



POLICE DEPARTMENT

March 14, 2023

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In the Matter of the Charges and Specifications :

Case No.

- against - :

2022-25499

Inspector James Palumbo :

Tax Registry No. 927315 :

Patrol Borough Brooklyn South :

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Fredy Kaplan, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent: Louis C. La Pietra, Esq.
La Pietra & Krieger, PC
30 Glenn Street – Suite 105
White Plains, NY 10603

To:

HONORABLE KEECHANT L. SEWELL,
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Inspector James Palumbo, on or about June 2, 2020, at approximately 2215 hours, while assigned to PBBS and on duty, in the vicinity of 4th Avenue, between Atlantic Avenue and Pacific Street, Kings County, wrongfully used force, in that he stomped his foot about Person A's upper body multiple times without police necessity.

P.G. 221-02, Page 2, Prohibition 11

USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on January 25, 2023.

Respondent, through his counsel, entered a plea of Not Guilty. The CCRB entered video evidence and Investigator Benjamin Shelton's testimony to support the charge. Respondent testified on his own behalf and offered video and photographic evidence. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all of the evidence in this matter, the Tribunal finds Respondent Not Guilty.

ANALYSIS

The following is a summary of the facts which are not in dispute. On June 2, 2020, at approximately 2200 hours, Respondent performed supervisory duties in the vicinity of 4th Avenue, between Atlantic Avenue and Pacific Street, Kings County. Members of Service from various commands had been mobilized to that area in response to demonstrations related to the death of George Floyd in Minneapolis, Minnesota, on May 25, 2020, while in police custody. At that time, Respondent was in his current position as operations commander for Patrol Borough Brooklyn South.

At about 2215 hours, Respondent observed an individual, whom he later learned was

Person A on the ground while three uniformed police officers struck him with batons.

Respondent approached the incident and took specific actions, which are in dispute. Person A was later placed under arrest.

The following is a summary of the relevant evidence presented at the trial.

Video Evidence

CCRB called a supervising investigator, Benjamin Shelton, to testify about the steps CCRB took to investigate this case. Shelton stated he was the third investigator to be assigned to this case; at the point of his assignment, Respondent had already been identified as the subject of the investigation (T. 27-28).

The investigative file included videos collected from civilians, body-worn camera video from Captain Hepworth¹, a video used in a New York Times article about the protests², and the NYPD case file for this incident (T. 31-32). CCRB entered into evidence Captain Hepworth's body-worn camera footage, a cell phone video from a civilian witness, [REDACTED]³; and the footage used in the New York Times article⁴ (T. 39; CCRB Exs. 1, 2, and 3).

CCRB Exhibit 3, an edited video obtained from the New York Times, depicts the following:

00:00-00:05: Person A is running from three uniformed officers, and he is pushed to the ground, and the three officers strike him multiple times with their batons.

00:06-00:07: Respondent runs over to them and uses his left hand to push the officer on his left side away from Person A. His left foot lifts and steps onto Person A's shoulder area but then comes off Person A's body. His right hand is on the shoulder of the officer on the ground on the right.

¹ Captain Hepworth's body-worn camera footage does not show the incident involving Person A. Still, it captures enforcement activity in the area of a Modell's store at or near the time of the incident in this case.

² Shelton testified that he interviewed one of the article's authors, who eventually provided the original video in response to his request (T. 52).

³ According to Shelton, he obtained video from the Internal Affairs Bureau, which acquired it from [REDACTED].

⁴ Shelton testified that he did not know who captured or filmed the video published in the New York Times article, nor did he know whether or not any specialized equipment was used to edit or alter the video in any way (T. 55).

00:07-00:12: His right hand, holding a baton, is pushing against the shoulder of the officer to his right. His foot returns to the ground, and he steps onto Person A's shoulder area.

00:13-00:15: Multiple officers come into the frame and surround Person A who is still on the ground.

CCRB Exhibit 2 captures a different angle of the same incident. In this video, Respondent uses his arm to push away one officer who is standing over Person A and reaches down and uses his other arm to push another officer, who is kneeling over Person A backward (CCRB Ex. 2 at 00:14-00:20). Person A is lying on the ground on his side with his knees toward his chest; it is unclear from the video where his hands are.

Respondent's Exhibit A in evidence is an arrest photograph of Bryan Person A

Respondent's Exhibit B is a video recording obtained from the body-worn camera of Police Officer Kolnberger, which depicts the following:

- 22:07:02-22:07:48 Person A is seated in the roadway and appears to be handcuffed. Someone is shining a flashlight on his chest while a police officer reaches over Person A's left shoulder and searches a zippered pouch strapped to his chest.
- 22:07:52-22:08:14 The police officer standing before Person A kneels, reaches across Person A's torso, and searches his left front pants pocket. The police officer then begins patting down the outside of Person A's right pants pocket before the camera angle changes and Person A's head obstructs the view of what the kneeling police officer is doing. The police officer comes to his feet and stands in front of Person A
- 22:08:15-22:09:43 Kolnberger's right hand comes into view as it holds Person A's right shoulder. The feet and legs of three other police officers standing around Person A come into view. Person A engages in a discussion with one of the police officers, who asks him who organized the demonstration, and Person A responds that he has no idea. Person A then continues the conversation, discussing some proposed law enforcement legislation, before the police officer standing before him walks out of the frame.
- 22:09:43-22:10:47 The police officer standing before Person A walks back into the frame, but only his right lower leg is visible. The camera shifts to the left

and reveals Kolnberger kneeling behind Person A reaching down with his right hand to rest on Person A's left shoulder. Kolnberger's left-hand reaches up to adjust the camera, partially obscuring the lens. His hand rests on his leg as he continues to hold Person A's right shoulder with his right hand.

22:10:48-22:11:03

Kolnberger and another police officer, kneeling behind Person A assist him in rising to his feet. The camera view shifts to face Person A as he is brought to a seated position on the curb. Kolnberger leans down and searches the inside of the zippered pouch on Person A's chest. Kolnberger then stands up, facing several police officers who are standing on the sidewalk facing him.

Shelton defined a "stomp" as "rais[ing] your foot off the ground, or whatever surface that you bring it down upon, and lowering it down on that surface with speed and force" (T. 78).

Shelton testified that in his opinion as an investigator, Respondent's foot made a "stomping motion" on Person A twice: once with his "left foot to sort of step on [Baez's] right shoulder blade area [and] the foot came down on the ground," and second when Respondent "lifted his left foot again and stepped on the side of [Baez's] head" (T. 30, 85).

Shelton was shown Respondent's Exhibit B and agreed that Person A was heard "chuckling" and having a "coherent conversation" with the officers after his arrest (T. 106; Resp. Ex. B). He conceded that the arrest photo in Respondent's Exhibit A did not show any visible marks on Person A's face, nor were there visible marks or injuries on his face and neck area seen in the video. Person A was not heard on video complaining about injury to the officers, and he refused medical attention (T. 86-94, 107-10; Resp. A; Resp. Ex. B).

Shelton testified that when he attempted to interview Person A he was informed by Person A's attorney that Person A would not be participating in the investigation⁵ (T. 74).

⁵ Person A's attorney advised Shelton that Person A was pursuing a civil action arising from this incident (T. 73-74).

Respondent's Testimony

Respondent testified that he was the operations officer for Brooklyn South on June 2, 2020. He explained that his role that evening was to track all the police officers and police resources coming to the Barclays Center throughout the night (T. 154-55).

Respondent testified that he had received information that a burglary, or potential looting, occurred at the Modell's across the street from the Barclays Center. Initially, Respondent was focused on that investigation, as many protestors were attracted to the police activity and attempted to interview the officers. He explained that a "loud commotion" drew his attention away from Modell's to several officers striking Person A as he appeared to resist arrest. Respondent testified that he had a "supervisory obligation to intervene," so he ran toward the police officers (T. 127-28).

He observed Person A was still resisting as he attempted to remove the officers from him. Respondent admitted that he stepped on Person A's shoulder area twice: he used his arms to push the officers away from Person A and placed his foot on Person A's shoulder to keep him down as he appeared to be attempting to get off the ground. Respondent testified that he "lost [his] balance trying to move those two cops off, and then trying to keep Mr. Person A down" (T. 159). He observed Person A lift his head off the ground, and Respondent believed he was still resisting arrest, so he placed his foot on Person A's shoulder a second time to keep him down (*Id.*). Respondent explained that, at that moment, he believed "a foot strike would be the most reasonable use of force to control Person A and to intervene and de-escalate the situation" (T. 135). He did not want to end up in a position that would jeopardize his safety if he crouched down or kneeled on the ground while the officers were swinging batons, and Person A refused to be handcuffed (*Id.*).

Credibility

Shelton's testimony is credible insofar as it pertains to the investigative steps taken by CCRB. To the extent that he was permitted to offer biased opinions regarding the probative value of the evidence, his testimony was helpful to help the trier of fact in understanding CCRB's theory of the case. Such views, however, are not binding upon this Tribunal.

Respondent's testimony was forthright, concise, and credible. Although he is an interested witness in this proceeding, his in-court testimony was logical and corroborated by the video evidence.

Specification 1: Wrongful Use of Force

CCRB has failed to meet its burden of proof by the credible, relevant evidence that Respondent "stomped" on Person A or otherwise used unlawful force against him.

Respondent credibly testified as to the events of that evening, and there is no physical evidence that would be consistent with a stomp. The CCRB did not provide proof of injury to Person A's shoulder or head. In contrast, the arrest photograph in Respondent's Exhibit A depicts Person A's face without any injuries. Respondent's Exhibit B, the video of Person A interacting with the police officers after he is handcuffed, does not capture any visible evidence of damage caused by a "stomp" to Person A's shoulder or head. In the view of the Tribunal, he appears to be relatively calm, even though he is handcuffed and in the presence of several police officers. Person A does not complain about the use of force, nor does he request medical attention, which would not be surprising for someone who had suffered an injury during an arrest.

I have carefully reviewed the video evidence offered in evidence by the parties. While the videos were each taken from different visual perspectives, they appear generally consistent. Despite Respondent's reference to a "foot strike," the details he provided regarding his actions

with his foot were compatible with stepping on Person A rather than "stomping" on him, as corroborated by CCRB Exhibits 2 and 3, and Respondent's Exhibit B.

Even though the evidence does not establish that Respondent "stomped" Person A using his foot to restrain him warrants further examination. Under the circumstances presented in this case, Respondent used reasonable force and acted with police necessity. Patrol Guide section 221-02(11) allows an officer to use the "reasonable force necessary to gain control."

Respondent testified credibly that when his attention was drawn to the incident, he saw three police officers administering baton strikes to a man on the ground, whom he later learned was Person A. As a supervisor on the scene, it was Respondent's duty to intervene and de-escalate the situation so that Person A could be handcuffed without injury (P.G. 221-01, 221-02). Respondent testified that Person A was refusing to be handcuffed, and resisting arrest, as the officers attempted to take him into custody (T. 157).

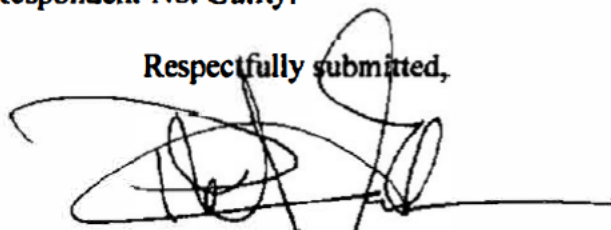
Respondent testified that he stepped on Person A's shoulder to keep him on the ground while also trying to push the officers away from Person A. He added that he momentarily lost his balance as he moved the officers away while attempting to balance his foot on Person A. Respondent then observed Person A lifting his head off the ground and, believing he was still resisting arrest, picked up his foot and placed it on Person A's shoulder again to keep him down (T. 159).

Respondent's movement of pushing the officer on the left of him away is captured in the video evidence (CCRB Ex. 3 at 00:06-00:07; CCRB Ex. 2 at 00:14-00:16). Respondent's hand is also seen on the shoulder of the officer to the right of him who is kneeling, appearing to hold him back with the baton in his hand (CCRB Ex. 3 at 00:08-00:12; CCRB Ex. 2 at 00:14-00:18). Respondent recalled telling the officers to "get off" and "back up" when he approached (T. 158).

In sum, the evidence established that, rather than engaging in a punitive use of excessive force against a suspect who had already been the recipient of several baton strikes delivered by three police officers, Respondent took action consistent with the Patrol Guide's unambiguous direction that police officers must intervene in any circumstance where another Member of Service is believed to be misusing force against a suspect.

Based upon the foregoing, I find Respondent Not Guilty.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Paul M. Gamble", written over a horizontal line.

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

A handwritten signature in black ink, appearing to be "Edward A. Caban", written over a horizontal line.
JUL 08 2022
EDWARD A. CABAN
ACTING POLICE COMMISSIONER