



POLICE DEPARTMENT

November 22, 2022

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In the Matter of the Charges and Specifications :  
- against - :  
Lieutenant Eduardo Silva :  
Tax Registry No. 933356 :  
Risk Management Bureau :  
-----X

Case No.  
2021-24085

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

Before: Honorable Rosemarie Maldonado  
Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Brian Arthur, Esq.  
Civilian Complaint Review Board  
100 Church Street, 10<sup>th</sup> Floor  
New York, NY 10007

For the Respondent: Marissa Gillespie, Esq.  
Karasyk & Moschella, LLP  
233 Broadway, Suite 2340  
New York, NY 10279

To:

HONORABLE KEECHANT L. SEWELL  
POLICE COMMISSIONER  
ONE POLICE PLAZA  
NEW YORK, NY 10038

## CHARGES AND SPECIFICATIONS

1. Lieutenant Eduardo Silva, on or about May 29, 2020, at approximately 2300, while assigned to 078 PCT and on duty in the vicinity of 5<sup>th</sup> Avenue between Bergen Street and Saint Marks Place, Kings County, wrongfully used force, in that he pushed individual A in the back without police necessity.

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

USE OF FORCE

2. Lieutenant Eduardo Silva, on or about May 29, 2020, at approximately 2300, while assigned to 078 PCT and on duty in the vicinity of 5<sup>th</sup> Avenue between Bergen Street and Saint Marks Place, Kings County, wrongfully used force, in that he pushed individual A on the chest 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 October 19, 2022. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The CCRB entered into evidence two videos. 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 the charged misconduct.

## ANALYSIS

It is undisputed that from late May to early June 2020, New York City was in the midst of the George Floyd protests. During this period, the City experienced an outpouring of citizens who took to the streets to express outrage over Mr. Floyd's murder at the hands of a Minneapolis police officer. These unprecedented protests resulted in large crowds, often unplanned and mobile in nature, which spread across every borough of this City. In addition, the protests were

occurring amidst the 2020 COVID pandemic. This resulted in longer work hours and fatigue for the Members of Service assigned to these details. Adding to the difficulty of those days was the fact that legitimate First Amendment expression occurred simultaneously with criminal behavior, including firebombing, looting and violence toward the police.

In this case, CCRB alleges that, during these protests, Respondent pushed Individual A in the back and in the chest without police necessity. At trial, Respondent acknowledged that he used a push, or “hand check,” to remove that Individual from the street. Accordingly, the sole issue in dispute is whether the force Respondent admittedly used was reasonable. For the reasons set forth below, I find that it was.

It is uncontested that on May 29, 2020, Respondent was the Special Operations Lieutenant in the 78 Precinct. His tour began at approximately 1720 hours and ended the following morning at 0210 hours. That night, the George Floyd protests in Brooklyn intensified, and Respondent was required to respond to different locations to assist officers who were overwhelmed and outnumbered by multiple groups of protesters. Respondent credibly testified that what he experienced that night was unprecedented, describing it as “chaotic” and “out of control.” (Tr. 27-29, 39)

Specifically, Respondent recalled being stationed at the Barclays Center at about 1915 hours. About an hour later, the Legal Bureau deemed that the protests were no longer lawful and that the streets had to be cleared. (Tr. 29-34) At about that time, the Department called for a Level Three Mobilization. Between 2100 and 2130 hours, Respondent and his team moved to Grand Army Plaza to assist other officers monitoring a large group of protestors gathered at that location. They then returned to the 78 Precinct due to concerns that it could be breached and overrun. His next urgent call came from the Brooklyn Museum. There, he observed over 100

people that he described as “disorderly.” At one point, a person that wanted to give him a bag of Molotov cocktails approached. According to Respondent, the scene “erupted” and he was unable to secure the explosives. Respondent learned from reading an ICAD that around 2220 hours, a police van was firebombed in the vicinity of the Brooklyn Museum. (Tr. 30-31, 35-39)

Respondent testified that at approximately 2230 hours, his team headed to the 78 Precinct to use the restroom. Instead, they responded to radio calls from officers at Fifth Avenue and Bergen Street who were repeatedly requesting backup. Respondent testified that the tone of the officers’ voices indicated to him “they were in dire need of assistance.” (Tr. 40-41) He and six officers arrived at that location and observed crowds of people in the street. Respondent testified that as he approached he also saw objects being thrown at the officers who had called for backup. He immediately became concerned for his own safety and that of his fellow officers. Respondent exited the RMP, walked briskly toward the crowd and yelled for people to move back toward the sidewalk. (Tr. 42-43) According to his testimony, Respondent used a “hand check” to gain compliance. (Tr. 44)

The subject of this disciplinary trial is the first and second push executed by Respondent after he exited the RMP. The identity of Individual A is unknown to the CCRB; therefore, he was not called to testify at trial. Instead, CCRB relied on two video recordings of the incident: the first is a cell phone recording taken from a rooftop (CCRB Ex. 1); the second is a cell phone recording taken at street level. (CCRB Ex. 2). On the video footage in evidence, Individual A is seen wearing a white t-shirt, a black backpack and a hat.

Respondent testified that he “hand checked” Individual A to gain “compliance” with his lawful order to move in the direction of the sidewalk. (Tr. 44) Initially, he did not recall whether he used one hand or two, but upon review of the video acknowledged that he used two hands.

He conceded that Individual A did not hit him, nor did he have information that Individual A threw items or caused property damage. (Tr. 44-45, 48, 53, 64)

The Patrol Guide sets forth the parameters for determining whether the push was authorized. P.G. 221-01 and 221-02 state that force may be used 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. The force used must be “only the reasonable force necessary” under the circumstances.

Legal precedent establishes that the reasonableness of an officer’s actions must be judged “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Koeiman v. City of New York*, 36 A.D.3d 451 (1st. Dept. 2007), citing *Passino v. State*, 260 A.D.2d 915 (3d Dept. 1999). Furthermore, the “calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.” *Graham v. Connor*, 490 U.S. 386, 396- 97 (1989).

The evidence at trial failed to establish that, under these particular circumstances, the force used constituted sanctionable misconduct. First, the rooftop video in evidence confirms Respondent’s assessment that the conditions on Fifth Avenue and Bergen Street were dangerous. The sound of breaking glass and shattering items captured on video is chilling. The video also depicts garbage cans being thrown and kicked around the street, creating additional obstacles for traffic. Second, as Respondent’s RMP approaches, a crowd blocks the intersection where an ambulance, with lights and sirens on, attempts to inch its way through. Those present ignore that emergency vehicle and remain on the street blocking its path creating an inherently dangerous

condition. Third, it is uncontested that Respondent knew that the Legal Bureau had authorized officers to clear the streets due to violent incidents that had taken place that day, including some in that vicinity. Fourth, Respondent credibly testified that it was his intention to clear this intersection and move the crowd onto the sidewalk. The street level video clearly corroborates that he was attempting to do just that, as Respondent can be heard yelling orders to move back as he walks toward Individual A and the crowd.<sup>1</sup>

Moreover, with respect to Individual A in particular, the rooftop video footage shows him ignoring both Respondent's orders and the jarring lights and sirens of the ambulance trying to get through. In fact, as Respondent approaches, instead of moving toward the sidewalk, Individual A backs further into the street. As such, Individual A, who was furthest into the intersection, is the first person that Respondent encounters and pushes toward the sidewalk. After the first push to the back,<sup>2</sup> Individual A turns around and steps toward Respondent, trying to engage him by shouting. Respondent pushes him a second time in the torso to gain compliance. Almost immediately, the ambulance is finally able to cross the intersection. (CCRB Ex. 1 at 02:10-02:25; CCRB Ex 2 at 0:04-0:16)

Under these specific circumstances, the tribunal finds that Respondent's actions were reasonable. This finding is consistent with Department precedent. *See Disciplinary Case No. 2018-18426* (Dec. 18, 2019) (fifteen-year lieutenant found Not Guilty of pushing a civilian without police necessity. The evidence demonstrated that the civilian did not comply with directives to leave the busy area surrounding a funeral home where officers were actively trying

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<sup>1</sup> Inasmuch as Individual A did not appear to testify at trial, there is no credible evidence that he did not hear Respondent's order or that he did not have an opportunity to comply.

<sup>2</sup> In making this finding, I note that the tactic of pushing an individual in the back may, under certain circumstances, fall short of best practices. Given the facts of this case, however, it does not rise to the level of sanctionable misconduct.

to clear a large crowd during a high profile funeral); *Disciplinary Case No. 2015-13213* (July 19, 2016) (twenty-four-year lieutenant found Not Guilty of pushing an individual without police necessity. Respondent first used verbal commands then pushed a non-compliant individual in the back four times in an effort to remove him from an arrest scene. The pushes were found to be necessary to ensure the safety of fellow officers). The facts of this case are markedly similar to the precedent cited above – an experienced lieutenant reasonably used a low level of force to gain compliance with a lawful order aimed at addressing a dangerous situation.

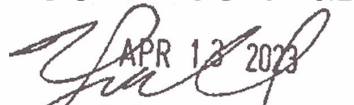
Accordingly, I find Respondent Not Guilty of the charged misconduct.

Respectfully submitted,



Rosemarie Maldonado  
Deputy Commissioner of Trials

**APPROVED**



APR 13 2023  
KEECHANT L. SEWELL  
POLICE COMMISSIONER