however, De Bour does not bear directly on this Court's analysis. In People v. Hollman, 79 N.Y.2d 181, 185 (1992), the Court of Appeals wrote to clarify the difference between a Level I and Level II encounter, an area the Court admitted had become confusing. De Bour stated that officers could make the "minimal intrusion" of approaching a citizen to request information if they had an objective, credible reason, not necessarily indicative of criminality, to

do so. De Bour, 40 N.Y.2d at 223. Hollman discussed the development that some lower courts had been viewing this Level I encounter as one only concerning inquiries to citizens that basically were seeking assistance, like asking "Where's the fire?" or stopping passersby to seek the parent of a lost child – in other words, encounters where the citizen was not a wrongdoer but just a bystander. See Hollman, 79 N.Y.2d at 189. Hollman rejected this view and clarified that the De Bour levels concern situations where the citizen is in some manner suspected of wrongdoing. This the Hollman Court termed the officers' "criminal law enforcement" capacity. The other, much more innocuous type of questioning, however, was part of the officers' "public service" function. Another example of the latter given by Hollman was asking someone, "Which way did he run?" Id.

The Court finds that Respondents' questioning of Simmons-El was within the public service function of the officers and therefore not analyzable under De Bour. Simmons-El was not involved in the arrest Respondents were working on. She was someone they encountered while looking for the complainant on the arrest. Their questions of whether she knew Person A or if he lived there were the functional equivalent of asking a bystander, "Which way did he go?" The fact that the officers kept questioning Simmons-El after her initial statement that she knew everyone in the building does not alter the analysis. They were still trying to get information from her, pointing out that she might not truly know everyone, and were not suspecting or accusing her of wrongdoing. Thus, Respondents' conduct was not improper under New York law. See Matter of Jonathan McL., 303 A.D.2d 169, 170 (1st Dept. 2003) (suppression denied; police acted in public service capacity when they were asked by cab driver to resolve dispute with appellant passenger, so their request to speak with appellant and for him to exit cab in order

to do so was justified). The Department has pointed to nothing in the Patrol Guide imposing a stricter rule about inquiring of bystander citizens.

Accordingly, the Court finds Respondent Brinson Not Guilty of Specification No. 1 against him in the Simmons El case (Case No. 86357/10).

Specification No. 1 Against Respondent Baaith

Specification No. 2 Against Both Respondents

– Use of Force Against Simmons-El and Taking Her Keys

These specifications are interrelated and refer basically to the same moment. Simmons-El alleged that while Respondents were asking her about Person A and she answered that there was no such person there, Respondent Brinson moved past her and tried to open the door, but it was locked. Respondent Baaith then pushed Simmons-El against the wall and handcuffed her. Respondent Brinson took the keys from her hand. Respondents testified that Simmons-El was belligerent and fought with them. She was holding her keys with the teeth of several of them extending from her thumb and forefinger like a weapon. According to Respondent Baaith, when Respondent Brinson tried to take the keys from Simmons-El, she began biting, kicking and scratching the officers. Respondent Baaith moved her against the wall and Respondent Brinson took the keys. Simmons-El was handcuffed.

Thus, the first specification against Respondent Baaith alleges that he "wrongfully and without just cause used force against" Simmons-El when he pushed her against the wall. The second specification against him alleges that he abused his authority when he "wrongfully and without just cause held" Simmons-El against the wall and handcuffed her. The second

specification against Respondent Brinson alleges that he abused his authority when he "wrongfully and without just cause seized" Simmons-El's house keys.

Respondents argued that their actions were a measured, justified use of force in response to Simmons-El attacking them. The key question for the Court, therefore, is whether this happened. It comes down to a question of credibility. While Respondents were interested witnesses as a matter of law, Simmons-El has filed a civil action in this matter, seeking monetary damages, so she too had a motive to lie.

In light of Respondents' testimony about Simmons-El's violent attack on them, the most striking thing in this case was what did *not* happen: Simmons-El was not arrested. Respondent Baaith alleged that she kicked and bit the officers, even trying to scratch the skin off his hand. This could have been charged as second-degree harassment (Penal Law § 240.26 [1]), second-degree obstructing governmental administration (Penal Law § 195.05), or even attempted second-degree assault, a felony (Penal Law § 120.05 [3]). After all, if Respondents are credited, there was probable cause to believe that Simmons El tried to inflict substantial pain or impairment of physical condition upon two police officers. The Court certainly has seen people arrested for much less. Yet Simmons-El was released without even a summons. Respondent Brinson, who had more time on the job, stated that as a matter of discretion, the officers did not arrest her, although Respondent Baaith testified that he felt she should have been arrested. Nevertheless, the lack of any action taken against Simmons-El casts severe doubt on whether she engaged in the kind of belligerence requiring Respondents to restrain her and seize her property.

A close examination of Respondent Baaith's testimony reveals much about Simmons-El's alleged belligerence. On direct examination, he was asked to describe how she was holding her keys while she insisted she knew everyone in the building but did not know Person A

Respondent Baaith was then asked, "So *what happened next* after she indicated she didn't know who he was and she knew everyone that lived there?" Respondent Baaith answered that Respondent Brinson "approached her and said: Give me the Like he reached out to her to acquire the keys *and she then* began getting into a physical altercation with him by biting and kicking and scratching him" (emphasis added).

The timing is crucial. Respondent Baaith's answer negates an essential part of Respondents' claim: that Simmons-El presented herself as a threat by attacking them, and so she was restrained with minimal force, and her weapon was removed. Rather, the answer supports the Department's allegation that Respondents were determined to enter the building, and in order to do so, took Simmons-El's keys, restraining her against the wall and handcuffing her in the process.

Simmons-El is a short, petite, older woman. Respondents' counsel suggested that "notwithstanding her age at the time or even now, a person does not lose the ability to get belligerent or angry or forceful against the police just because they're old." That is true, but she also would have been doing so against two bigger, younger male police officers. She might have been reluctant to comply with the officers' request to enter the building, but there was no apparent reason for her to present her keys deliberately as a weapon, and to resist entry by biting and kicking the officers, trying to scratch the skin off Respondent Baaith's hand.

As such, the Court rejects Respondents' version of events, in which they justifiably used force against Simmons El and seized her property.

A remaining issue is whether the need to find Person A justified Respondent Brinson's seizure of the keys. Person A was the complaining witness on an open complaint report. Respondents had just arrested an individual listed as the suspect on that open report. Person A

was not someone suspected of a crime, much less one presenting exigent circumstances to allow Respondent Brinson to seize Simmons-El's property.

Accordingly, the Court finds Respondent Baaith Guilty of wrongfully using force by pushing Simmons-El against the wall (Specification No. 1 against him); abusing his authority by wrongfully holding her against the wall and handcuffing her (Specification No. 2 against him); and Respondent Brinson Guilty of abusing his authority by seizing her keys (Specification No. 2 against him).

Specification No. 3 Against Both Respondents Entering Simmons-El's Building

The third specifications charge each Respondent with "wrongfully and without just cause" entering "Simmons-El's private building." The Advocate stated that Simmons-El was both the owner and a resident of the building in question, and this was what the specifications meant by her "private building."

It is undisputed that Simmons-El refused to allow Respondents to enter her building. The building was locked. Respondents were not responding to a report of a crime or a call for police assistance. They were seeking only the complaining witness on an unrelated cell phone larceny. There were otherwise no exigent circumstances that would allow Respondents to enter upon private locked real property without the consent of a tenant or landlord. It is noted here that while Respondents testified that Simmons-El never said she was the owner of the building, her tenancy was not in dispute then or at trial.

Accordingly, Respondents are each found Guilty of Specification No. 3 against them.

Specification No. 4 Against Respondent Brinson – Missing Activity Log Entries

Respondent Brinson is charged with failing to make Activity Log entries regarding the incident with Simmons-El. Counsel for Respondent Brinson conceded "that there was not an official memo book entry made in this case." Respondent Brinson asserted that he wrote something about the incident on the "fly paper" (the reverse, unlined side of the Activity Log page). Accordingly, he is found Guilty of Specification No. 4 against him.

Case No. 85780/09 (Respondent Brinson)

In this case, Respondent Brinson is charged with engaging in a physical altercation with the mother of his child, Person D, "by grabbing her arms and pushing her to the ground, causing redness to her chest." Person D and Respondent Brinson had lived together, but were in the process of, if not breaking up, Respondent Brinson moving out of the apartment. The Department alleged that he came to the apartment to remove some items, including a television. Person D shattered that television with a cup, then followed Respondent Brinson outside, throwing his clothing there. The Department alleged that Respondent Brinson grabbed Person D, slammed her to the ground, crossed her arms across her chest, pinned her, and put his knee in her abdomen. It was Respondent Brinson, though, that called 911.

Respondent Brinson testified that as he gathered his belongings, an irate and aggressive Person D stood in front of him and taunted him. He confirmed that Person D broke the television by picking up a cup and smashing it into the device. After he called 911, she started slapping and hitting him. To prevent the attack, he held her by the wrists, across her chest, but only after she made contact with him. She hit him a few more times with an open hand. Respondent Brinson testified that that he never raised his hands and hit Person D, kicked her, or threw her down.

Respondent Brinson and Person D ended up in the hallway and fell while he was still holding her. He did not recall how they fell, but testified that he never intentionally took her to the ground. Rather, he believed that it was because he lost his balance.

The Department's case relies in large part upon the hearsay statements of Person D. While Respondent Brinson corroborated much of what was described by Person D, he portrayed his conduct as justified by her attack on him. Person D stated that she slapped Respondent Brinson after police arrived, although Respondent Brinson testified that she attacked him after he called 911, and he restrained her, falling to the floor together. He agreed that she slapped him after police arrived as well.

Although hearsay is admissible in this forum, see Matter of Ayala v. Ward, 170 A.D.2d 235 (1st Dept. 1991), there are significant reasons for caution in cases like this that present close questions of credibility. The hearsay is central to the Department's case, so there is a pointed question of basic fairness in using the hearsay to reach a finding of fact. See *Case No. 77005/01*, signed May 27, 2002 (hearsay declarations are insufficient to support findings of guilt in cases that pose close questions of credibility). Person D did not appear for trial. In light of her failure to testify, the Court cannot observe her demeanor, explore possible motives to lie, or assess the credibility of her account after the test of cross-examination. Further, the claim that she was injured by Respondent Brinson tackling her was uncorroborated by any other evidence. See Matter of Grossman v. Kralik, 217 A.D.2d 625, 626 (2d Dept. 1995) (written memorandum of non-testifying judge who saw courtroom attendant sleeping was corroborated by other testimony at hearing). Although Blandino, the investigator, stated that he observed redness to Person D's abdomen, the officer that completed the DIR (DX 1), Sergeant Chavone Perkins, wrote, "No injuries claimed or observed @ time of report."

Blandino's co-investigator stated for the record at the interview that Person D had "a slight bruising on her chest, a red mark, very slight bruising on her left knee" (see DX 2a). No photograph of this was admitted into evidence and nothing more was said at trial about the size or degree of the redness. Moreover, redness alone to the chest would not be inconsistent with Respondent Brinson's version of events, as he admitted grabbing her around the chest and falling to the floor. Cf. Matter of Vallebuona v. Kerik, 294 A.D.2d 44, 51 (1st Dept. 2002) (reference in medical records to "deep" wound did not support hearing officer's conclusion that injury was consistent with intentional blows of a flashlight, but inconsistent with a fall or violent struggle on hard surface; inter alia, no medical testimony supported hearing officer's determination).

Person D' s own account casts her as very angry at the time of the incident. She fleshed out the reason that Respondent Brinson was moving out: he had slapped her the day before after they argued about him talking to other women. While he and his sister were in the process of gathering his property, he was "saying little comments." Person D asked them to leave one of the televisions for the child, but they refused. Respondent Brinson was "pulling the TV and the cords all out. Throwing the cords, basically, at me . . . pulling, like he's taking the TV. . . . [S]natching the wires, swinging them everywhere and pulling the TV down towards" Person D and the girl. Person D felt "played" because she had retracted earlier allegations against him. She admitted that she smashed the TV in question with a cup. This is all in accord with Respondent Brinson's testimony, in which he portrayed Person D as irate and aggressive, slapping and hitting him, leading him to grab her wrists in an attempt to hold her back.

As a party to the action, Respondent Brinson was an interested witness. See People v. Agosto, 73 N.Y.2d 963, 967 (1989) (criminal defendant is interested witness as a matter of law); Coleman v. New York City Transit Auth., 37 N.Y.2d 137, 142 (1975) (an actor in the transaction

at bar in civil case, having motive to shield self from blame, is interested witness, even if not a party). But there are greater problems with crediting Person D's hearsay account. Other than his interest in the outcome of the case, there is no apparent reason to disbelieve Respondent Brinson. In fact, it was he that called 911. It is unlikely that he would have wanted to bring police attention to himself if he had violently attacked Person D.

As such, the Court concludes that the Department failed to prove that Respondent Brinson engaged in a verbal and physical altercation with Person D. Accordingly, the Court finds Respondent Brinson Not Guilty in Case No. 85780/09.

PENALTY

In order to determine an appropriate penalty, Respondents' service records were examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). Respondent Baaith was appointed to the Department on January 10, 2007. Respondent Brinson was appointed to the Department on January 9, 2006. Information from their personnel files that was considered in making this penalty recommendation is contained in the attached confidential memoranda.

Respondents have been found Guilty of misuse of force and abuse of authority. Upon going to a building to look for a complaining witness on an open complaint report, they encountered Simmons-El, who refused to grant them entry. Respondents took her keys, physically restrained her, and handcuffed her. The Department did not make a penalty recommendation at trial, although its offer to Respondent Brinson was, the Court understands, 15 vacation days.

The Court notes that because this was not an internal investigation, but instead a CCRB matter, there is much about the case that is not known. For example, no information was

provided on how it was that Respondents took it upon themselves to try and make an arrest that ordinarily would be in the hands of detectives. There was no information on whether authorization was sought or given for Respondents to remove themselves from patrol and try and find the complaining witness, including by forcibly restraining a resident of the complainant's supposed building and taking her keys. Nor was there any information on where the suspect was during this time.

The misconduct here was egregious. Respondents were dealing with an older woman that had come downstairs upon awakening at 5 o'clock on a cold autumn morning because a police officer had shone a flashlight in her window and wanted to speak with her. Yet, upon her refusal to allow them entry, they forcibly restrained her and took her house keys. Respondents were looking for a complaining witness, not the perpetrator of a crime. There were no exigent circumstances that justified these actions. The force used to restrain Simmons-El was completely unnecessary not just because it was excessive, but because Respondents never should have restrained her in the first place. Their abuse of authority was only compounded by the misappropriation of the woman's house keys to enter her building without permission.

As such, the Court recommends that each Respondent forfeit 20 vacation days as a penalty.

Respectfully submitted,

APPROVED
JUN 04 2012
RAYMOND W. KELLY
POLICE COMMISSIONER

David S. Weisel
Assistant Deputy Commissioner Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER GABRIEL BAAITH
TAX REGISTRY NO. 942970
DISCIPLINARY CASE NO. 86358/10

In 2009 and 2010, Respondent Baaith received an overall rating of 3.5 "Highly Competent/Competent" on his annual performance evaluation. He was rated 4.5 "Extremely Competent/Highly Competent" in 2008. [redacted] Because he received three or more CCRB complaints within a year, he was placed on Level I Force Monitoring in May 2009. Respondent Baaith has no prior formal disciplinary record.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER TRAVIS BRINSON
TAX REGISTRY NO. 939940
DISCIPLINARY CASE NOS. 85780/09 & 86357/10

In 2008 and 2010, Respondent Brinson received an overall rating of 3.0 "Competent." He was rated 2.5 "Competent/Low" in 2009. [redacted] In May 2009, he was placed on Level II Discipline Monitoring. Respondent Brinson has no prior formal disciplinary record.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials