



POLICE DEPARTMENT

April 16, 2015

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Anthony Panetta
Tax Registry No. 937243
Transit Bureau District 33
Disciplinary Case No. 2013-10385

The above-named member of the Department appeared before the Court on September 12 and December 12, 2014, charged with the following:

1. Said Sergeant Anthony Panetta, on or about July 11, 2012, at approximately 0055 hours, while assigned to Transit Bureau District 33 and on duty, in the vicinity of North 7th Street and Bedford Avenue (Bedford Avenue "L" Subway Station), Kings County, did wrongfully use force against Benjamin Prez, in that he tackled Benjamin Prez, causing his chin to strike the ground.

P.G. 203-11 – USE OF FORCE

The Civilian Complaint Review Board (CCRB) was represented by Remi Groner and Paul Scotti, Esqs. Respondent was represented by Anthony DiFiore, Esq., The Quinn Law Firm, PLLC.

Respondent pleaded Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

RECOMMENDATION

Respondent is found Not Guilty.

FINDINGS AND ANALYSISIntroduction

The basic facts in this case are undisputed. On a July evening around 0030 hours, Benjamin Prez entered the Bedford Avenue subway station on the L line to head home. Prez was from [REDACTED] and had been living [REDACTED] for about six months. He was in his 20s and an AmeriCorps volunteer assigned to the city. Prez had gone out that night in the Williamsburg area and had three to four beers since about 2000 hours. He described himself, an individual who stood over six feet tall and weighed 180 pounds at the time of trial, as "slightly buzzed." He would not have driven a car because he felt he would have been hovering at the legal limit for intoxication.

The Bedford Avenue station had a single platform with staircases at both ends leading to the mezzanine and street. Prez described the platform as crowded. Upon descending the stairs to the platform, something caught Prez's eye. He was not sure what it was, but four people appeared to be having some kind of interaction. He stopped to watch. He was standing about two feet from the group. Other people were standing around as well.

It also was undisputed that, in fact, this interaction was Police Officer Nancy Farrell and her supervisor, Respondent. They were assigned in plainclothes to the Transit District 33 conditions unit and were issuing a summons to a musician on the platform (see CCRB Exhibits [CCRBX] 4 & 5, exemplar photographs of area). They testified that their shields were visible around their necks. Their guns also were visible on their waists.

Although the music itself was legal, the musician, Person A, was using an unauthorized amplifier for his guitar. Respondent testified that there had been complaints from residents at street level about such noisiness. Also present was Person A's fellow performer, Jon McCormick, although only Person A actually was getting the summons.

Prez

Prez claimed that he did not know Farrell was a police officer and did not see a shield or a gun. He indicated nonetheless that he had a vague idea police action was occurring and admitted that he believed Farrell was an officer based on the way she spoke. In any event, Prez stood by and watched. Prez admitted that he was the closest bystander to Farrell. Farrell, however, sensed he was too close to her and asked him to step back. He was near her gun side.

Prez asserted that he moved as little as 7 and as much as 10 feet away. Respondent, however, told Prez to move to the far end of the platform or leave the station. Prez recognized Respondent to be a police officer. He described Respondent as over six feet tall and 200 pounds.

Prez was "curious" as to why he had to move and inquired of Respondent. Although Prez denied being angry, only confused, he admitted that his voice was "[s]lightly maybe" raised. Prez stood there and watched. It was possible that Respondent more than once directed him to move further away. Prez described Farrell as being closer to the platform edge than Respondent.

Prez stated that after about 10 seconds of Respondent watching him and writing, Respondent said, "Okay," and began walking quickly and angrily toward him. Respondent "took me from a standing position and directly planted me into the ground." Respondent landed on top of Prez's back. Prez's chin hit the floor with "very intense" and "very brutal" force. He began bleeding profusely. After he was arrested, he received 10 deep sutures at a local hospital, leaving a gash approximately four to five centimeters (see CCRBX 1, photograph of chin; CCRBX 2, photograph of bloody shirt; CCRBX 3, hospital records). He was arrested for obstructing governmental administration and other offenses. His case later was resolved with an adjournment in contemplation of dismissal.

Farrell

Farrell testified that the platform was not very crowded. Her summons book and radio were in her hand while speaking to Person A and McCormick. Prez was "like right over my shoulder." Farrell was 5'3". It was her right shoulder, the side on which she kept her gun. She told Prez that he needed to move back and he asked why. She stated it was for safety reasons but he persisted, "[N]o, why"? She also told him that he was too close to her firearm. Eventually Prez moved a couple of steps but he still was too close for comfort. He was coherent in Farrell's opinion.

Respondent

Respondent testified that the crowd condition "was not shoulder-to-shoulder, but there was enough people." It thus was "really weird" when Prez walked into their space. Prez looked "glazed" to Respondent. Respondent testified that Farrell told Prez as many as five times that she was a police officer and he needed to move for safety reasons. Prez did not move, until doing so "slightly," two to three feet.

Respondent testified that he grabbed Prez's arm and placed his hand on Prez's back to "escort" him "peacefully" from the scene. Prez flailed his arms and tried to get away.

At that point, Respondent determined to arrest Prez for obstructing governmental administration. They got "entangled," however, and Respondent pulled Prez in to protect both of them. Respondent denied that he tripped Prez intentionally. He said that their legs "may have tangled and tripped to the floor." As they were falling, Respondent tried to control the fall. He did not intend to injure Prez.

McCormick

The most neutral and enlightening testimony of the trial was given by McCormick. In many ways McCormick was similarly situated to Prez. McCormick was 31 years old and had moved to New York City in 2005. He graduated college with a degree in theater. He was an actor by occupation but also worked as the manager of a bar on the Lower East Side. He was at the Bedford Avenue station to play music with his friend. McCormick previously had been arrested for outstanding warrants and unpaid open-container and public urination summonses.

McCormick's testimony, however, generally favored Respondent. He recognized that the police had a difficult job to perform and respected them for it. He also criticized Prez for separating himself from the community in that he no longer resided in New York.

McCormick testified that the officers' shields were out. He described Prez as standing "rather close," "unnecessarily close," even "awkwardly close" to their erstwhile quartet. In fact, Prez "walked into our space" and definitely was in Farrell's personal space. Not only that, he was in her blind spot. Something seemed wrong with him, in McCormick's opinion. Prez was standing by a pillar one to two feet away from Farrell (see DX 4, photograph of platform with positions of various individuals as stated by McCormick).

According to McCormick, the officers told Prez to move but he asked "what for." Farrell indicated to Prez that he should not stand right behind her. They explained to Prez that he was engaging in "obstruction of government." He said that he was not obstructing anything, but nevertheless moved back "slightly," behind the same beam that was "close by" (see DX 5, alternate view of platform with positions), five or six feet away. There also was a woman seated on the bench approximately the same distance as Prez. Prez kept watching the police action.

McCormick recounted that Respondent several times told Prez to keep moving down the platform but he did not do so. McCormick testified that Prez smiled at the officers in a manner

that suggested he felt he did not have to obey. Respondent told him he had two choices, move further down the platform or leave the station. Prez did not move. McCormick testified that Respondent went to grab Prez's arm. Prez pulled his arm away. Respondent tried grabbing him again and Prez started to run. Respondent clipped Prez's foot with his own foot to stop him, and tackled Prez, leading both to fall to the platform. McCormick's impression was that this tripping was intentional because Respondent reached out with his leg. Part of Respondent's body was on top of Prez. When the two fell, they were between two beams, 18 to 24 inches from the tactile warning strip.

Legal Analysis

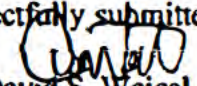
At the outset, the credible evidence established that Respondent had the authority to eject Prez from the station. The rules of the Metropolitan Transportation Authority give officers broad discretion to eject persons for violating the rules. See 21 NYCRR § 1050.11; Patrol Guide § 212-20 (procedure for the rules' application). Even disorderly conduct under the rules suffices. See § 1050.7 (i) (any activity which may cause or tend to cause annoyance, alarm or inconvenience to a reasonable person or create a breach of the peace). Furthermore, Respondent had valid reasons for telling Prez to move. The credible evidence indicated that Prez was at most six feet from the officers. Under circumstances in which Prez was drunk and initially non-compliant, it was a valid exercise of discretion for Respondent to decide he had to move. His refusal was grounds for ejection too. See § 1050.6 (d)(1) (all persons on Transit property must obey lawful orders and directives from police).

Additionally, Respondent validly moved to arrest Prez for obstructing governmental administration. There are three basic ways to obstruct governmental administration: intimidation; physical force or physical interference; or an independently unlawful act. Penal

Law § 195.05. The CCRB correctly stated that words alone are insufficient to constitute physical force or interference under the statute. See People v. Case, 42 N.Y.2d 98, 99 (1977) (radioing other drivers of location of radar speed checkpoint). Here, however, Prez physically and intentionally intruded himself into a specific area of police activity and refused to leave. Cf. Matter of Isaiah C., 96 A.D.3d 617, 618 (1st Dept. 2012) (when court officers attempted to subdue appellant's friend after courtroom disruption, appellant aggressively approached them with raised hands despite directives to disperse; these intentional actions and words, taken together, were sufficient intrusion into police activity); Matter of Quaniqua W., 25 A.D.3d 380, 380-81 (1st Dept. 2006) (appellant noisily banged on payphone in subway station, causing disturbance, and officers directed her to leave; she refused to comply, screamed, cursed, flailed her arms and struggled with the officers, who were trying to maintain order in the station).

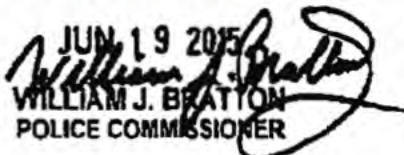
The remaining issue is whether Respondent's use of force was excessive. The CCRB failed to prove that it was so. Prez was noncompliant and physically resisted the prior, much less extreme uses of force employed by Respondent. These included strongly worded directives and the placing of Respondent's hand on Prez to guide him away or out. Further, Respondent needed to take control of Prez because they were near the edge of the platform and easily could have fallen. Under these circumstances, Respondent's use of force was proper, whether that constituted tackling Prez, tripping him intentionally, or getting intertwined with him accidentally. Prez's injuries truly were unfortunate but were a result of his own resistance, not any excessive force by a Department member. This well may be one of those instances where the officer's use of force looked "awful," but was in fact "lawful." As such Respondent is found Not Guilty.

Respectfully submitted,


David S. Weisel

Assistant Deputy Commissioner – Trials

APPROVED

JUN 19 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER