



POLICE DEPARTMENT CITY OF NEW YORK

August 31, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Sean Phillips  
Tax Registry No. 953250  
103 Precinct  
Disciplinary Case No. 2015-14317  
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**Charges and Specifications:**

1. Said Police Officer Sean Phillips, on or about April 18, 2015, at approximately 0340 hours, while assigned to the 103<sup>rd</sup> Precinct and on duty, in the vicinity of [REDACTED] [REDACTED] Queens County, did wrongfully use force against Person A in that Police Officer Sean Phillips used a chokehold against Person A.  
P.G. 203-11 - USE OF FORCE
2. Said Police Officer Sean Phillips, on or about April 18, 2015, at approximately 0340 hours, while assigned to the 103<sup>rd</sup> Precinct and on duty, in the vicinity of [REDACTED] [REDACTED], Queens County, was discourteous to Person A in that Police Officer Sean Phillips stated in sum and substance SHUT THE FUCK UP. WE ARE HERE TO HELP YOU, YOU FUCKING IDIOT.  
P.G. 203-09, Page 1, Paragraph 2 PUBLIC CONTACT GENERAL
3. Said Police Officer Sean Phillips, on or about April 18, 2015, at approximately 0340 hours, while assigned to the 103<sup>rd</sup> Precinct and on duty, in the vicinity of [REDACTED] [REDACTED], Queens County, did wrongfully use force against Person A in that Police Officer Sean Phillips restricted or hindered the breathing of Person A without police necessity. *(As Amended)*  
P.G. 203-11 - USE OF FORCE

**Appearances:**

For CCRB-APU: Nicole Junior, Esq.  
Civilian Complaint Review Board  
100 Church Street, 10<sup>th</sup> floor  
New York, NY 10007

For the Respondent: Stuart London, Esq.  
Worth, Longworth & London, LLP  
111 John Street Suite 640  
New York, NY 10038

**Hearing Dates:**  
June 9 and 27, 2016

**Decision:**  
Not Guilty

**Trial Commissioner:**  
ADCT Nancy R. Ryan

### REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 9 and 27, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called Edwin Pena as a witness and presented the transcript and audio recording of a CCRB telephone interview of Person A. Respondent called Police Officer Henry Spengenberg, and Sergeant David Zabransky. 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

It is undisputed that on April 18, 2015, at approximately 0340 hours, Respondent and his partner that evening, Police Officer Henry Spengenberg, who were assigned to the 103 Precinct, were on duty, in uniform, patrolling in a marked RMP. They responded to an assault in progress



at [REDACTED] in Queens, NY. A female had called 911 from that address yelling that a male was choking her and that she couldn't breathe and needed an ambulance. (Resp. Ex. A) A male, Person A, and a female were in the basement apartment at that location when the police arrived. Sergeant David Zabransky arrived at the location shortly after Respondent and Officer Spengenberg.

Sergeant Zabransky kicked open the apartment door and he entered the apartment, followed by Respondent and Officer Spengenberg. Respondent was wearing a body camera and he activated it when Sergeant Zabransky kicked the door. When Respondent entered the apartment, the female was in a room to the side of the entranceway. Person A was in the vicinity of the doorway to that room. Respondent took Person A to the ground. Person A yelled that his ribs were broken. Someone said, "Shut the fuck up. We are here to help her, you fucking idiot."

The only questions in this case are whether Respondent, 1) used a chokehold against Person A; 2) restricted or hindered the breathing of Person A without police necessity; or 3) was the person who made the comment noted above.

With regard to the charges pertaining to a chokehold, there was testimony concerning the manner in which Respondent took down Person A, from Officer Spengenberg, Sergeant Zabransky, Respondent, and a hearsay statement from Person A. Officer Spengenberg, who testified he did not see every single step of the takedown, stated that he saw Respondent grab Person A in the upper shoulder collar bone area and push him down while he was resisting. (Tr. 74- 75)

Sergeant Zabransky testified that he could not see exactly how Respondent took Person A down. He stated that he had asked Person A several times to step out of the way so that



he could enter the room where he saw the female lying on the floor hyperventilating and hysterical. He further testified that Respondent then came around his side, stepped in front of him, and started pushing Person A away from the doorway area. (Tr. 83) At the time Respondent made physical contact with Person A, Respondent's body was between Sergeant Zabransky and Person A and was blocking the Sergeant's view. (Tr. 92-93) As soon as Respondent moved Person A, Sergeant Zabransky entered the room and focused on the medical condition of the woman. (Tr.83) The next time he saw Person A, he was already in handcuffs. (Tr. 84)

Respondent described Person A as blocking the pathway inside the apartment that led to where the female was. He testified that Person A was not responding to verbal instructions to move and that he became more hostile and was flexing and flailing his arms. He saw him lower his shoulder and thought Person A was going to take a swing at the Sergeant. At that point he stepped, "in front of the sergeant and made contact with Person A to move him out of the situation." (Tr. 104) He testified that he placed his left arm on Person A's right forearm and placed his right hand in his shoulder area. (Tr. 105) Respondent perceived that Person A became more hostile and aggressive. Respondent testified that when Person A moved, his hand moved from his shoulder area further towards Person A's neck. At this point Respondent had control of Person A's right arm and as he was escorting Person A away from the door, Person A fell down. Respondent testified that there was debris and multiple objects scattered all over the floor of the apartment. Once he was on the ground, Respondent rear cuffed Person A. (Tr. 106-07, 136-37) Respondent testified that he never had his hand by Person A's throat. He described the throat as the windpipe in front of the neck. ((Tr. 140-41)



On cross-examination, Respondent was shown clips from his body camera. At the 42 -44 second marks on the video, Respondent acknowledged that the band on his right wrist can be seen in the area where Person A's shoulder meets his neck. (Tr. 121-22) He also testified that parts of his hand were visible in the clip at the 44 second mark. In the parts of the clip that were not in shadows, he saw the knuckle to his thumb and part of his wrist. (Tr. 124) He agreed that his five fingers were around the area of the back of Person A's neck. He denied that his thumb was ever across Person A's neck. He agreed that Person A's ear was visible in the web between his index finger and thumb on his right hand. (Tr. 125) In subsequent questioning about the positioning of his hand and where the "web" of his hand was, Respondent demonstrated that his thumb and fingers on his right hand were all next to each other as he initially placed it on Person A's shoulder and that the four fingers and the thumb remained together throughout the incident. (Tr. 143-44).

When Respondent was shown the video, he agreed that Person A was talking at the 25 and 33 second marks and was still talking up until the 41 second mark and that from the 41 to 46 second mark, Person A could not be heard yelling at the Sergeant. Person A is again heard talking from the 46 second mark to the one minute 22 second mark. (Tr. 130-31).

Person A's hearsay telephonic interview essentially begins with the CCRB investigator telling Person A that he is calling about a complaint they received, "about what happened to you in April in your home involving a possible chokehold." (CCRB Ex. 1B, 2) Person A immediately responds, "A what? You mean it's broken ribs." When asked to describe what happened in an open ended question, Person A stated that the cops broke his window, kicked his door in, and slammed him to the ground, breaking his ribs by jumping on his back. (CCRB Ex. 1B, 3) Upon further questioning of what part of his body the officer grabbed, Person A says he



thinks it was like his neck or "something like that. Body and neck, you know what I mean? Like just my shoulders." The investigator then asks, "He didn't grab your neck and push you down to the ground?" Person A responds by saying, "Yeah, something like that." The investigator continues by asking, "Do you know if he cut off your breathing at all?" Person A says, "What choking me? No. He didn't choke me." The investigator continues by saying, "But his hand was on your neck?" Person A then stated, "Yeah. Yeah. Yeah. His um foot, like, was on my neck." When the investigator goes back to the period of time Person A was being taken down to the ground as opposed to when he was already on the ground, Person A again stated, "No, I wasn't being choked though." (CCRB Ex. 1B, 6) The investigator then proceeded with other questions but goes back later in the interview to ask, "Do, do you know if, like, his hands were in the front of your throat or on, like the side of your throat?" Person A responds to this question by saying, "No. He just grabbed me. And not --not even choking half way, nah nah I can't tell a lie, you know what I mean?" (CCRB Ex. 1B, 8)

Under Patrol Guide 203-11, as it was in effect at the time of this incident, members of the Department were barred from using a chokehold. Under 203-11, "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 this case, CCRB has not met their burden of proving by a preponderance of the evidence that Respondent either used a chokehold (Specification 1) or restricted or hindered the breathing of Person A without police necessity (Specification 3).

In this case CCRB has brought two separate charges concerning the physical actions of Respondent towards Person A. Specification 3, which is more narrowly worded than PG 203 11, charges that Respondent actually restricted or hindered the breathing of Person A. Perhaps the most convincing evidence in this case comes from the hearsay statement of the purported victim



of the chokehold. Despite what can only be seen as a series of leading questions posed by the CCRB investigator, Person A consistently denied that any chokehold took place. In fact, he seems surprised when the investigator starts the conversation by stating he is calling about an incident involving a possible chokehold. Person A never makes any mention of his airway being restricted or his breathing being hindered in any way. In fact in his initial recitation of the incident he doesn't even mention being touched any place near his neck and instead focused on the injuries he claimed occurred to his ribs. Even when the CCRB investigator directly asks Person A if the officer's hands were in the front or side of his throat, Person A clearly responds, "No." It is clear from the statement of Person A that he did not perceive any restriction or hindering of his breathing. CCRB has not proven by a preponderance of the credible evidence that Respondent actually restricted or hindered the breathing of Person A and I therefore find him Not Guilty of Specification 3.

Specification 1 involves the full definition of a chokehold as cited above in the quote from PG 203-11. To determine whether Respondent is guilty of this specification involves an analysis of whether his actions included any pressure to the throat or windpipe, which may have prevented or hindered Person A's breathing or reduced his intake of air. While Respondent has acknowledged his hand was in the shoulder and neck area of Person A, he denied that his thumb was ever across the front of Person A's neck. Nothing in Person A's statement contradicts this testimony from Respondent. The video in this case does not provide dispositive evidence of what occurred during the entire incident. When the video is viewed at a slow speed it appears that Respondent does approach Person A's shoulder area with his thumb separated from his other fingers. While this is not consistent with Respondent's memory of his five fingers being together during the entire approach to the neck area, it also is not proof by a preponderance of



the evidence that this approach to the shoulder area, or a very brief slip of the hand up towards Person A's ear, as testified to by Respondent, created the degree of pressure on the throat or windpipe which may have hindered Person A's breathing. First of all, the video is not completely clear as to where Respondent's thumb is at all times when part of his hand is seemingly on the side portion of Person A's neck. The thumb is only partially visible at the 44 second mark and it can't be determined where the top portion of the thumb is. Secondly, if Respondent's thumb did cross a portion of Person A's neck as it moved from the shoulder to neck area it could only have been for a very brief time. Based on Person A's statement and his lack of perception of any hindrance of his breathing, it is more likely than not that Respondent either exerted no pressure to the throat or windpipe from his thumb or that it was of such a minimal degree that it did not create the degree of pressure on the throat or windpipe which may have prevented or hindered breathing or reduced his intake of air.

I also reject the suggestion that the fact that Person A ceased yelling during the period of time Respondent had his hand in his neck area is proof that Respondent was using a chokehold. Person A could have ceased his yelling simply because he was being taken to the ground, or for a number of other reasons. The cessation of his yelling does not prove by a preponderance of the evidence that his airway was in any way obstructed.

Based on the credible evidence in this case, I find that CCRB has not proven by a preponderance of the evidence that Respondent used a chokehold therefore I find him Not Guilty of Specification 1.

With regard to Specification 2, the words as charged can be heard in the video. However, the CCRB did not prove by a preponderance of the evidence that it was Respondent who uttered those words. Respondent denied that he said the words. (Tr. 110) Person A's statement



supports this testimony from Respondent. When specifically asked if Respondent used any kind of profanity towards him or made threats to him, Person A responded, "No. Just ignoring me out." (CCRB Ex. 1B, 11) I therefore find Respondent Not Guilty of Specification 2.

Respectfully submitted,

*Nancy Ryan*

RM

Nancy R. Ryan  
Assistant Deputy Commissioner Trials

**APPROVED**

OCT 20 2016  
*James P. O'Neill*  
JAMES P. O'NEILL  
POLICE COMMISSIONER