



POLICE DEPARTMENT

February 27, 2015

MEMORANDUM FOR: Police Commissioner

Re: Detective Paul Ortiz
Tax Registry No. 943634
Narcotics Borough Brooklyn North
Disciplinary Case No. 2013-9865

The above-named member of the Department appeared before me on December 16, 2014, charged with the following:

1. Said Detective Paul Ortiz, while assigned to the 52nd Precinct on or about February 26, 2012, at approximately 1330 hours, in the vicinity of [REDACTED] Bronx County, abused his authority as a member of the New York City Police Department, in that he stopped Person A, without sufficient legal authority. P.G. 212-11, Page 1, Paragraph 1 - STOP AND FRISK
2. Said Detective Paul Ortiz, while assigned to the 52nd Precinct on or about February 26, 2012, at approximately 1330 hours, in the vicinity of [REDACTED] Bronx County, abused his authority as a member of the New York City Police Department, in that he searched Person A, without sufficient legal authority. P.G. 212-11, Page 1, Paragraph 3 - STOP & FRISK
3. Said Detective Paul Ortiz, while assigned to the 52nd Precinct on or about February 26, 2012, at approximately 1330 hours, in the vicinity of [REDACTED] Bronx County, did wrongfully use force against Person A, in that he pulled his arms up by his handcuffs without legal justification. (*As amended*) P.G. 203-11, Page 1 - USE OF FORCE
4. Said Detective Paul Ortiz, while assigned to the 52nd Precinct on or about February 26, 2012, at approximately 1330 hours, in the vicinity of [REDACTED] Bronx County, did wrongfully use force against Person A, in that he kicked him about his ankle without legal justification. (*As amended*) P.G. 203-11, Page 1 - USE OF FORCE

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The Civilian Complaint Review Board (CCRB) was represented by Gretchen Robinson, Esq. Respondent was represented by James Moschella, Esq. Respondent, through his counsel, entered a plea of not guilty to the subject charges. The CCRB presented Jennifer Jarrett as a witness and moved Person A's CCRB interview into evidence. Respondent presented Sergeant Richard Johnson as a witness and testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

After evaluating the testimony and evidence presented at the hearing, and assessing the credibility of the witnesses and hearsay declarations, this tribunal finds that there was sufficient evidence to support a finding that Respondent engaged in misconduct when he stopped, detained and searched Person A without sufficient legal justification. Accordingly, Respondent is found guilty of the conduct set forth in Specifications 1 and 2. There was insufficient evidence to prove that Respondent pulled Person A's arms by his handcuffs or kicked his ankles. Accordingly, Specifications 3 and 4 are dismissed.

FINDINGS AND ANALYSIS

The following facts are not in dispute. On February 26, 2012, Sergeant Richard Johnson, Police Officer Deida and Respondent were part of a Narcotics Bronx module conducting enforcement observations within the confines of the 52 Precinct. At approximately 1230 hours, they stopped a vehicle in the vicinity of [REDACTED] an area identified by the Precinct and Narcotics Bronx commanders for drug activity and shootings. Sergeant Johnson took the lead on the vehicle stop. He engaged the occupants of the vehicle and ordered them to get out while Respondent continued observing the surrounding area. (Tr. 42-46, 80-81)

Person A lived on [REDACTED] At approximately 1230 hours, he realized that he did not have potatoes for his meal. As Person A left for the store, he grabbed his coat, keys and five dollars, but did not take his wallet or identification because he was only walking to the corner. On [REDACTED] he noticed that the police were pulling over a minivan at the intersection of [REDACTED] The police officers

jumped out, surrounded the vehicle and ordered the motorists out of the van. Person A decided to cross the street so as not to walk through the motorists and officers involved in the vehicle stop. (CCRB Ex. 1A, p. 3, 21-22, 31-32, Tr. 96-97)

Sergeant Johnson and Respondent noticed that a "short male black" walking on the sidewalk changed direction and crossed the street. This was Person A. Respondent indicated to the Sergeant that he was going to speak to Person A. (Tr. 46-47, 53-55) Upon approach, Respondent asked Person A a series of questions. The interaction became acrimonious and, within 30 seconds, Respondent handcuffed Person A and held him against a vehicle. Sergeant Johnson was still engaged in the car stop but heard a "commotion" and observed Respondent restraining Person A. When Sergeant Johnson concluded the vehicle stop he walked across the street to ascertain what had transpired. Person A protested and expressed his irritation at being stopped and restrained, but his behavior did not rise to the level of disorderly conduct. No weapons or contraband were found on Person A and he was released without being issued a summons. (Tr. 46-50, 52-57, 63, 67, 81-82, 88, 91)

Allegation of Unlawful Stop and Search

At issue is whether Respondent engaged in misconduct by stopping and searching Person A without sufficient legal authority. Respondent testified that his decision to approach Person A was founded on his observation, from about 15 to 20 feet away, that he was "fidgeting with his waistband like under his jacket" and then "abruptly turned to cross the street" to avoid the police in a high crime area. Respondent suspected that Person A had a weapon and approached with the intent to ask some general questions. (Tr. 81-82, 93-95, 97) As Respondent explained:

His demeanor, you know, from my experience, it just caught my attention. Just, you know, get that feeling to go talk to him and see what he was about. Like what's he doing there. . . . [T]he main thing was, you know why he abruptly changed when he saw us. . . . I just approached him to say, hey, what you are doing here. Just to talk to him. (Tr. 81-83)

I find that Respondent's initial request for information was justified and consistent with New York State law. The Court of Appeals has defined a "request for information" as "a general non-threatening encounter in which an individual is approached for an articulable reason and asked briefly about his or her identity, destination or reason for being in the area." *People v. Hollman and People v. Saunders*, 79 N.Y.2d 181, 590 N.E.2d 204, 581 N.Y.S.2d 619 (1992). Specifically, police can ask questions regarding a person's name, address, reason for being in the area and an explanation of the conduct or item that prompted the approach. Although Respondent did not have a clear recollection of the specific questions he asked, at his CCRB interview, even Person A stated that upon approach Respondent asked for his name and address and where he was going – all questions within permissible bounds. (Tr. 84; CCRB Ex. 1A, p 4)

Regrettably, the police encounter in this case did not end with this series of non-accusatory questions. Instead, it very quickly evolved to a forcible stop and search. Not surprisingly, Respondent's account differs significantly from Person A's version of events. Respondent testified at trial that when he approached Person A he became "argumentative" and asked why he was being stopped. He does not remember whether he stood in front of Person A or how he started the conversation, but "right away [Person A] said, 'what does it matter?' and started talking loudly." Respondent stated that he asked Person A to "put his hands to the side" because Person A did not "stop messing with his waistband." According to Respondent, instead of complying with this request, Person A "started flailing his arms" and continued asking why he was being stopped and harassed. Respondent explained that based on Person A's "mannerism and stuff," "something didn't feel right." Although he did not see a bulge he "had a hunch" and "suspected" that Person A had a weapon. He placed Person A in handcuffs for safety. Respondent testified that he conducted a frisk around Person A's waistband and jacket. Sergeant Johnson estimated that it was 30 seconds from the time Respondent left to approach Person A and the time he saw Person A handcuffed across the street. No weapons or contraband were found as a result of the frisk. Although at the CCRB interview Sergeant Johnson responded in the

affirmative when asked whether Respondent searched Person A, at trial he did not recall a search but stated that, given the circumstances, a frisk would have been proper. (Tr. 61-62, 83-85, 89-90, 95, 99)

At his CCRB interview Person A maintained that Respondent ran toward him, and before reaching the sidewalk, blocked his path and asked his name, address and destination. Person A answered the questions and admitted that he was not carrying identification because he was walking to the neighborhood store. When Respondent asked what store, he pointed to the establishment on the corner. According to Person A, Respondent said, "You sure?" and then backed him into a car, spun him around and handcuffed him. Person A thought he was under arrest and demanded an explanation. Respondent answered that Person A looked familiar. Person A told the CCRB that the police could not possibly know him because he worked long hours, did not "hang out" and did not have "police contact." Respondent insisted that he "could resemble somebody." Person A responded, "Why, because I am Black? We all look alike?" Respondent then went through all of his pockets, including his pants pockets. According to Person A, Respondent "took everything out . . . and put everything [back] in." Respondent found only keys, an electric bill, receipts and a metro card. Person A called out to Sergeant Johnson to intervene. Sergeant Johnson walked over when the vehicular stop was completed. (CCRB Ex. 1A, p 4-7, 24, 26-29, 30-31, 35-37, 45)

Police action beyond a request for information requires an elevated level of suspicion regarding criminal activity. Although no bright lines separate the various levels of police interactions, it is well established that once questioning becomes extended and accusatory and focuses on possible criminality, it is no longer a simple request for information. At this point the encounter is elevated to a common law inquiry, which must be based on a founded suspicion that criminality is afoot, or a stop which must be based on a reasonable suspicion that a person has committed, is committing, or is about to commit a felony or misdemeanor. *People v. DeBour*, 40 NY2d 210 (1976) Likewise, the use of handcuffs may be justified to protect police officers in

certain non-arrest situations when reasonable suspicion exists that the suspect is armed and cannot be frisked without subjecting an officer to additional dangers. *People v. Allen*, 73 NY2d 378 (1989) A search is authorized only if a frisk reveals an object which may be a weapon. See *Patrol Guide Section 212-11, Page 1, Paragraph 3 - STOP & FRISK*

Whether Respondent was justified in elevating the level of this encounter turns on a thorough consideration of all relevant facts. A tribunal must be particularly careful to assess the factual circumstances known by the police officer at the time. *People v. Medina*, 107 A.D.2d 302 (2nd Dept. 1985) Here, the preponderance of the credible evidence supports a finding that Respondent did not have sufficient legal justification to progress from a request for information to a stop, a non-arrest detention or a search. I find that Respondent engaged in the charged misconduct based primarily on his own testimony and on the video surveillance admitted into evidence which corroborates relevant aspects of Person A's account. (CCRB Exs. 1A, 5)

As discussed above, Respondent's initial observations justified an approach to request information. At that point, Person A had every right to leave, refuse to answer or refuse to cooperate. This tribunal believes that Person A balked at being approached by the police, but both Respondent and Sergeant Johnson testified that the manner in which he objected did not rise to the level of disorderly conduct. Thus, by their own account, Person A's protests were insufficient to raise the level of suspicion needed to escalate this police encounter.

Nonetheless, it is undisputed that Person A was handcuffed. At trial, Respondent explained that stopping and detaining Person A was justified because he feared for his safety. Respondent's account on this critical point, however, was less than reliable. I was particularly troubled by Respondent's trial testimony articulating his specific reasons for this stop and non-arrest detention. When Respondent was interviewed on August 7, 2012, about five months after the stop, he told the CCRB investigator that he could not remember the event. In fact, he claimed not to have any recollection even after being given an opportunity to review his own memo book entry which included the notations "Person A" and "furtive movements" and indicated that a UF-

250 form was prepared. (Tr. 99-103; CCRB Ex. 8) In contrast, more than two years later Respondent appeared before this tribunal and gave a particularized account of his February 2012 observations. The additional details provided at trial included: Person A “fidgeting with his waistband” under the “bulky winter coat” he was wearing at the time; his certainty that Person A was using his “right hand,” not his left, to “adjust something on his waistband;” that he gave Person A a direct order to “keep his hands by his side;” that Person A failed to comply; that his arms were “flailing” during their conversation and when he was released; and that Person A told him that a family member was a councilman. (Tr. 82-83, 90, 93-95, 98-99)

Respondent’s detailed trial testimony must be examined in light of his prior CCRB statement that he “did not remember this incident” at all. This tribunal understands that it is impossible for a police officer to recall each and every individual encounter he or she has with private citizens. This tribunal also understands that certain aspects of Respondent’s recollection may have been refreshed after watching the surveillance video that recorded a few seconds of this police action. It comports with common sense, however, that Respondent would have a clearer recollection of this interaction just months after its occurrence – particularly when he claimed to have handcuffed Person A for his own safety. It is suspect that in 2012 he had no recollection of this stop and the non-arrest detention but in 2014 was able to recall very specific details. For example, the certainty with which he testified at trial that Person A used his right hand, and not his left, to grab his waist had the ring of an after-the-fact embellishment. I also found unconvincing that Respondent recalled only at trial that Person A made a statement that his relative was an elected official.

Also at issue is whether Respondent searched Person A without legal authorization. At trial, Respondent testified that he only frisked Person A’s waistband and jacket. Sergeant Johnson also testified at trial that he did not recall Person A being searched. The preponderance of the credible evidence, however, does not support Respondent’s version of events.

Where, as here, hearsay evidence is relied upon to meet the complainant's burden of proof, this tribunal must carefully assess its reliability and probative worth. *See People ex. rel. Vega v. Smith*, 66 N.Y.2d 130, 495 N.Y.S.2d 332 (1985); *300 Gramatan Avenue Associates v. State Division of Human Rights*, 45 N.Y.2d 176, 179-80, 408 N.Y.S.2d 54, 56 (1978). The courts have held, however, that corroborating evidence may bolster the reliability of an out-of-court statement that supports a determination. *Police Dep't v. Ayala*, OATH Index No. 401/88 (Aug. 11, 1989), *aff'd sub nom. Ayala v. Ward*, 170 A.D.2d 235, 565 N.Y.S.2d 114 (1st Dep't 1991), *lv. to app. en.*, 78 N.Y.2d 851, 573 N.Y.S.2d 69 (1991). Here, Person A's hearsay declaration with respect to the search was reliably corroborated by the surveillance video admitted into evidence as CCRB Ex. 5.

At his CCRB interview, Person A testified that after being handcuffed, Respondent started "digging" in all of his pockets, including his pants pockets. As noted above, Person A recalled carrying only an electric bill, a metro card, five dollars in cash, keys and receipts and that Respondent took "everything out" of his pockets, held the items in his hand and then "put everything" in one pocket. (CCRB Ex. 1A pp. 4- 5, 30-31, 39-41) The few moments of this encounter captured by a school surveillance camera partially corroborate Person A's account that he was searched. As the camera pans the area, it depicts Respondent and Person A standing in the street between two vehicles. Person A's hands are handcuffed behind his back and Respondent stands directly in front of him seemingly rifling through what appears to be papers. Respondent is then seen reaching into Person A front pant pocket. I note that even though Respondent testified that he watched this video, he claims to have only conducted a frisk and provided no justification for reaching into Person A's pocket. In short, these brief video images are more consistent with Person A's account than with Respondent's account.

Weighing Person A's partially corroborated hearsay statement against the testimony of Respondent I find the hearsay statement to be more reliable with respect to Specifications 1 and 2. Notably, Respondent's delayed recollection of his reasons for this stop, and the video

contradicting his testimony that he only conducted a frisk, damaged Respondent's credibility and precluded reliance on his testimony. Accordingly, I find that the preponderance of the credible evidence supports a finding that Respondent engaged in the sanctionable misconduct set forth in Specifications 1 and 2 and that he stopped and searched Person A without sufficient legal justification.

Allegation of Wrongful Use of Force

The remaining specifications charge Respondent with wrongfully using force against Person A by pulling his arms up by the handcuffs and kicking his ankle. CCRB presented its case solely through hearsay; specifically, Person A's CCRB interview and medical records from [REDACTED] Medical Center. As discussed above, although hearsay is admissible in this forum, there are significant reasons for caution in cases like this that present close questions of credibility. Factors to be considered in assessing the reliability and probative value of hearsay include the declarant's personal knowledge of the facts, the bias of the declarant, the degree to which the hearsay is corroborated and the centrality of the hearsay to the case. *See Matter of Ayala v. Ward*, 170 A.D.2d 235 (1st Dept. 1991); *Disciplinary Case No. 77005/01* (May 27, 2002) The more important the hearsay is to the proof of a case, the more critically it should be assessed. *Maloney v. Suardy*, 202 A.D.2d 297 (1st Dept. 1994).

The following is a summary of what Person A told the CCRB investigator about his injuries. According to Person A, Respondent "got rough" and lifted his arms only after he challenged Respondent by asking whether he looked familiar to him because Person A is Black. (CCRB Ex. 1A pp. 4-6) Later in the interview, Person A provided additional details and told the CCRB investigator that Respondent "yanked" his arms but "made it seem as if he did it 'cause he was trying to get to my front pockets" to conduct a search. (CCRB Ex. 1A p. 41) He further claimed that Respondent kicked his ankles and calves purportedly to spread his legs for a frisk in the presence of Sergeant Johnson. (CCRB Ex. 1A p. 50)

According to Person A, once he returned home, he began to feel pain in his shoulder and ankles. At about 1900 hours he took a painkiller, but the discomfort did not subside. By midnight, the pain and swelling were so intense he could not sleep. Person A went to the emergency room where he was examined and had x-rays taken. No fractures were found and he was given medication and a referral. According to Person A, he had to wait for an appointment with a physician. The doctor conducted a second examination and tested his range of motion. Person A described his condition as "horrific." The doctor prescribed Oxycodone and physical therapy and recommended that he see an orthopedist for a possible tear in his rotator cuff. At the time of his CCRB interview, Person A was awaiting additional test results. (CCRB Ex. 1A pp. 5-6, 8, 16-19, 41-42, 49-51)

At trial Respondent testified that he did not pull Person A's arms when he was handcuffed, did not kick him and that he did not do anything to intentionally cause discomfort. Respondent admitted that he held on to Person A's handcuffs to "control him because he kept turning around" but did not hold them to "hurt him." (Tr. 86, 88-89) Sergeant Johnson testified at trial that from across the street he saw Respondent trying to control Person A by holding his body. He did not see Respondent kick his ankles or pull his arms. Furthermore, Sergeant Johnson had no recollection of Person A complaining about an injury. (Tr. 51-52)

CCRB offered Person A's medical records in support of Specifications 3 and 4. (CCRB Ex. 4) The first document admitted into evidence appears to be a *Patient Home Care Instructions* issued upon Person A's discharge from [REDACTED] Hospital's Emergency Room. This document is a generic form with home care instructions dated February 27, 2012 at 0305 hours. According to the *Patient Home Care Instructions*, Person A visited the emergency room seeking treatment after midnight on the day of his encounter with Respondent. The second document is a *Referral Form* issued by the [REDACTED] Medical Practice. The *Referral Form* recorded Respondent's complaint of shoulder pain and limited range of motion due to a "trauma" suffered

“2 [days] ago.” The third document is a letter from a [REDACTED] doctor recommending that Respondent abstain from work for a few days due to a shoulder injury.

Respondent is specifically charged with injuring Person A by pulling his arms up by his handcuffs. There is insufficient evidence in this record to support this specific charge. As noted above, Person A initially told the CCRB that Respondent used this force as a reaction to a comment he made. Later in that interview he noted that as he was leaning against a car, Respondent searched his back pant pockets and then raised his cuffed hands to seemingly gain access to his front pockets. The surveillance video entered into evidence raises questions about Person A’s account. In that video Respondent and Person A stand face to face as Respondent puts his hand into Person A’s front pant pocket. Nowhere on the video does it capture Respondent raising Person A’s cuffed hands to gain access to his front pant pocket. In fact, both parties seem composed and Person A does not seem to be in distress.

This tribunal acknowledges that the camera did not capture the entire interaction. However, because Person A did not appear at the hearing, many unanswered questions remain about his hearsay account. For example, this tribunal did not have the benefit of having Person A reconcile his account with the images recorded by the surveillance camera or address Respondent’s assertion that it was Person A who was moving while he held the handcuffs. We also do not know specifics such as whether Person A had a pre-existing condition. Although the medical records report a shoulder injury, I cannot conclude that the injury was caused only by Respondent “pull[ing] his arms up by his handcuffs” as alleged in the charge and by the hearsay declarant. Additionally, the alleged use of force was uncorroborated by any other witness, even though Person A told CCRB others had been present to observe the incident.

For these reasons I find that the hearsay statement of Person A – even with the medical records offering partial corroboration – is not reliable enough to constitute proof by a preponderance of the credible evidence that Respondent pulled Person A’s arms up by his handcuffs.

Inasmuch as Person A's medical records do not support an ankle or calf injury, and Sergeant Johnson denied having seen Respondent kick Person A's ankles, I find that there is insufficient evidence to prove the claim that Respondent kicked Person A as set forth Specification 4.

Accordingly, Specifications 3 and 4 are not sustained.

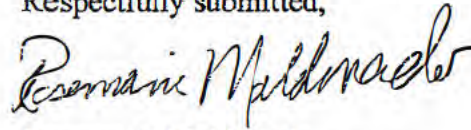
PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on January 10, 2007. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB recommends the forfeiture of 10 vacations days as the appropriate penalty for the misconduct alleged in all four specifications. A lower penalty is warranted in this case. As noted above, this tribunal only sustained Specifications 1 and 2 charging him with an unlawful stop and search. Specifications 3 and 4, which alleged the wrongful use of force, were not sustained. Accordingly I recommend the forfeiture of 5 vacations days as the appropriate penalty. This is consistent with prior penalties for stops and searches without legal authorization. See *Disciplinary Case No. 78915/03* (13-year member of the Department forfeited five vacation days for unlawfully stopping and searching a person in an area known for drug sales); *Disciplinary Case No. 78516/03* (a lieutenant with 15 years of service forfeited five vacation days for unlawfully frisking an individual and threatening that individual with arrest); *Disciplinary Case No. 80959/05* (a penalty of five vacation days for a police

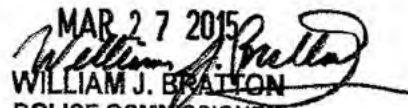
officer who stopped, searched and handcuffed a citizen without sufficient legal authority)

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

MAR 27 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

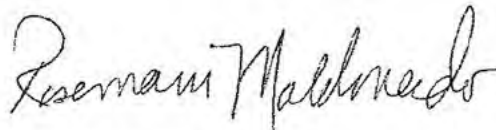
POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE PAUL ORTIZ
TAX REGISTRY NO. 943634
DISCIPLINARY CASE NO. 2013-9865

Respondent received an overall rating of 4.0 “Highly Competent” on his last three annual performance evaluations. He has been awarded one medal for Excellent Police Duty and two for Meritorious Police Duty. [REDACTED]

[REDACTED] He was on Level I Force Monitoring between September 2012 and February 2014 for receiving three or more CCRB complaints within a year. He has no prior formal disciplinary record.

For your consideration.



Rosemarie Maldonado
Deputy Commissioner Trials