



POLICE DEPARTMENT CITY OF NEW YORK

December 29, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Gerard Fenton
Tax Registry No. 951725
77 Precinct
Disciplinary Case No. 2015-14532

Charges and Specifications:

1. Said Police Officer Gerard Fenton, while on-duty, while assigned to the 77th Precinct, on or about October 28, 2014, did wrongfully leave an arrestee unattended inside the backseat of a radio motor patrol vehicle.
P.G. 208-02, Page 1, Paragraph 6 – ARRESTS – REMOVAL TO
DEPARTMENT FACILITY FOR PROCESSING
2. Said Police Officer Gerard Fenton, while on-duty, while assigned to the 77th Precinct, on or about October 28, 2014, improperly arrested an individual known to the Department without probable cause, to wit: said Police Officer Fenton arrested an onlooker that was making derogatory statements and videotaping the lawful arrest of an individual known to the Department.
P.G. 208-03, Page 10, Additional Data – ARRESTS – GENERAL PROCESSING
– OBSERVE[R]S AT THE SCENE OF POLICE INCIDENTS

Appearances:

For the Department: Javier R. Seymore, Esq.
Department Advocate's Office
One Police Plaza, 4th Floor
New York, NY 10038

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

Hearing Date:
September 27, 2016

Decision:

Guilty

Trial Commissioner:

ADCT David S. Weisel

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on September 27, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Sergeant Victor Crespo of the Internal Affairs Bureau as a witness. 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, the Court finds Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

It was undisputed that on October 28, 2014, Respondent and his partner, Police Officer James Burnett, assigned to the 77 Precinct, arrested Individual 2, a known gang member for whom there was an active I-card, on the sidewalk of Franklin Avenue.¹ This was done at the direction of the special operations lieutenant during roll call earlier that day.

It was further undisputed that the officers had no problems placing handcuffs on Individual 2 and taking him to the police vehicle. His friend, Individual 1 however, was standing nearby, video-recording the encounter. Individual 1 also was making various profane and ugly remarks toward the officers. It was further undisputed that after placing Individual 2 in the back of the police vehicle, Respondent left the area of the vehicle and went back to the sidewalk to confront Individual 1. This led to a physical altercation and Individual 1 was arrested.

¹ Burnett was incorrectly identified at trial as Police Officer "Michael Barnett."

According to the Department, Respondent violated the Patrol Guide in two ways. First, he allegedly left Individual 2 unattended in the back of the police vehicle. Second, he allegedly arrested Individual 1 for recording the encounter and making obnoxious comments, rather than for any independent offense. Respondent asserted that Individual 2 was not unattended, that Individual 1 made threats against Respondent, justifying his arrest, and that arresting Individual 1 was a priority, justifying leaving the area of the police vehicle.

SERGEANT VICTOR CRESPO investigated the case for the Internal Affairs Bureau. A local television station forwarded footage of a news story about the police treatment of Individual 1 to the Office of the Deputy Commissioner Public Information. Individual 1's attorney had notified the TV station of the story. After the referral by the television station, DCPI notified IAB of the matter (Tr. 10-11, 38-39).

One of the several parts of the investigation was the official Department interview of Respondent. Respondent stated the special operations lieutenant told him and Burnett that Individual 2 was a known gang member, that he was likely armed, and that they should apprehend Individual 2 because there was an active I-card on him. As it turned out, Crespo testified, Individual 2 was not armed (Tr. 11-12, 27).

Individual 1 was interviewed by other IAB investigators. Individual 1 admitted cursing at and antagonizing the officers and accusing them of traffic violations. Individual 1 said that "he knew what he did" and was suing the Department "to get that check" (Tr. 19, 28-34, 38).

Crespo obtained several portions of video footage during the investigation. One was the video taken by Individual 1. Respondent and Burnett are seen arresting Individual 2 on the sidewalk next to a building. Burnett tells Individual 1 to back up. Individual 1 or others make various profane, obnoxious, and racially offensive remarks while Respondent and Burnett handle Individual 2. These included calling the officers "bitch ass niggers" and telling Burnett, "You slow as fuck too by the

way, white boy -- you almost busted your ass" (Burnett had to pursue Individual 2 on foot). Around 15 seconds into the video, the officers place Individual 2 in their marked police vehicle. Around 23 seconds, Respondent moves away from the vehicle, back onto the sidewalk, and directly toward Individual 1. Around 27 seconds, someone says, in sum and substance, "You have two seconds to back up." A verbal and physical confrontation between Respondent and Individual 1 begins. This lasts approximately 34 seconds and then the video ends. At several points during the unseen confrontation, someone says, in sum and substance, "Touch me and I'll fuck you up" (Tr. 10-15, 34-37, 42-43; Dept. Ex. 1, video disc, Individual 1's recording).

A second video was surveillance footage from a deli next to the site of the arrest. There was no audio. Individual 1 is seen recording the arrest from 10 to 15 feet away. Around 5 seconds into the video, Individual 1 walks perhaps five feet toward Respondent, Burnett and Individual 2, but Burnett turns and gestures to him to move back. Individual 1 complies and Burnett indicates that he is satisfied. Around 15 seconds, the officers walk Individual 2 to their vehicle. At 24 seconds, Individual 1 is at the curb, still recording the officers, about 10 to 15 feet away, but there is a parked car between them. At approximately 31 seconds, Individual 2 is inside the police vehicle but Crespo could not determine from the video whether the doors were locked. Both officers walk toward Individual 1 and the sidewalk, with Respondent leading. At 34 seconds, Respondent pushes Individual 1 backward with both hands. Respondent squares to fight Individual 1 at approximately 37 seconds. Crespo noted that Respondent "looks around a little quick" and puts on black gloves. The video clip ends at 41 seconds as the officers and Individual 1 walk out of view (Tr. 15-19, 43-44; Dept. Ex. 1, 758 Franklin Avenue file).

Crespo testified that once an arrestee is placed in a police vehicle, the officers are supposed to stay with him. Crespo conceded that if there were two people to be arrested, one officer could stay at the vehicle with the handcuffed prisoner, and the other officer could arrest

the second individual. If one officer leaves the vehicle to arrest a second person, and the second officer has to leave the vehicle to assist, it is still the responsibility of the first officer to determine whether the second arrest is justified. The child safety locks in the police vehicle were operable on that day and Individual 2 did not attempt to escape. Burnett received a Schedule B command discipline for leaving the prisoner unattended (Tr. 19-20, 22-27, 41, 81).

Crespo did not observe Individual 1 commit any crime on the videos and none of the interviews changed that conclusion. Individual 1 was arrested for assault, menacing and resisting arrest. These charges later were dismissed on the prosecution's motion (Tr. 21-22, 38-40, 43, 46-47).

RESPONDENT testified that the special operations lieutenant addressed the platoon on the day in question. The lieutenant stated that there was an ongoing dispute between two crews. Intelligence had been gathered indicating a possible shooting that day. The lieutenant indicated that Individual 2 was involved, and was possibly armed, as were other crew members. Individual 2 also had an active I-card (Tr. 51-53).

Respondent testified that he and Burnett found Individual 2 on Lincoln Place between Franklin and Classon Avenues. When the officers approached Individual 2, he cursed at them and started running. Burnett pursued Individual 2 on foot and Respondent pursued him in the vehicle. Individual 2 got tired and stopped on Franklin Avenue, and put his hands behind his back. He was placed securely in the back seat of the vehicle (Tr. 53-54, 66).

Respondent testified that Individual 1 and some others were there. Individual 1 was screaming derogatory statements at the officers. One of these, which occurred before Individual 1 began recording, was "You get shot for that, you get hit for that, you get killed for that." Respondent considered this to be a threat and determined that he was going to arrest Individual 1. Respondent conceded that every situation was different and he would not arrest every suspect that made a

threat. Here, Respondent noted, it was a dangerous time for police officers and the hatchet attack against several officers in Queens had just occurred that week. Respondent claimed that he could not recall whether Individual 1 made other threats after commencing the video recording (Tr. 53-57, 62-63, 65-67, 71).

After arresting Individual 2 and bringing him to the police vehicle, Respondent told Burnett, "I'll be right back." Respondent asserted that he did not leave Individual 2 unattended because Burnett still was there. Respondent approached Individual 1 and pushed him "to get distance." Respondent was concerned that Individual 1 had a weapon "because of what was going on in the community at the time." Therefore, he did not want to "put my hands on an individual that they could possibly harm me." Respondent wanted to "see what he was actually going to do because I didn't want to pull my firearm out on him in a crowd and possibly someone else could get hit if he actually pulled a weapon out on me" (Tr. 57-58, 67-68).

Individual 1 did not pull out a firearm, but he did "put his hands up and fight me." Respondent put on his other black glove and punched Individual 1 threw a punch back and the exchange continued until both were on the ground. Respondent and Burnett were able to gain control of Individual 1 was arrested for assault, menacing and disorderly conduct. He was not armed (Tr. 58-61, 65, 69).

Specification No. 1

The first specification charges Respondent with wrongfully leaving Individual 2 unattended in the police vehicle. The Patrol Guide procedure under which Respondent is charged, § 208-02 (6), states that the arresting officer is to remain with the prisoner at all times until relieved.²

² The arresting officer eventually was listed as Burnett, for both Individual 2 and Individual 1. Respondent, however, placed Individual 2 in handcuffs, led him to the police vehicle, placed him inside, and shut the door. Respondent also considered both himself and Burnett to have arrested Individual 2 (Tr. 54-55). Therefore, for the purposes of this procedure, Respondent can be considered the arresting officer.

Thus, at the outset, the fact that Individual 2 was secured with handcuffs in a putatively locked back seat does not alter this responsibility.

The tribunal also rejects Respondent's argument that he did not abandon Individual 2 because Burnett remained at the car. The videos show instead that Burnett left the car too, roughly at the same time Respondent did. Around 25 seconds of Individual 1's recording, and 32 seconds of the deli recording, Burnett turns toward Respondent and follows him away from the vehicle. Burnett does this while Respondent is still in the gutter, not yet on the sidewalk, maybe two feet ahead of Burnett. Individual 1's recording also shows that if Respondent told Burnett anything just before walking away, it was unlikely, "I'll be right back," as Respondent contended. Both officers walked away from Individual 2 and both are responsible.

As discussed *infra*, there was no valid reason to arrest Individual 1. But even if Individual 1 made the threat that Respondent said he uttered, it did not create the kind of emergency situation in which an officer would be justified leaving an otherwise secured prisoner unattended. As such, Respondent is found Guilty of Specification No. 1.

Specification No. 2

The second specification charges Respondent with violating the procedure of Patrol Guide § 208-03, p. 10, concerning "Observers at the Scene of Police Incidents." The procedure notes that people are allowed to observe an arrest that takes place in public. This right is "limited by reasons of safety to all concerned, and as long as there is no substantive violation of law." The procedure reminds officers that an arrest of a bystander for obstructing governmental administration is not authorized for simply remaining at the scene. Furthermore, crude or vulgar speech, requesting and memorializing the names or shield numbers of members of the service, and recording by photo, audio or video, do not constitute probable cause to arrest a bystander

“unless the safety of officers or other persons is directly endangered or the officer reasonably believes they are endangered or the law is otherwise violated.” See introduction & paras. a & b.

The Court did not find Respondent to be credible in his testimony that Individual 1 uttered any kind of substantive threat. Rather, the evidence demonstrated that this was a pretext to arrest Individual 1 for being an obnoxious presence, in violation of Patrol Guide § 208-03.

First, Respondent’s testimony was internally inconsistent. He testified that he wanted to avoid placing his hands on Individual 1 because he was afraid he might have a weapon. Yet that is exactly what Respondent did by pushing Individual 1 with both hands. Respondent had to walk more than 10 to 15 feet, around a parked car, when he returned to the sidewalk and pushed Individual 1. This move just as easily could have given Individual 1 the time, space or inducement to brandish a firearm.

Second, the threat is nowhere on the approximately 25 seconds of Individual 1’s recording before Respondent confronts him. There could not have been that much time before the video commenced because Respondent is still in the midst of handcuffing Individual 2 when the video begins. Respondent also indicated that it was only a few seconds between making visual contact with Individual 2 and handcuffing him (Tr. 60). This would leave very little time for Individual 1 to make an unrecorded threat.

Third, Respondent’s answers made no tactical sense. He testified that the alternative to pushing Individual 1 was to pull out his firearm on him. 0 There was, however, no reason for Respondent to use a firearm to simply approach Individual 1. Respondent had even more suspicion that Individual 2 was armed than he did for Individual 1 because the lieutenant mentioned Individual 2 by name as possibly being armed. Respondent believed that Individual 1 was just a fellow crew member and as such could have been armed. Respondent’s actions warrant an inference that confronting Individual 1 in this way was punitive and retaliatory.

Fourth, an objective review of the video indicates that Respondent engaged in a physical confrontation with Individual 1 due to his ugly and profane commentary, and not for any supposed threat. Respondent's completely unprofessional push of Individual 1, his quick look around, and his taking a fighting stance is evidence of this.

As such, the arrest violated the Patrol Guide and Respondent is found Guilty of Specification No. 2.

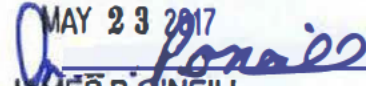
PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on January 9, 2012. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Advocate's recommendation of a penalty of 10 vacation days is supported by precedent. See *Case Nos. 2014-11648 & -49* (July 27, 2015) (officers forfeited four vacation days each for leaving prisoners that they were processing unattended in holding cell without notifying desk officer and arranging for coverage); *Case No. 82742/07* (Oct. 20, 2008) (five vacation days for excessive force during arrest and issuing disorderly conduct summons without probable cause). As such, the Court recommends that Respondent receive a penalty of 10 vacation days in this matter.

Respectfully submitted,

APPROVED

MAY 23 2017

JAMES P. O'NEILL
POLICE COMMISSIONER



David S. Weisel
Assistant Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER GERARD FENTON
TAX REGISTRY NO. 951725
DISCIPLINARY CASE NO. 2015-14532

On his last three performance evaluations, Respondent twice received an overall rating of 3.5 "Highly Competent/Competent" and once received an overall rating of 3.0 "Competent." He has been awarded one medal for Excellent Police Duty. [REDACTED]

Respondent has no prior formal disciplinary history. On March 12, 2015, Respondent was placed on Level 1 Force Monitoring for having three or more CCRB complaints in one year. That monitoring remains ongoing.

For your information.

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner Trials