



POLICE DEPARTMENT

July 6, 2007

MEMORANDUM FOR: POLICE COMMISSIONER

Re: Police Officer Miguel Marte
Tax Registry No. 927135
Patrol Borough Brooklyn North Anti-Crime Unit
Disciplinary Case No. 82387/06

The above-named member of the Department appeared before me on March 15, 2007, charged with the following:

1. Said Police Officer Miguel Marte, while assigned to the 73 Precinct, while on duty, at about 2140 hours on June 1, 2005, in front of [REDACTED] Kings County, was discourteous to an individual known to this Department: to wit, Respondent used profanity toward said individual in that he used such words as "bitch," "punk," and "fuck" to said individual. (*As amended*)

P.G. 203-09, Page 1 – PUBLIC CONTACT

2. Said Police Officer Miguel Marte, while assigned to the 73 Precinct, while on duty, at the date, time and location indicated in Specification #1, did wrongfully and without just cause use physical force against an individual known to this Department: to wit, Respondent pushed said individual. (*As amended*)

P.G. 203-11, Page 1, Paragraph 2 – USE OF FORCE

3. Said Police Officer Miguel Marte, while assigned to the 73 Precinct, while on duty, at the date, time and location indicated in Specification #1, did abuse his authority as a member of the New York City Police Department in that he wrongfully and without just cause threatened an individual known to this Department with the use of force: to wit, Respondent threatened to punch said individual. (*As amended*)

P.G. 203-10, Page 1, Paragraph 4 – PROHIBITED CONDUCT

The Department was represented by Nancy Lichtenstein, Esq., Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

EVIDENCE

Introduction

It is not disputed that on June 1, 2005, Police Officer Patrick Caprice was shot while on duty, that the Respondent was one of the members of service who responded to the scene of the shooting to find Officer Caprice prone on the ground bleeding from his gunshot wounds, and that the Respondent helped lift Officer Caprice into a vehicle which transported him to the hospital.

The Department's Case

The Department called Rafael Innis and Germain Difo as witnesses and offered the statement of [REDACTED]

Rafael Innis

Innis, who is married to [REDACTED] and is employed by the New York City Housing Authority as a mechanic, testified that at about 2140 hours on June 1, 2005, he and [REDACTED] who was his girlfriend at the time, arrived in front of [REDACTED] the building in which they resided. Innis saw "a lot" of police vehicles with lights flashing arriving in front of the building. A police officer asked to see their IDs and they both handed them over. Innis asked this officer, who was looking at their IDs and writing down information, "What happened?" When Innis "didn't get an answer," he again asked this officer, "What happened?" As the officer began to speak to Innis, the Respondent came over and interrupted the officer by telling Innis, "Just shut the fuck up and go upstairs." Innis asked the Respondent, "Who the fuck are you talking to? What is wrong with you?" The Respondent then ordered him, "Go stand over there."

Innis moved and then told the Respondent, "You're telling me to stand in front of the building. Any other night it's loitering." The Respondent told him again, "Just go stand over there." The Respondent asked him, "Didn't I tell you to move the fuck down?" and ordered him to "move further down punk." Innis testified that the Respondent walked over to him and pushed him twice for no reason. Innis recalled that the Respondent first pushed him on his right shoulder as he told him to "move further down." Even though Innis then started "moving down, the Respondent pushed him again, in his back, as he told him, "Move down. Get the fuck out of here. I don't want to see you."

On cross-examination, Innis acknowledged that about 30 police officers were on the scene when he and [REDACTED] arrived in front of the building, soon "a lot" of police

vehicles arrived and that “hundreds” of police officers, helicopters with searchlights and news vans arrived at the scene. Innis acknowledged that he became upset at the Respondent because he refused to give him back his ID and because he refused to allow him to enter the building to rejoin [REDACTED] [REDACTED] had told Innis to “calm down” and that he should not talk to the police officers. Innis testified that he remained “physically calm” during his entire encounter with the Respondent. Four or five police officers had to hold the Respondent back from attacking Innis. Innis denied that anyone had to hold him back from going at the Respondent. No one, other than the Respondent, placed a hand on him during this incident.

Germain Difo

Difo, who has been employed as a CCRB investigator for the past two years, testified that he conducted a tape-recorded interview of [REDACTED] [Department’s Exhibit (DX) 1].

[REDACTED] told Difo that on June 1, 2005, at about 9:40 p.m., she and Innis, who was her fiancé at that time, arrived at [REDACTED] When they got there, “There was a whole bunch of police outside. We didn’t know what had happened. When we got to the front, to the entrance of the building” they were asked to produce identification to establish that they lived in the building. [REDACTED] recalled that “there were so many police. They were all over the building. It was terrifying.” Innis “wanted to know what was going on.”

As they were taking their IDs out of their wallets, Innis asked the police officers what had happened. One police officer started to tell him what had happened but another

officer interjected, "Don't fucking worry about it. Just give me your ID." Innis "just looked" at this officer and then asked, "What's the problem?" The officer told him, "Don't say nothing else. Just give me your fucking ID." Innis asked, "What's the problem? All I asked was a question. You want to be a jerk about it and not tell me what's going on, but you're asking for my ID."

██████ who was "still standing there," became "scared because I don't know what's going on." The officer then told Innis, "I'm not giving you your fucking ID and you can't come in the building." The officer told ██████ "Miss, go ahead and go in the building." As ██████ entered the building she heard Innis ask the officer, "You are not going to let me in the building?" The officer told Innis, "No, walk away." Innis then walked a short distance away from the building and "stood on the side." The officer was "walking behind him waving a nightstick at him" saying "here bitch, you better go ahead on, walk away." Innis then walked "a little bit more." ██████ asked another officer, "Why is he doing that? Why is he following him? Why is he trying to get him into an altercation? He's walking away, why's he still following him and yelling at him?"

██████ opined that, "On the street, you know that's a threat right there."

██████ went upstairs and looked out a window. Innis called her on her phone and asked her, "Do you see it?" ██████ went to get her camcorder but the battery was dead. She watched the officer. She heard him say, "Yeah bitch, 'cause do something about it and I'm going to knock your ass out. I'm going to show you who's the man." She thought that the officer was "crazy." Innis was "still exchanging words back and forth" with the officer. Innis said, "Better yet, what's your badge number?" The officer

responded, "Bitch, what are you going to do about it? You're not going to do nothing about it." The officer waved his baton in Innis' face and yelled in his face.

██████ was "begging him not to get into it with this officer." ██████ told Innis, "Baby, please don't get into it with him. We don't know where it is going to lead. It's your word against his and of course, with everything else going on, you're going to seem like the bad guy. You know, he's not leaving you alone, don't say nothing else." Innis told the officers, "You are telling me to stand here, if I stand here any other time you all would say I am trespassing, but you are making me stand here. You tell me to move, I move, he's still following me, he's still yelling, he's still threatening me, just leave me alone. Do your job. Do what you came to do. That's what you're doing. I'm not the one you are looking for, so leave me alone."

██████ recalled that "after a while" the officer "got cool saying they found who they were looking for. So he's like 'Okay you can go in the building now.' He kind of threw him his ID and allowed him in the building. Once he allowed him in the building and he got upstairs, Rafael is still upset. He went outside, spoke to a few supervisors, asked him what he should do and they told him he could file a report. So we went on the internet and we did that." ██████ recalled that "there was another lady who was literally pulling Ralf away. Every time the officer came, she was pulling him." The lady told Innis, "Look, he's not worth it. Don't go, don't go down for this," as she was, "Just pulling him away saying don't get into it." ██████ recalled that, "I am begging Ralf, 'Look, don't, just ignore him, please. We've got too much. We've got our children, our work, do not, because he can't get arrested. He works for the City and he can't get arrested.' So he's like, '██████ I am trying.' He kept on saying, 'I'm trying. I'm

trying. I'm walking away and he's telling me to walk away.' and the guy still, he's literally still following Ralf yelling. He's screaming at the top of his lungs for no, it was no reason. There was just no reason for it." He pushed him "maybe once." The officer instructed Innis to "move to the end, get away from here. Shut the fuck up." The officer "called him a bitch and he told him to 'shut the fuck up, get the fuck away from here, go ahead, do something about it so I can go ahead and knock you the fuck out or drop you.'" [REDACTED] stated that, "Ralf he's, he's not the type of person that just likes to hear that, you know." The officer told Innis that he would "beat the shit out of him and he'll arrest him."

On cross-examination, Difo testified that his investigation revealed that numerous police units, including Emergency Services and the Canine Unit, responded to [REDACTED] [REDACTED] that police officers conducted a sweep of the building and that Sergeant William Burke was a supervisor at the scene. Difo testified that he is certain that he told Innis and [REDACTED] to provide him with the names of any persons who witnessed this incident. They did not provide him with any names.

The Respondent's Case

The Respondent called retired Sergeant [REDACTED] as a witness and testified in his own behalf.

Sergeant [REDACTED] (Retired)

[REDACTED] who retired last year after 21 years of service (the last five as a sergeant at the 73 Precinct), recalled that on June 1, 2005, at about 9:30 p.m., he was assigned as the

patrol supervisor when he received a radio transmission that Police Officer Caprice had been shot. He responded to [REDACTED] and arrived at the shooting scene as the van transporting Caprice to the hospital was leaving the scene.

He was conducting a vertical patrol of the building when Emergency Services Unit (ESU) vehicles arrived at the scene. ESU supervisors were instructing officers not to allow anyone to enter [REDACTED]. [REDACTED] told the Respondent not to allow anyone to enter the building. [REDACTED] then saw the Respondent telling a man that even though he had ID, he was not allowed to enter the building. The man began yelling at the Respondent and was agitated, confrontational and abusive. [REDACTED] interceded and told the Respondent "to take a couple of steps back" from the man. [REDACTED] told the man that no one was being allowed to enter at that time but the man continued to demand that he be allowed to enter the building immediately. [REDACTED] told the man that if he did not leave, he would be arrested for Disorderly Conduct. [REDACTED] did not hear the Respondent use any profanity and he did not see him push the man.

On cross-examination, [REDACTED] was confronted with answers he provided at his CCRB interview. When [REDACTED] was asked at this interview whether he had heard the Respondent call the man a "bitch" or a "pussy-assed faggot," [REDACTED] had stated that he did not recall hearing this.

The Respondent

The Respondent, who is presently assigned to Patrol Borough Brooklyn North, testified that on June 1, 2005, he was assigned to the 73 Precinct's Conditions Unit and his assignment that day was to serve as the driver for Lieutenant Battle. After they had

responded to the scene where Police Officer Caprice had been shot and after the Respondent had helped lift the bleeding Caprice into a van which transported him to the hospital, they responded to a radio transmission that the shooter had fled into [REDACTED] [REDACTED]

After he arrived in front of that building, Lieutenant Stevenson directed the Respondent to secure the front entrance and to check the IDs of anyone attempting to enter the building to insure that they lived in the building. Shortly thereafter, an ESU sergeant ordered the Respondent not to let anyone else into the building, because ESU was conducting "a sweep" of the building using canines, and to keep the area in front of the entrance to the building clear of onlookers so that arriving ESU officers could quickly enter the building. When the Respondent told Innis, who had showed the Respondent his ID upon request, that he could not enter the building, Innis became upset, irate and belligerent. Innis told the Respondent, "I live in this fucking building, I have the right to enter and no one is going to tell me that I can't enter my building." Innis then attempted to walk into the building. The Respondent stopped him, warned him that he could be arrested and "snapped out" his "ASP"¹ toward the ground in an attempt to get Innis to "back off." Innis then "retreated." The Respondent did not direct any profanity at Innis, he did not threaten to punch him and he did not put his hands on him.

On cross-examination, the Respondent recalled seeing [REDACTED] speaking to Innis who was continuing to demand that he be allowed to enter the building. The Respondent could not recall whether Innis was with anyone. He testified that Innis had refused to comply with his orders.

¹ ASP is the manufacturer name of expandable batons issued to members of the service.

FINDINGS AND ANALYSIS

It is charged that the Respondent was discourteous to Innis in that he directed profanity at him by using "such words as 'bitch,' 'punk,' and 'fuck,'" that the Respondent wrongfully and without just cause used physical force against Innis by pushing him, and that he abused his authority by wrongfully and without just cause threatening to punch Innis.

Initially, it must be noted that the specific, on duty circumstances the Respondent was presented with here involve one of the most stressful situations a police officer can endure: the immediate aftermath of the shooting of a fellow officer. It is not disputed that the Respondent's interaction with Innis took place shortly after the Respondent had personally assisted Caprice, who was bleeding from his gunshot wounds. It is also not disputed that the Respondent had good reason to believe that the shooter had fled into [REDACTED] and [REDACTED] corroborated the Respondent's testimony that his orders were to keep the area in front of the entrance to the building clear of civilians so that responding officers could quickly move from their vehicles to the entrance in order to enter the building and apprehend the shooter. Finally [REDACTED], [REDACTED] and even Innis, supported the Respondent's description of a hectic, frenzied atmosphere in front of [REDACTED] [REDACTED], with numerous Department vehicles arriving at the scene and uniformed officers (some assigned to emergency units) rushing into and around the building. Thus, although uniformed members are required to maintain discipline and self-control even under the most trying circumstances, given the combination of factors described above, it is not surprising that at the point when Innis and [REDACTED] arrived in front of the building,

the Respondent's adrenaline level was extremely high and, as a result of his personal contact with the bleeding Caprice, his emotions were, understandably, already raw.

Into this highly charged atmosphere stepped Innis, who was not aware that the police were in hot pursuit of a man who had just shot an officer and who they believed had fled into [REDACTED]. Innis was also not aware of the Respondent's assignment. He testified that he immediately took a dislike to the Respondent because he interrupted an officer who had started to explain to Innis why so many police officers were arriving at [REDACTED]. Moreover, Innis testified that after he was told, "Just shut the fuck up and go upstairs," he had "responded in kind" by stating, "Who the fuck are you talking to?"

It was clear to Innis that a major police action was taking place at [REDACTED]. [REDACTED] Innis acknowledged that "a lot" of police vehicles were arriving and that soon "hundreds" of police officers, helicopters with searchlights and news vans arrived at the scene. [REDACTED] told CCRB, "There were so many police. They were all over the building. It was terrifying."). Innis also acknowledged that [REDACTED] told him to refrain from questioning the busy police officers about what was going on. Innis should have followed [REDACTED]'s advice and saved his questions for later. However, he ignored her sound advice and asked the officer who was busy writing down information from their IDs, "What happened?" When an impatient Innis "didn't get an answer" from this officer, rather than wait, he again asked, "What happened?" When the Respondent interrupted his attempt to converse with this officer, Innis decided that it was a good time to deliver a lecture to the Respondent. [REDACTED] recalled that Innis told the Respondent, "You want to be a jerk about it and not tell me what's going on, but you're asking for my ID." Innis also decided to

berate the Respondent about the Department's loitering enforcement policy after the Respondent ordered him to "go stand over there." Innis admitted that he told the Respondent, "You're telling me to stand in front of the building" now but on "any other night it's loitering." Innis further admitted that the Respondent had to order him a second time to "just go stand over there." Innis also testified that the Respondent later asked him, "Didn't I tell you to move the fuck down?" and then ordered him to "move further down punk." This testimony constitutes implicit admissions by Innis that the Respondent had ordered him to move further away than he did move and that the Respondent had to issue his order to "move down" more than once.

██████ told CCRB that after the Respondent had instructed Innis to "walk away," Innis had moved only a short distance away and "stood on the side" which resulted in the Respondent telling Innis, "Here bitch, you better go ahead on, walk away." ██████ stated that Innis responded to this order by moving only "a little bit more" away even though ██████ heard the Respondent order Innis to "move to the end, get away from here."

Thus, Innis and ██████ both implicitly acknowledged that while the Respondent was trying to do his job of clearing civilians away from the area in front of the entrance to the building, Innis was verbally berating him and that Innis did not fully comply with his direction to move to the end of the front of the building. Even though Innis believed that the Respondent's decision not to allow him to enter the building was arbitrary and unwarranted, Innis did not have the right to verbally castigate the Respondent while he was performing his duties or to refuse to fully obey the Respondent's order that he move to the area where the Respondent had directed him to go. As a result, I find that even if the Respondent used rough language in addressing Innis, under the circumstances

presented here, his use of profane remarks would not rise to the level of actionable misconduct because Innis, an onlooker, was badgering him and refusing to cooperate with his directions during the course of a potentially dangerous, highly charged, stressful street situation.²

Although Innis asserted that the Respondent had pushed him twice for no reason, Innis' own testimony reflects that even if the Respondent did engage in the limited, minor physical contact described by Innis, this contact was not gratuitous but was for the purpose of enforcing his order to Innis that he move to the area where the Respondent had directed him to move. Innis testified that as the Respondent pushed him (on his right shoulder), the Respondent contemporaneously was telling him to "move further down." Innis also testified that when the Respondent pushed him a second time (on his back), the Respondent at the same time told him, "Move down. Get the fuck out of here. I don't want to see you." Although Innis asserted that there was no need for the Respondent to push him in the back because he was already "moving down," as noted above, I find that Innis did not fully comply with the Respondent's original direction that he move down to the area at the end of the front of the building. Under the circumstances presented here, the two open-handed pushes described by Innis would not rise to the level of actionable misconduct because the Respondent was under a duty to comply with [REDACTED]'s order to keep civilians away from the front of the building and because Innis was being

² See Disciplinary Case No. 80852/05 (approved by the Police Commissioner on December 9, 2005) where the Respondent was found Not Guilty of discourtesy because, even if he had told an on-looker to mind his "fucking business," his profane comment did not rise to the level of a disciplinary offense since it was made during the course of a stressful street encounter. See also Disciplinary Case Nos. 69412/94 (approved on June 1, 1995) and 68632/94 (approved on January 18, 1995).

uncooperative in that he was not fully complying with the Respondent's order to move further down.

Thus, I find that the record does not support a finding that the extremely limited force Innis described the Respondent as having used was gratuitous in nature.

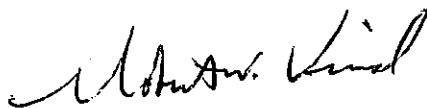
With regard to the charge that the Respondent wrongfully and without just cause threatened to punch Innis, I would initially note that Innis' testimony that he himself was "physically calm" and that he did not adopt an aggressive posture toward the Respondent at anytime during this encounter, is refuted by what [REDACTED] told CCRB. Although Innis acknowledged that he became so upset at the Respondent that [REDACTED] had to tell him to "calm down," Innis adamantly asserted that no one had to hold him back from the Respondent and that no one other than the Respondent had placed a hand on him. [REDACTED] in contrast, told CCRB that a "lady" bystander had grabbed Innis and tried to physically pull him away from the Respondent more than once, and [REDACTED] described herself as "begging" Innis "not to get into it with this officer." (DX 1 p. 6 and 12) It makes no sense that [REDACTED] would be "begging" Innis "not to get into it" with the Respondent or that a woman who was a mere onlooker would interject herself into this confrontation and try to pull Innis away from the Respondent, unless both women had become convinced by Innis' demeanor and posture that he was on the verge of initiating physical contact with the Respondent.

Thus, even if the Respondent had made such a comment, it would not rise to the level of actionable misconduct under the circumstances presented here since Innis adopted a physically aggressive posture, acting as if he wanted to fight the Respondent. This conclusion is supported by [REDACTED]'s statement to CCRB that she heard the

Respondent issue the warning, "Go ahead, do something about it, so I can go ahead and knock you the fuck out" or "drop you" to Innis. The statement, "Go ahead" is consistent with Innis acting as he if he was about to come at the Respondent.

The Respondent is found Not Guilty.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner – Trials

APPROVED



JAN 29 2008
RAYMOND W. KELLY
POLICE COMMISSIONER