



POLICE DEPARTMENT

June 25, 2024

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In the Matter of the Charges and Specifications :

- against - :

Deputy Inspector Omar Birchwood :

Tax Registry No. 945512 :

77 Precinct :

Case No.

2022-26837

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Vanessa Facio-Lince
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB:

Nicole Jardim, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent:

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To:
HONORABLE EDWARD A. CABAN
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Deputy Inspector (then Captain) Omar Birchwood, on or about March 21, 2021, at approximately 0155 hours, while assigned to the 73 Precinct and on duty, in the vicinity of [REDACTED] Kings County, wrongfully used force, in that he grabbed L.D.'s [REDACTED]'s arm and pushed her into Apartment [REDACTED], located at [REDACTED] without police necessity.

P.G. 221-02, Page 2, Prohibition 11

USE OF FORCE

2. Deputy Inspector (then Captain) Omar Birchwood, on or about March 21, 2021, at approximately 0155 hours, while assigned to the 73 Precinct and on duty, in the vicinity of [REDACTED] Kings County, abused his authority as a member of the New York City Police Department, in that he entered [REDACTED] in Brooklyn, without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5
(now encompassed by
A.G. 304-06, Page 1, Paragraph 1)

PUBLIC CONDUCT—
PROHIBITED CONDUCT

3. Deputy Inspector (then Captain) Omar Birchwood, on or about March 21, 2021, at approximately 0155 hours, while assigned to the 73 Precinct and on duty, in the vicinity of [REDACTED] Kings County, wrongfully used force, in that he pulled [REDACTED] O.G. [REDACTED] out Apartment [REDACTED], located at [REDACTED], in Brooklyn, without police necessity.

P.G. 221-02, Page 2, Prohibition 11

USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on May 14, 2024. Respondent, through his counsel, entered a plea of Not Guilty to the charged misconduct. The Civilian Complaint Review Board did not call any witnesses, but entered evidence including Body-Worn Camera (hereinafter "BWC") footage from the incident (CCRB's Exhibits 1 and 2 and L.D. [REDACTED]'s CCRB Interview transcript and audio (CCRB's Exhibit 4 and 4A) for the court's consideration. Respondent testified on his own behalf and called Sergeant [REDACTED]

██████████. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all of the evidence in this matter, the Tribunal finds Respondent Not Guilty of the charged misconduct.

ANALYSIS

The following is a summary of the facts that are not in dispute. On March 21, 2021, at approximately 0155 hours, the ShotSpotter system sent an alert regarding three gunshots in the vicinity ██████████, followed later by a 911 call reporting fireworks at the same location. Respondent Birchwood, who was then the Executive Officer of the 73 precinct, responded to the location with Sergeant Frantz Chauvet and Sergeant ██████████. As they approached the location, they observed a person, later identified as ██████████ (hereinafter O.G.), and another individual standing outside ██████████, which is in close proximity to the reported location. As Respondent and the two sergeants exited their vehicle, O.G. and others ran into ██████████, which is a multi-dwelling apartment building. Sergeant Chauvet and Sergeant ██████████ ran after them and followed them inside the building. (Tr. 33-37, 62-63, 89)

Respondent was behind them, but he dropped his radio and was unable to get into the building before the door locked. He waited outside for a few minutes until two individuals walked out of the building, allowing Respondent to gain entry. Respondent proceeded to look for his officers. After going to the wrong floor, Respondent returned to the second floor where he was joined by other officers that arrived on scene. The door to an apartment on the second floor was open and ██████████ (hereinafter L.D.) was standing in the doorway speaking to the officers. Respondent approached L.D. and asked her if he could enter her apartment. She did not

consent to him entering her apartment. Respondent then used his hand to push L.D. out of the doorway and enter the apartment where Sergeants Chauvet and Sergeant [REDACTED] were. (Tr. 66, 89-94)

Inside the apartment, there were several individuals yelling. Respondent attempted to engage with O.G. and his family members about why he took certain police action, but the commotion continued. Respondent authorized Sergeant Chauvet to issue O.G. a summons for the fireworks found inside the apartment. An argument ensued between Sergeant Chauvet and O.G. A decision was made to take O.G. to the precinct to issue him the summons. Sergeant Chauvet approached O.G. who was in the doorway of the apartment, and attempted to handcuff him, but his family members intervened by pulling him away from the officers. Respondent assisted Sergeant Chauvet by grabbing O.G. and pulling him out of the doorway of the apartment. Ultimately, O.G. was arrested, taken to the precinct, and issued a summons for disorderly conduct. (Tr. 48-50 78, 99-104)

Sergeant [REDACTED]'s testimony:

Sergeant [REDACTED] testified that on the date and time of this incident, he was responding to a ShotSpotter Activation at [REDACTED] along with his partner, Sergeant Chauvet, and Respondent. He testified that two days prior to this incident, a person had been shot in that area, so when he heard this ShotSpotter activation he "took it very seriously." (Tr. 35) He acknowledged that ShotSpotter technology also picks up the sound of fireworks and other loud noises. However, Sergeant [REDACTED] asserted that on the night in question, as far as he was concerned, he was responding to shots fired at that location. (Tr. 40)

Upon arrival at the scene, Sergeant [REDACTED] observed two males standing near where the ShotSpotter was activated. Although the two males were not in his "first line of sight," he

recalled that upon exiting their unmarked police vehicle, the two males immediately ran into a building located at [REDACTED]. Sergeant [REDACTED] testified that Sergeant Chauvet “gave chase” and he proceeded to follow his partner into the building. Sergeant [REDACTED] acknowledged that he and his partner followed them into an apartment despite not having a warrant or consent to enter. There was no conversation between the partners either before or during the chase, but given the two males’ proximity to the location of the ShotSpotter activation and their flight, Sergeant [REDACTED] suspected they might be involved. In fact, according to Sergeant [REDACTED]’s testimony, he believed he and his partner were chasing an individual with a gun. Sergeant [REDACTED] acknowledged that he became aware that there was a 911 call regarding fireworks at that same location, but stated that he did not know that until after the fact. (Tr. 40-45, 55)

Sergeant [REDACTED] testified that once they were inside the apartment, it was a “hostile scene.” He added, “There was multiple individuals in there. There was a lot of yelling and screaming. My partner [is] asking the individual that he was trying to stop for his ID. He was being combative and erratic with him.” (Tr. 37) While inside of the apartment, Sergeant [REDACTED] observed fireworks (specifically a Roman candle) in the living room near one of the males they chased. He stated that as he was trying to explain what was happening to the occupants of the apartment, there was a lot of yelling and loud music playing. At some point during this hectic interaction, Sergeant [REDACTED] recalled, “They actually admitted to that they were shooting the fireworks off and they understand why this happened. So they were apologetic for it.” (Tr. 49) A decision to issue O.G. a summons for possessing the fireworks was later made. (Tr. 50)

Sergeant [REDACTED] indicated that minutes later (he estimated between 2-5 minutes), Respondent came into the apartment. He did not see when Respondent entered the premises, but

asserted that he knew he was there because he could hear Respondent behind him stating multiple times in sum and substance: "Don't touch me! Get your hands off me!" (Tr. 56) Sergeant [REDACTED] stated that he was "not surprised" that Respondent entered the apartment when he did "because two of his officers were in the apartment with multiple people inside, outnumbered. So that would be proper; anybody would do that." (Tr. 38)

Sergeant [REDACTED] was asked to describe the circumstances surrounding O.G.'s apprehension. He described O.G.'s demeanor at that time as "very erratic," "belligerent," "drunk" and "vulgar." Sergeant [REDACTED] recalled that O.G. refused numerous directives to provide them with his identification for the purpose of issuing a summons. He stated that at one point, O.G. even became combative with members of his own family. (Tr. 38) According to Sergeant [REDACTED], at the time that Respondent was speaking with O.G. and attempting to issue the summons, it was "complete chaos." "He [O.G.] was cursing. He was being combative, belligerent. He was flailing his body from him." (Tr. 48)

Sergeant [REDACTED] acknowledged that he was charged as a co-Respondent in this case. He testified that although he felt he did nothing wrong, he accepted discipline in this case "because I didn't want to drag out the situation. I wanted to get promoted and transferred. And this process takes a long time." (Tr. 54) He further disclosed that after resolving this case he was promoted.

Respondent's testimony:

Respondent testified that in March 2021, he was the Executive Officer of the 73 precinct. On that date and time in question, he and his team responded to a ShotSpotter activation in the vicinity of [REDACTED]. He recalled that Sergeants [REDACTED] and Chauvet ran into the building located at [REDACTED] immediately upon arrival. Respondent ran after them but because he dropped his Department radio, by the time he picked it up, his partners were no

longer there and he was locked outside the building. He used his radio to call for another unit to the location because he was locked outside by himself and two of his officers were inside the building with “unknown people.” (Tr. 62-63, 89-91)

Respondent estimated that he was locked outside the apartment for about two to three minutes before two individuals exited the building, let him inside. The building is a walk-up building and Respondent did not know which apartment the sergeants had gone into. He initially went to the wrong floor and it was not until he heard Sergeant Chauvet and Sergeant [REDACTED]’s voices inside of an apartment on the second floor that he knew where to go. (Tr. 66, 68, 91-93)

As Respondent approached the apartment, he saw L.D. standing in the doorway speaking with other officers who just arrived on scene. The door of the apartment was slightly open so Respondent could hear screaming and commotion inside. Respondent asked L.D. if he could go inside her apartment, but she repeatedly refused to let him in and blocked the door with her body. According to Respondent, he was attempting to explain to L.D. why he needed to gain entry (to make sure that his officers were safe) but despite his pleas, she refused to let him inside. Respondent admitted that he had to push L.D. out of the way to get inside the apartment. (Tr. 68-70, 93-96)

Once inside the apartment, Respondent testified that based upon his observation, Sergeant Chauvet and Sergeant [REDACTED] were outnumbered. Respondent described the scene inside the apartment as a “very fast-paced, chaotic scene.” (Tr. 98, 106) He recalled seeing O.G., who appeared to be intoxicated, animatedly interacting with Sergeant Chauvet while a male relative was trying to calm him down. Sergeant Chauvet asked O.G. numerous times for his identification, but he did not comply. As this was happening, Respondent stated that L.D. was

holding her phone's camera within a foot of Respondent's face and in his "zone of safety." (Tr. 74-78) Respondent stated that from a tactical standpoint this presents a problem.

As a police officer you don't want anybody within arm's length because we -- we do have a firearm, they can disarm us. It's a dangerous situation. Someone could hit me or any officer so at least they need to be at least arm's length to be considered -- you're in my zone of safety, basically. (Tr. 78)

After conferring with Sergeant Chauvet, a decision was made to issue O.G. a summons for the fireworks that were inside the apartment. According to Respondent, O.G. dropped his body to the floor by the doorway of his own volition when he was informed that he was being taken to the precinct. Respondent and other officers tried to lift O.G. up off the floor, but his family members intervened by pulling him back inside of the apartment. Respondent testified that his intention was to take O.G., who was being wholly uncooperative, to the precinct where they could issue him a summons and remove him from the chaotic scene. He further asserted that neither he nor any other officer used body strikes, kicks or anything else to gain O.G.'s compliance. Respondent stated that they merely grabbed O.G. by the arm and pulled him up from the floor to get him outside of the apartment. (Tr. 78-80) Respondent reiterated that they used "minimum amount of force [we] can just to stabilize the situation." (Tr. 81)

Video and Hearsay Evidence:

There were three videos received in evidence at the hearing: Respondent's BWC footage (CCRB Ex. 1), Sergeant Chauvet's BWC footage (CCRB Ex. 2) and L.D.'s phone camera video (Resp. Ex. A). The footage depicted in each video, although taken from different angles, largely corroborates the testimony of both Sergeant [REDACTED] and Respondent. CCRB's Exhibit 1 at 00:47-00:55 captures L.D. blocking the doorway of her apartment and Respondent subsequently grabbing her arm and pushing her aside to gain entry. The same video, at 08:53, shows the moment when the officers inform O.G. that he will be receiving a summons and ask him to stand

up off the floor. O.G.'s family then intervenes in his apprehension by pulling him back inside of the apartment and Respondent and other officers grab O.G. off the floor and out of the apartment. (*Id.* at 09:21-09:26) Respondent's Exhibit A captures similar footage, but from a different angle.

The court also reviewed CCRB's Exhibit 4 and 4A (L.D.'s CCRB interview and transcript). L.D.'s version of events is generally consistent with the videos received in evidence, as well as much of Respondent and Sergeant [REDACTED]'s testimony. There is therefore no dispute as to the actions taken by Respondent on the night in question. The only issue is whether his actions constitute sanctionable misconduct.

Specification 1: Use of Force With Respect to L.D.

There is no question that Respondent pushed L.D. aside to gain entry into her home. The question for this Tribunal is whether the push was reasonable under the circumstances. In determining whether the use of force was reasonable, the trier of fact must allow for police officers' frequent need to make "split-second" judgments about how much force is necessary "in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). The test of reasonableness requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Koeiman v. City of N.Y.*, 36 A.D.3d 451 (1st Dept. 2007), *citing Graham*, 490 U.S. at 396.

Patrol Guide 221-01 states "force may be used when it is reasonable to ensure the safety of the MOS or a third person, or otherwise protect life, or when it is reasonable to place a person in custody or to prevent escape. Any application/use of force must be reasonable under the

circumstances.” The Patrol Guide lists a number of factors to aid in determining reasonableness including but not limited to, “the nature and severity of the crime/circumstances; the immediacy of the perceived threat or harm to the subject, members of the service, and/or bystanders and the number of subjects in comparison to the number of MOS.”

In this case, Respondent credibly testified that he was concerned for the safety of Sergeant Chauvet and Sergeant [REDACTED] who were inside L.D.’s apartment with a person who could be armed. Respondent could hear yelling inside the apartment and knew that the officers were outnumbered. As the highest-ranking member of service on scene, Respondent had a responsibility to quell any threat with which his subordinates may be confronted. The immediacy of the threat justified Respondent’s use of minimal force (i.e. pushing L.D. aside) to enter the apartment in the absence of L.D.’s consent. Further, this Tribunal opines that a reasonable officer placed in Respondent’s position of having to gain entry into a location to assist fellow officers may have done the same.

I therefore find Respondent Not Guilty of Specification 1.

Specification 2: Entry Without Sufficient Legal Authority

There is no dispute that Respondent entered L.D.’s apartment without a warrant and without her consent. The issue is whether exigent circumstances justified Respondent’s warrantless entry into her home. Although Respondent may have entered the apartment without consent, I find that under these unique facts, his actions were reasonable and in good faith, given the exigency of the situation.

“[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not be reasonably crossed without a warrant.” *People v. Garvin*, 30 N.Y.3d 174, 180 (2017), quoting *Payton v. New York*, 445 U.S. 573, 590 (1980).

The test for determining such circumstances is an objective one that turns on the totality of the circumstances confronting the police at the time. *U.S. v. MacDonald*, 916 F.2d 766, 769 (2d Cir. 1990). The essential question in determining whether exigent circumstances justified a warrantless entry is whether law enforcement agents were confronted by an “urgent need” to render aid or take action.” *Id.*, quoting *U.S. v. Martinez-Gonzalez*, 686 F.2d 93 (2d Cir. 1982). In *People v. Mitchell*, 39 N.Y.2d 173, 177-78 (1976), the New York Court of Appeals established a three-prong test to determine whether this exception applies. The elements of this exception are: 1) the police had reasonable grounds to believe that there was an emergency and an immediate need for their assistance for the protection of life or property; 2) the entry or search was not primarily motivated by an intent to arrest and seize evidence; and 3) the police had a reasonable basis, approximating probable cause, to associate the emergency with the area or place to be entered or searched.

Respondent, who was responding to a ShotSpotter alert, observed his officers pursue two men at the location of the alert and then lost sight of them when they ran into a multi-unit apartment building ahead of him. He was unable to gain access to the building for two to three minutes and had no information about what was going on inside. Shortly after entering the multi-unit building, he could hear Sergeant Chauvet and Sergeant [REDACTED]’s voices, along with others yelling, coming from an apartment of the second floor. Once at the door of the apartment, Respondent attempted to gain consensual entry into the apartment from L.D., but she refused. Respondent, who was the Executive Officer of the 73 precinct at the time of this incident, had an objectively reasonable basis to believe that his subordinates could have been at imminent risk of being harmed. He had reason to believe that the two males chased by his partners were inside the apartment with the officers and could be armed, and he could hear that the officers were

outnumbered based upon the shouting coming from inside. Respondent was confronted with a situation that required immediate action to avoid potentially serious consequences.

I therefore find that Respondent's warrantless entry into the apartment was justified under the exigent circumstances exception. CCRB has not established evidence of a bad faith motive or ignorance of available facts, which would be considered negligent; such a warrantless entry would therefore not constitute actionable misconduct. Accordingly, Respondent is found Not Guilty of Specification 2.

Specification 3: Use of Force as Against O.G.

Although O.G. did not testify at the hearing, after carefully reviewing the video evidence offered by the parties and considering the testimony of Respondent and Sergeant [REDACTED], I find that CCRB has failed to meet its burden of proof by a preponderance of the credible, relevant evidence that Respondent used unlawful force against him.

The video evidence presented at the hearing depicts O.G. behaving in a manner consistent with being intoxicated as described by Respondent and Sergeant [REDACTED]. O.G. was being belligerent and not cooperating with the officers' numerous verbal directions to provide his identification. Given the chaotic nature of the scene inside the apartment, and O.G.'s inebriated condition, it was a prudent decision to transport him to the precinct to issue a summons. Although the video evidence does not depict exactly how O.G. got to the floor, the officers can be heard telling O.G. to stand up because he is going to get a summons. (CCRB Ex. 1 at 08:55) O.G.'s family members attempted to pull him back into the apartment and away from the doorway. Respondent then grabbed O.G.'s arm in order to prevent him from going back into the apartment. O.G. resisted and a struggle ensued between him and other officers.

Considering the circumstances, Respondent was permitted to utilize the minimal level of physical force necessary in order to eject O.G. from the doorway. Importantly, we can see in CCRB's Exhibit 1, at 09:26, that Respondent grabbed his arm in an attempt to prevent him from being pulled back into the apartment. Thus, it appears that Respondent was properly utilizing minimal force in order to gain compliance from O.G. CCRB did not prove, by a preponderance of the credible evidence, that Respondent was acting wrongfully when he grabbed O.G.'s arm and pulled him out of the doorway.

I find Respondent's minimal use of force justified under the circumstances and therefore, he is Not Guilty of Specification 3.

Respectfully submitted,



Vanessa Facio-Lince
Assistant Deputy Commissioner Trials

APPROVED

JUL 19 2024

EDWARD A. CABAN
POLICE COMMISSIONER