



POLICE DEPARTMENT

November 18, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Daniel Callinan
Tax Registry No. 945542
23 Precinct
Disciplinary Case Nos. 2013-10152

Police Officer Michael Cintron
Tax Registry No. 943089
23 Precinct
Disciplinary Case No. 2013-10150

The above-named members of the Department appeared before me on September 3 and September 30, 2015, charged with the following:

Disciplinary Case No. 2013-10152

1. Said Police Officer DANIEL CALLINAN, on or about January 1, 2012, at approximately 05:38 hours, while assigned to the 23rd Precinct and on duty, in the vicinity of East 106th Street and 1st Avenue, New York County, did intentionally use force without police necessity, in that he struck Person A numerous times with a closed fist, causing physical injury.

P.G. 203-11 - USE OF FORCE
P.L. §120.00(1)

Disciplinary Case No. 2013-10150

1. Said Police Officer MICHAEL CINTRON, on or about January 1, 2012, at approximately 05:38 hours, while assigned to the 23rd Precinct and on duty, in the vicinity of East 106th Street and 1st Avenue, New York County, did intentionally use force without police necessity, in that he struck Person A numerous times with a closed fist, causing physical injury.

P.G. 203-11 - USE OF FORCE
P.L. §120.00(1)

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The Civilian Complaint Review Board (CCRB) was represented by Heather Cook, Esq., Respondent Callinan and Cintron were represented by Craig Hayes, Esq.

Respondents through their 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

Disciplinary Case No. 2013-10152

Respondent Callinan is found Not Guilty.

Disciplinary Case No. 2013-10150

Respondent Cintron is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

CCRB called William Yammie and Daniel Simmons Jr. as witnesses.

Respondents called Sergeant Theohari Koumniotes as a witness. Respondents testified on their own behalf.

Evidence

The following facts are undisputed. At approximately 0530 hours on January 1, 2012. Respondents were assigned to the Street Narcotics Enforcement Unit and were working in the vicinity of 106th Street and the FDR Drive. At approximately 5:30 AM

they received a radio run for a dispute at East 105th Street and First Avenue. (Tr. 78).

Respondents and their team responded to the location. Person A, after trying to get in a cab, ran from the officers through an area known as Franklin Plaza. Respondents chased him and, ultimately caught up with Person A and struck him multiple times.

Person A admitted to possessing marijuana at the time. Multiple Ziplocs of cocaine that he attempted to throw on the ground were also recovered at the scene. (Tr. 84-85). Person A was handcuffed and arrested for Criminal Possession of a Controlled Substance in the Third Degree, Assault in the Second Degree, Resisting Arrest and Unlawful Possession of Marijuana. Bruises were visible in his arrest photo.

The relevant area of dispute in this case is whether the force used by Respondents Callinan and Cintron was necessary in the course of their arrest of Person A or was gratuitous force used after Person A had already been placed in handcuffs and had ceased any type of resistance. There are different accounts of the sequence of events that night.

Person A did not testify in this case on the advice of the attorney representing him in a civil action against the City regarding this incident. (Tr. 68). Nor were any medical records pertaining to Person A entered into evidence. He also did not appear for an in person CCRB interview. Instead, the CCRB relied on the transcript from his February 16, 2012, phone call to the CCRB, which was admitted into evidence. (CCRB Ex. 4B). In that statement, Person A indicated that on the night in question, he was trying to catch a cab to IHOP but got out of the cab because it was already full. He stated that while he was trying to catch another cab, someone tried to grab him and he ran. He did not have any idea why he was being chased because he was just trying to catch a cab. (*Id.* at 13).

As he was running, he realized police officers were chasing him. He recalled hearing one officer yell, "We're going to make you scream like a little girl." (*Id.* at 4). He continued running in a circle through Franklin Plaza and then put his hands up and stopped in front of another policeman who screamed and tackled him to the ground. He stated that as he was trying to put his hands behind his back, he started getting hit and was punched, hit and kicked. (*Id.* at 4-5). He recounted that he "tried to block [his] face with the cement." Person A further stated that there were many officers on him and they were laughing. (CCRB Ex. 4B, 5). He admitted he had "weed" on him. (*Id.* at 7).

Later that night, Person A went to the hospital. He stated he had two black eyes and a concussion. (*Id.* at 4). He never mentioned being handcuffed in his statement. He did note that he was charged with assault and a "controlled substance." (*Id.* at 6).

Two civilian witnesses testified at trial. One was a bus driver, William Yammie, and the other was, Daniel Simmons, one of the bus passengers. Person A was already on the ground before either of these witnesses made their observations from inside the bus.

Mr. Yammie described stopping the bus he was driving when he saw some police activity near the bus stop at East 106th Street and First Avenue. He testified that he heard a scream and then saw a man on the ground, face down and handcuffed. He heard a second scream and then saw a police officer, whom he repeatedly described as the "blond haired officer," sitting over the man on the ground and punching him in his ribs while a dark haired officer, whom he described as "Italian", was punching the man's face. (Tr.

15-16). He recalled that a third officer went to the police van, grabbed an object that he was not able to identify and also began to beat the man in the face area. (Tr. 41).¹

On cross-examination, Mr. Yammie agreed that the blond haired officer was sitting in the middle of the man's back and had his knees or shins on the ground while he threw punches into the man's side. (Tr. 33-34). He testified that he shouted out to the officers to stop and the blond haired officer stood up and stopped, but the other officer continued to repeatedly punch the man in the face, then stopped and walked around before continuing to punch him in the face. (Tr. 17). He witnessed the officers beating the man for about ten minutes. (Tr. 21). He did not see anyone kicking the man or holding his legs. (Tr. 43). The dark haired officer (Tr. 15-16, 21), told him to leave so he printed out a transfer, wrote "police abuse" on it, and left a couple of minutes later. (Tr. 22; CCRB Ex. 1).

Mr. Yammie did not report what he saw at the time and had to be subpoenaed by CCRB to testify at trial. (Tr. 26). He did not want to testify against police officers because, "You see amount of black individual on television because of police officers." (Tr. 27). On cross-examination, Mr. Yammie was asked to confirm statements contained in a transcript of his CCRB interview in which he said, 1) in his world they call the police the Mafia; 2) the blond guy was an asshole; and 3) the sergeant was a jackass; and 4) the cop hitting the man in the head was small in stature. He said "if that's there, then I said that." (Tr. 37-40).

Mr. Simmons, the bus passenger, testified that he was riding the bus home from his job. When the bus was in the area of E 106th St and First Avenue, he saw some

During his brief CCRB phone call, Person A did not state that he was hit with an object. He also did not provide any physical descriptions of any of the officers involved.

flashing red lights and a police van. After the bus stopped, he went to the front to find out what was going on. (Tr. 47). The bus driver told him the police were beating a kid. While he was standing right next to the bus driver, he saw one police officer with his knee on the back of a man who was in handcuffs lying face down on the ground. He saw another officer "beating a guy in the head" and another one kicking his feet. (Tr. 46-48). The officer who was kicking at the man's feet came up to the bus driver and told him to move the bus but the bus driver refused. (Tr. 52). He estimated that the bus remained at the scene for thirty minutes. (Tr. 47). Mr. Simmons testified that he called 911 and told them that officers are beating up a kid who is handcuffed. He did not identify himself to 911. (CCRB Ex. 3).

On cross-examination, Mr. Simmons was asked about statements he made in a CCRB interview. After having portions of the interview read to him, he agreed with defense counsel's leading questions that he had told the CCRB investigator that there were approximately five officers on top of the man on the ground, with one punching his face, one with his foot on his neck, one with his knee in his back and two officers at his legs, one of whom was kicking the man. (Tr. 61-62). He stated that his recollection was "fresh" at the time of the CCRB interview; however he denied stating that the man was trying to "avoid" getting hit even when confronted with the interview transcript. (Tr. 58-60).

Mr. Simmons testified that he has been arrested "quite a few times." (Tr. 54). He was convicted of possession of cocaine in 2010 and also of petit larceny in 2010. He asserted that, with regard to the petit larceny charge, he pled guilty on the advice of his attorney even though he had not stolen anything. (Tr. 65-66). He acquiesced that in

making the plea, he made a false statement to the criminal court judge. Mr. Simmons also acknowledged convictions in 2011 and 2012 for possession of a forged instrument. (Tr. 66).

The officers who testified at the trial were the two Respondents and Sergeant Koumniotes. The CCRB interview of Officer Kevin Puello was also introduced into evidence. Respondent Callinan testified that after responding to the radio run, he saw two people unsuccessfully try to get in a cab. When he asked if he could talk to them, Person A began grabbing his waistband and started sprinting away. (Tr. 80-81). Respondent Callinan started chasing him. He saw him run full speed, face first into some scaffolding and fall down. (Tr. 98). According to Respondent Callinan, Person A got back up and continued to run. (Tr. 82-83).

Respondent Callinan recounted that Person A continued to run after he attempted to toss the cocaine. During the chase, he gave Person A verbal commands to stop. After Person A essentially made a circle, he ran towards Officer Koumniotes, put his shoulder down and hit Officer Koumniotes. Both Person A and Officer Koumniotes fell to the ground. (Tr. 86-87). Respondent Callinan testified that he caught up and grabbed Person A after he was on the ground. He remembered putting a knee on Person A and that Person A had his hands buried beneath him and kept trying to roll over and get up. He stated that other officers arrived and they were all trying to pull Person A's arms out from under him. Person A resisted tremendously, trying to kick and flail and refusing to respond to verbal commands. (Tr. 88). Respondent Callinan struck Person A in the back of the rib area to try to loosen his arms from underneath him. It took multiple officers to finally handcuff Person A. (Tr. 90).

Respondent Callinan testified that once Person A was handcuffed, he did not strike him or see anyone else strike, kick or hit him with an object (Tr. 91). He recounted that once Person A was cuffed he stopped all resistance. (Tr. 103). According to Respondent Callinan's testimony and as indicated on the felony complaint he signed on January 1st after the arrest, four bags of marijuana were recovered from Person A hand. (Tr. 92, CCRB Ex. 6). Respondent Callinan testified that any reference to recovering the marijuana from the ground in his CCRB interview could have been a misunderstanding. (Tr. 97). Person A was arrested and charged with criminal possession of a controlled substance, criminal possession of marijuana and assault on a police officer. (Tr. 92).

Sergeant (then Police Officer) Koumniotes also described the chase of Person A in his testimony. Officer Koumniotes was behind other members of his team during the chase. Like Respondent Callinan, he saw Person A knock his head on the scaffolding and get back up. (Tr. 114). At some point, Person A began to run back towards Sergeant Koumniotes who was standing in the middle of the street. (Tr. 114). Sergeant Koumniotes who was about 5'11 and weighed approximately 235 pounds at the time, put his hands up to his chest area and told Person A to stop. Person A lowered his body and ran into Sergeant Koumniotes. (Tr. 115-16). Sergeant Koumniotes fell backward from the collision. He sustained a cut on his head a chipped tooth and was disoriented. He believed he was diagnosed with a concussion. (Tr. 117). He tried to help the other officers out because Person A was kicking and twisting and throwing his arms. However, because he was disoriented after the fall, he was not certain if he continued to try to grab Person A. (Tr. 118).

Respondent Cintron also participated in the chase of Person A. He arrived at the scene where Person A and Sergeant Koumniotes collided after they were both on the ground. He remembered that Person A was flailing his feet so he attempted to grab his legs. He also tried to pull his arms out from under his body. (Tr. 136). Respondent Cintron sprained his right hand during the incident but stated that he is not sure exactly how that happened. (Tr. 140). He testified that he did not strike Person A and did not see anyone strike or kick or hit Person A after he was handcuffed. (Tr. 137).

He recalled that a bus driver was yelling at the officers, asking why the police were arresting the man. Respondent Cintron recounted that he instructed him to keep the bus moving. (Tr. 138-39).

Officer Puello's involvement in the incident was limited. He drove the van while the other officers were engaged in the foot pursuit. He recalled seeing Person A on the ground, "resisting pretty bad." (CCRB Ex. 5). When he observed his partners in a struggle trying to cuff Person A, he jumped out of the van to assist and in doing so, sustained an injury to his hand. (CCRB Ex. 5).

Analysis

There is no question that force was used in the arrest of Person A. In dispute is whether the force used was necessary or excessive. Under Patrol Guide 203-11, only that amount of force necessary to overcome resistance may be used to effect an arrest. CCRB has charged both Respondents with using unnecessary force in striking Person A numerous times with a closed fist, causing physical injury. I find that CCRB has not met its burden of proving these charges by a preponderance of the evidence.

As a preliminary matter, I note that Person A did not testify in this case nor did he submit for an in person interview with a CCRB investigator. In his phone conversation with CCRB, he never even mentions being handcuffed. In sum, there is no statement from the arrestee himself as to whether the officers continued to use any force after he was handcuffed. There are also no medical records in evidence to corroborate his claims of injury.

CCRB points to the two eyewitnesses as providing evidence that the Respondents continued to hit Person A after he was handcuffed. However, there are serious problems with their testimony that renders it unreliable.

While eyewitness testimony can often be expected to differ slightly based on different vantage points and particular memories, in this case there are significant differences in the observations supposedly made by two people who were positioned right next to each other at the time of the observations. Mr. Simmons indicated he was standing right next to Mr. Yammie on the bus. Thus, it is reasonable and logical to expect that their observations, made from the same vantage point during the same period of time, would be quite similar.

Mr. Yammie described one officer sitting on Person A punching him in the ribs while a second officer was punching the man's face. At a later point, Yammie reported that he saw a third man get something from the car and then hit Person A in the face too. He testified he did not see anyone kicking Person A or holding his legs.

Mr. Simmons testified that there were approximately five officers beating Person A. In an account that differs significantly from that of Mr. Yammie, Simmons asserted that one officer had his foot on Person A's neck and two officers were near his

legs, with one officer repeatedly kicking Person A in the legs. He further recalled another officer had his knee on Person A's back. The significant differences in their accounts as to the number of officers and the type of force that was applied is more than can be attributed to slight differences in memory or vantage points.

Further, there is a large discrepancy in the amount of time the two witnesses said they were watching the incident. Mr. Yammie said he was at the scene for about 10 minutes while Mr. Simmons had the bus remaining at the scene for over 30 minutes. Also, Mr. Yammie says it was the dark haired officer, who he described as the officer punching Person A face, who came over to the bus to tell him to move while Mr. Simmons has the man who was kicking Person A feet as the officer who came over to the bus. (Tr. 52).

Beyond the discrepancies between their testimonies, Mr. Yammie's testimony is further called into question by the fact that he continuously referred in his testimony to a blond haired officer as the one with his knee on Person A back who was also punching him in the ribs. Neither Respondent has blond hair.

Mr. Simmons' credibility was called into question in that he admitted that he lied in court before when he plead guilty to a crime he did not commit and that he has two convictions for use of a forged instrument, a crime in which dishonesty is the central component.

A final, additional problem with the testimony of both Mr. Yammie and Mr. Simmons is the potential for bias which could stem from their opinions and interactions with the police. Yammie expressed a negative view of the police in his testimony, comparing the police to the Mafia. Such a statement makes it difficult to believe that he

was able to view the incident in question objectively. His referring to the officers as an “asshole” and a “jackass” further support a finding of possible bias. As to Mr. Simmons, he testified that he had been arrested by the police quite a few times, claiming that he was innocent one of those times. His experiences therefore could also very well lead to negative feelings towards the police.

The arrest photo introduced into evidence in this case does not alter the opinion of the court. While there is definite bruising to Person A face in the photo, the officers here did not deny that they had to use force to arrest Person A. Callinan testified that he hit a resisting Person A several times while he was trying to handcuff him. Respondent Cintron testified that he held Person A legs down as they were trying to handcuff him. The other two officers on the scene recalled significant resistance from Person A, which makes facial injury and bruising highly likely. All of the officers testified credibly, even as to details like Person A running in a circle and falling down after running into scaffolding. They recounted what occurred in a straightforward manner and their accounts were consistent with one another. Respondents only deny using additional force after detaining him in handcuffs. This alleged additional force that purportedly was applied after Person A was handcuffed is the excessive force that CCRB contends is the sole basis for these charges. Yet, the bruising in the arrest photo does nothing to prove that excessive force occurred after Person A was arrested when it is not disputed that an extensive struggle ensued prior to his being handcuffed.

Without medical records it is impossible to know the true extent of any injuries. In this case, there are several possibilities for how Person A obtained the bruising. The officers testified that Person A ran into some scaffolding and fell down. He

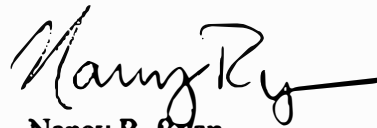
also had a collision with K oumniotes which was violent enough to knock both of them to the ground and cause the officer to sustain cuts and a chipped tooth. In addition, Person A was lying face down and resisting as the officers tried to arrest him, stating himself that he was trying to "block [his] face with the cement." Based on those facts, contact with the pavement was extremely likely at some point during that encounter. In sum, it seems highly likely that Person A was injured while running from the officers and subsequently resisting arrest. *See Case No. 81716/06* (September 28, 2006) (finding that an injury to complainant's head was the "incidental" result of her non-compliance with a police directive to get down, and not the result of excessive force); *Case Nos. 80418/04 & 80419/04* (November 28, 2005) (finding no excessive force where a complainant initiated a physical struggle and resisted arrest upon being awoken at the end of the subway line and sustained bruising as a result of the struggle.).

The credible evidence does not show that both Respondents did intentionally use force without police necessity in that they struck Person A multiple times with a closed fist, causing physical injury. I therefore find both Respondents Not Guilty.

APPROVED

FEB 22 2006
WILLIAM J. BRADY
POLICE COMMISSIONER

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner - Trials