

By Katherine Bouton

In the spring of 2009, Dan Carione was 44 years old, a deputy inspector with the New York City Police Department (NYPD) with almost two decades of police work to his credit. He expected that he would stay on the force at least until he reached the mandatory retirement age of 63. He was a lifer. “I loved the department,” he said to me in the spring of 2015.

Jim Phillips, 40, a sergeant in the Bronx, also had two decades on the job. Like Carione, he had worked all over the noisy city, in the subways, on the streets, policing demonstrations with piercing whistles and loud-speakers. Both had been first responders at the World Trade Center on 9/11.

In 2009, the police department informed Carione he would have to retire. Phillips got the same news in January 2010. Their crime? Wearing hearing aids.

Not only were they wearing hearing aids, but they were hearing aids that the police department had arranged testing for, and had paid for. Both had gone back to work with the aids, oblivious of any pending problem. Then, out of the blue, they were told their police careers were over.

In 1996, Dan Carione was involved in a shootout and his partner discharged a revolver close to his right ear. He dates his hearing loss from this incident. As for the noise and chaos at the World Trade Center, he says, “9/11 broke my heart, but it did not further damage my hearing.”

Jim Phillips sustained a hearing loss when policing a loud demonstration of whistle-blowing construction workers in October 2008.

Both, in other words, incurred routine job-related injuries for an active-duty police officer.

**When a New York City police officer is told he can no longer do his job because he wears hearing aids, what does he do? He calls HLAA. Find out how Daniel Carione fought for the job he loved, got NYPD policy changed, and educated a lot of people about hearing loss.**

### **New Policy on Hearing Aids**

In January 2010, the NYPD issued a written policy on hearing aids, which required police officers to have “normal” hearing. The policy applied to new recruits, as well as to any officer who requested hearing aids. (Officers are not routinely tested once they are hired.) They would not be allowed to wear hearing aids for the test.

In late 2009, before the policy was finalized, a police surgeon gave Carione the news that he could no longer work in the department. He immediately appealed to his Chief, who said the same thing. He went to the union, and got the same message. Eventually he went to the police commissioner himself. They all said the same thing: police department regulations forbade officers to wear hearing aids on duty. As noted, this policy or rule was adopted after Carione was told that he was being forced to retire.

In 2009, he was the Queens Borough Commander in the office of internal affairs, with 50 investigators and other NYPD personnel assigned to internal affairs under his direction.

In September 2010 he was transferred to a desk in the office of the chief of internal affairs, where, he says, he was given limited responsibilities.

Arranging his forced retirement took time but since the police department provided him with a desk and a computer—and not much to do—this gave him plenty of time for research. His research led him to HLAA and, specifically to Lise Hamlin, the director of public policy, and David Gayle, HLAA’s volunteer attorney. David Gayle helped Carione with his initial legal research into other disability cases, which was exhaustive.

“One of the things that stood out was Dan’s persistence,” Hamlin told me this past March. “He really pulled it all together.”

The respect was mutual. “I would say this: when you have a hearing loss, you’re really at times isolated from a lot of the world,” Dan Carione said. “Lise Hamlin and David Gayle were advocates for me. I didn’t have anyone else who would listen.”

But he did have that computer, good research skills, and good contact with police officers around the country.

One thing he did was search for other NYPD officers who had also been forced out because they were wearing hearing aids. Through contacts in the Bronx he met Jim Phillips, a sergeant, who wore bilateral hearing aids. Like Carione’s, Phillips’ hearing aids were paid for by the department and Phillips went on working after he received them. In January 2010, he was told he had to leave the department. Like Carione, he fought the decision.

Phillips retained an attorney, Colleen Meenan, a former police officer herself who has been involved in other discrimination cases against the

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# Standing Your Ground

Photo courtesy of New York  
Police Department Photo  
Unit, 1 Police Plaza



for Justice

NYPD. When Carione met Phillips, they decided to be joint plaintiffs in the case. The defendants were the City of New York, the NYPD, the NYPD medical board, and the police commissioner.

Colleen Meenan was the first attorney on the case, pursuing it on her own for three years. As the suit progressed, Meenan, who remained the lead attorney, was joined by Disability Rights Advocates attorneys Stuart Seaborn and Rebecca Rodgers.

### **Building the Case**

Meenan amassed what seemed like undeniably persuasive evidence. Much of it had been put together by the NYPD itself, and all of it worked against the city's own case. Much of it was uncovered in the discovery process.

The NYPD's case hinged primarily on a report prepared for the United States Postal Service, which found many problems with hearing aids that might impair a police officer's ability to perform the job. The NYPD's consultant on hearing aids, Mark B. Kramer, cited the Postal Service in explaining why hearing aids are not compatible with police work.

They don't resolve hearing to normal levels, he maintained: They may leave acoustic cues inaudible, they may compromise binaural hearing, they require batteries that may go dead without warning. They have control switches and knobs that the user must adjust and which will likely fail during the life of the instrument. They may become blocked by earwax, be affected by electronic interference, require remote control units. They may be displaced or rendered inoperative during physical confrontation, and they may be incompatible with sound monitoring equipment.

Sounds pretty damning, right? The problem is that this report was issued not only not in this decade but not even in this century. It was prepared in 1996, and most of the

information was based on the use of analog hearing aids. All hearing aids are digital these days, and they rarely have the problems that analog aids had.

The issue of hearing aids becoming inoperative during a confrontation was one that particularly vexed the officers. NYPD allows officers to wear glasses and prosthetic limbs.

"Imagine an active shooter protocol. I'm working with my hearing aid," Carione said to me. "The officer on my left wears prescription glasses. The officer on my right wears a prosthetic leg. The glasses fall off and shatter. The prosthetic leg fractures. My hearing aid battery gives me a 40-minute warning but let's say it unexpectedly goes dead. The assailant turns the corner. One officer can't see. One can't walk. I can hear out of one ear and more important, I can see. Who would you want standing by?"

“ I think this case is really important for those who wish to serve and for those who are responsible for those who serve. People who serve go with their heart, they have to risk their life. To eliminate the possibility of service, to those people who have already surmounted difficulties in their own lives... I don't think we're a country like that. We're a country that values service. ”

—Colleen Meenan

In an amicus brief filed by AARP, the Hearing Loss Association of America, the Veterans of Foreign Wars, and Veterans United for Truth, the NYPD objections were dismantled one by one. It's breathtaking to read the points in the brief, and one wonders how the NYPD ever thought it could win the case.

In addition, a survey conducted by the NYPD in 2010 found that

the department was the only major department in the country that maintains a blanket exclusion policy for officers who wear hearing aids, although a few prohibit hearing aids for applicants.

### **The NYPD Makes Its Case**

Despite this overwhelming evidence, the judge in the case rejected applications for summary judgment from both sides. The NYPD's claim was that an officer with a hearing aid is not qualified to perform the essential functions of the job. The plaintiffs argued that the NYPD was not following the requirements of the ADA as amended in 2008. Performance of the essential functions of the job must be determined with the applicant afforded a reasonable accommodation.

That is, officers with newly-acquired hearing loss must be allowed to wear the hearing aid or aids when they take the hearing test. So must recruits. Once they pass the test, their ability to perform "essential functions" is considered on a case-by-case basis, with evaluation of the job tasks taken into consideration.

"What's really a precedent is the decision to consider hearing loss on a case by case analysis," Stuart Seaborn explained to me. "There is some hearing loss that is so severe that it's not appropriate for police work. We don't want a blanket ruling either way. We want evaluation of what someone can do on a case-by-case basis."

Perhaps equally important is the unique nature of police work in New York City. Most New Yorkers are exposed to an excessive level of noise on a daily basis and in fact New Yorkers have a higher-than-average prevalence of hearing loss. For police officers this noise exposure is intensified. Many work in the subways and on noisy streets, they are exposed to gun shots, sirens, whistles. It is likely that many police officers already have hearing loss. With this agreement, they will be able to come forward and

get that hearing loss treated. Up to this point they have been policing the city with untreated hearing loss.

It's important on another level as well. Hearing loss is by far the largest medical issue facing returning veterans, with hearing loss and tinnitus constituting the two largest categories for disability claims. A blanket ban on hearing aids excludes veterans from police work, a job which many veterans turn to.

### Justice is Served

Plaintiffs and defendants, with their attorneys, gathered at Federal Court in Manhattan on March 9, 2015. Within a few hours, an agreement had been reached. Why did it get this far? The plaintiffs aren't sure. Stuart Seaborn told me he was "shocked that they took it this far and then settled at the last minute. It's amazing all the resources that were spent on it."

Dan Carione expects to return to the NYPD at his old rank, deputy inspector. According to the terms of the agreement he will be reinstated within 10 days of receiving a hearing test at the Center for Hearing and Communication. Assuming he passes the test, he will receive all back pay, benefits and seniority from the day he was retired, June 24, 2011, until the day he begins work again. He will return any pension and disability payments received in the interim. According to the agreement, he will not be tested again unless he develops additional hearing loss.

Jim Phillips, who has been working with the Brewster, New York, police department, has decided to stay in Brewster. He too will be rewarded back pay. Both officers will receive additional sums with a 1099 miscellaneous form issued by the City of New York, as additional compensation. The city is required to pay all attorney fees and costs.

Dan Carione and Jim Phillips, with their legal team, were a formidable presence. Colleen Meenan praised her clients: "Both Dan and



Officer Carione, his legal counsel and friends after the trial at federal court in Manhattan, from left: Stuart Seaborn, Disability Rights Advocates; Shelly Ann Quilty-Lake, Meenan and Associates; Rebecca Rodgers, DRA; Dan Carione, plaintiff; Jerry Bergman, HLAA New York City Chapter; Colleen Meenan, Meenan and Associates; and plaintiff Jim Phillips.

Jim have stood on very principled ground in this case. They were not looking for monetary compensation without an understanding that policy would change. They were willing to go forward to jury, when they might lose."

As for the case itself, she says, "I think this case is really important for those who wish to serve and for those who are responsible for those who serve. People who serve go with their heart, they have to risk their life. To eliminate the possibility of service, to those people who have already surmounted difficulties in their own lives... I don't think we're a country like that. We're a country that values service."

As for the specific issues, Lise Hamlin summed up HLAA's common-sense position: "This is not to say that we oppose hearing acuity standards and testing. But the hearing acuity levels must be set with real needs in mind, and each person should be taken as an individual, and tested with their hearing aids on." **HLM**

*Katherine Bouton is the author of Shouting Won't Help, a memoir of adult-onset hearing loss, and Living Better With Hearing Loss: A Guide to Health, Happiness, Love,*



*Sex, Work, Friends... and Hearing Aids. She is a former editor at The New York Times, and a member of the HLAA Board of Trustees. Katherine blogs at <https://hearbetterwithhearingloss.wordpress.com> and can be reached at [katherinebouton@gmail.com](mailto:katherinebouton@gmail.com). An essay by Bouton about the case appeared in the New York Times Op-Ed page on March 28, 2015.*

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