



POLICE DEPARTMENT

June 10, 2015

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Edward Caceres
Tax Registry No. 941482
61 Precinct
Disciplinary Case No. 2014-11644

The above-named member of the Department appeared before me on February 27, 2015, charged with the following:

1. Said Sgt. Edward Caceres, on or about October 31, 2012, at approximately 0215 hours while assigned to 61st precinct [sic] and on duty, inside of 2575 Coney Island Avenue (the 61st Precinct), Kings County, did wrongfully use force against Person A, in that he punched him in the face.

P.G. 203-11, Page 1, Paragraph 2 – USE OF FORCE

2. Said Sgt. Edward Caceres, on or about October 31, 2012, at approximately 0215 hours while assigned to 61st precinct [sic] and on duty, inside of 2575 Coney Island Avenue (the 61st Precinct), Kings County, was discourteous in that he stated to Person B in sum and substance: SHUT UP. MIND YOUR FUCKING BUSINESS.

P.G. 203-09, Page 1, Paragraph 2 – PUBLIC CONTACT – GENERAL

The Civilian Complaint Review Board was represented by Raasheja Page, Esq.
Respondent was represented by John D'Allesandro, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is not disputed that on October 30, 2012, the day after Super-storm Sandy struck New York City, Person A, his [REDACTED] Person C, and his [REDACTED] Person B were stopped by police on [REDACTED], Brooklyn, after they were observed carrying a safe which they had covered with a towel. Although Person C truthfully told the police that the safe was his and that they were transferring it to his mother's house for safekeeping, the police told them that unless they could prove ownership on the spot by entering the combination and unlocking the safe, they would be arrested. Since the safe could not be opened because the digital combination lock was waterlogged, they were arrested, transported to the 61 Precinct at 2575 Coney Island Avenue, Brooklyn, and placed in holding cells.

On October 31, 2012, at about 0215 hours, Person A was removed from a cell by Police Officer Iftikhar who attempted to place him into another holding cell. Because Person A considered this cell to be filthy, Person A physically resisted Iftikhar's efforts to put him into this cell. Iftikhar swept Person A's legs out from under him, Person A fell to the floor, and Iftikhar fell on him. Iftikhar then yelled out for assistance.

Respondent was on duty, in uniform, inside the 61 station house at this time.

The CCRB prosecutor offered the following out-of-court statements made by Person A and Person B:

Person A, at his tape recorded CCRB interview [CCRB Exhibit (CCRBX) 1] on January 29, 2013, stated that as many as seven officers responded to Iftikar's call out, that Respondent was one of these officers, and that Respondent began kicking him in the head while he was on the floor. Person A stated that Respondent had kicked him in the back of his head, in the skull area, and on the left side of his face, and that he was also hit on the left side of his torso and on his back. Person A was examined and treated at Beth Israel Hospital.

Person B, at his tape recorded CCRB interview (CCRBX 2) on March 29, 2013, stated that from inside the cell he had been placed in he saw three or four officers throw his [REDACTED] down to the floor and that he saw punches and kicking by these officers who used "excessive" and "unnecessary" force. When Person B was asked how many punches he had seen hit Person A, he stated that he clearly saw one hit the left side of Person A's face. He stated that he when he "screamed" out, "What the fuck are you guys doing?!" he was told to shut up and mind his business. An officer who was "kind of short with little black hair" told him, "Shut up and mind your fucking business."

Respondent testified on his own behalf.

Respondent recalled that he was inside the 61 Precinct standing near the front desk when he heard the desk sergeant call out "85" (officer needs assistance) and yell that "Iftikhar needs help" in the cell area. Respondent ran to the holding cell area. When he arrived there, Iftikhar and Person A appeared to be struggling on the floor. Respondent tripped over Person A and Iftikhar. As he reached out with his right hand to cushion his

fall, Respondent's right hand hit a cell bar and then the cement floor. He fell on top of Person A. He suffered a broken hand. Respondent testified that he did not punch Person A in the face and that he did not yell any profanities at Person B.

On cross-examination, Respondent agreed that after he fell down on top of Person A he remained on top of him. Respondent confirmed that at his CCRB interview he had stated that when he arrived at the holding cell area, Person A was on his back and he had wrapped his legs around Ifikhar's body on the floor. He did not know whether Person A was in handcuffs at the time. He agreed that Person A and other prisoners began repeatedly yelling out his shield number. He believed that Person A was assaulting Ifikhar. He did not observe Person A attempt to escape from the station house. He denied that he had told Person B to "shut up and mind his fucking business." Respondent was shown a Mugshot Pedigree photo of Person A that was taken after this incident (CCRBX 3) which depicts a swelling under Person A's left eye.

Respondent offered in evidence the CCRB Complaint Report regarding Person A's allegation [Respondent's Exhibit (RX) A] and the "Investigative Recommendation" report prepared by the CCRB investigator who investigated Person A's complaint (RX B).

FINDINGS AND ANALYSIS

Under Specification No. 1, Respondent is charged with having wrongfully used force against Person A by punching him in the face.

Since Person A failed to appear to testify at this trial, the CCRB prosecutor offered his CCRB interview as hearsay evidence (CCRBX 1). At his CCRB interview, Person A asserted that Respondent "was kicking me in my head" and "in the back of my head," in

the skull area, and on the left side of his face, (CCRBX 1 p. 25-28) and that he was also "hit" on the left side of his "torso" and on his "back." (CCRBX 1 p. 29) On the CCRB Complaint Report, Person A asserted that he "was repeatedly kicked in the face and head" by Respondent (RXA p. 2).

Since Person B, Person A's brother, also failed to appear to testify at this trial, the CCRB prosecutor offered his CCRB interview as hearsay evidence (CCRBX 2). At his CCRB interview, Person B asserted that after Person A was thrown to the floor he saw "some kicking, there was a few punches" (CCRBX 2 p. 4) but when Person B was asked how many punches he had seen hit Person A, he answered that he had only clearly seen one punch hit Person A's face. (CCRBX 2 p. 19) Person B also claimed that he saw Person A being kicked in his ribs. (CCRBX 2 p. 21)

Although hearsay is admissible at Department disciplinary trials and may form the sole basis for making findings of fact,¹ hearsay testimony may be found to be insufficient to support a finding of guilt in a disciplinary trial even where the hearsay testimony is supported by circumstantial evidence.² Where, as here, the case presented against the Respondent consists solely of hearsay evidence, this hearsay must be assessed to determine whether it can be relied upon because it is believable.³ An important aspect of this assessment consists of ascertaining whether the record contains any independent evidence which corroborates the hearsay claims.⁴

Here, Person A's and Person B's hearsay declarations are inconsistent with independent evidence in the record, specifically the CCRB investigator's analysis of the medical

¹ RCNY Title 38, 15-04(e)(1).

² See *Eppler v. Van Alstyne*, 93 AD2d 930 (1983).

³ See *People ex. rel. Vega v. Smith*, 66 NY2d 130 (1985); *Ayala v. Ward*, 170 AD2d 235 (1991).

⁴ See *Grossman v. Kralik*, 217 AD2d 625 (1995).

records from Beth Israel Hospital documenting the post-incident examination of Person A's face and body and the Mugshot Pedigree photo Person A's face.

The CCRB investigator wrote in his Investigative Recommendation report that these medical records indicate that “ (a) general exam of Person A's body yielded normal results with no abrasions or lacerations. A CT scan of Person A's head yielded normal results. Person A's diagnosis was *u* (emphasis added) contusion to the face and a headache.” (RXB p. 14) If Person A had been repeatedly punched and kicked on his face and head as he claims, it is likely that he would have suffered more observable injuries than just one contusion on his face, and if Person B's claim that Person A was kicked in his ribs and Person A's claim that he was “hit” on the left side of his “torso” and on his “back” were true it is likely that at least one abrasion or laceration would have been observed on Person A's body.

Although the Mugshot Pedigree photo of Person A's face that was taken after this incident depicts some swelling underneath his left eye (CCRBX 3), this single minor injury does not support Person A's claim that he “ was repeatedly kicked in the face and head” or Person B's claim that Person A was hit in the face with “a few punches.”

Person A's and Person B's hearsay declarations must also be evaluated in light of the civil legal action Person A has filed regarding this incident in which he is seeking \$350,000 in damages (RXB p. 15). Since they did not appear to testify at his trial, Respondent's attorney did not have the opportunity to cross-examine them regarding whether they exaggerated or embellished the claims they made in their statements to CCRB because of their pecuniary interest in this lawsuit.

Finally, the CCRB prosecutor argued that the fact that Respondent suffered a broken right hand during this incident shows that he must have incurred this injury by punching Person A. However, Respondent has consistently asserted that he suffered this injury because when he tripped over Person A and Ifikhar his right hand hit a cell bar and then hit the cement floor when he fell to the floor. Respondent's trial testimony as to how he broke his hand is consistent with the line of duty injury report he filed after this incident. (RX B p. 10)

Based on the above, Respondent is found Not Guilty of Specification No. 1.

Under Specification No. 2, Respondent is charged with having been discourteous to Person B by telling him, in sum and substance, "Shut up. Mind your fucking business."

At his CCRB interview, Person B admitted that while the officers were on the floor with Person A, he "screamed" at the officers, "What the fuck are you guys doing?!" (CCRBX 2 p. 22) Although Person B initially told his interviewer that after he screamed this question he was told "to shut up and mind my business," (CCRBX 2 p. 25) he changed this to "shut up and mind your fucking business." (CCRBX 2 p. 26) He described the officer who told him to "shut up and mind your fucking business" as "kind of short with little black hair."

Respondent denied that he had told Person B to "shut up and mind his fucking business." However, even if Respondent did direct this remark at Person B, I would find him not guilty of having been discourteous to Person B under the circumstances presented here. When Respondent and the other officers arrived in the holding cell area in response to Ifikhar's officer-needs-assistance call and saw an open cell door and Ifikhar down on the floor entangled with a prisoner (Person A), they were faced with a situation that needed

to be brought under immediate control. Person B's admitted action of screaming profanity at the officers while they were trying to separate Person A and Iftikhar and get them off the floor had the potential to exacerbate an already chaotic situation because Person B's screaming could have encouraged Person A to resist the officers.

This tribunal has consistently held that the normal rule that an officer must address a civilian in a courteous and respectful manner is inapplicable during stressful enforcement situations or where an officer is attempting to get a chaotic situation under control.⁵ This incident constituted just such a situation.

Therefore, Respondent is also found Not Guilty of Specification No. 2.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner – Trials

APPROVED

JUN 19 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

⁵ See, for example, *Case No. [REDACTED]* (Jan. 18, 1995) where an officer who told a suspect to “shut the fuck up” because the suspect was engaging in belligerent and resistive behavior was found not to have committed actionable misconduct; and *Case No. [REDACTED]* (Sept. 12, 2005) where an officer was found not guilty of discourtesy even though the officer had uttered a remark containing the word “fuck” because the officer made this remark while he was effecting the arrest of a suspect who was engaging in resistive behavior.