The City of New York

POLICE DEPARTMENT

July 9, 2014

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Melvin Thomas
Tax Registry No. 940800
Police Service Area 2
Disciplinary Case Nos. 2011-3879 & 2012-7022

The above-named member of the Department appeared before me on September 19, November 7 and November 21, 2013, and on January 13 and February 24, 2014, charged with the following:

Disciplinary Case No. 2011-3879

1. Said Police Officer Melvin Thomas, assigned to the 83rd Precinct, while off-duty, on or about March 1, 2011, within the confines of the 43rd Precinct, in Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Officer was involved in a physical altercation with Person A. (*As amended*)

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

Disciplinary Case No. 2012-7022

1. Said Police Officer Melvin Thomas, assigned to the 84th Precinct, while off-duty, on or about February 26, 2012, within the confines of the 48th Precinct, in Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said officer did subject a person known to this Department to sexual contact without the latter's consent.

P.G. 203 10, Page 1, Paragraph 5 – GENERAL REGULATIONS
FORCIBLE TOUCHING

2. Said Police Officer Melvin Thomas, assigned to the 84th Precinct, while off-duty, on or about February 26, 2012, within the confines of the 48th Precinct, in Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the

Department, to wit: said officer was involved in a physical altercation with Person C and Person D.

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

3. Said Police Officer Melvin Thomas, assigned to the 84th Precinct, while off-duty, on or about February 26, 2012, at a location known to this Department, did fail and neglect to properly safeguard his off-duty firearm. (*As amended*)

P.G. 204-08, Page 2, Paragraph 7 FIREARMS-GENERAL REGULATIONS

4. Said Police Officer Melvin Thomas, assigned to the 84th Precinct, while off-duty, on or about February 26, 2012, at a location known to this Department, having changed his residence, did fail and neglect to notify his Commanding Officer by submitting form Change of Name, Residence or Social Condition (PD 451-021), as required.

P.G. 203-18, Page 1, Paragraph 3 – RESIDENCE REQUIREMENTS

5. Said Police Officer Melvin Thomas, assigned to the 84th Precinct, while off-duty, on or about February 26, 2012, within the confines of the 48th Precinct, in Bronx County, having been involved in an off-duty incident, did thereafter fail and neglect to report said incident to the Patrol Supervisor, precinct of occurrence.

P.G. 212-32, Page 1, Paragraph 2 – OFF-DUTY INCIDENTS INVOLVED UNIFORMED MEMBERS OF THE SERVICE

The Department was represented by Beth Douglas, Esq., Department Advocate's Office, and Respondent was represented by Stuart London, Esq.

Respondent, through his counsel, pleaded Guilty to Specification Nos. 4 and 5 in Disciplinary Case No. 2012-7022. He entered a plea of Not Guilty to the remaining subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2011-3879

Respondent is found Not Guilty.

Disciplinary Case No. 2012-7022

Respondent, having pleaded Guilty, is found Guilty of Specification Nos. 4 and 5. Respondent is found Guilty in part of Specification No. 2. Respondent is found Not Guilty of Specification No. 3. The Assistant Department Advocate dismissed Specification No. 1.

SUMMARY OF EVIDENCE PRESENTED

The testimony and other evidence presented at this trial regarding these two unrelated disciplinary cases will be summarized separately under the respective case number for each set of charges.

Disciplinary Case No. 2011-3879

Introduction

Respondent and Person A [redacted]. It is not disputed that on March 1, 2011, Respondent and Person A, [redacted] drove together to a food truck located on Jerome Avenue adjacent to the Cross Bronx Expressway which is located within the confines of the 43 Precinct in the Bronx. While they were at the food truck, Respondent and Person A engaged in an emotional verbal and physical interaction which involved

Person A telling Respondent that she intended to move to [redacted] After Respondent drove Person A home to her residence at [redacted], Person A placed a call to 911 [Department's Exhibit (DX) 2 is the audio disc of Person A's 911 call and DX 2-A is a transcript of the call]. Person A told the 911 operator that "It's not an emergency. I need to fill out a report or a domestic violence but it's, it's over already. I just want to have report." Person A requested that the responding police officers "come with no sirens, please" because "there's no violence or nothing and there's a lot of elderly people." Person A confirmed to the 911 operator that the report concerned a past domestic dispute.

The 911 dispatcher transmitted a radio call that a patrol unit respond to [redacted] to take a report. Police Officers Sharice Nowell and Jessica Thomas, who were on duty in uniform assigned to the [redacted] Precinct performing patrol duties in a marked Radio Motor Patrol car (RMP), radioed the dispatcher that they were responding to [redacted] to handle the call.

The Department Advocate's Case

The Advocate called Police Officers Sharice Nowell and Jessica Thomas and Sergeants John Farrell, Jonathan Schenck and Michael Minogue as witnesses and offered the statement of Person A.

Police Officer Sharice Nowell

Nowell testified that when she and Thomas arrived at [redacted] they were met by Person A. Nowell recalled Person A had what "looked like a black eye" and

some "scratches around her neck and chest area." When Nowell learned that the injuries may have been caused by a member of the service (MOS) she immediately requested that the on duty patrol supervisor, Sergeant John Farrell, respond to [redacted] Prior to Farrell's arrival, Person A told Nowell that she and Respondent were getting food when they began having an argument, that it escalated and that Respondent "hit" and "assaulted" her in the face with his hand. Nowell recalled that although initially Person A was calm and did not seem upset, at the [redacted] Precinct she became "irate" and she "shut down" and would no longer cooperate with the investigation.

On cross-examination, Nowell confirmed that during her official Department interview she never used the word "hit" or the word "assault" when she was asked to describe what Person A had told her about the incident. She did state that Person A had told her that she and Respondent "were having a struggle."

Police Officer Jessica Thomas

Thomas recalled that Person A told her and Nowell that she had been involved in a "verbal dispute with her [redacted] which escalated into pushing and shoving" and that she had "ended up on the wall and that's how she sustained her injuries." Thomas saw that Person A had a "black eye with scratches underneath" as well as scratches on her "neck and chest area." Person A refused medical attention. Thomas recalled that when Farrell arrived he spoke with Person A before transporting her to the 43 Precinct.

Thomas prepared a Domestic Incident Report (DIR) regarding this incident (DX 3). The DIR's "Statement of Allegations/Supporting Deposition" section contains a handwritten account by Person A in which she wrote:

Early Tuesday morning Melvin and I got into a normal misunderstanding. We exchanged harsh words and we tried to reconcile our differences but words got a bit disrespectful and we tussled and spinned around holding each other. I hit a wall and I pushed him away he told me to stop and I agreed but I felt my face swelling. My purpose of calling the police was to document an incident that could help me in future for [redacted]. I believe our fight could have been avoided like in the past. He never intended to hurt me and neither did I.

Person A signed this DIR underneath a jurat which states that "False Statements made herein are punishable as a Class A Misdemeanor, pursuant to section 210.45 of the Penal Law."

On cross-examination, Thomas confirmed she used the terms "pushing" and "shoving" to describe the incident when she filled out her portion of the DIR and that Person A told her that the injury was accidental, that she did not feel she was assaulted, and that she did not want Respondent to be arrested.

Sergeant John Farrell

Farrell recalled that when he arrived at [redacted] Person A told him that she and Respondent had a verbal argument that had "escalated to a point where she received injuries like minor swelling and some bruising to her face and some scratches on about like the neck area and upper chest." He observed "reddening and swelling" on Person A's face. Farrell decided to bring Person A to the [redacted] Precinct. Person A refused medical

attention. Farrell directed Thomas to fill out a DIR. Respondent came to the [redacted] Precinct. The Bronx Investigations Unit and the duty captain, Captain Stilianesis, also responded to the [redacted] Precinct and interviewed Farrell, Nowell, Thomas and Person A. After these interviews were completed, Farrell was directed by Stilianesis to arrest Respondent. The

[redacted] District Attorney's Office later declined to prosecute Respondent because Person A was uncooperative.

On cross-examination, Farrell recalled when he arrived at [redacted] Thomas was waiting for him outside and Nowell was inside with Person A. He recalled that Person A was "relatively calm" but that she was "uncooperative." Farrell confirmed that Person A told him that it was a "pushing-shoving type of an incident," that she never described the incident as an assault, and that she told him the incident had stemmed from an argument she and Respondent had about her plan to relocate [redacted] to [redacted]

Farrell took photos of Person A. Farrell did not sign or review the DIR that was completed by Thomas. Farrell later learned that Person A had informed the Bronx District Attorney's Office that she did not want to proceed further [Respondent's Exhibit (RX) A is the [redacted] District Attorney's Office's declined prosecution form].

Sergeant Jonathan Schenck

Schenck, who is assigned to the Bronx Investigations Unit, recalled that on March 1, 2011, he responded to the [redacted] Precinct after he received a request from the duty captain that he assist in the investigation of an off-duty dispute involving Respondent and Person A. When Schenck arrived at the [redacted] Precinct and saw Person A he noticed discoloration under Person A's right eye and scratches on her neck and chest.

Schenck conducted a tape-recorded interview of Person A [DX 1 is the transcript of the tape-recording]. During this interview, Person A stated that while they were at the food truck, she and Respondent discussed terminating their relationship. Their conversation became "very emotional" and Respondent started to hug her. Person A told Schenck that

she "did appreciate the fact that he was hugging me." When she "felt him tug me closer" and "he was holding me tighter, talking a little louder" and "getting a bit more aggressive," she decided that she "needed to get aggressive" and so she tried to break the hug by ducking under Respondent's arms. When she did this, his elbow struck her face. Person A stated that because she wanted to end their hug, because she "couldn't get him off of me," and because she "felt my feet literally dancing off the ground," she "tussled with him" because she "wanted to get a better grip on him" so that she could push him away from her. She wanted to walk to the car and have him drive her home. When he grabbed the collar of her coat with one hand and tugged on it, she "tried to kind of get from under him" by ducking underneath his arms which caused her face to come into contact with Respondent's elbow resulting in a bruise on her face. As a result of this, she became somewhat dizzy and she did "not go where I was going" which caused her body to hit the wall next to her.

After Respondent drove Person A home, Person A's roommate saw the bruise on her face and urged her to contact the police.

On cross-examination, Schenck confirmed that Person A never told him that she was in fear of Respondent and that during the interview she had stated that "I don't feel that his intentions were to hurt me." (DX 1). Schenck was unable to determine the exact location of the wall Person A may have fallen against. After the incident Person A "took care of herself." She did not request medical or hospital treatment for her injuries. Schenck took pictures of the scratches but did not bring them with him to the Trial Room. Person A did not want Respondent to be arrested.

After the interview with Person A, Respondent was arrested. The District Attorney's Office later dismissed the case. [redacted] Since this incident, Person A has not made any complaint to Schenck against Respondent.

Sergeant Michael Minogue

Minogue, who is assigned to Brooklyn North Investigations, was assigned to review the investigatory paperwork prepared by the duty captain and Bronx Investigations, review the 911 call transcript, and re-interview Person A.

Minogue made numerous attempts to contact Person A. In April 2011, Person A returned one of Minogue's messages. He was then able to conduct an interview of Person A over the telephone. This interview was not recorded but Minogue prepared an investigatory worksheet detailing what Person A told him.

On cross-examination, Minogue stated Person A told him the injuries she sustained were accidental and it was an "accidental strike." She further stated that she was not assaulted and that she did not want to press charges. She told Minogue that she and Respondent have maintained a positive relationship for the sake of the child they have together. Person A confirmed to Minogue that when she called 911 on the day of the incident, she stated that she did not want police to respond with lights and sirens and that there was "no violence."

Respondent's Case regarding Disciplinary Case No. 2011-3879

Respondent testified on his own behalf.

Respondent

Respondent, an eight-year MOS who has been assigned to the 79 Precinct and the 83 Precinct, testified that he was transferred from his command first to Brooklyn Central Booking and then to Police Service Area 2. Respondent is currently on modified duty status.

On March 1, 2011, Respondent met with Person A to discuss the possible relocation [redacted] to [redacted]. It was night time so they went to get dinner at an outdoor location. At the time, although Respondent was in a romantic relationship with Person A, he was [redacted] and living with his [redacted]

Their discussion became a "verbal dispute" that "escalated" and "got louder." Person A became "very excited" and tried to leave. Respondent testified "I grabbed her" and "she tried to escape my grasp" and "went under my shoulder and fell." While she was falling, she scraped her face against a wall. He noticed she had a "red mark to her face." Respondent picked Person A up, the conversation ended, and he decided to drive her home. Later that night, he was arrested and suspended from duty regarding the incident. He was later informed by his attorney that the arrest charges had been dismissed by the [redacted] District Attorney's Office.

On cross-examination, Respondent confirmed that the disagreement between him and Person A was over the fact that she wanted to move to [redacted] to take [redacted] Respondent asserted that although Person A had begun yelling and cursing at him,

and although his own voice was raised, his voice "wasn't at her level" and that he kept "trying to calm and control the situation." Respondent acknowledged that he had grabbed Person A by her shoulders with his hands but that he only held her for "seconds." When he let go of her, she fell against the wall she had been standing next to. After the incident, he drove Person A home to her residence.

Disciplinary Case No. 2012 7022

Introduction

It is not disputed that on the night of February 26, 2012, Respondent, who was off duty, went to Eros, a night club, with his cousin Person B. While they were inside Eros, Respondent was slapped in the face by Person C. Outside Eros, Respondent had a physical interaction with Person C and with Person D Respondent did not report this incident to the patrol supervisor, precinct of occurrence. Respondent was arrested and suspended from duty based on allegations made against him by Person C and Person D.

The Department Advocate's Case

The Department called Sergeant Vincent Deynes, Captain James Palumbo and Lieutenant Philip Sena as witnesses and offered the out-of-court statements of Person C and Person D.

Sergeant Vincent Deynes

Deynes, who is assigned to Internal Affairs Bureau (IAB) Group 34, recalled that on February 26, 2012, he responded to the 44 Precinct to investigate an off duty incident involving Respondent. At the precinct he was present when the complainant, Person C, was interviewed. (DX 4, transcript of interview of Person C). Also, Deynes interviewed a second witness, Person D (see DX 5, transcript of interview with Person D translated into English with corrections made by Deynes). Parts of that interview were conducted in Spanish.

During the interview with Person C he saw she had an "abrasion" or "laceration" to her left cheek, a "minor cut or abrasion" to her left pinky, and an "abrasion or a cut" to her right elbow. At some point he was told that photographs were taken of her injuries (see DX 6A, 6B, 6C, three photographs of the three injuries described by Deynes).

On voir dire, Deynes testified he was not present when the photographs were taken. Further, he does not know who took the photographs or what camera was used.

Returning to direct examination, Deynes testified he saw that Person D had "redness about the face, more specifically, underneath the eyes to his nose" and that his nose appeared "swollen." Two photographs were taken of Person D's injuries (see DX 7A, 7B, two photographs of the injuries described by Deynes). Further, Person D was having "difficulty breathing."

Deynes testified, according to the Patrol Guide, members involved in off duty incidents are required to remain on scene if feasible and, if not, to notify the desk officer of the precinct of occurrence.

On cross-examination, Deynes stated he was also present when Person D's girlfriend, Person E and cousin, Person B were interviewed. Person C alleged that Respondent unlawfully touched her inside of a nightclub called Eros. She then stated to Deynes, she slapped Respondent after he touched her. From the interviews Deynes learned while at Eros the complainant and witnesses had purchased two bottles of liquor. And that there were male dancers at the club.

After Respondent allegedly touched Person C, she said she left the club with Person B, Person E and her brother Person D. At that time she did not tell anyone that Respondent had touched her. In her interview, Person C stated once outside Respondent began punching and pushing her and then said something to the effect of "no girl is going to punch me or slap me" (DX 4). Then, at some point, Person D became involved in a physical fight with Respondent.

During the interview Person C said she did not observe Respondent drunk (DX 4). However, Deynes said Person D told him he was drunk during their interview and on re-direct Deynes testified Person D had indicated to him Respondent was also drunk (DX 5).

Captain James Palumbo

Palumbo, a 13-year veteran of the Department who is currently assigned to Brooklyn South Task Force recalled that on February 26, 2012, he was a lieutenant assigned to Internal Affairs Bureau Group 34 and that he responded to this incident. Palumbo attempted to retrieve video surveillance footage from Eros. He also directed his team to locate and interview the complainant and the MOS involved in the incident.

At some point, Palumbo informed Respondent that he was "being placed under arrest and suspended." Respondent had two firearms that needed to be surrendered. One of the weapons was at Respondent's command, the other was located in the "garage of his [redacted] house." Palumbo told Respondent to call his "[redacted] Person G and let him know they were coming to retrieve the firearm but Palumbo did not want the [redacted] to have the safe combination or to handle the firearm for fear of an accidental discharge. Respondent called Person G and they conversed in Spanish. Palumbo stated he did not understand what they were saying.

On cross-examination, Palumbo agreed his primary function was to organize the investigation, not to investigate the details. After informing Respondent he was going to be arrested, Palumbo went to Respondent's 10-card, in order to discern how many firearms he had and where they were located. Respondent's service weapon was at his command and his off-duty was in a safe at the [redacted]'s house. Palumbo requested the father-in-law's name and date of birth to run a criminal history check. The report prepared in regard to the check stated that Person G had [redacted], one for [redacted] and [redacted]. At some point later, that information was determined to be incorrect.

In addition to requesting the [redacted]'s name and date of birth, Palumbo testified he requested the combination to the safe. Palumbo denied that he had told Respondent that he did not need for Respondent to tell him the combination to the lock on the safe so long as Person G knew the combination number. However, when Palumbo was questioned as to whether he asked Respondent, "Does Person G have the combination?" Palumbo confirmed that he did remember asking Respondent "something

to that effect." Palumbo wrote the combination down in a notebook but was unable to locate the notebook to bring to the trial. He continued to testify that he relayed the combination to either Lieutenant Walsh or Sergeant Sena, the investigators responding to the Bronx residence to retrieve the off-duty firearm. Palumbo was uncertain if Walsh or Sena used the combination to open the safe or if Person G had unlocked the safe himself.

Lieutenant Philip Sena

Sena was assigned to Internal Affairs Bureau, Group 34 as a sergeant in 2011. There his duties were to provide support and immediate action before turning a case over to an investigator. Sena was requested to assist in the investigation of Respondent. He removed Respondent's duty weapon from his locker in the 84 Precinct and responded to a residence in [redacted] to retrieve Respondent's off-duty firearm. He had no prior information on how the firearm was secured.

He arrived at the [redacted] residence and was met by Person G led him into a garage. Person G then went to the back area of the garage and bent down in front of a safe. Sena "didn't see whether he did physically open it or not," although he believed "he hadn't been bent over long enough to put a combination or a key." When Sena reached the safe's door, it was open.

On cross-examination, Sena reiterated he retrieved Respondent's firearm and shield from the 84 Precinct then went to the [redacted] Precinct. From the [redacted] Precinct he was directed to respond to a residence to retrieve Respondent's off-duty weapon. At the residence he was met by Person G. There was a language barrier but Sena was able to relay to Person G that he was there for Respondent's off-duty firearm. Person G "bent over

in the location of the safe," Sena "told him to stop," Person G stood up, the safe door was "ajar," and then Sena physically retrieved the firearm.

At some point investigators believed that Person G had a [redacted] for [redacted]. But this later proved to be inaccurate information.

Sena vouchered the firearm back at the command (see RX B, voucher of Respondent's unloaded firearm). He does not recall if the firearm was loaded or unloaded when he retrieved it from the safe.

Respondent's Case regarding Disciplinary Case No. 2012-7022

Respondent called Assistant District Attorney Gina Torres as a witness and testified on his own behalf.

Assistant District Attorney Gina Torres

Torres is employed as an Assistant District Attorney in the Bronx County District Attorney's Office. During the pretrial stage, she was assigned to Respondent's case. She spoke with the original assistant assigned and then interviewed Person C told her that she was at the club with Respondent on the night in question. At some point near closing time, Person C was watching a "male review" dancer when Respondent approached her, said something, then grabbed her buttocks and vagina. Person C struck Respondent, an argument ensued, and Respondent was removed from the club by the bouncers. A few minutes later Person C left the club with the group she had arrived with. At some point, Respondent approached the group outside, struck Person C in the face, and she fell to the ground.

Next, Torres interviewed Person E was at the club with Person C She states they were all intoxicated and she did not observe anything. Person C had only told Person E that Respondent touched her vagina and buttocks. However, later that evening Person C instructed Person E to lie to the police and "to tell the police that she was in the club and observed [Respondent] grab [Person C] on her vagina and her buttocks." Originally, Person E went along with Person C's's plan and lied to police but later confessed to Torres. She also indicated to Torres she would come and testify as to her recantation.

When Torres spoke again to Person C, she denied Person E's allegation. However, after speaking to Person C one more time, she stopped returning Torres's phone calls. Moreover, Person C had indicated to Torres she had a criminal history. She was recently arrested for "fighting in front of a building with a woman that walked by" and may be on probation.

Torres was also able to interview Person C's brother, Person D. He told Torres he did "not observe a physical altercation between [Person C] and [Respondent]." Also, he did "not see any [*sic*] of the sexual touching incident." Person D further told Torres that after leaving the club, he lost sight of Person C behind a vehicle. At this point, he heard her scream and then observed her on the ground. Person C told him Respondent had struck her, whereupon, he then struck Respondent.

The case against Respondent was dropped. Torres stated that Person C was no longer cooperating and that Person D informed her that he had overheard Person C telling Person E to lie to the police. Also, Person D stated that Person C told him to lie to the police as well and say he observed Respondent strike her.

On cross-examination, Torres testified she became involved "midway through the life" of Respondent's case. The charges against Respondent were dropped in January 2013. Torres believed she never ran Person C's criminal history. She had just relied on what Person C told her about the fight with the woman. Also, she was uncertain if in fact Person C was on probation.

Torres was aware that Person E and Person C had a falling out. She agreed that Person D and Person E had changed their stories from what they had originally told Internal Affairs Bureau investigators but that Person C did not. Last, Torres testified she made attempts to contact Person B but they were apparently unsuccessful.

On re-direct, Torres agreed a major concern and contributing factor to dismissing the case was that her complainant had asked two witnesses to lie.

On further questioning, Torres recalled that when she confronted Person C about Person E's statements Person C became very upset. Person C did not directly deny Person E's accusations and this made Torres question Person C's credibility.

Respondent

Respondent testified that on February 26, 2012 he and his cousin met at a club called Eros. Also at the club was his cousin's girlfriend Person C, her brother, Person D, Person D's girlfriend, Person E, and Respondent's friend, Person F Respondent did not consume any alcohol prior to arriving at Eros. Eros is a lounge with a dance floor and a bar. Respondent stated it is "not a strip club" but they did have a male dancer who dances in his underwear and a female dancer who dances in a bathing suit. Respondent and Person F arrived at Eros at approximately 1:30 a.m. After

introductions Respondent stated aloud to no one in particular this is not a place for "somebody who is married." Person C responded to him by saying "who's married?" Respondent did not have any further conversation with Person C and spoke mostly with Person B.

Around 4:00 a.m. Respondent decided to leave and was looking for Person B so he could say goodbye. He saw Person C near the bar with the male stripper. He tapped her on the shoulder to ask her if she knew where Person B was. Person C turned around and smacked Respondent in the face. Person F and two bouncers witnessed the event. Respondent testified prior to leaving Eros he asked Person B why Person C had slapped him. Then he left the nightclub with Person F.

Once outside Person F took the valet ticket and went to retrieve the car. As Respondent was waiting for Person F to return he saw Persons B, C, D and E crossing the street. Respondent followed the four of them and called out to get Person C's attention. Person C turned around, came towards him "aggressively," and was "screaming." Respondent took a couple of steps back and "pushed her off" of him. Person C fell to the ground. In response, Person D punched Respondent on the left side of the face causing "instant bleeding." Respondent testified he "had no choice but to defend" himself and fought back.

During the fight with Person D, Person C came up behind Respondent and pushed him to the ground. Respondent states he was on "the ground getting assaulted by two different people." At some point, Person F and Person B are able to stop the fight. Respondent got in the vehicle with Person F and left the scene. He had "swelling and redness" to the left eye, an "open cut" on the left side of his face, and he was "bleeding."

Respondent states he wasn't drunk and probably had "one or two" glasses of Hennessy. Also, during the fight Respondent's cell phone was taken.

When he got home he did not notify the patrol supervisor or the precinct of occurrence. He thought it was just a "misunderstanding amongst family" and that they would talk it out later once everyone was "level headed."

Respondent then explained why his address was not correctly depicted on a Department form. At the time, his [redacted] was having issues moving out of his home, the home address he had on file with the Department. Respondent agreed to let her remain in the home until her new apartment was ready and he relocated to [redacted]

The day after the incident at Eros Respondent was notified to respond to the [redacted] Precinct. There, he was informed by Inspector Mainolfi that he was being suspended because of the altercation from the night before. Respondent told Mainolfi "not to let the other people involved leave because" they should be "charged for assault." However, they were not detained and arrested. Only Respondent was arrested. And again, those charges were later dismissed.

Respondent had to surrender his duty and off-duty firearms. His duty weapon was in his locker in the 84 Precinct. His off-duty firearm was in a safe in a garage. He was asked by Palumbo if there was somebody that he trusted enough to give them the combination to the safe so the off-duty firearm could be recovered. Respondent suggested Person A's [redacted], Person G, who was staying at the residence. Palumbo told him to "call [the [redacted]] and give him the combination number so when the guys show up they can have access to the safe."

Person G later told Respondent he opened the safe when the officers arrived and pointed to the firearm. The officer removed the firearm and attempted to hand Person G the loaded magazine. He gestured with his finger saying "no" and the officer placed the magazine back in the safe.

Seven months after he was arrested for the incident at Eros the charges were dismissed. Respondent has not spoken to Person C, Person D, or Person E since that night.

On cross-examination, Respondent testified that on February 26, 2012, Respondent kept a combination safe in Person A's garage. The safe contained Respondent's off-duty firearm. Only Respondent and Person G have access to the garage. Respondent stated the safe was not bolted to the ground and could be lifted with the assistance of another person.

Respondent was notified his duty status was being changed and he would have to surrender his firearms. His duty weapon was in the 84 Precinct. He told Palumbo that his off-duty weapon was located in [redacted] at Person As residence. Palumbo told Respondent to give the combination to Person G and then requested Person G's full name and date of birth. At some point during the investigation Person G's name was run and the results of that inquiry were that Person G was a [redacted].

With regard to the incident at Eros nightclub on February 26, 2012, Respondent confirmed that he met Person C, Person D, and Person E for the first time that night, and that, just prior to leaving, Respondent tapped Person C on her shoulder, she turned around and, without making eye contact, slapped him in the face. Respondent thought Person C appeared drunk. He asked Person B why she slapped him and he did not know. At some point after they exited the club, Respondent began following Person C because he wanted to

know why she slapped him. Respondent called out Person C's name. She turned around and then came towards him in an "aggressive manner." Respondent started "back pedaling," but "she was still coming" so he "pushed her off." Person C fell to the ground. Person D then punched Respondent. Respondent testified he had to defend himself and pushed and probably punched him back. Respondent left the location with Person F. He testified that he believed that it was a "family incident and that it would be talked about the next day when we all were cool headed." Although he was injured, Respondent did not contact a PBA delegate or seek medical attention.

On further questioning, Respondent agreed that when they were outside Eros Person C did not make physical contact with him before he pushed her to the ground. Respondent demonstrated that he had pushed her away with open palms placed against her stomach. On re-direct examination, Respondent explained that he had pushed Person C as a "defensive move" because she was coming towards him in an "aggressive manner" and he was afraid that she would hit him.

FINDINGS AND ANALYSIS

Disciplinary Case No. 2011-3879

It is charged that while he was off-duty on March 1, 2011 within the confines of the [redacted] Precinct in [redacted] County, Respondent engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that he "was involved in a physical altercation" with Person A. It is not disputed that the interaction between Person A and Respondent while they were at a food stand became emotional when Person A told Respondent that she was going to t[redacted]

This charge implicitly alleges that Respondent engaged in physical contact with Person A that was of such a nature that it rose to the level of an actual physical altercation. The evidence offered by the Advocate consisted of what Person A told the 911 operator; what Person A told Nowell, Thomas and Farrell; what Person A wrote on the DIR; and what Person A told Schenck and Minogue.

With regard to the 911 call, the interaction that is the subject of this charge would never have resulted in an investigation, much less an arrest, had Person A not called 911 and she only called 911 because after Respondent drove her home her roommate saw the bruise on her face and urged her to contact the police. Person A told the 911 operator that her call was "not an emergency," that she was calling only because "I just want to have a report," and that "there's no violence or nothing." (DX 2A)

As to how Person A described the physical contact that took place between her and Respondent to the MOS who responded to her residence, Nowell testified that Person A told her that Respondent hit and assaulted her, but Thomas and Farrell testified that Person A only described some pushing or shoving.

On the DIR, Person A wrote that "we tussled and spinned around holding each other" which caused her to "hit a wall" and that when she "pushed him away he told me to stop and I agreed" and that she wanted to have a report that she could use against Respondent if he attempted to [redacted]. (DX 3)

Most significantly, Person A told Schenck that she had voluntarily engaged in close physical contact with Respondent by embracing him in a hug (DX 1 p. 5) and that she :did appreciate the fact that he was hugging me." (DX 1 p. 6) Person A stated that it was only when she "felt him tug me closer" that, because "he was holding me tighter, talking

a little louder" and, as she perceived it, "getting a bit more aggressive," that she decided that she herself "needed to get aggressive," even though she was not afraid of him. (DX 1 p. 7)

Person A also told Schenck that although she wanted to end their embrace, because she "couldn't get him off of me" and because she "felt my feet literally dancing off the ground," she "tussled with him" because she "wanted to get a better grip on him" in order to push him away from her. (DX 1 p. 7-10) Based on Person A's description of her own action that she "tussled with him" to get "a better grip on him," Respondent could have reasonably interpreted her physical actions as a desire to continue and even enhance their emotional embrace. As to the bruise on her face, Person A explained to Schenck that as she "tried to kind of get from under him" by ducking underneath his embracing arms, her face contacted with Respondent's elbow which hurt her and disoriented her to the extent that she did "not go where I was going" which resulted in her falling into the wall she had been standing next to (DX 1 p. 11-13).

Finally, Minogue testified that Person A told him that she had informed the responding officers that she had been accidentally injured and that Respondent had never struck her.

It is clear that the bruise under Person A's right eye was a major factor in the decision that Respondent should be arrested, which was the genesis of this disciplinary charge. However, Person A has consistently claimed that this bruise was caused when she was accidentally struck in the face by Respondent's elbow as she moved out of their hug by ducking underneath his arms and by coming into contact with a wall as she spun out of their embrace.

Based on Person A's statements, the record does not sufficiently establish that the physical interaction between Respondent and Person A was a genuine altercation. As a result, Respondent is found Not Guilty.

Disciplinary Case No. 2012-7022

Specification No. 1

The Advocate previously moved to dismiss this charge which alleged that on February 26, 2012, Respondent engaged in conduct prejudicial to the good order, efficiency or discipline of the Department by subjecting Person C to sexual contact inside Eros without her consent.

It is recommended that this charge be Dismissed.

Specification No. 2

It is charged that while Respondent was off-duty on February 26, 2012, outside of Eros, he engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that he was involved in a physical altercation with Person C and Person D.

I do not credit anything that Person C told Deynes about what happened outside of Eros, because Person C's claim that inside Eros Respondent had used his hand to "rub" her "private area" (DX 4 p. 15) is unsupported and because Torres testified that when she interviewed Person C's friend Person E she told Torres that even though she had not seen Respondent do anything to Person C asked her to lie and claim that she had witnessed Respondent sexually assaulting Person C inside Eros.
However, I nonetheless find Respondent Guilty of being involved in a physical altercation with Person C outside of Eros based on his own testimony. Respondent testified

that while he and Person C were still inside Eros, he tapped her on her shoulder to ask her if she knew where his cousin was and that Person C turned around and, without making eye contact, raised her hand, and slapped Respondent's face. Respondent further testified that prior to leaving Eros he asked his cousin why Person C had slapped him. Thus, Respondent's own testimony establishes that he knew that Person C was angry at him and that she was not averse to engaging in spontaneous physicality.

Despite this knowledge, Respondent admitted that when he was standing outside Eros and saw Person C crossing the street, rather than simply stay away from her, he initiated contact with her by following her and calling out to her to get her attention solely because he wanted to know why she had slapped him earlier.

Based on what Person C had done to him inside Eros, I find that Respondent should have been able to clearly foresee that his actions of approaching her and calling out to her on the street could well result in a physical response on her part. Since Respondent, on his own volition, placed himself in a situation where he had every reason to expect that Person C might attempt to slap him again, Respondent should not have been surprised when, as he testified, Person C came toward him aggressively. Moreover, Respondent admitted that even though Person C had not yet laid a hand on him outside Eros, because she was screaming in his face he decided to initiate physical contact with her by putting his palms on her stomach and pushing her away from him which caused her to fall to the pavement.

As a result of Respondent's admissions, his claim that he was only acting in self-defense when he pushed Person C because he was afraid that she was going to hit him does

not justify his action of initiating a physical altercation with Person C outside Eros that he could easily have avoided.

With regard to Person D, I credit Torres' testimony that when she interviewed Person D, he told her that without giving any prior verbal warning to Respondent that would have allowed Respondent to withdraw and avoid a physical altercation, he had immediately punched Respondent in the face after he saw Person C on the ground and heard her exclaim that Respondent had just hit her. Person D's statement to Torres corroborates Respondent's claim that even though he and Person D had not exchanged a single word, Person D had attacked him immediately after he pushed Person C. Since Person D did not afford Respondent any opportunity to withdraw and avoid being punched and since Respondent was not required to let Person D pummel him without responding to what amounted to a sneak attack by Person D, I concur with Respondent's argument that, under the circumstances, he had no choice but to defend himself against Person D's unexpected attack.

Therefore, Respondent is found Guilty only of that part of Specification No. 2 that charges that he engaged in conduct prejudicial to the good order, efficiency or discipline of the Department by becoming involved in a physical altercation with Person C.

Specification No. 3

It is charged that while Respondent was off-duty on February 26, 2012, he failed and neglected to properly safeguard his off-duty firearm. When Respondent was suspended on February 26, 2012 as a result of the allegations made against him by Person C and Person D , IAB investigators took possession

of his firearms. It is not disputed that Respondent accurately informed the IAB investigators that his off duty firearm was stored inside a fifty pound safe which had a combination lock and that this safe was located inside the garage of the residence owned by Person G, the s[redacted]r of Person A (Respondent's then [redacted]). It is further undisputed that Palumbo directed Sena and Walsh to retrieve the firearm and that when they arrived at Person G's residence he brought Sena to the safe and the firearm was inside the safe.

I credit Sena's testimony that when he retrieved the firearm from inside the safe, the door to the safe was not locked, which is the basis for this charge that Respondent had failed to properly safeguard his off-duty firearm. Respondent asserted that the reason the door to the safe was not locked was because he had followed Palumbo's instruction to him that he call Person G and provide him with the combination number for the lock on the safe which Respondent had never previously given to Person G. Palumbo denied that he had told Respondent that he did not need for Respondent to tell him the combination to the lock on the safe so long as Person G knew the combination number. However, when Palumbo was questioned as to whether he asked Respondent, "Does Person G have the combination?" Palumbo confirmed that he did remember asking Respondent "something to that effect." Palumbo corroborated Respondent's claim that he asked Respondent to tell him Person G's name and date of birth and the combination number. Although Palumbo recalled that he had written these three things down on a slip of paper and that he had given the combination number to either Sena or Walsh, Sena testified that Palumbo did not give the combination number to him and Walsh did not testify at this trial.

With regard to Palumbo's request that Respondent tell him Person G's name and date of birth, Palumbo confirmed that he wanted Person G's name and date of birth in order to ascertain whether Person G had a criminal history. Palumbo admitted that the purported criminal history of Person G that he obtained and provided to the commanding officer of IAB Group 32 was completely inaccurate because Person G had never been convicted of [redacted]

Based on Palumbo's request that Respondent provide him with Person G's name and date of birth, and based on Palumbo's admission that he had asked Respondent something to the effect of "Does Person G have the combination?" it would not be surprising if Respondent misinterpreted Palumbo's remarks as a direction from Palumbo to call Person G, whose criminal history Respondent knew IAB would be checking, and provide him with the combination number so that he could open the safe for the responding officers when they arrived at his residence. Sena's testimony indicates that this may well be exactly what Person G did. Sena testified that when Person G escorted him to the safe, Person G approached the safe first and he saw Person G briefly bending over in front of the safe, possibly long enough to have unlocked the door on the safe.

Based on the above, I find that the Advocate did not sufficiently prove that Respondent failed and neglected to properly safeguard his off-duty firearm. Therefore, he is found Not Guilty of Specification No. 3.

Specification Nos. 4 and 5

Respondent pleaded Guilty to Specification No. 4 and admitted that he had failed and neglected to notify his Commanding Officer that he had changed his residence by submitting form Change of Name, Residence or Social Condition (PD 451-021) as he was required to do. Respondent also pleaded Guilty to Specification No. 5 and admitted that after he had been involved in the off-duty incident outside Eros he failed and neglected to report the incident to the Patrol Supervisor, precinct of occurrence.

Respondent, having pleaded Guilty, is found Guilty of Specification Nos. 4 and 5.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on January 9, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. He has no prior formal disciplinary record.

Under Disciplinary Case No. 2012-7022, Respondent has been found Guilty of engaging in conduct prejudicial to the good order, efficiency or discipline of the Department while he was off-duty by becoming involved in a physical altercation with a woman outside a night club. As discussed above, I have found that Respondent could easily have avoided becoming involved in a physical altercation with this woman. In addition, Respondent has pleaded Guilty and admitted that he failed to report this physical altercation incident to the patrol supervisor, precinct of occurrence, as he was required to do. In *Case No. 2008-83838* (March 5, 2009), a 13-year MOS who had no

prior disciplinary record forfeited 15 vacation days for becoming involved in a bar fight and then failing to notify the desk officer, precinct of occurrence.

Finally, Respondent has pleaded Guilty and admitted that he failed to notify his Commanding Officer that he had changed his residence by submitting form Change of Name, Residence or Social Condition (PD 451-021) as he was required to do. In mitigation of this misconduct, Respondent testified that because he and his wife had recently separated he had moved out of their marital residence and was temporarily staying at his sister's residence.

With regard to the charge he has been found guilty of, and the charges he has pleaded guilty to, under Disciplinary Case No. 2012-7022, it is recommended that Respondent forfeit as a penalty 20 of the 30 days he served on pre-trial suspension without pay (from February 26, 2012 until March 26, 2012). The ten additional suspension days he served should be restored to him.

With regard to Disciplinary Case No. 2011-3879, Respondent was suspended without pay for 15 days (from March 1, 2011 until March 15, 2011). Since Respondent has been found not guilty of the sole charge in this case, these 15 suspension days should be restored to him (pursuant to NYC Administrative Code §14-123).

Therefore, it is recommended that a total of 25 of the 45 days he served on his two pre-trial suspensions should be restored to Respondent.

Respectfully submitted,

Robert W. Vinal
Assistant Deputy Commissioner - Trials

APPROVED

NOV 07 2012

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER MELVIN THOMAS
TAX REGISTRY NO. 940800
DISCIPLINARY CASE NOS. 2011-3879 & 2012-7022

Respondent received an overall rating of 3.0 on his 2013 performance evaluation, 3.0 on his 2011 evaluation, and 4.0 on his 2010 evaluation. He has been awarded one Excellent Police Duty medal. [redacted]
He has no formal disciplinary record.

He was on Level 1 force monitoring from August 12, 2009 until March 1, 2011. He was placed on Level 2 discipline monitoring on March 1, 2011 which is continuing.

For your consideration.

Robert W. Vinal
Assistant Deputy Commissioner – Trials