



POLICE DEPARTMENT

November 28, 2018

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In the Matter of the Charges and Specifications :

Case No.

- against - :

2017-17754

Police Officer Fermin Bueno :

Tax Registry No. 948710 :

94 Precinct :

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

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB:

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

For the Respondent:

Craig Hayes, Esq.
Worth, Longworth & London
111 John Street
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Police Officer Fermin Bueno, on or about August 10, 2016, at approximately 1930 hours, while assigned to PSA 7 and on duty, approximately in front of [REDACTED], Bronx County, wrongfully used force, in that he used a chokehold against Person A.
P.G. 221-01, Page 3, Paragraph 2(a) Force Guidelines
2. Police Officer Fermin Bueno, on or about August 10, 2016, at approximately 1930 hours, while assigned to PSA 7 and on duty, approximately in front of [REDACTED], Bronx County, wrongfully used force, in that he used physical force against Person A by slamming Person A into a van door, while Person A was handcuffed, without police necessity.
P.G. 221-02, Page 2, Paragraph 11 Force Guidelines

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on October 24, 2018. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The CCRB introduced video footage of the incident, as well as two recorded phone calls with Person A. 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. Having reviewed all of the evidence in this matter, I find Respondent not guilty of both charges.

ANALYSIS

This case involves an allegation that Respondent used excessive force against Person A during a street encounter on August 10, 2016. Person A did not appear to testify at this trial, and did not appear at the offices of the CCRB for an in-person interview. He did briefly discuss the matter with a CCRB investigator in two telephone calls that were recorded; a

recording of those calls, and the accompanying transcripts, were admitted into evidence (CCRB Exs. 1, 1A, and 1B).

In the first call on January 30, 2017, Person A initially was unclear as to which incident he was being questioned about, but then appeared to recall the encounter, stating, "Yeah, where they grabbed me up for no reason and beat me up or something, man?" Person A provided no further details of what transpired. (CCRB Ex. 1A at 4) In the second call on February 27, Person A appeared reluctant to cooperate for fear of police reprisal. He also expressed concern that he was receiving no benefit for speaking about the incident. His only statement about the encounter was that the officer came out of his car and attacked Person A. Specifically, Person A claimed that after he questioned the officer as to why he was being followed, the officer exited his vehicle, grabbed Person A, pulled him inside the car, and the officers beat him up. Again, Person A provided no further details regarding what occurred. (CCRB Ex. 1B at 4-7)

Videotaped footage recorded by a bystander was introduced into evidence (CCRB Ex. 2). In that footage, Respondent initially can be seen arguing with Person A on the sidewalk, with Sergeant Jason Korpolinski standing there as well. Respondent pulls Person A's left arm behind his back in an effort to handcuff him, and a cup of coffee in Person A's left hand seems to fall to the ground. The sergeant, meanwhile, is holding Person A's right arm by his side. When Person A pulls his left arm forward, Respondent, from behind, places his right arm over Person A's right shoulder and around Person A's upper chest area, underneath Person A's chin. Respondent reaches around with his left hand and clasps his own right hand. Respondent then starts lifting and walking Person A toward the van, with Person A pulled slightly back against Respondent's chest; Person A's feet appear to be off the ground for approximately two seconds. Person A is placed face-first against the back of the van, where the officers rear-cuff him. The officers then

walk Person A toward the side door of the van. Person A appears to briefly stumble. Respondent steers him left into the side of the van, and Person A is placed inside the van.

Respondent testified that at about 1935 hours that day, he and Sergeant Korpolinski observed a potential buyer enter a drug-prone location to purchase narcotics in the vicinity of 278 Brook Avenue in the Bronx. The officers were in uniform, inside an unmarked van. Person A, who had no association with the potential buyer, approached the van and shouted obscenities toward the officers, threatening, "I'm going to fuck you up." Respondent was concerned that Person A was going to compromise their observations of the drug location, and so he moved the van to another parking spot. Person A, in the company of several other individuals, again approached the van, and continued to threaten the officers. Respondent exited the van and asked what the problem was, and Person A answered, "You guys keep looking at me." One of the individuals with Person A stated that Respondent was "cool," and tried to persuade Person A to walk away. Person A resisted, flailing his arms, so they walked away without him. (Tr. 26-30, 40)

Respondent repeatedly warned Person A that he would be arrested if he didn't move away, but Person A refused. Respondent took out his handcuffs, moved behind Person A, and told him to put his cup of coffee down, which was in his left hand. Respondent testified that as he tried to grab his left wrist, Person A threw the coffee on Respondent's lap. Since he felt resistance from Person A, Respondent placed his right arm around Person A from behind, with his right wrist and forearm underneath the chin area of Person A. Respondent's right arm was across Person A's chest, exerting pressure to hold Person A who was leaning back against him. Rather than throw Person A to the ground, Respondent made a conscious decision to walk him to the police van, briefly lifting Person A off the ground in the process. Respondent insisted that he did not put his

arm on Person A's throat or neck, and did not apply any pressure to his neck or windpipe. Respondent testified that Person A never complained that he was choked or that he had trouble breathing. (Tr. 31-36, 44, 46-47, 49-51)

Respondent pushed Person A against the rear of the van where he was handcuffed. He and the sergeant then walked Person A to the side of the van to place him inside. According to Respondent, Person A was still resisting, stiffening his body, stopping his feet, and trying to move to the right. Respondent guided Person A to the left, bringing his body into contact with the van, before placing him inside. Respondent insisted that he did not strike or beat up Person A inside the van. Respondent testified that Person A had no visible injuries and made no request for medical attention. Person A was taken to the precinct, where he was issued a summons for disorderly conduct (CCRB Ex. 3) and released. Person A apologized to Respondent, and offered to pay for his dry cleaning. (Tr. 37-39, 52-56, 58)

Specification 1 charges Respondent with using a chokehold against Person A. Section 221-01 of the Patrol Guide states that members of the service shall not use a chokehold. "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." This definition of what constitutes a chokehold focuses on the conduct itself, rather than the intention of the officer. If an officer exerts pressure on a person's throat or windpipe in the manner proscribed, that officer will have run afoul of the guidelines, and be subject to discipline. Here, after considering the testimony of Respondent, the hearsay statements of Person A, and after carefully reviewing the other exhibits including the video footage, I am not persuaded, by a preponderance of the credible evidence, that Respondent used a chokehold.

Respondent was the only witness to testify at the trial. He testified in a straight-forward, professional manner about the incident, starting with Person A's belligerent behavior that precipitated the encounter. Person A even ignored the urgings of the individuals with him, and refused to walk away. Respondent may have been imprecise in his description of how coffee was thrown on him by Person A; from the video footage Person A's arm was being pulled back, and it was unclear whether he deliberately spilled coffee on Respondent before dropping the cup to the ground. But overall, Respondent provided detailed, logical testimony, and I credit his account. He convincingly denied that he placed his arm on the throat or neck of Person A; he explained how he grabbed Person A's chest from behind and deliberately walked him toward the van, without using a prohibited chokehold.

Person A, meanwhile, did not appear to testify at this trial. He also did not appear for an in-person interview with the CCRB investigators to discuss what occurred. His only statements came from two brief telephone interviews with a CCRB investigator, where Person A seemed reluctant to discuss the incident for fear of police reprisal. He did claim that the officers pulled him inside a car and beat him up, but no charges were filed alleging such misconduct. Although he was not specifically asked whether he was choked, it is significant that at no point in either phone conversation did Person A make any statement that would suggest the use of a chokehold against him as he was handcuffed and walked to the van.

In the absence of any such statement from Person A, the CCRB primarily relied on the video footage to support the allegation. Even without any statement from Person A, if the video footage were persuasive in establishing that a chokehold was used, that alone could support a guilty finding. However, a close viewing of that footage does not establish that Respondent used a chokehold against Person A. Specifically, at about the 00:15 mark, Respondent places his right

arm over Person A's right shoulder and onto Person A's upper chest, with part of his arm under Person A's chin. Respondent then reaches around with his left hand and grabs hold of his own right hand, in order to maintain control of Person A; it appears that Respondent's right arm is slightly down, away from Person A's throat. Respondent pulls back on Person A's chest and Person A's feet are briefly lifted off the ground, as Respondent walks him toward the van. At no point in the video sequence does it appear that Respondent is applying pressure to Person A's throat or windpipe. Further, at no point on the video does Person A react as if there is pressure on his throat or that he is having difficulty breathing. To be sure, as noted by Counsel for CCRB, there is no requirement that one's breathing actually be impaired for there to be a chokehold. However, the absence of any such reaction by Person A, under circumstances where he was forcibly pulled back and briefly lifted off his feet, does support Respondent's testimony that there was no pressure being exerted on Person A's throat or windpipe.

This tribunal is mindful that Respondent's arm was positioned close to Person A's throat area. Nevertheless, Respondent convincingly testified that he did not place his arm on Person A's throat or neck, and did not apply pressure to his windpipe, as he methodically restrained and maneuvered Person A to the police van, rather than throw him to the ground. After thoroughly reviewing all of the evidence, including the hearsay statements of Person A as well as the video footage, I am not persuaded that there is sufficient credible evidence to the contrary. The record has thus failed to establish by a preponderance of the credible evidence that Respondent used a chokehold on Person A, and I find him not guilty of Specification 1.

Specification 2 charges Respondent with using excessive force on Person A by slamming him into the side of the van without police necessity. Section 221-02 of the Patrol Guide

requires members of service to "apply no more than the reasonable force necessary to gain control" of a resisting subject.

Respondent credibly testified that as the officers were leading him to the side door of the van, Person A was tensing his body, refusing to move his feet, and trying to turn to the right. On the video footage, Person A appears to briefly stumble. Respondent explained how he steered Person A toward the van, and Person A's left side struck the side of the van.

Again, Person A did not appear to testify, so there was no opportunity to question him regarding what occurred by the side of the van. During his two phone statements, he complained of being beaten inside the car, but made no mention of being slammed into the side of the van. The video footage, meanwhile, appears consistent with Respondent's description of what transpired. The officers walk Person A to the side of the van, he stumbles, and the officers steer him to the left, where it appears part of Person A's body makes contact with the side of the van. There was no indication that Person A suffered any discomfort or injuries as a result of this contact. Under the circumstances, Respondent used a reasonable amount of force in order to get a handcuffed prisoner inside the police vehicle for transport to the precinct. The record has failed to establish, by a preponderance of the credible evidence, that Respondent used excessive force by slamming Person A into the side of the van, and, I find him not guilty of Specification 2.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED

JAN 11 2019

JAMES P. O'NEILL
POLICE COMMISSIONER