



POLICE DEPARTMENT CITY OF NEW YORK

May 9, 2016

MEMORANDUM FOR: Police Commissioner

Re: Detective Jesus Capo
Tax Registry No. 926640
28 Precinct
Disciplinary Case No. 2015-14316

Charges and Specifications:

1. Said Det. Jesus Capo, on or about September 17, 2014 at approximately 2344 hours, while assigned to the 28th Precinct and on duty, in the vicinity of [REDACTED], wrongfully used force, in that he punched Person A, without police necessity.
P.G. 203-11 - USE OF FORCE

Appearances:

For CCRB-APU: Suzanne O'Hare, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

For Respondent: James Moschella, Esq.
Karasyk & Moschella, LLP
233 Broadway-Suite 2340
New York, NY 10279

Hearing Date:

April 5, 2016

Decision:

Not Guilty

Trial Commissioner:

ADCT Jeff S. Adler

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on April 5, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. Person A, the alleged victim of the punch, did not file a complaint and did not appear to testify. Instead, CCRB introduced its recorded interviews of two witnesses, Person B and Person C, as well as video footage recorded by a bystander at the scene. Respondent called Police Officer Michael Duffy, and Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent not guilty of the charged misconduct.

FINDINGS AND ANALYSIS

On September 17, 2014, at about 2344 hours, Respondent observed what appeared to be a hand-to-hand drug transaction in [REDACTED] [REDACTED] [REDACTED]. At the time of the observation, Respondent was inside an unmarked police car with Sergeant Joel Edwards and Officer Michael Duffy. Respondent, who was in plain clothes and driving, jumped out of the car in pursuit of the buyer, who he later learned to be Person A. Officer Duffy, who was in uniform, went to assist Respondent, while Sergeant Edwards pursued the seller (who was not apprehended). Person A was only able to take a few steps from the corner before he was apprehended by Respondent. At issue is whether Respondent wrongfully used force by punching Person A during the apprehension. I find that he did not.

Person A did not file a complaint against the police and did not appear to testify. Instead, CCRB introduced recorded interviews, and accompanying transcripts, of witnesses Person B (CCRB Exs. 1 and 1A) and Person C (CCRB Exs. 2 and 2A), who each made complaints against various officers involved in the event. Also introduced was a four-and-a-half minute video recorded by someone else at the scene (CCRB Ex. 3), though that recording only begins after Person A had already been apprehended and was in police custody. It was stipulated that Person B had misdemeanor convictions for possession of marijuana in 2008 and resisting arrest in 2007, as well as a manslaughter conviction in 1993. In 2007, Person C had a felony conviction for criminal possession of a controlled substance in the fourth degree, for which she was placed on five-years probation.

Hearsay evidence is admissible in an administrative tribunal, and a case may be proven with such evidence provided it is found to be sufficiently reliable and probative on the issues to be determined. See *Ayala v. Ward*, 170 A.D.2d 235 (1st Dept. 1991); *In the Matter of 125 Bar Corp v. State Liquor Authority of the State of New York*, 24 N.Y.2d 174 (1969). To be sure, it is preferable to have testimony from a live witness, where opposing counsel has the opportunity to cross-examine, and the court can observe the demeanor of the witness. In the absence of such live testimony here, this tribunal listened carefully to the prior recorded statements of Person B and Person C, and reviewed the accompanying transcripts.

Person B spends most of his one-hour complaint discussing the altercation he and Person C had with the police after Person A¹ was already apprehended. After Person A was removed from the scene, there was a confrontation between police and several civilians in the crowd, leading to the arrests of Person B and Person C. As for the incident with Person A, Person B stated that he observed

¹ Person B, who claimed he did not know Person A prior to the incident, and only learned his name at the precinct, mistakenly refers to Person A as "Person A" throughout his statement.

Respondent run up behind Person A and punch him in the right side of his face, knocking Person A to the ground. According to Person B, Respondent never announced himself as an officer. Person B then heard Respondent tell Person A several times to “spit it out”, though Person B never saw anything actually come out of Person A’s mouth.

In her complaint, Person C similarly spends most of her time discussing her allegations of how she was repeatedly beaten by police at the scene and at the precinct. Regarding the incident with Person A², Person C claimed that from a distance of about 30 feet away, she saw Respondent run up behind and punch Person A in the face, knocking him to the ground. Another officer then told Person A to spit the crack out.

The video footage commences after Person A’s apprehension, too late to provide corroboration for the witnesses’ accounts. The video begins with Person B shouting that what just happened was police brutality, that they punched the man in the face for nothing. Person C echoes, “for nothing,” before shouting about how the police did not have probable cause. Person C also yells that the police didn’t need to punch the individual in the face like that. Both Person B and Person C appear loud and agitated as they scream angrily at the police. At about the 2:34 mark, an individual appears to be secreting a plastic bag inside his underwear in his butt area; although counsel for CCRB argued that this wasn’t Person B, in his statement Person B acknowledges that it is him, and that the substance in the bag is marijuana. (CCRB Ex. 1A at 66-67)

Respondent testified that after witnessing what he believed to be a hand-to-hand drug sale, he exited his vehicle to try to apprehend the buyer, Person A. Respondent identified himself as “police”, and ran toward Person A. As Person A was walking northbound on 7th Avenue, Respondent saw him place his hand toward his mouth, which the detective interpreted as a

² Person C, too, claimed not to know Person A prior to the incident, and only learned his name in court. She refers to Person A throughout the interview as “Person A”

possible attempt to swallow evidence. Respondent grabbed Person A's hand, and then brought Person A to the ground, where he was handcuffed with the assistance of Officer Duffy. Respondent insisted he never punched Person A in the face. Person A apologized for trying to get away, and did not complain of any injuries. (Tr. 56-60)

Respondent testified that the sergeant then returned to the location without apprehending the seller. Respondent witnessed the sergeant engaged in a physical altercation with Person B, who Respondent recognized as working at the juice bar about 25-30 feet up the block. Person B punched the sergeant in the face, and a "melee" erupted between police and the civilians in the area. During the melee, Respondent's hand was fractured. (Tr. 60-63)

Officer Duffy testified that he exited the car behind Respondent and went to assist in Person A's apprehension, a few feet off [REDACTED] [REDACTED] [REDACTED] Other than the couple of seconds it took the officer to exit the vehicle, he was watching Respondent and Person A the entire time. Officer Duffy observed Respondent taking Person A to the ground; he did not see Respondent punch Person A in the face. Officer Duffy heard Person A apologize to the officers, and did not complain of any injuries. As the arresting officer, Officer Duffy was with Person A most of the night, and did not observe any injuries, redness, or swelling on Person A. Although Officer Duffy did not see Person A reaching for his mouth, and did not see anything recovered from Person A's mouth, he did hear Respondent telling him to "spit it out," and Respondent told Officer Duffy at the scene that he saw Person A go to his mouth. Cocaine was recovered from Person A's pants pocket. (Tr. 28-30, 33-36, 46-47, 49-50)

After the apprehension, Officer Duffy saw a large group of civilians approaching from up the block, from the area in front of the juice bar; Officer Duffy described that area as a "chronic location" within the precinct, due to multiple incidents of civilians interfering with police activity

there. Many of the approaching civilians were extremely agitated, screaming and cursing at the police, including Person B, the “main agitator.” Multiple officers were required to bring the situation under control. Person B and Person C were arrested. (Tr. 31-32, 37-38)

Section 203-11 of the Patrol Guide, which deals with the use of force by members of the service, emphatically declares that EXCESSIVE FORCE WILL NOT BE TOLERATED. All members of the service at the scene of a police incident are required to “use minimum necessary force.” After reviewing the evidence presented in this case, I find that the record has failed to establish that Respondent wrongfully used force against Person A.

By themselves, the statements of Person B and Person C to CCRB have limited probative value with this tribunal, since neither was subject to cross examination, and both have prior criminal contacts. The video does provide some support to the extent that it shows them both screaming at the police for punching Person A. However, the video also shows what appears to be a strong animosity on the parts of Person B and Person C toward police, an attitude that is evident in their interviews with CCRB as well.

More importantly, when asked in their interviews to describe how Respondent punched Person A, the witnesses gave conflicting accounts. When asked whether Person A turned around before being punched, Person B stated, “No, he didn’t.” Person B said that Respondent punched Person A from behind, with the punch landing on the right side of the face. (CCRB Ex. 1A at 22) In contrast, Person C stated that Respondent punched Person A “right dead in his face.” When asked whether the punch was, in fact, to the right side of the face, Person C twice stated emphatically, “the front.” Person C went on to explain that Respondent said “hey, hey” to Person A turned around, and as soon as he turned around is when Respondent punched him. (CCRB 2A at 19) In light of the witnesses’ discrepancies on this pivotal point, and

factoring in their criminal histories and apparent anti-police biases, this tribunal is not persuaded that either of them actually witnessed Respondent punch Person A in the face. Person B and Person C, who themselves are complainants in that evening's event, either fabricated their accounts, or at best were mistaken in what they saw; it was dark and they were some distance up the block, and may have misinterpreted Respondent's act of reaching for [REDACTED] hand near his mouth as a punch to the face. Either way, their claims that they saw Respondent punch Person A in the face are not sufficiently reliable to support a finding of fact.

In contrast, Respondent credibly insisted that he apprehended Person A without punching him in the face. On the one hand, counsel for CCRB brought out that during his March 17, 2015 interview with CCRB, Respondent claimed he did not recall the details of his arrest of Person A. However, Respondent explained that when he was called down for the interview, he was unsure whether it was to discuss his arrest of Person A or the "slew of allegations" against the various officers involved in the melee after the apprehension of Person A. Moreover, Respondent maintained that with the benefit of having reviewed the trial discovery in this case, he now is better able to recall the details of his encounter with Person A. (Tr. 72-74)

Respondent's insistence that he did not punch Person A received significant corroboration from Officer Duffy. Officer Duffy confirmed that he never saw Respondent punch Person A. Although there were a couple of seconds where Officer Duffy lost sight of Respondent, the officer otherwise was watching Respondent and Person A the entire time, and saw Respondent take Person A to the ground without punching him. Also telling was that Officer Duffy did not observe any injuries to the face of Person A, and did not hear Person A complain of any injuries. Indeed, Person A even apologized to the officers for attempting to flee. Officer Duffy was

detailed and consistent, and this tribunal credits his account of what occurred that night. That account corroborates Respondent's testimony that he did not punch Rudrow in the face.

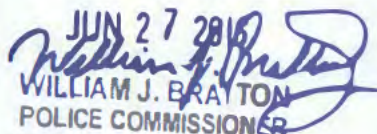
In light of Officer Duffy's credible corroboration, this tribunal credits Respondent's testimony that he did not punch Person A in the face. The statements of Person B and Person C suggesting otherwise were unpersuasive. The credible evidence has failed to establish that Respondent wrongfully used force against Person A by punching him, and I find Respondent not guilty.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED

JUN 27 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER