



POLICE DEPARTMENT CITY OF NEW YORK

February 29, 2016

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Eliezer Pabon
Tax Registry No. 944868
Patrol Borough Bronx
Disciplinary Case No. 2014-12863

Charges and Specifications:

1. Sergeant Eliezer Pabon, on or about May 17, 2014, in the vicinity of [REDACTED], while on-duty, while assigned to the 48th Precinct, did use unjustified force against Minor A to wit, while Minor A was hand cuffed, Said Sergeant Pabon did strike Minor A's head against a glass storefront.

P.G. 203-11 – USE OF FORCE

Appearances:

For the Department: Samuel Yee, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Andrew C. Quinn, Esq.
The Quinn Law Firm
Crosswest Office Center
399 Knollwood Road-Suite 220
White Plains, NY 10603

Hearing Date:

January 6, 2016

Decision:

Guilty

Trial Commissioner:

ADCT Nancy R. Ryan

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on January 6, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Minor A, Sergeant Darren D' Auteuil and Sergeant Eliezer Pabon as witnesses. They also introduced video clips as evidence. Respondent called Police Officer Joffre Cortez 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.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

It is undisputed that on May 17, 2014, Police Officer Joffre Cortez was on duty in the 48 Precinct and was assigned as the driver for Respondent. (Tr. 105-06) They were both in uniform and the car was a marked RMP. (Tr. 111) At approximately 10:00 PM that evening, Officer Cortez and Respondent were driving in the vicinity of Fordham Road in the Bronx.

Officer Cortez testified that he saw two young male blacks running westbound on Fordham Road. A complainant then flagged them down and stated he was just assaulted by these two males. (Tr. 107-09) The complainant, Person C, was bleeding from his mouth. Person C got into the car with Officer Cortez and Respondent. Officer Cortez testified that when they got to [REDACTED], Person C identified his attackers as they were exiting a hookah store. (Tr. 109-10)

At this point, Officer Cortez and Respondent got out of their car and apprehended the two males, who were Minor A, age 14, and Minor B. (Tr. 15, 111) Minor A was approximately 5'2" and weighed 90 pounds. Minor B was smaller than Minor A. (Tr. 19) Officer Cortez told the males to stop and turn around and that they were being arrested. Officer Cortez handcuffed Minor B and Respondent

handcuffed Minor A. He testified that as the handcuffs were going on, the males started resisting and cursing. (Tr. 112-13)

It is undisputed that after Minor A and Minor B were placed in rear handcuffs they were both held facing the glass window of the hookah store by Officer Cortez. Minor A testified that his face was about two inches from the glass (Tr. 21), while Respondent described him as being approximately a foot away from the glass (Tr. 148-49) and Officer Cortez described him as being one or two feet from the glass. (Tr. 120) The glass did not appear to be damaged to Minor A (Tr. 49), Officer Cortez (Tr. 123) or Respondent. (Tr. 172)

Minor A tried to turn to speak to Officer Cortez. (Tr. 21). Minor A acknowledged he moved his body to turn away from the window three or four times while he was being held by Officer Cortez. (Tr. 53) During the three to five minute period during which Officer Cortez was holding Minor A and Minor B, Respondent left the immediate area of the store window for short periods of time to speak to Person C and the store owner and also to call for an additional car to transport the two arrestees. (Tr. 20, 127, 149-50)

While Respondent was again standing near the store, at one point he reached towards Minor A and made contact with him in the neck area. (Tr. 23-24, 153) This contact caused Minor A to hit the glass, which shattered. (Tr. 24, 152) Minor A sustained a cut to his head and a piece of glass entered his chest. (Tr. 24, 174) Minor A was taken by ambulance to the hospital where he had surgery for his chest wound and remained hospitalized for five days. (Tr. 26, Dep't. Ex. 3)

There are differing accounts of the events immediately preceding the contact between Minor A and Respondent.

Minor A testified that right before Respondent made contact with him, he was moving his shoulders to try to turn to explain that he was in fact the victim in the case. Respondent told him to shut up. (Tr. 22-23, 54). Minor A further testified that he then said to Respondent, "F you me shut up, nigger." (Tr. 23) About four to five seconds after he said this, Respondent "mushes" the back of his head to the glass. (Tr. 22). On cross-examination, Minor A agreed that when he felt the hand on the back of his neck he felt a squeeze to the area as if somebody was going to grab him by the back of his neck. (Tr.

55) He also acknowledged that at the time he felt the contact with his neck, he couldn't see behind him and wasn't sure who was grabbing his neck. (Tr. 56)

Officer Cortez testified that while he was holding Minor A by his arm, Minor A, who continued to curse, kept trying to turn his body around and Officer Cortez used his elbow to push him back to face the store. (Tr. 118-19, 140) Officer Cortez further testified that he felt that based on the way Minor A kept moving, he felt he was going to try to run. (Tr. 118) He stated that Minor A at one point did take a step away from him and did pull his arms away after they were handcuffed. (Tr. 136-37) On cross-examination, Officer Cortez conceded that he never asked Respondent for any help to secure Minor A. (Tr. 133)

Respondent testified that after Minor B and Minor A were handcuffed he allowed Officer Cortez to hold both of them since they were both small in stature and young and, "you don't really think kids are going to run." (Tr. 166) Respondent stated he was going back and forth from the area where the males were being held to speak to Person C and to call on the radio for back-up assistance to transport them in a car with a partition. (Tr. 167-69). He testified that while the typical response time for such a request would be one to two minutes, on this night it took four or five minutes. (Tr. 168)

At one point while he was looking for the back-up to arrive, Respondent was standing near Minor A when he noticed Minor A's shoulders, "going back and forth." Respondent testified that this, "pretty much raised me to, you know, think he was going to run." (Tr. 171) He further testified that, "Once I saw him make the motion, I bladed my body and I had my radio in my right hand, and with my left hand fully extended, I was able to grab him and I was trying to secure him against the glass." (Tr. 171) Respondent denies trying to put Minor A through the glass and stated that he was, "pretty much trying to make sure he didn't run off." (Tr. 172) He stated he was just trying to grab Minor A's right shoulder area to have more control over his whole body. (Tr. 173) He further elaborated that he felt he used, "the minimum amount of force I could use, you know, for a kid that size," and that he was just, "attempting to immobilize him ... (to) make sure he wasn't moving anywhere until the transport came along and just put him in the car." (Tr. 177)

Respondent further stated that when he, "proceeded to restrain him and put him against the glass, as soon as he touched, it just blew up in my face." (Tr. 174) He was not expecting that to happen and he then immediately yanked Minor A away from the window area. He saw a laceration on Minor A's head and bent him over, "so he wouldn't get blood on himself." (Tr. 174-75). Respondent said he next immediately called for an ambulance. (Tr. 175) Very shortly after the incident he also reported the incident to IAB. (Dep't Ex. 5A)

There were two other hearsay statements entered into evidence pertaining to the period of time right before Minor A hit the glass. One was the IAB interview of Minor B (Dep't. Ex. 6 – audio tape and 6A – transcript) and the other was the IAB interview of Person D (Dep't. Ex. 7- audio and 7A – transcript). Despite the Department's attempts to locate and have these two witnesses appear, neither testified at the trial.

Minor B stated that he was standing right next to Minor A in front of the store window (Dep't. Ex. 6A, 22) According to Minor B, Minor A was saying words to the effect that they were going to come right out when Respondent told him to shut up. He stated he then heard Minor A say something like, "I don't got the right to shut up." (Dep't Ex. 6A, 17) Minor B further stated that out of the corner of his eye he saw Respondent grab Minor A by his right arm and push Minor A into the glass. (Dep't. Ex. 6A, 18, 26, 47) Minor B, also stated that Respondent "was mad" because his face tightened up. (Dep't. Ex. 6A, 18)

In Person D's statement he claimed that he was watching the incident from across the street when he saw a Sergeant step away from the two boys to approach someone in an unmarked car. While not a hundred percent sure of the words, he then heard one of the boys say fuck you to the Sergeant. (Dep't. Ex. 7A, 10) At this point, Person D stated, "The sergeant made it his business to come back and push the little boy." (Dep't. Ex. 7A, 7) He also stated that he believed the Sergeant pushed the boy's head with his left hand. (Dep't. Ex. 7A, 9)

In Person D's account, he described the force used by the Sergeant as, "very little force." According to Person D, "It wasn't you know like he shot the kid through the damn window... It was just a freak accident." (Dep't. Ex. 7A, 10) He stated that the

boy wasn't rowdy or trying to escape or run. He further stated the officer "wasn't hyped up or anything," nor did the officer throw, kick, "stomp" or use other force against the boy. (Dep't. Ex. 7A, 10-12, 15)

Another document introduced into evidence in the case is a report from a glass expert who examined fragments from the glass in question after it broke. He also examined the video footage of the incident. In a conclusion that was not challenged by the Department, the expert concluded that based on information he had from the Bronx District Attorney's office (who requested the report), the glass in question had a bullet hole in it before the time of the incident in question. The expert determined the glass was not tempered safety glass. In the expert's opinion, "To a 99% degree of certainty, the subject glass window most likely would not have broken from the extent of the impact that Sgt. Dauteuil (sic) [this is the name of the IAB investigator who testified that this was a typo and the report should read Sergeant Pabon] imposed on the injured young man had it not been previously damaged by the bullet hole, and the young man would probably not have been injured by broken glass." (Resp. Ex. A. Tr. 94-100)

From the credible testimony and the video evidence in this case, and in fact as acknowledged by Respondent, it was Respondent's contact with Minor A that caused Minor A to hit the window. The court recognizes that Minor A received significant injuries which required hospitalization when the window broke. However, the uncontradicted expert's report in this case has concluded with a 99% degree of certainty that the glass in this case was compromised and most likely should not have broken in this incident. As the lay witness, Person D, stated, the fact that the window broke can perhaps best be seen as a "freak accident," which resulted from Respondent's conduct. I find that Respondent could not have foreseen, nor based on his testimony and the written statement of Person D, did he intend, these consequences of his actions.

Setting aside the consequences, the question still remains as to whether the contact the Respondent made with Minor A was a justifiable use of force. Under Patrol Guide 203-11 (effective 8/1/13), "all members of the service at the scene of a police incident must:

b. Use minimum necessary force."

I find that in this case the force used by Respondent when he made contact with the handcuffed Minor A was more than minimum necessary force to arrest or restrain Minor A and therefore was not a justifiable use of force.

Respondent's position in essence is that he grabbed Minor A as a means to immobilize Minor A, who he thought was going to run. However, this position is not borne out by the credible testimony in this case, nor by the video clip.

While the video does not contain an audio portion, it supports the events immediately preceding the push as described by Minor A, Minor B and Person D. It appears more likely than not that the Respondent, rather than acting to restrain an arrestee who was attempting to run, was reacting in anger after some comment had been made by Minor A. (Dep't. Ex. 4, Video clip 2 at approximately 5:43-5:50)

Also, Respondent testified that the reason he thought Minor A was going to run was that he was turning his shoulders. On the video, however, it is clear that Minor A was making similar, and in fact more pronounced, movements at an earlier point while Respondent was standing very close to him and at times was looking directly towards him. Respondent not only makes no attempts to physically restrain Minor A at this time, but he also walks away from the area where Minor A is turning, to go speak to another person. (Id. At approximately 1:44-3:01). If these shoulder movements truly were cause to believe Minor A was going to run, Respondent seemingly would have addressed them when he first saw Minor A making the movements.

Also, as can be seen on the video, when Minor A turns his shoulders in the period of time shortly before he makes contact with the glass he is mainly turning in a direction where he would have had a glass door blocking his escape route had he attempted to escape. This factor also undermines the reasonableness of Respondent's stated belief that Minor A was going to run.

Finally, it should be noted that Officer Cortez who was actually holding Minor A never indicated to Respondent that he needed any assistance in securing Minor A.

I find that Respondent's actions in making contact with the handcuffed Minor A were not a reasonable use of force. There is no credible testimony that Minor A was

trying to flee and therefore the contact was not necessary and constituted an unjustifiable use of force. I find Respondent Guilty.

PENALTY RECOMMENDATIONS

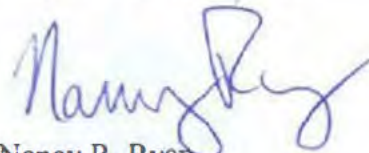
In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on July 9, 2007. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Accordingly, I recommend that Respondent's penalty be the forfeiture of five vacation days. As discussed above, while Minor A did suffer injuries that required hospitalization, these injuries were not either an intentional or foreseen consequence of Respondent's actions. The forfeiture of five days is consistent with prior disciplinary cases where officers pushed or made contact with complainants in manners which were deemed to be unjustified uses of force. In *Disciplinary Case No. 2013-10920*, signed September 2, 2015, a four-year police officer with no prior disciplinary record forfeited five vacation days for pushing complainant without police necessity. Respondent attempted to justify his action by testifying that when complainant was walking toward him he heard complainant mumble something and make a face that was not a welcoming look. In *Disciplinary Case No. 2013-9972*, signed March 27, 2015, a twenty-three-year police officer with one prior adjudication forfeited five vacation days for unnecessarily slapping a person he was arresting. Since Respondent testified that arrestee was compliant, the force used against him was gratuitous in nature. In *Disciplinary Case Nos. 2013-10971 & 2013-10991*, signed February 26, 2015, a seven-year police officer with no prior disciplinary record forfeited five suspension days for striking complainant in the head and chest without necessity. A video recording of the event did not support Respondent's claim that the force used was inadvertent or needed to move complainant away from where his friend was being arrested for disorderly conduct.

In making this recommendation, the tribunal acknowledges that heavier penalties have, at times, been imposed for use of force against a handcuffed or restrained prisoner. See *Case No. 2014-12487* (September 10, 2015) (five-year police officer forfeited fifteen

vacation days for punching a handcuffed prisoner, who was lying flat in the back of an RMP, with such force that he broke the prisoner's jaw in two places); *Case No. 85820/09* (October 5, 2010) (fourteen-year police officer forfeited fifteen vacation days for kicking a handcuffed prisoner in the head); *see also Case No. 2014-11827* (August 21, 2015) (seventeen-year sergeant negotiated a penalty of thirty vacation days for hitting an arrestee while he was handcuffed with a closed fist); *Case No. 2013-10481* (November 12, 2014) (five-year police officer with no prior disciplinary history negotiated a penalty of ten vacation days for punching a handcuffed individual after said individual spit in his face). I find, however, that the circumstances of this case warrant a lower penalty. In this case the force used was not the type of force intentionally used to inflict harm on an individual. Respondent pushed Minor A, as opposed to punching or hitting him with a closed fist. While the force was gratuitous under the circumstances in this case, pushing someone is not the same level of force as a kick to the head or a punch in the face where an officer intentionally attempts to inflict pain on the handcuffed individual as a punishment for his or her conduct.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

MAY 24 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
SERGEANT ELIEZER PABON
TAX REGISTRY NO. 944868
DISCIPLINARY CASE NO. 2014-12863

Respondent was appointed to the Department on July 9, 2007. In his last three performance evaluations, he received an overall rating of 4.0 "Highly Competent," another 4.0 "Highly Competent," and a 3.5 "Highly Competent/Competent." [REDACTED]

[REDACTED] He has no medals.

He has no prior formal disciplinary record.

For your consideration.



Nancy R. Ryan
Assistant Deputy Commissioner Trials