



POLICE DEPARTMENT CITY OF NEW YORK

June 13, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Charles Davis  
Tax Registry No. 941623  
71 Precinct  
Disciplinary Case No. 2016-16717  
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**Charges and Specifications:**

1. Police Officer Charles Davis, on or about March 22, 2016, at approximately 1700 hours, while assigned to the 71<sup>st</sup> Precinct and on duty, in the vicinity of [REDACTED] [REDACTED] wrongfully used force, in that he struck Person A in the face with a radio without police necessity.

P.G. 203-11 - USE OF FORCE

**Appearances:**

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

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

**Hearing Date:**

May 5, 2017

**Decision:**

Not Guilty

**Trial Commissioner:**

ADCT Jeff S. Adler

## REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on May 5, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. CCRB introduced the hearsay statements of complainant Person A and eyewitness Person B. Respondent called Police Officer Michael Baratta and 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

At approximately 1700 hours on March 22, 2016, Respondent and his partner Officer Michael Baratta, both in uniform, stopped their marked RMP behind a double-parked Porsche [REDACTED]. Officer Baratta, the operator, signaled the Porsche's occupant, Person A, to move the vehicle. Person A declined to do so, and was issued a summons for double-parking. Following the issuance of the summons, an altercation occurred between Person A and the officers. It is alleged that during that altercation, Respondent wrongfully used force against Person A in that he struck him in the face with a police radio without police necessity.

Person A was notified by CCRB of the hearing date, but did not appear to testify. Messages were left with eyewitness Person B, but he, too, did not appear. A recording of CCRB's interview with Person A on May 12, 2016, along with the accompanying transcript, were

admitted into evidence (CCRB Ex. 1 and 1A). A recording of an IAB interview of Person B on April 2, 2016, and the accompanying transcript, were admitted as CCRB Ex. 3 and 3A. Also, a CCRB interview of Person B on June 14, 2016, with the transcript, were admitted as CCRB Ex. 2 and 2A. Hearsay evidence is admissible in an administrative tribunal, and a case may be proven with such evidence provided it is found to be sufficiently reliable and probative on the issues to be determined. *See Ayala v. Ward*, 170 A.D.2d 235 (1<sup>st</sup> Dept. 1991); *In the Matter of 125 Bar Corp. v. State Liquor Authority of the State of New York*, 24 N.Y.2d 174 (1969). To be sure, it is preferable to have testimony from a live witness, where opposing counsel has the opportunity to cross-examine, and the court can observe the demeanor of the witness. In the absence of such live testimony from these witnesses here, this tribunal listened carefully to the prior recorded statements of Person A and Person B, and reviewed the accompanying transcripts.

In his CCRB statement, Person A, whose attorney was present for the interview, confirmed that he was double-parked in front of the barber shop when the police car pulled up behind him. An officer, who apparently was Officer Baratta, asked him to move the car, but Person A told him he was just waiting for his wife to bring the car seat for their two-year old child, who already was inside the vehicle. Officer Baratta issued him a summons. Person A was standing outside his Porsche, while his wife was speaking with the other officer, apparently Respondent. Person A stated that when he received the summons, he said to his wife words to the effect of <sup>st</sup>.. Fuck this shit. You know what? Fuck them.<sup>st</sup> Officer Baratta then walked back to Person A and asked for identification. While Person A was searching his pockets for identification. Officer Baratta suddenly grabbed his wrist, turned him around, and tried to put Person A in a headlock. Person A moved his head out of the hold, and was essentially pinned against his car with both officers close to him. (CCRB Ex. 1A at 5-8, 44-46)

According to Person A, Officer Baratta then sprayed him in the eyes with O.C. spray for “an extended period.” Unable to see, Person A turned his head, and claimed that he then felt something hit his face. Person A could not see who or what hit him. He stated that he lost consciousness, ended up on the ground, and woke up face down on the ground in handcuffs, in severe pain. Person A later learned from watching video and speaking with witnesses that he had been “profusely bleeding.” Someone also told him he had been hit with a radio. (CCRB Ex. 1A at 9-10, 33, 47)

Person A was brought to Kings County Hospital. A portion of his medical records was introduced by Respondent (Resp. Ex. A). Those records indicate that Person A suffered a cracked tooth, as well as a three centimeter superficial laceration to his right cheek and an abrasion to the inside lining of the right lower portion of his cheek. The records also indicate that there was no loss of consciousness. Two photographs depict the injury to Person A’s face (CCRB Ex. 5) and the chipped teeth (CCRB Ex. 5A). Person A speculated that he may have chipped the teeth when he hit the ground, but wasn’t really sure. (CCRB 1A at 39)

Counsel for Respondent offered into evidence the transcript of Person A’s 50-H hearing on June 10, 2016. Person A’s account on that date was essentially consistent with his statement to CCRB on May 12.

In his statement to IAB, Person B acknowledged he was a friend of Person A and his family for a number of years. Person B worked at the barbershop and was preparing to pray when he observed the altercation between Person A and the officers. He confirmed Person A’s story about waiting for the car seat, and stated that after being issued the summons, Person A, who was outside his vehicle, said words to the effect of “I don’t care about no fucking ticket” and “I’ll pay this shit.” Officer Baratta exchanged words with Person A, and as Person A turned away from him to re-enter his



vehicle, Officer Baratta grabbed him. Person A, who is a "big guy," shrugged off the officer, and Respondent came running over. (CCRB Ex. 3A at 3, 8-11, 15-17)

According to Person B, both officers tried to restrain Person A, who questioned why they were grabbing him. Officer Baratta pulled out his mace and sprayed Person A's face, and Respondent hit Person A in the face with his walkie-talkie; Person B described it as a "two-piece combo." The walkie-talkie fell to the ground, near the front left tire of the Porsche. The officers got Person A to the ground and handcuffed him. (CCRB Ex. 3A at 11-12, 19-20)

In his statement to CCRB two months later, Person B provided a similar account of events. Person B clarified that from where he was standing in the doorway of the shop, he "couldn't really see, like, exactly where (Person A) was hit." He couldn't see if it was the right or the left side of the face. When Person B saw the walkie-talkie on the ground, that's how he knew that Respondent had hit Person A with the radio. (CCRB Ex. 2A at 7, 28-29) Person B stated he did not see either officer try to put Person A in a headlock, and did not know if Person A ever lost consciousness. (CCRB Ex. 2A at 44-45, 48)

Additionally, CCRB introduced video footage taken by a bystander during the latter portion of the incident. The footage shows Person A already prone on the ground being handcuffed, with several officers around him. Respondent is seen retrieving his radio from the ground near the open driver's side door of the Porsche. Person A is visibly upset, cursing at the officers and kicking out at them. Blood can be seen coming from the face of Person A as he is lifted off the ground and brought to a stretcher.

Officer Baratta testified that he had noticed the Porsche double-parked for about forty-five minutes to an hour before he pulled up behind and asked Person A to move the vehicle. Person A refused to do so, so Officer Baratta issued him a summons. As Officer Baratta was

walking back to the RMP, he heard loud screaming. The officer saw Person A, who was out of his vehicle, "aggressively walking" toward Respondent, who was standing by the middle of the Porsche on the driver's side. Person A was "screaming at the top of his lungs" at Respondent, repeatedly saying "fuck you" to him. Officer Baratta described Person A as a large man, over six feet tall, weighing more than 300 pounds. (Tr. 34-37, 51)

According to Officer Baratta, Respondent told Person A, "that's it," and said he needed to see his identification, but Person A responded, "Fuck y'all, y'all ain't getting shit." Respondent asked again, and told Person A he was not free to leave, but Person A took a half step toward the Porsche. Officer Baratta observed Respondent grab Person A's wrist, and Person A then pushed Respondent in the chest. Both officers grabbed Person A's arms in an attempt to handcuff him, but Person A refused to put his hands behind his back and struggled with the officers. (Tr. 39-41, 52-53) The officer testified that Respondent tried to go over the radio to request assistance, but was unsuccessful because it was a busy frequency. Officer Baratta also was unsuccessful in radioing for back-up. Officer Baratta then pepper-sprayed Person A in his face. The officers, with the assistance of a plainclothes officer who arrived on the scene, were able to take Person A to the ground, where he landed "belly first, face first." After a brief additional struggle, Person A was handcuffed. Officer Baratta insisted that neither he nor Respondent struck Person A, with a radio or otherwise. (Tr. 42-45, 54-55)

When Person A was rolled to his side, Officer Baratta noticed some blood on his face, a little trickle that got worse. Person A continued to be belligerent, kicking and screaming. The crowd slowly grew during the course of the incident, and they, too, were yelling and cursing at the officers. Person A was arrested and charged with disorderly conduct, obstructing governmental administration, and resisting arrest. (Tr. 46-48, 55-56)

Respondent testified that after his partner issued Person A the summons, Person A was cursing and yelling at the officers, and a woman who was with Person A was aggressively arguing with them as well. The Porsche was blocking the flow of traffic on the street, and many people were gathering to watch what was happening. Respondent tried to explain to Person A that he was wrong for double-parking, but Person A responded by saying "Fuck you," and continued to behave aggressively as he came toward Respondent. Respondent asked for Person A's identification, for the purpose of issuing him a disorderly conduct summons, but Person A said "I'm not giving you shit." Despite being instructed that he wasn't free to leave, Person A moved toward his vehicle. Respondent grabbed Person A's right wrist, but Person A turned and pushed the officer in the chest, elevating the encounter into an arrest situation. (Tr. 63-67, 80-82)

According to Respondent, Person A reached inside the Porsche and grabbed hold of the steering wheel, to make it difficult for the officers to apprehend him. Each officer grabbed one of Person A's arms. Respondent instructed Person A to stop struggling and give the officers his hands, but an agitated Person A continued to struggle. Respondent started to go over his radio to ask for assistance, but aborted the attempt since Person A was screaming and Respondent did not want to cause an overreaction from fellow officers. Instead, Respondent re-holstered his radio, and he and his partner pulled Person A out of the vehicle. Officer Baratta maced Person A, and some of the aerosol affected Respondent's eyes as well. Respondent felt Person A weaken, and Officer Baratta put a call for back-up over the radio. With the help of a plainclothes officer who arrived, Person A was brought to the ground, belly first, with Respondent falling directly on top of Person A as he was going down. After Person A was handcuffed, Respondent retrieved his radio from the ground near the Porsche, where it fell during the struggle. Respondent insisted that no



punches were thrown by either officer, and that neither he nor his partner struck Person A with a radio. (Tr. 68-75, 83-86)

It is alleged that Respondent wrongfully used force against Person A in that he struck him in the face with his radio without police necessity. The applicable section of the Patrol Guide at the time of the incident, section 203-11, cautions that "excessive force will not be tolerated." An officer at the scene of an incident is directed to "use minimum necessary force." The section also notes that when taking a violent or resisting subject into custody, "officers should utilize appropriate tactics in a coordinated effort to overcome resistance."

It is undisputed that Person A suffered injuries to his face during his encounter with the officers. The video and a photograph clearly depict his bleeding face. The narrow issue here, however, is whether the record has established, by a preponderance of the credible evidence, that Respondent did, in fact, strike Person A with his police radio. CCRB relies primarily on the hearsay statements of two witnesses, Person A and Person B, and only Person B claimed to see the radio strike. The two are essentially consistent in providing their versions of what occurred. The problem, though, is that neither was subjected to cross-examination, leaving multiple questions unanswered.

Person B provides the most significant direct evidence in support of the accusation, claiming that he saw Respondent strike Person A with the walkie-talkie. It would have been useful, though, to hear Person B questioned on what precisely he could see from his vantage point at the barbershop. It appears from the video that a person in the doorway of the shop would likely have had a difficult time seeing the details of the encounter that occurred on the driver's side of the double-parked Porsche. Indeed, Person B, himself, revealed some uncertainty when he stated that he "couldn't really see, like, exactly where (Person A) was hit." Part of Person B's account was based on



assumption: he stated that since the radio fell on the ground underneath the Porsche, "that's how I knew that if he hit him with the walkie-talkie."

Similarly, it would have been valuable to hear Person B questioned about whether any part of his account was influenced by hearing how other people in the area described what occurred. A telling illustration of how a person's description of events might evolve is found on the video, which was recorded and narrated by someone whom Person A identified as a barber named Person C. At about the 4:18 mark of the video, Person C states that he doesn't know which officer busted Person A's face. But by 5:27, Person C focuses the camera on Respondent and emphatically asserts that this is the one who hit Person A in the face with the walkie-talkie, without offering any explanation for this sudden insight.

Also unexplored were Person B's potential biases, either against the police or in favor of his long-time friend, Person A. At times during his statement to IAB, Person B seemed to display an anti-police bias, going so far as to accuse the officers who showed him a photo array of trying to set him up. Person B never was challenged as to whether he consulted with Person A before settling on his version of events, and whether he was just trying to help his friend recover money in his lawsuit.

The corroboration for Person B's hearsay account is minimal. Person A did state that he felt something hit his face, though he wasn't sure who or what hit him. Again, in the absence of live testimony, it is difficult to credit whether Person A was even hit at all before making contact with the ground. In the medical records submitted (Resp. Ex. A), Person A complains of being "roughed up" by the police, and being "maced in the face", but apparently does not make a single specific reference to being hit in the face or being struck with an object. Also, the records indicate that there was no loss of consciousness. If there were any truth to Person A's hearsay

claim that he had been struck in the face with an object, to the point where he was briefly knocked unconscious, one would expect at least some mention of that when he went to the hospital. These records are from the same day of the incident, before Person A had an opportunity to embellish his story with an eye toward his lawsuit. His subsequent exaggerations raise significant credibility concerns regarding Person A's hearsay narrative.

Since the video footage begins at the point where Person A already is on the ground, it, too, provides minimal corroboration for what preceded. Even as he lies on the ground after being handcuffed, Person A can be seen kicking and cursing at the officers. Respondent can be seen retrieving his radio from the ground next to the Porsche, but that isn't proof that he used the radio to strike Person A; indeed, the radio could have fallen to the ground as the officers tussled with the heavysset Person A, trying to secure him. The footage, along with the photographs, also show Person A bleeding from what looks like a cut to his face and a cracked tooth. [REDACTED]

[REDACTED]

[REDACTED]


[REDACTED]

[REDACTED] This injury might be consistent with Person A having been struck with the radio, but the facial injuries, including the chipped tooth, also could have been sustained when Person A was forcefully brought face-forward to the ground. Additionally, Person A may have been injured during the initial struggle by the car, where he was leaning inside the vehicle in close proximity to multiple hard surfaces. He also may have incurred injury when he removed himself from what he claimed was an attempted headlock. The record does not support a specific inference that the injury was caused by being struck with a radio.

Meanwhile, both Respondent and Officer Baratta took the witness stand, and were subjected to the capable cross-examination of counsel for CCRB. The officers each answered questions willingly, in a straight-forward manner. Their description of the incident was logical and consistent, and I credit their testimony that Respondent never struck Person A with his radio.

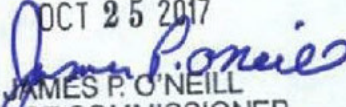
This tribunal is mindful that Person A did sustain noteworthy injuries during this encounter, as depicted in stark video footage, and it is unfortunate that what began as a summons for double-parking escalated the way it did. That said, the issue here is whether the record has established, by a preponderance of the credible evidence, that Respondent struck Person A in the face with a radio. It has not, and I find Respondent not guilty.

Respectfully submitted,



Jeff S. Adler  
Assistant Deputy Commissioner Trials

**APPROVED**

OCT 25 2017  
  
JAMES P. O'NEILL  
POLICE COMMISSIONER