



POLICE DEPARTMENT

December 23, 2020

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In the Matter of the Charges and Specifications : Case No.
- against - : 2019-20990
Police Officer Paul Rodriguez :
Tax Registry No. 943750 :
33rd Precinct :
-----X

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

Before: Honorable Josh Kleiman
Assistant Deputy Commissioner Trials

APPEARANCES:

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

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

To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Police Officer Paul Rodriguez, on or about March 22, 2018, at approximately 1919, while assigned to 033 PCT and on duty, in the vicinity of in front of [REDACTED] New York County, wrongfully used force, in that he used a chokehold in that he placed his arms around the front of Person A's neck and applied pressure without police necessity.

P.G. 221-01, Page 3, Prohibition 2

FORCE GUIDELINES

2. Police Officer Paul Rodriguez, on or about March 22, 2018, at approximately 1919, while assigned to 033 PCT and on duty, in the vicinity of in front of [REDACTED] New York County, wrongfully used force, in that he placed his arms around the front of Person A's neck, and restricted Person A's breathing 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 November 24, 2020. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The CCRB called Laura Davis as a witness and entered video footage of the incident into evidence. The alleged victim, Person A did not testify. 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. Having reviewed all of the evidence in this matter, I find Respondent Not Guilty.

ANALYSIS

The following disciplinary matter concerns the actions of Respondent in effecting the arrest of Person A on March 22, 2018; specifically, whether Respondent employed a chokehold upon Person A during the course of the arrest.

POLICE OFFICER PAUL RODRIGUEZFactual Record

It is uncontested that on the day in question Respondent was working a plain clothes detail in an unmarked car with three other members of the service: (1) Police Officer Christopher Ferrara, (2) Police Officer Dwight Powell and (3) Sergeant Jeffrey Balzotti.

At approximately 7:19 p.m., Respondent, who was seated in the backseat behind the driver and dressed in a red hooded sweatshirt and blue jeans, looked out the window of the unmarked vehicle and observed a man and woman arguing. Respondent later identified the man as [Person A] Respondent observed [Person A] push the woman with whom he was arguing. Respondent told the driver of the unmarked vehicle to stop. Respondent then saw [Person A] punch the woman in the face with a closed fist, knocking her down. [Person A] proceeded to lift the woman up by the hood of her sweatshirt, pull the hood over her face, and continue to strike her. The officers, including Respondent, exited their vehicle and approached [Person A] (Tr. 69-72)

Police Officer Powell confronted [Person A] first, asking to speak with him, but [Person A] ran away. Police Officer Powell slipped and fell in the snow while Respondent and Police Officer Ferrara continued the chase. Sergeant Balzotti followed in the unmarked car. [Person A] ran approximately two blocks where he climbed the steps of a brownstone and jumped a gate into the front yard of an adjacent brownstone that was secured from the sidewalk by a tall gate. (Tr. 72-76, 96)

Respondent discovered that the front door to the gated area was unlocked and proceeded through the door. Upon Respondent entering the gated area, [Person A] attempted to escape by

¹ [Person A's] name is misspelled in various exhibits entered into evidence as [Person A]

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climbing the gate. Respondent pulled at **Person A's** waist to attempt to remove him from the gate. This tactic, however, did not work and **Person A** remained on the gate. (Tr. 76-77)

In dispute is what Respondent did next. According to CCRB, Respondent used a chokehold to remove **Person A** from the gate. According to Respondent, he placed his arms around **Person A's** face, not his neck (Tr. 77-81). In support of its contention that Respondent employed a chokehold, CCRB entered a 36-second silent video clip from a surveillance camera positioned over the gated area (CCRB Ex. 1), as well as two snapshots from the video clip (CCRB Ex. 5A & 5B). According to the timestamp on the video, the video clip begins on March 22, 2018, at 19:22:03 hours, and depicts the following:

19:22:03-19:22:10 – **Person A** runs down a sidewalk adjacent to and towards the gated area. **Person A** runs past the gated area. He is being chased by Respondent and Police Officer Ferrara. Respondent is running down the middle of the street and is wearing a red sweatshirt. Police Officer Ferrara is running down the sidewalk and is wearing a black sweatshirt.

19:22:11-19:22:16 – **Person A** climbs over a barrier and into the gated area. Respondent and Police Officer Ferrara arrive at the gated area. Respondent opens a door and enters the gated area. Police Officer Ferrara remains on the sidewalk.

19:22:17-19:22:19 – **Person A** attempts to escape the gated area by scaling a railing and gate adjacent to the stairs of the brownstone.

19:22:19-19:22:22 – Respondent grabs **Person A** by his waist and attempts to pull **Person A** down without success. Respondent grabs the hoodie of **Person A**'s sweatshirt and again attempts to pull **Person A** down without success.

19:22:23-19:22:24 – Respondent places his left arm around **Person A's** head, followed by his right arm. **Person A's** head moves backward and both Respondent and **Person A** fall backward to the ground and off-camera. Police Officer Powell enters the gated area.

19:22:25-19:22:39 – Police Officer Ferrara remains on the sidewalk. Sergeant Balzotti enters the gated area. Respondent and **Person A** remain off camera.

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The CCRB called one witness at trial, Ms. Laura Davis, a neighbor who was able to partially view some of the incident from her fifth floor fire escape across the street (Tr. 30, 48, 58). Ms. Davis candidly stated that she did not remember Respondent having any interaction with **Person A** (Tr. 49-50). She further testified that she did not recall how **Person A** was pulled down from the gate (Tr. 55). Ms. Davis did state, however, that she heard **Person A** shouting “I can’t breathe,” afterwards, when **Person A** was already on the ground (Tr. 33, 38). She admitted, however, that she did not see anyone touching **Person A's** neck area (as charged) when he was repeatedly stating “I can’t breathe,” and that it may have been a “panic attack” (Tr. 38-41).²

CCRB entered into evidence a cellphone video taken by Ms. Davis from her fifth floor fire escape (CCRB Ex. 2). The video does not contain a timestamp. The parties agree that Ms. Davis’s video begins after the first video ends, but could not establish for certain the amount of time that passed between the two videos. CCRB estimated the intervening time to be a “few minutes . . . [m]aybe, two minutes at most” (Tr. 63). Respondent estimated that it was “a minute or two” after **Person A** was handcuffed (Tr. 120-21). Ms. Davis stated that it was only after she observed **Person A** pulled from the gate and she saw a struggle ensue on the ground that she decided to go get her phone, which took her about 30 seconds to retrieve (Tr. 28).

Ms. Davis’s video, with sound, records the following events:

00:00-00:29 – Respondent is outside the gated area on the sidewalk. He briefly walks down the sidewalk with Police Officer Ferrara and then returns to standing on the sidewalk in front of the gated area. On his return, Respondent pulls his badge, which is around his neck on a lanyard, out of his sweatshirt. **Person A** who cannot be seen on camera yet, can be heard periodically shouting “ah” and twice states, “He hit me.” Sergeant Balzotti, wearing a gray hooded fleece jacket,

² Ms. Davis also testified that she believed that **Person A** was punched one time after he was taken off the gate; although she did not see any punch make contact, nor did she say who threw the punch. Respondent, however, was not charged with punching **Person A** and no further evidence of a punch was presented. Nevertheless, Respondent denied punching **Person A** (Tr. 26, 57-58, 80).

exits the gated area with his badge displayed on a lanyard around his neck. Several pedestrians gather on the sidewalk in front of the gated area.

00:30-00:59 - **Person A** is heard stating "I can't breathe," repeatedly. Sergeant Balzotti states to a pedestrian "Alright, enough, enough, you don't know what you're talking about, you have no idea." Sergeant Balzotti gestures to someone in the gated area to come out of the gated area. It is unclear who he is gesturing to.

00:50-00:59 - A zoom feature is used such that **Person A** and Police Officer Powell are now visible on screen in the gated area. **Person A** is lying on his right side with his feet bent. Police Officer Powell attempts to lift **Person A's** upper body off the ground without success. No one else appears to be in the gated area with them. **Person A** twice states, "I need a hospital." An unknown person says, "sit up."

01:00-01:42 - **Person A** resumes repeating, "I can't breathe" and shouting "ah." Respondent appears to be speaking to the pedestrians on the sidewalk, but his words are inaudible. **Person A** is seen lying on his side, rocking back and forth as he is speaking. Police Officer Powell is standing next to him. Respondent turns his attention to **Person A** but remains outside the gated area. **Person A** resumes stating, "I can't breathe." An unknown person states "sit up," repeatedly. An unknown person states, "He doesn't want to sit up." A female pedestrian arrives and repeatedly tells **Person A** to "relax." Police Officer Powell and **Person A** remain in the gated area. Respondent remains on the sidewalk.

While no medical records were presented at trial, a photograph of **Person A** was entered into evidence by CCRB, depicting an injury to the left side of **Person A's** forehead (CCRB Ex. 4). CCRB also entered into evidence a force report prepared by Respondent (CCRB Ex. 3). The report indicates that force was used, specifically "wrestling/grappling," and notes that **Person A** suffered a small laceration to his forehead.

Respondent testified that he did not employ a chokehold; rather, he stated that he brought his left arm around the left side of **Person A's** face and grabbed **Person A's** chin/jaw line with his left hand. He then brought his right arm across the right side of **Person A's** face, placing it between **Person A's** mouth and nose. Respondent stated that he was then able to successfully remove **Person A** from the gate. They both fell to the ground, whereupon

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Respondent released his arms from around **Person A's** head and restrained **Person A** until Police Officer Powell entered the gated area and handcuffed **Person A**. Respondent stated that he had no further interaction with **Person A** after he was cuffed. (Tr. 77-81, 83-84, 86-87, 119-20, 122)

Respondent testified that he believed the injury to **Person A's** forehead was caused by a scrape when **Person A** fell to the ground from the gate (Tr. 83, 93). Respondent entered into evidence **Person A's** mugshot (Resp. Ex. A), depicting a bandage on **Person A's** forehead and no visible injuries to **Person A's** neck. Respondent further testified that he did not observe any injuries to **Person A's** neck area (Tr. 83, 105).

On cross and re-direct examination, Respondent stated that he had no memory of **Person A** stating "I can't breathe," but admitted to hearing it on the video for the "first time" (Tr. 120). Respondent, who is depicted standing only a few feet away from **Person A** when he is stating "I can't breathe," stated that he may have had "tunnel vision"-like concentration on something else, causing him not to hear **Person A's** words.

Findings

The two specifications in this matter arise from the same underlying accusation: that Respondent effected a chokehold upon **Person A**. Specification 1 charges the chokehold itself and Specification 2 charges that, as a result of the chokehold, **Person A's** breathing was restricted.

Specification 1

Person A did not testify and no statements of **Person A** were entered into evidence (Tr. 61, 128-29). No witness, including Ms. Davis, testified that they observed a chokehold and no eyewitness statements on the subject, hearsay or otherwise, were entered into evidence.

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Rather, CCRB appeared to rely on the first video (CCRB Ex. 1) to establish Respondent's use of a chokehold; more specifically, approximately one second in the first video (19:22:23-19:22:24) (Tr. 143-44).

To prove that a chokehold was used, CCRB must prove that Respondent applied pressure to Mr. Grullon's "throat or windpipe, which may prevent or hinder breathing or reduce air intake" (*see* P.G. 221-01, Page 2, Definitions (issued June 1, 2016)).³ The record evidence, including the first video, does not establish by a preponderance of the evidence that Respondent applied such pressure to Person A's "throat or windpipe." I find, instead, that the first video corroborates Respondent's testimony that he pulled back on Person A's head to dislodge him from the gate.

Due to the vantage point of the camera, from a high-angle above Respondent and Person A, if a chokehold had occurred it is more likely than not that some portion of Respondent's hand or arm would have been blocked from view by Person A's chin and/or jawline, which they were not. CCRB's Exhibits 5A and 5B in evidence, which are still images CCRB captured from the relevant second of the first video (CCRB Ex. 1), do not appear to depict Respondent's hand or arm on Person A's neck. In Exhibit 5A, Respondent's left hand appears to be placed against Person A's face, on or near his chin. And his hand is turned outward with four fingers showing. If Respondent's left hand had instead been on Person A's neck, it is more likely than not that a portion of Respondent's left hand would have been hidden underneath Person A's jawline, which is not depicted in the still image. Similarly, in Exhibit 5B, Respondent's arm appears to be placed across Person A's mouth and against the bottom of Person A's nose. If Respondent's right arm had instead been on Person A's neck, it is more likely than not that a

³ This was the version of Patrol Guide Section 221-01 in effect on the incident date. It has since been amended.

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portion of Respondent's right arm would have appeared underneath Person A's chin, which is not depicted in the still image. Accordingly, I find Respondent Not Guilty of Specification 1.

Specification 2

The only evidence presented that Person A's breathing was restricted was by way of Ms. Davis's testimony, corroborated by the video evidence (CCRB Ex. 2), that Person A repeatedly stated, "I can't breathe." Neither Ms. Davis, nor the video evidence, however, are sufficient to establish a connection between Person A's statements and Respondent's actions. Ms. Davis stated that she did not remember Respondent having any interaction with Person A and that Person A could have been having a "panic attack" (Tr. 49-50). Indeed, although the evidence is slight and inconclusive, there is some evidence to support that Person A was having a panic attack, including a pedestrian's repeated suggestion that Person A "relax" and Person A being observed on video to be rocking back and forth despite no one appearing to be causing him to move in this manner. The only injury established in the record was an injury to Person A's forehead, which Respondent credibly testified was likely caused when Person A was brought to the ground and a struggle ensued. Respondent correctly noted this injury in his force report.

Accordingly, having found that Respondent did not employ a chokehold, there is simply no evidence to establish that Respondent restricted Person A's breathing. Accordingly, I also find Respondent Not Guilty of Specification 2.

Respectfully submitted,

APPROVED
FEB 27 2021
[Signature]
DERMOT SHEA
POLICE COMMISSIONER

Josh Kleiman
Josh Kleiman
Assistant Deputy Commissioner Trials