



POLICE DEPARTMENT

January 24, 2023

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In the Matter of the Charges and Specifications :

- against - :

Lieutenant Joel Witriol :

Tax Registry No. 942838 :

Housing PSA 7 :

Case No.

2022-25365

-----X
At:

Police Headquarters
One Police Plaza
New York, NY 10038

Before:

Honorable Rosemarie Maldonado
Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU:

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Civilian Complaint Review Board
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For the Respondent:

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To:

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

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CHARGES AND SPECIFICATIONS

1. Lieutenant Joel Witriol, on or about June 4, 2020, at approximately 2000, while assigned to PSA 7 and on duty in the vicinity of East 136th Street and Brook Avenue, Bronx County, wrongfully used force, in that he kicked [Complainant] in the face with the heel of his boot, 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 2, 2022. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The CCRB entered the hearsay statement of Complainant into evidence. 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 guilty of the charged misconduct and recommend that Respondent forfeit ten (10) vacation days and that he be suspended for ten (10) days.

ANALYSIS

From late May to mid-June 2020, the City experienced an outpouring of citizens who took to the streets to express outrage over George Floyd's murder at the hands of a Minneapolis police officer. These unprecedented protests resulted in large crowds, often unplanned and mobile in nature, which spread across every borough of this City. Adding to the challenges of policing such large-scale demonstrations was the fact that legitimate First Amendment expression occurred simultaneously with criminal behavior, including firebombing, looting and violence toward the police. As a result, from June 1 to June 6, 2020, Mayor de Blasio and

Governor Cuomo imposed a citywide 8:00 p.m. curfew in New York City. Non-exempt personnel who violated the curfew were subject to arrest. It is within this context that the incident at issue in this case occurred.

On June 4, 2020, Respondent was the Integrity Control Officer of PSA 7, working the 4:00 p.m. to midnight shift. Sometime after 5:00 p.m., all uniformed members of service in that unit were ordered to "suit up" and prepare to deploy. Respondent recalled that the Department had shared intelligence with officers that individuals who aimed to start rioting were traveling to the Bronx by bus. They also received reports that the NYPD had detained a vehicle carrying Molotov cocktails. The Department advised all officers to exercise caution. (Tr. 49-52, 65-68, 72)

While still at PSA 7, Respondent received a number of "10-85" radio transmissions from officers in the field who were requesting assistance. Soon thereafter, a "10-13" distress call came through requesting urgent assistance at 136th Street and Brook Avenue in the Bronx.

Respondent described that call as follows:

[I]t was really bad, like numerous officers calling for help. You could hear it in their voice, they are in distress. And, basically, putting over, too, that be careful for cocktails, bottles with urine, feces. They, basically, kept on saying to whoever comes, basically, be careful, watch your back. (Tr. 52-53)

Respondent recounted that after receiving the transmission he "ran" from his office and "jumped" into a RMP, not taking notice of what car he was entering or who was driving. The distress calls continued during the seven-minute drive. He estimated that upon arrival, there were approximately 600 individuals in the area. The scene was chaotic, with residents of a housing development attempting to block protestors from entering. Some in the crowd began throwing items such as socks stuffed with rocks, bottles of urine, mace and "cocktails" at the police. (Tr. 53-56, 67-68)

Respondent was present as the 8:00 p.m. citywide curfew approached. He estimated that at about 7:50 p.m., a chief used a microphone to announce that everyone was "free to leave" the area. Some complied, but many stayed and resisted enforcement of the curfew. Respondent testified that the Strategic Response Group took the lead, but were outnumbered and could not maintain control. He specifically recalled items being thrown at cops and them slipping while struggling to make arrests. During one interaction, a civilian attempted to take an officer's firearm. (Tr. 56-58)

Respondent began assisting with curfew enforcement. Although engaged in police action, he failed to activate his Body-Worn Camera. Nonetheless, it is uncontested that Respondent grabbed Complainant by the arm and swung her around to facilitate her arrest. The sole issue in this case is whether Respondent also kicked her in the face without police necessity as other officers handcuffed her. (Tr. 60-61, 63-64, 69-71, 79)

Complainant did not appear to testify at trial. Instead, CCRB relied on a hearsay statement to present her version of events. On June 26, 2020, a CCRB investigator conducted a telephonic interview of the Complainant -- a 21 year-old female who was 5'3" and weighed 120 pounds. During that interview, she alleged that on June 4, 2020, at approximately 7:30 p.m., she was participating in what she described as a "peaceful protest" near 136th Street and Brook Avenue in the Bronx. It was her recollection that before the 8:00 p.m. curfew, officers refused to let people leave and used force to "trap" or "kettle" them into confined spaces. (CCRB Ex. 10 at 4, 16-17, 25-27, 33-34).

Complainant told CCRB investigators that a police supervisor "yanked" her out of the crowd as she was holding hands with other protestors and "slammed me down on my knees" "into a swarm of officers." She stated that instead of "verbally addressing me to put my hands

behind my back,” the officers struck her with batons as she was zip tied. Complainant asserted that although she was “compliant,” she “was kicked in the face by the sergeant¹ who dragged me out of the crowd of protestors.” (CCRB Ex. 10 at 17-18) Later in the interview, Complainant elaborated that her knees were “kicked in” before falling to the ground. As she kneeled with her body “tilted upwards,” she was “kicked in the face.” Complainant explained that the kick landed on her right eye and cheek. Respondent did not say anything after that and “just left.” Complainant added that officers continued to strike her head and back with batons and that she might have briefly “blackened out.” (CCRB Ex. 10 at 18-19, 45-47, 51-52).

During the interview, Complainant also told CCRB that she suffered “pretty severe” injuries, including a black eye and a large cut on her nose. She also recalled a “boot print scab” on her face. (CCRB Ex. 10 at 5-6, 19) Because Complainant thought she might have a concussion, she sought medical help from the NYPD. Records in evidence detail that an ambulance transported Complainant to Lincoln Hospital at 11:44 p.m. Fire Department documents note that Complainant was ambulatory, but had “a contusion to the nose,” “pain” in the neck and head, and “bleeding” that was eventually “controlled.” (CCRB Ex. 9 at 1) Screenshot images of Body-Worn Camera footage show Complainant in an ambulance and confirm that, as she was being transported, she had a “black eye” and cut on her nose. (CCRB Ex. 6B)² Lincoln Hospital medical records reported her claim that she was “hit” and “kicked” by the police. Their medical findings include a “scalp hematoma,” as well as injuries to the right eye and nose. (CCRB Ex. 8 at 4, 6) Specifically, the records note that:

¹ Complainant explained to the investigator that she believed it was a sergeant because “the sergeants were wearing white shirts” and the other officers around her “were all wearing black shirts.” (CCRB Ex. 10 at 28) It is clear that Complainant’s assumption about Respondent’s rank is incorrect. There is no dispute that Respondent pulled Complainant from the crowd, that he was a lieutenant at the time of this incident and that members of service in the rank of lieutenant and above wear white shirts, not sergeants.

² This tribunal notes that these photographs also depict Complainant’s facial tattoos.

Pt BIBEMS³ in NYPD custody. Pt reported that she was at the protest when she was shoved to the ground and kicked in the head. Pt noted with abrasion to R side of nose, R infraorbital ecchymosis/abrasion, and bruising to bilateral lower forearms. Pt reported LOC for approximately 3 min. No battle sign noted... (CCRB Ex. 8 at 3)

The attending physician ordered a CT scan; the results were negative. (CCRB Ex. 8 at 6; CCRB Ex. 10 at 9) The hospital gave Complainant Tylenol for pain control and released her into police custody at 0219 hours the following morning. (CCRB Ex. 8 at 6)

At trial, Respondent testified that police told protestors that they would be arrested if they refused to disperse before the 8:00 p.m. curfew. According to Respondent, Complainant did not comply and then resisted arrest by failing "to give [her] hand" when an officer grabbed it. He further recounted that she pulled her hand back and was "kicking." While attempting to effectuate the arrest, Respondent witnessed individuals to his left attempt to toss a wheelbarrow at them. He also claimed that he was sprayed with mace coming from both officers and civilians. (Tr. 59-60, 79)

According to Respondent, his physical contact with Complainant was limited to grabbing her by the arm and swinging her around in order to arrest her. He indicated that after he was maced, other officers stepped in. Respondent emphatically denied intentionally kicking or stomping Complainant in the face or head. He acknowledged that Body-Worn Camera footage captured him leaning forward with his leg moving toward Complainant. Respondent asserted, however, that as he interacted with Complainant, he rubbed his eyes and at that moment "slipped on something." Another officer "held me up, pushed me back..." and kept him "from falling." When asked during cross examination whether he had told CCRB at his interview that his foot may have made "contact" with Complainant, he responded, "Not kicked her, lost balance and

³ BIBEMS is acronym for "brought in by emergency medical services."

made contact with her Nothing on purpose over there, if anything.” He also acknowledged that he had not mentioned being maced during his CCRB interview, but explained that his recollection was refreshed after repeatedly watching the video. (Tr. 61-62, 64, 82-84, 90-91)

The primary issue raised by the proof in this case is whether Complainant’s hearsay statement is sufficiently reliable to support a finding that Respondent used excessive force. For the reasons set forth below, this tribunal concludes that the entirety of the record supports a finding that Respondent kicked Complainant without police necessity.

First, I credit Complainant’s hearsay statement that Respondent was the member of service who injured her. It is well-established law that although hearsay is admissible in an administrative tribunal, it must bear sufficient indicia of reliability to be accorded probative weight. *See* Disciplinary Case No. 2014-11948 (May 27, 2015), citing *Ayala v. Ward*, 170 A.D.2d 235 (1st Dep’t 1991). In cases where a charge is based primarily on hearsay, the out of court statement is deemed sufficiently reliable only if it is detailed and corroborated and ‘so substantially reliable and probative that a reasonable inference of the existence of a fact may be culled therefrom.’” Disciplinary Case No. 2018-19483 (April 29, 2021), quoting *Police Dep’t v. Ayala*, OATH Index No. 401/88. (Aug. 11, 1989); *see also Dep’t of Envtl. Prot. v. Ginty*, OATH Index No. 1627/07 (Aug. 10, 2007). Complainant’s hearsay statement meets this standard.

I read the transcript and listened to the audio recording of CCRB’s telephonic interview of Complainant. I found her account to be detailed, consistent and entirely convincing. She repeatedly asserted, in a clear and direct manner, that the supervisor in the “white shirt” who grabbed her arm and pulled her out of the crowd was also the member of service that kicked her in the eye. Neither her tone nor the manner in which she answered questions gave any indication that she was fabricating this claim. On the contrary, Complainant seemed to be making an effort

to provide the most accurate information she could under the circumstances. For example, when asked whether she was able to identify any officer by name, Complainant told the investigator that she only had the name of the officer who escorted her to the hospital. She quickly emphasized, however, that that officer “didn’t do anything wrong.” (CCRB Ex. 10 at 35) Complainant was also honest about not being able to provide certain details. She candidly stated that she might have “blacked out” and thought she could have a concussion, but openly acknowledged that the CT scan was negative. In addition, Complainant submitted a photo identifying Respondent as the officer who kicked her. (CCRB Ex. 11)

Second, Complainant made a contemporaneous statement as to how she was injured just hours after this incident. As noted in detail above, she reported to medical personnel at Lincoln Hospital that she was “hit” and “kicked” by the police. In addition, the medical records, and photos introduced into evidence, corroborate the nature and extent of the injuries she described to CCRB during her interview. In sum, there is convincing documentary to support that she did not embellish her statement to the CCRB.⁴

Third, Body-Worn Camera footage from various officers support Complainant’s claim that Respondent is the officer that kicked her. The videos in evidence briefly capture the chaotic scene and this specific incident from two different angles. The following is a summary of the relevant segments of the Body-Worn Camera footage entered into evidence:

CCRB Ex. 3:

- 0:27:39: Respondent grabs Complainant and swings her away from the fence and onto the ground. A female voice says, “Let me go home.” A male voice repeats, “Get on the ground”

⁴ In making this credibility finding I acknowledge that Complainant stated she had a civil lawyer and that this might serve as a potential motive to embellish facts. During her CCRB statement, Complainant also made some unflattering comments about the NYPD. Given the totality of evidence, however, I am not persuaded that any of these potential credibility issues are strong enough to undercut her corroborated account of what occurred in this case.

- 0:27:45: Multiple officers hunch over to zip tie arrestees

CCRB Ex. 1

- 0:27:45: An officer says, "Stand up, Stand up" to an unknown individual
- 0:27:45: Respondent is hunched over Complainant. An indeterminate shadow seems to briefly pop up and then recede
- 0:27:50: Respondent stands upright
- 0:27:51: Respondent leans forward and steps forward
- 0:27:51: A police officer uses his right hand to push Respondent away from the scene. Respondent walks away

Upon careful review of these brief video segments, this tribunal concludes that they captured the moment Respondent moved his leg to kick Complainant. In fact, as noted above, Respondent acknowledged that the Body-Worn Camera recorded him leaning forward and moving his leg toward Complainant. He also acknowledged at trial that an officer pushed him back. The most logical inference that can be drawn from this evidence, and the entirety of the record, is that Respondent injured Complainant by kicking her in the eye and that a fellow officer observed this unnecessary force and interceded.

Fourth, Respondent's explanation that his admitted actions were not intentional do not correspond to the video recordings. Respondent claimed that as he grabbed Complainant, he was maced, "rubbed" his eyes and "slipped on something," making any subsequent contact with Complainant accidental. As brief as the video segments are, they do not depict Respondent, or any other officer, wiping their eyes. In addition, Respondent steps purposefully and is in command of his own body. Moreover, his assertion that a police officer pushed him back to keep him "from falling" is not supported by the type of motion used. In short, Respondent's version of events defies logic.

Accordingly, this tribunal finds that Respondent is guilty of the charged misconduct.

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent's employment history also was examined. *See* 38 RCNY § 15-07. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

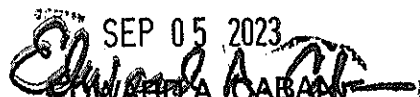
Respondent, who was appointed to the Department on July 20, 2006, has been found guilty of kicking a civilian in the eye without police necessity. The CCRB has recommended a penalty of 10 vacation days and 10 suspension days, representing the presumptive penalty for non-deadly force resulting in physical injury. The tribunal finds that this recommendation fairly and adequately addresses Respondent's misconduct during this incident. Accordingly, I recommend that Respondent forfeit ten (10) vacation days and that he be suspended for ten (10) days.

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

SEP 05 2023

EDWARD A. CABAN
POLICE COMMISSIONER