



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

July 25, 2016

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Darryl Chen**
Tax Registry No. 903608
77 Precinct
Disciplinary Case No. 2014-11368

The above named member of the service appeared before Deputy Commissioner Rosemarie Maldonado on June 17, 2015, and was charged with the following:

DISCIPLINARY CASE NO. 2014-11368

1. Said Police Officer Darryl Chen, on or about August 24, 2012, at approximately 1930 hours while assigned to the 77th precinct and on duty in the vicinity of [REDACTED] Kings County, wrongfully used force in that he placed his right hand around [REDACTED] throat, thereby causing him to be held in a chokehold.

P.G. 203-11

USE OF FORCE

2. Said Police Officer Darryl Chen, on or about August 24, 2012, at approximately 1930 hours while assigned to the 77th precinct and on duty in the vicinity of [REDACTED] Kings County, wrongfully used force in that he placed his left forearm around the throat of [REDACTED] and placed his right forearm on the back of [REDACTED] neck, thereby causing him to be held in a chokehold.

P.G. 203-11

USE OF FORCE

In a Memorandum dated October 16, 2015, Deputy Commissioner Rosemarie Maldonado found Police Officer Darryl Chen Not Guilty of Specification No. 1 and Guilty of Specification No. 2 in Disciplinary Case No. 2014-11368. Having read the Memorandum and analyzed the facts of this matter, I approve the Not Guilty finding with respect to Specification No. 1, but disapprove the Guilty finding with respect to Specification No. 2.

Police Officer Chen faced extreme danger during his lengthy struggle with an armed individual who was violently resisting arrest. Officer Chen's actions in this incident were well documented on the video entered into evidence, which showed the challenge and the risks Officer Chen faced. I have determined that Officer Chen's actions in attempting to effectuate an arrest and ensure the safety of the public, his partner, himself, and the armed individual, were lawful, proper, reasonable, and necessary, under the totality of the circumstances. Therefore, Officer Chen will be found Not Guilty of both Specifications in this matter.

This decision does not sanitize or create a safe space for chokeholds generally but rather carves out an exception in very specific and exceptional circumstances.


William J. Bratton
Police Commissioner



POLICE DEPARTMENT

October 16, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Darryl Chen
Tax Registry No. 903608
77 Precinct
Disciplinary Case No. 2014-11368

The above-named member of the Department appeared before me on June 17, 2015, charged with the following:

1. Said Police Officer Darryl Chen, on or about August 24, 2012, at approximately 1930 hours while assigned to the 77th precinct and on duty in the vicinity of [REDACTED] Kings County, wrongfully used force in that he placed his right hand around [REDACTED] throat, thereby causing him to be held in a chokehold.

P.G. 203-11 - USE OF FORCE

2. Said Police Officer Darryl Chen, on or about August 24, 2012, at approximately 1930 hours while assigned to the 77th precinct and on duty in the vicinity of [REDACTED] Kings County, wrongfully used force in that he placed his left forearm around the throat of [REDACTED] and placed his right forearm on the back of [REDACTED] neck, thereby causing him to be held in a chokehold.

P.G. 203-11 - USE OF FORCE

The Civilian Complaint Review Board (CCRB) was represented by Raasheja Page, Esq., Respondent was represented by John Tynan, Esq. Respondent through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called [REDACTED] as a witness. 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

Respondent is found not guilty of Specification 1 and guilty of Specification 2.

FINDINGS AND ANALYSIS

Respondent stands charged with placing an armed, non-compliant suspect in a chokehold at two different points during a physical struggle which took place while effectuating the complainant's arrest. The following is a summary of the undisputed facts. On August 24, 2012, at approximately 1930 hours, [REDACTED] was standing outside of [REDACTED] with at least three other individuals. (Tr. 13, 47-49) At that time, he was knowingly concealing marijuana, approximately 30 vials of crack cocaine and a loaded, illegal firearm in his crotch. (Tr. 23; Resp. Ex. A) [REDACTED] was admittedly under the influence of marijuana during this police encounter and his intent was to sell the crack cocaine in his possession. (Tr. 25-26)

Respondent, Officer Ferrara and Officer Camacho approached the group and attempted to detain [REDACTED]. They were able to place only one handcuff on his wrist. [REDACTED] then refused to comply and engaged the officers in an intense physical struggle aimed at evading arrest. They wrestled onto the ground where [REDACTED] writhed, reached for his waistband, fought, attempted to bite the officers and ultimately succeeded in biting Officer Ferrara's hand. (Tr. 13-19, 50-61)

This part of the struggle to subdue [REDACTED] was recorded. The video captured members of the public angrily screaming and throwing garbage cans at the officers as they wrestled with [REDACTED] on the ground. An anonymous woman attempted to separate [REDACTED] from the officers and had to be removed by Officer Camacho. The disorder

escalated to the extent that Camacho was compelled to remove his firearm to effectuate crowd control. (CCRB Ex. 1)

██████ was eventually arrested. He subsequently pled guilty to criminal possession of a weapon in the second degree and was sentenced to a term of two years jail, plus two years of post-release probation. He is currently incarcerated at Five Points Correctional Facility.¹ (Tr. 20, 26-27; Resp. Ex. A)

In dispute is whether Respondent put ██████ in a chokehold at two different points during this intense physical struggle with an armed suspect. The testimony presented at trial concerning the degree and type of force used are very much at odds.

The following is a summary of the relevant facts as set forth by ██████ at trial. ██████ recounted that he was speaking with friends and waiting for a haircut when three officers exited their car with guns drawn, tackled him and said he was under arrest. (Tr. 13-16) From ██████ perspective, resisting this arrest was justified because the illegal gun he was carrying “was not visible” and the officers had “no probable cause.” (Tr. 23, 33-34)

██████ testified that Respondent “punched” and “choked” him as he lay on his back and choked him a second time as he lay on his stomach. According to ██████, he could not breathe and fought back because he “honestly felt [he] was going to die.” ██████ claims to have told Respondent, “get off . . . you’re choking me,” but asserts that Respondent ignored him as well as those in the crowd who were angrily yelling at the officers. (Tr. 16)

¹ ██████ testified before this tribunal from the correctional facility via video conferencing.

What follows are excerpts of what [REDACTED] told this tribunal about the first alleged chokehold:

Q. And with regard to the first time that you were choked ... how did he choke you the first time?

A. The first time I can't really recall because so much was going on. It was so many officers and people around ... he had me in an awkward position because I was on my back the first time. So I can't really recall the actual choke on that one.

Q. And how did the actions of this officer affect your breathing when this happened?

A. I actually passed out....

Q. Did the officer let go or stop choking you when you said I can't breathe?

A. No, he did not let go. As I started to like fight against him, he kept like choking stronger. (Tr. 18-19)

[REDACTED] testified that when he was turned on his stomach to be handcuffed, Respondent held him in a second chokehold. At trial he described this second alleged chokehold as follows:

Q: What happened (the second time) while on your stomach?

A: The second time, that's when ... another officer was putting handcuffs on me while [Respondent] was choking me. And I'm telling him I can't breathe, I did not do anything. Like why are you arresting me. But through all those telling him that I can't breathe, he just totally ignored me.

Q: When you were on your stomach and you say that you were being choked, can you specifically describe what the officer was doing? How was he choking you?

A: He was kind of like choking me like this with his forearm, and like that's what made me couldn't breathe because the pressure from his forearm was actually cutting off the circulation in my neck. (CCRB - Just for the record, the witness indicated forearm wrapped around the front of his neck from the back.) (Tr. 17-18)

█████ admitted that he purposely resisted arrest and that he bit an officer. He claims that if he had “given up” Respondent “would have kept on choking [him].” (Tr. 35) On cross-examination, █████ added that he fought the officers because he did not want to go to jail. (Tr. 33-34) █████ confirmed that he has no pending lawsuit against the City relating to this incident. (Tr. 20)

At trial, Respondent recounted a materially different version of events. He recalled that his attention was first drawn to █████ group because he smelled marijuana. When Respondent and his partners approached, the suspects “jumped” and “threw” what they were holding. (Tr. 50) In addition, Respondent observed █████ use his right hand to push what appeared to be a bulge down the front of his pants. Based on his training and experience, Respondent believed that this bulge was a firearm. █████ began to run, but Respondent quickly caught up and █████ tried “grabbing his crotch area.” Respondent asserted that, “at this point I knew he had a gun on him.” (Tr. 49-52)

Respondent and his partner attempted to handcuff █████ but were only able to secure one cuff before he resisted, bringing all of them to the ground. Respondent recalled kneeling over █████ to control his hands and prevent him from reaching for his firearm. █████ fought back, tried to reach for his waist and attempted to bite the officers. Respondent testified that he followed Departmental training tactics by grabbing █████ chin to avoid contact between the officer’s hand and the perpetrator’s mouth. As he did so a woman hovered over them yelling and trying to intervene. When Respondent briefly let go of █████ chin, he bit Officer Ferrara’s hand. Respondent then attempted to restrain █████ by placing his forearm on the suspect’s chest. (Tr. 53-57, 62; CCRB Ex. 1: 15 seconds). █████ resistance intensified, causing Respondent to lose control. (Tr.

65-67, CCRB Ex. 1: 33 seconds) Officer Ferrara was also on the ground holding onto [REDACTED] one handcuffed wrist and helping to subdue him. Respondent continued to struggle with [REDACTED] on the ground and regained control by turning him around and again placing his arm over [REDACTED] shoulder and chest area. Ultimately, Respondent and Officer Ferrara were able to handcuff [REDACTED] and take him into custody. (Tr. 57-58)

Respondent recounted that it was a very dangerous and intense situation, not only because he believed the suspect was armed and reaching for his weapon, but also because approximately twenty people were crowding in. Hostile individuals in the group bent over them, reached out, apparently pulled his arm, yelled and threw garbage cans as they attempted to effectuate [REDACTED] arrest. (Tr. 53-55, 60-61; CCRB Ex. 1) Respondent denied wrapping his forearm around [REDACTED] throat or placing his fingers around his neck during his attempt to restrain him. He also testified that he did not recall [REDACTED] saying anything during the physical struggle. (Tr. 54, 76-81)

The Patrol Guide is controlling in this case. Section 203-11 imposes the standards to be followed when the use of force is necessary to achieve legitimate police goals. It specifically requires that members of service “at the scene of an incident” use the “minimum force” needed and that they “employ non-lethal alternatives, as appropriate.” “Deadly physical force” may only be used “as a last resort and consistent with Department policy and the law.” Section 203-11 warns uniformed members of service that “excessive force will not be tolerated.”

It is within this context that the Patrol Guide proscribes the use of chokeholds by officers as they carry out their duties. Section 203-11 states in pertinent part:

Members of the New York City Police Department will NOT use chokeholds. A chokehold shall include, but is not limited to, any pressure

to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air.

In sum, although the use of deadly force is permitted, when necessary, the Patrol Guide rules out chokeholds as a sanctioned option. Moreover, as written, what constitutes a chokehold under the Patrol Guide is broadly defined and *mens rea* is not a delineated factor.

After reviewing the record presented at trial, including the video footage, there is no doubt that significant force was justified to gain control of [REDACTED] and to protect the officers and the public. Therefore, the only questions raised by these charges are: (1) whether Respondent used two chokeholds to restrain [REDACTED]; and, (2) if so, whether the use of this restraint mechanism constitutes sanctionable misconduct.

Specification 1 alleges that Respondent “wrongfully used force in that he placed his right hand around [REDACTED] throat, thereby causing him to be held in a chokehold.” After evaluating the trial testimony in its entirety, and examining the recording entered into evidence, I find Respondent not guilty of Specification 1.

It is undisputed that [REDACTED] bit Officer Ferrara’s hand during their physical struggle. The video recording confirms that, before [REDACTED] injured Officer Ferrara, he was moving his head toward Respondent’s hand in an effort to also bite him. I credited Respondent’s testimony, as corroborated by the video, that he attempted to prevent being bitten by using the permissible tactic of holding [REDACTED] head by the chin. (CCRB Ex.1, 0 to 9 seconds) Moments later, in the midst of this physical struggle, Respondent is seen moving his hand below [REDACTED] chin. Respondent contends that at that point he was still

holding [REDACTED] chin. CCRB contends that he was restraining [REDACTED] with an unauthorized chokehold.

Below is a summary of the relevant portion of the video which captures the five seconds after Respondent moved his hand below the chin:

- At or about 9 seconds
 - [REDACTED] is on the ground lying on his back while Respondent leans over his upper torso. They are facing each other.
 - Respondent's right hand is holding [REDACTED] chin and his left hand is on the ground holding his radio. Officer Ferrara is holding onto [REDACTED] cuffed right wrist.
 - An anonymous woman gestures angrily, her hands and face inches from Respondent's face.
- At or about 10 seconds
 - The anonymous woman angrily leans in closer toward Respondent and [REDACTED].
 - Respondent lowers his fingers from [REDACTED] chin area. Four of his fingers, and the side of his hand, seem to be on [REDACTED]s shoulder or collar bone area. His thumb is not visible.
 - [REDACTED] is seen moving and lifting his head and opening his mouth.
- At or about 11.5 seconds
 - Respondent turns his face to his left and away from the woman's face and gesturing hand.
 - At about that time Respondent raises his pointer and two other fingers away from the shoulder or collar bone area and up toward the neck area. The rest of his fingers seem to remain on [REDACTED] collar bone.
 - [REDACTED] is seen moving, lifting his head and opening and closing his mouth.
- At or about 13 seconds
 - Respondent looks up at the woman and then back down at [REDACTED].
 - [REDACTED] right hand grabs Respondent's shirt.
- At or about 14 seconds
 - Respondent begins to use both hands to push [REDACTED] right hand down and to the side while Officer Ferrara is still holding onto the handcuff on [REDACTED] right wrist.

The Patrol Guide's current definition of a chokehold consists of two parts. There must be "pressure to the throat or windpipe" that "may prevent or hinder breathing or

reduce intake of air." Proof that there was contact on or about the neck area is alone insufficient to support a finding that this proscribed tactic was used. Thus, although the credible evidence, and the video, confirm that for a few seconds Respondent's fingers were in the proximity of [REDACTED] neck area to prevent biting, this evidence must be evaluated within the context of the record as a whole. This includes [REDACTED] own testimony, which is quite telling on this point.

As set forth in more detail above, [REDACTED] did not provide any details concerning the first alleged choke. In fact, when specifically asked during direct examination, "how did he choke you the first time?" [REDACTED] answered, "I can't really recall the actual choke on that one." It stretches credulity that if a chokehold had actually been used at that point that [REDACTED] would not remember it. For the reasons set forth below I am persuaded that [REDACTED] failure to recollect details about the alleged first chokehold supports a finding that, although Respondent's fingers were momentarily on or about his neck area, this contact did not constitute a chokehold.

In making this finding I acknowledge that it would be reasonable for someone in a fight to be unclear about certain particulars. For example, in this case it is understandable that [REDACTED] erroneously recalled biting Respondent when in fact he bit Officer Ferrara. It seems highly unlikely, however, that under these circumstances [REDACTED] would have forgotten how he was choked if choking had indeed taken place. First, during this part of the struggle, [REDACTED] and Respondent were face-to-face on the ground which enabled [REDACTED] to directly see what Respondent was doing. Second, the video is evidence that during those seconds [REDACTED] was actively engaged with Respondent and that he continued to struggle. Third, [REDACTED] recalled a number of other details about those moments,

including the presence of the anonymous woman who bent over them and tried to intercede on his behalf, when police pushed that woman away and when he bit an officer. In short, the evidence established that [REDACTED] was alert and aware during this part of the encounter and that he was in a position to observe Respondent. Given these circumstances, it is simply not credible that [REDACTED] vividly recalled other facts but was unable to describe this major event. Thus, his failure to recollect is more likely an indication that Respondent did not use a chokehold while [REDACTED] was on his back and was indeed holding his chin.

Significantly, [REDACTED] testimony also included material falsehoods that undermined the reliability of his assertion that he was choked while on his back. At trial [REDACTED] testified that he "actually passed out" after Respondent choked him the first time. The video, however, belies [REDACTED] claim. As noted above, [REDACTED] continued to forcefully struggle against Respondent and Officer Ferrara during and after Respondent's hand was on or about the area of [REDACTED] neck. At no time during this segment of the video did [REDACTED] "pass out." Moreover, the video does not support [REDACTED] testimony that Respondent "punched" him. Given the compelling evidence to the contrary, I find that [REDACTED] false claims were little more than after-the-fact fabrications tailored to increase Respondent's culpability.

I note that in this instance there is also evidence that the contact at issue occurred as Respondent shifted his weight while protectively moving away from the woman attempting to intervene. As noted in detail above, Respondent's hand moves at or about the time that he turns his face to the left away from the woman's hand in which she holds an unidentified item. Although *mens rea* is not a component of the Patrol Guide

definition, evidence that the contact was likely to have been the result of a protective reflex can be used as a factor in determining the type of contact used and pressure exerted.

In sum, although the video shows that for a few seconds Respondent placed part of his hand on or about [REDACTED] neck area to prevent a bite, based on [REDACTED] testimony and the totality of the record, I find that whatever pressure may have been exerted was insufficient to fall within the scope of the Patrol Guide's two-pronged definition of a chokehold. Specifically, the record failed to prove that Respondent exerted pressure that may have prevented the suspect's breathing. Accordingly, I find that Respondent did not engage in the misconduct described in Specification 1.

In Specification 2 Respondent is charged with wrongfully using force by placing his left forearm around [REDACTED] throat while placing his right forearm on the back of his neck, "thereby causing him to be held in a chokehold." I concur. Below is a summary of the relevant segments of the video recording:

- At or about 28 seconds
 - [REDACTED] bites Officer Ferrara as Respondent uses his left hand to talk into his radio.
- At or about 34 seconds
 - [REDACTED] slips out of the officers' grip. Respondent wrestles on the ground with [REDACTED] to subdue him and prevent him from reaching for his firearm.
 - The anonymous woman tries to physically separate [REDACTED] from Respondent.
- At or about 42 seconds
 - [REDACTED] is flipped onto his stomach and Respondent uses his body to keep him on the ground.
- At or about 46 seconds
 - Officer Camacho removes his firearm to separate the hostile crowd from Respondent.

- [REDACTED] torso is off the pavement with his right arm pressed against the ground.
- Respondent controls [REDACTED] by sitting on his back.
- At or about 50 seconds
 - Officer Ferrara attempts to secure both of [REDACTED] hands in handcuffs.
- At or about 52 seconds
 - Respondent places his left forearm around what appears to be [REDACTED] neck area.
- At or about 59 seconds
 - Two garbage cans are thrown at the officers.
- At or about 1 minute, 4 seconds
 - Respondent's left forearm is pressed against [REDACTED] throat and his right forearm is pressed against the back of [REDACTED] lower head/neck area.
- At or about 1 minute, 10 seconds
 - Respondent releases his arms and removes his right forearm from the back of [REDACTED] lower head/neck area and lowers his left forearm to [REDACTED] chest area.

Although at trial Respondent stated that his left forearm always remained on [REDACTED] upper chest, and not his throat, the video evidence to the contrary is compelling. This tribunal is particularly concerned that between 1 minute 4 seconds and 1 minute 10 seconds on the video Respondent is seen simultaneously wrapping his forearms around both the front and back of [REDACTED] neck and throat area. It is more likely than not that the dual restraint captured on video was more than incidental touching and that it put pressure on [REDACTED] throat which may have hindered the suspect's breathing.

Accordingly, I find that this particular restraint was a prohibited chokehold as defined by the Patrol Guide and that Respondent is guilty of the misconduct set forth in Specification 2.

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). Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB argues that the forfeiture of 15 vacation days is the appropriate penalty in this case. For the reasons set forth below, I disagree. First, CCRB sought this penalty for two alleged chokehold violations, but only one charge was sustained.

Second, the tactical violation at issue occurred within the reality of a fast moving and volatile situation. [REDACTED] was a dangerous and armed suspect who exerted extreme resistance to avoid arrest. Not only did he fight the officers, he reached for the area where his loaded firearm was secreted and threatened the health and safety of these police officers by biting. Security concerns were further heightened by the presence of a hostile crowd – including a woman who appeared to pull at Respondent and onlookers who threw garbage cans. In sum, this is not a case where the use of force was gratuitous. On the contrary, force was necessary to protect both the officers and the public.

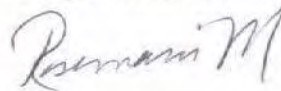
Third, despite the dangers involved, Respondent and his partners seem to have been attempting to use the minimal force necessary under these circumstances. For example, at one point in the video Respondent actually lowered his grip on [REDACTED] chest in what seemed to be a conscious effort to avoid his neck. Within this context, the use of this prohibited tactic was likely to have been reflexive and not premeditated.

Fourth, Respondent has been a police officer since 1993. In his 22 years of service he has had only one prior disciplinary case – an unrelated matter resolved in 1999.

On the one hand, this tribunal acknowledges that there is concern for officers who might be penalized for taking vigorous police action where close choices must be made. On the other hand, the Department has a compelling interest to minimize serious injuries resulting from undue pressure exerted on the neck and throat of a suspect. All officers, however, are charged to know the standards set forth in the Patrol Guide and are placed on notice that violations can lead to disciplinary charges. In this case, Patrol Guide Section 203-11 sets forth a very clear message that officers must stay clear of the fragile pathways of the neck area. Respondent did not abide by this clear standard. Penalties have been consistently imposed for cases involving Patrol Guide violations of use of force prohibitions. *See, Disciplinary Case No. 2011-4135* (July 23, 2013)(a 23-year detective who discharged his firearm outside Department guidelines, in that he fired at a moving vehicle, forfeited 30 vacation days even though he reasonably believed that he had to act to prevent his partner from suffering serious physical injury or death); *Disciplinary Case No. 2013-10417* (Sep. 22, 2015), (a 21-year captain forfeited 15 vacation days for shooting at a moving vehicle even though he believed if he had not fired his gun when he did he would have been killed.)

Based on the record as a whole, and taking into account the mitigating circumstances discussed above, I recommend a penalty of the forfeiture of three vacation days.

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials



POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DARRYL CHEN
TAX REGISTRY NO. 903608
DISCIPLINARY CASE NO. 2014-11368

Respondent was appointed to the Department on August 30, 1993. His last three annual evaluations were 4.5 overall ratings of "Highly/Extremely Competent" from 2012 through 2014. He has two medals for Excellent Police Duty.

In 1999, Respondent pled guilty to failing to prepare a property clerk's invoice worksheet, as required, after taking property into his custody. He negotiated a penalty of ten (10) vacation days.



For your consideration.

A handwritten signature in cursive script, appearing to read "Rosemarie Maldonado".

Rosemarie Maldonado
Deputy Commissioner Trials