



POLICE DEPARTMENT CITY OF NEW YORK

June 23, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Tracey Duncan
Tax Registry No. 938409
Critical Response Command
Disciplinary Case No. 2015-13917

Charges and Specifications:

1. Said Police Officer Tracey Duncan, on or about February 1, 2014, at approximately 1800 hours, while assigned to the 71st Precinct and on duty, in the vicinity of [REDACTED], Kings County, did wrongfully use force against Person A in that he struck Person A in the head with an asp.

P.G. 203-11 – USE OF FORCE

Appearances:

For the CCRB: Vanessa McEvoy, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondents: Craig R. Hayes, Esq.
Worth, Longworth & London LLP
111 John Street, Suite 640
New York, NY 10038

Hearing Dates:

March 4 & 24, 2016

Decision:

Not Guilty

Trial Commissioner:

ADCT David S. Weisel

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on March 4 and 24, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The CCRB called Person B as a witness and presented the CCRB interview transcripts of Person A and Person C. Respondent called Lieutenant Luis Machado and Police Officer Christine Damico as witnesses, and 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 Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

Most of the facts in this case are not disputed. On the evening of February 1, 2014, Respondent and Police Officer Christine Damico were assigned to the 71 Precinct as the domestic violence officers. They both were in uniform. Lieutenant Luis Machado was assigned as the special operations supervisor on that date, working in plainclothes (Tr. 40-41, 49-50, 123, 149).

A woman named Person B walked into the precinct and stated that she had been robbed and beaten up by her boyfriend, Person A. The three officers interviewed Person B, who reported that Person A had hit her, and showed the officers bruising on her face. She also showed them a photo of Person A and indicated that he could be found at a barbershop located at [REDACTED] [REDACTED] or at a room he was renting across the street. Respondent, using Department databases, looked up Person A's criminal background, which showed several felony arrests and three outstanding burglary warrants. Machado directed two anticrime officers to the apartment,

and accompanied Damico and Respondent to the barbershop (Tr. 20-23, 33, 38-39, 50, 53, 124, 150-51; Respt. Ex. D, Internal Affairs Bureau worksheet excerpt listing arrest history).

Upon arriving at the barbershop, the officers immediately identified a man they believed to be Person A based off the photo Person B had shown them. Machado asked Person A for his name and then quickly moved to handcuff him. A struggle ensued with Person A on the ground and Machado on top of him. Respondent took out his expandable baton (also known as an asp or ASP due to the genericized trademark of a major manufacturer) and began striking Person A on the legs (Tr. 55-57, 60-61, 70, 95, 124, 126, 134, 145, 147, 155).

A cell phone video taken by Person C (CCRB Ex. 2), a friend of Person A that was present in the barbershop, depicted what happened next:

- 0:01-0:04: Machado, in the dark hat and red hoodie, is lying on top of Person A, who is moving around on the floor. Damico stands behind Machado's head with her handcuffs in hand and repeatedly yells, "Stop." Respondent stands near Machado's feet and strikes Person A in the legs with the expandable baton four times while holding his handcuffs in his other hand.
- 0:05-0:08: Machado loses his grip as Person A begins to turn over and sit up while continuously moving his legs in Respondent's direction. Damico leans down and reaches toward Person A before backing away. Respondent continues to strike Person A's legs. At one point, Person A attempts to grab the end of Respondent's baton, and kicks at either Respondent or Machado.
- 0:08-0:10: Respondent continues striking Person A's legs with the expandable baton, and then steps forward and swings again. As the arc of the baton comes down, Person A moves to his right with his right arm extended. It is unclear where exactly the baton lands on Person A's body. Machado then looks at Respondent and appears to briefly say something. Respondent starts to swing the baton again but stops before striking.
- 0:10-0:20: A male voice is heard saying, "Oh, he hit him in the face." Damico yells, "Tell him to stop," appearing to be speaking to others in the barbershop who are not seen on the video. Person A is moving significantly less on the floor and covers his head with his arms. Machado keeps two hands on top of Person A, holding him down. A male voice is heard again, saying, "You can't hurt the boy like that . . . Just cuff him, don't hit him no more."
- 0:20-0:35: Machado lies on top of Person A. At one point, Respondent leans over them, appearing to look down at Person A. Damico again yells, "Just tell him to

stop,” and the male voice can be heard saying, “Just cuff him. Just cuff him.” Two other officers, one in a red hoodie and one in a gray jacket, come into the frame and attempt to assist in cuffing Person A. At 0:30, Damico can be heard saying, “He took my cuffs,” and at 0:37, stating, “He has the cuff in his hand.”

- 0:44-0:51: A female voice is heard stating, “Hello, I’m a family member, what’s going on?” Person A then is handcuffed.

Hospital records indicated that Person A arrived at the hospital in police custody at 1200 hours on February 2, 2014, with numerous complaints: right hand pain, swelling to right bicep, swelling to both wrists, right rib pain, cuts, lacerations and swelling to both legs, and abrasions to his right arm. Person A reported that he was hit in the head with a “nigh[t]stick,” which had caused lightheadedness at the time. The examination revealed a one-centimeter curvilinear laceration to Person A’s left parietal scalp. One staple was placed in said “scalp wound.” Person A was discharged back into police custody and advised to follow up in a week for suture removal (CCRB Ex. 1, pp. 2, 7-8, 11-12).

In dispute is whether Respondent struck Person A in the head with the expandable baton and, if he did, whether that was a wrongful use of force. Although Person B testified, she was not present at the barbershop. Neither Person A nor Person C appeared at trial. Counsel represented that Person A currently is incarcerated in state prison for unrelated felony charges until 2025. It also was noted that Person A has a lawsuit pending against the City and Respondent in connection with this incident, and that his attorney did not wish to have him testify in this proceeding. Person C had work on the day of trial and declined to appear. The CCRB telephone interview transcripts of Person A and Person C were presented as evidence (Tr. 43-45).

Person B did not recall telling the police that Person A carried a gun. She did tell them that he called her and said, “I am going to air your shit out,” meaning he was going to shoot her. While Person B knew that Person A had a pending court date, and told the officers he had been arrested in

the past, she did not know he was facing significant prison time or had outstanding warrants (Tr. 31, 35-37).

Person B testified that when she saw Person A entering the precinct, there was blood leaking down one side of his face (Tr. 25-26). The black DVU officer, Respondent, told Person B, "[W]e got him back for you." Weeks later, she had a conversation with Person A where he told her, "They whooped my ass because of you." He showed her a small bruise on his knee (Tr. 25-26, 28-30).

Person A spoke with a CCRB investigator by telephone on April 1, 2015, fourteen months after the incident. Person A recounted that he was getting off work at the barbershop when officers approached him and an officer in plainclothes asked his name. When Person A asked, "what for," the officer told him to put his hands behind his back. Person A stated that he again asked why and the officer in plainclothes grabbed his arm and flung him to the floor. Person A estimated that there were three officers on him while he was face down. One officer, a heavyweight, tall dark-skinned man (Respondent), hit Person A with a "nightstick." Person A denied resisting. He could not recall exactly how many times he was struck with the stick but suggested it was a couple of times in the head. After his arrest, he had to receive stitches in both legs and a staple in his head (CCRB Ex. 3b, Person A interview transcript, pp. 5, 8-13).

Following the conversation with Person A, the CCRB contacted Person C by telephone after Person A mentioned him as a witness. Person C recalled that a black and a "Mexican" officer came into the barbershop where he and Person A were working. He recalled that "they asked [Person A] for his name, he asked why, and they just jumped on top of him." He also asserted that Person A was hit with a nightstick or asp several times, including once in the head. Person C contended that Person A could not do anything to resist or fight back as the many officers on top of him just kept beating him (CCRB Ex. 4b, Person C interview transcript, pp. 2-3, 6-7).

Machado, Damico and Respondent provided a markedly different narrative. According to the officers, Person B reported that Person A "doesn't want to get caught because he is already running away from a warrant that would give him seven years," and was known to carry a gun. Upon arrival at the barbershop, Machado recalled, Person A provided a false name. Machado was confident that the man was Person A and attempted to handcuff him. Machado stated that when he went to grab Person A's wrist, Person A ran toward the back of the shop, and then turned around and swung at him. Damico did not see this. Machado chased and then bear-hugged Person A, telling him to stop resisting, and forced him to the ground, causing them both to fall. Person A kept his hands under his chest, heightening Machado's concern about a possible weapon, and continued to fight, telling Machado he "wasn't going in." Damico stood behind Machado, yelling at Person A to stop. She testified that she warned Machado she had dropped her handcuffs and they were within Person A's reach. Machado recalled hearing her yell, "[H]e has my cuffs" and Person A gripping them with both hands. Machado repeatedly tried to pull Person A's arm from under Person A's body without success and became tired. He lost his grip, allowing Person A to turn his entire body around and almost break free, but Machado "scrambled," grabbing Person A by the waistband to get him down again. Person A had not stopped resisting or fighting (Tr. 52, 55-63, 70, 72-75, 102, 125-26, 128-29, 135-37, 145, 147, 151).

Machado testified that he had no recollection of somebody indicating Person A had been hit in the face and did not recall seeing him bleeding from the head. He agreed, however, that he told IAB, "What I saw is that he struck like three times in the legs. Somebody screamed face, but he never actually hit the face." Machado suggested that when he almost lost his grip on Person A, Respondent almost hit him in the face because Person A was turning his body. Machado asserted, however, that the strike did not connect to Person A's face. Instead, he said, it accidentally struck Machado's arm. He acquiesced, however, that shortly after someone yelled

"face," Person A stopped actively moving around. Machado then directed Respondent to assist with handcuffing and Respondent ceased using the baton. Person A, however, still refused to give his arm to be handcuffed and was not cuffed until other officers arrived and forcefully grabbed each arm. Machado stated that he would not have been able to secure and handcuff Person A on his own (Tr. 63-64, 76-79, 91, 108-14, 164).

Damico testified that she did not recall injuries to Person A's face but agreed that she had indicated to CCRB investigators there was "maybe some injury to his face." She contended that she was unaware of how his face was injured. When they returned to the precinct, she spoke with Person B and did not hear Respondent make any statement to the effect of "We got him back for you." Respondent denied saying this as well (Tr. 140-44, 170).

At the barbershop, Respondent recalled, he tried to grab Person A's hand to assist Machado in cuffing him but when he was unable to do so, he took out his expandable baton and began striking Person A in the legs. He did not think of getting on the ground with Machado and Person A because more people were coming into the barbershop and it would not have been safe to have his back turned entirely. He also pointed out that pepper spray would have been inappropriate because it was a small space and everyone inside might have been affected (Tr. 134, 154-55, 162).

Respondent asserted that Person A did not comply after the first couple of strikes but he continued striking in quick succession in the hopes that he would comply. He stopped using the baton when Person A stopped resisting. When more officers entered the barbershop, they were able to gain control of Person A. Respondent denied striking Person A in the head or aiming for his head. It was possible that, because Person A was moving around the floor, he inadvertently struck Person A's head when he stepped forward and swung the baton as Person A rolled over. Respondent maintained, though, that he still was only aiming for the upper part of Person A's leg as he stepped

forward. He agreed that after the final time he struck with the baton, he went to take another swing but stopped himself. Respondent was unsure why he stopped himself but thought that he might have realized he was at a bad angle to strike “an appropriate location to the body” (Tr. 155-56, 163, 167, 175-77).

Having carefully considered all of the evidence and testimony, the Court finds that Respondent’s actions did not constitute actionable misconduct. The most accurate reflection of what occurred in the barbershop is the cell phone video. The CCRB commendably conceded that “some force had to be used” to effectuate Person A’s arrest (Tr. 194). This undoubtedly was a potentially dangerous situation. A background check had revealed that Person A had outstanding warrants and a lengthy violent arrest history. Person B indicated to the officers that Person A threatened to shoot her. Although the CCRB argued that Person A did not actually have a weapon and that this was not a “life-or-death struggle” (Tr. 195), the fact is that Respondent and his partners did not know that in the moment. Moreover, as Damico pointed out, a barbershop was full of numerous objects that could be used as weapons (Tr. 129). There was a crowd of onlookers as well.

It was alleged that Respondent, in the throes of this chaotic scene with a resisting felon, took a “deliberate step towards Mr. Person A’s upper body” and then intentionally struck with the expandable baton (Tr. 194, 200). Though it was conceded that the video does not reveal a strike to the head, the CCRB asserted that the laceration to Person A’s scalp and the aghast statement “he hit him in the face” establish that Person A was struck in the head. The Court agrees that it is likely the baton did strike Person A in the head or face. The baton appears to land somewhere about the head, though it was unclear exactly where, and the laceration, though small in size, is consistent with the baton hitting his scalp.

The tribunal, however, does not share in the CCRB's view that the strike was wrongful or deliberate. Here, the strike occurred at perhaps the most dangerous and tense point in the altercation where Machado appeared to have lost his grip. Person A had turned over entirely and was sitting up and moving about the floor. As a result of these unanticipated movements, Respondent, who had been aiming consistently for Person A's lower body, inadvertently struck Machado in the arm or shoulder and Person A in the head as both turned their bodies while he swung. In fact, the video shows that Person A was moving toward the right while Respondent swung the blow in question, making his upper body a wider target.

The lack of an intent to strike the head or injure Person A is further supported by the next few seconds of the video, in which Respondent stopped himself from striking Person A. He assessed the situation and saw that he was no longer able to use the expandable baton as he had been, and that Person A was under control. This tribunal does not view the strike in question as wrongful but merely an unintended result of Person A turning over and quickly moving in an attempt to break free from the officer that was trying to cuff him.

The Court is also unpersuaded by the assertions that Respondent should have employed means other than the baton to subdue Person A, as the baton itself was not leading to compliance. As Machado and Respondent credibly testified, pepper spray would have incapacitated everyone, and wrist restraint tactics or Respondent joining Machado in wrestling Person A would have been problematic given the number of people gathered in the barbershop. While there was testimony from the officers of their training that baton strikes should avoid the head, as impacts there can result in serious injury or death, there is no persuasive evidence Respondent was aiming for the head (Tr. 63, 79-81, 90, 99-103, 105-06, 108, 110, 174, 176-77, 220).

The Court notes that IAB conferred with the Recruit Training Section on this matter. The commanding officer of RTS noted, in a memorandum dated February 4, 2015, that three

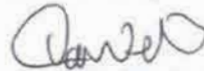
members assigned to RTS viewed the video and found it to be “consistent” with recruit training given in the Police Academy (see Respt. Ex. B, RTS memorandum; Exs. A & C, IAB closing report and worksheet noting recommendation that Respondent be exonerated on IAB’s excessive-force allegation).

Finally, Person B testified that, when the officers returned to the 71 Precinct with a bleeding Person A in custody, Respondent told her, “[W]e got him back for you.” The CCRB asserted that this statement “explains motive and why [Respondent] was so out of control” (Tr. 205). Respondent denied saying anything to this effect and Damico recalled hearing no such statement. In any event, if the statement was made, the tribunal does not find it probative on the issue of Respondent’s motive. It does not prove that he intended to injure Person A or use excessive force. At most, it was an acknowledgement that Person A received an injury, just as he had injured her.

The Court does not credit the hearsay accounts of Person A and Person C that Person A never resisted or fought with the police. For one thing, the video shows otherwise. But more than that, to the extent the video does not show the origin of the encounter, neither Person A nor Person C appeared to testify at trial and therefore were not subject to the scrutiny of cross examination. The court would have benefitted from an opportunity to observe their demeanor while recounting the events in question at trial and hearing their responses to cross examination. This is particularly problematic as it was represented that Person A has a pending lawsuit against the City and Respondent in connection with this incident. His non-appearance was not simply because he currently is incarcerated in state prison. Person A’s attorney advised him not to appear here, in what can reasonably be described as a desire not to have Person A make statements that could be used against him in the civil litigation. Moreover, Person A did not speak with the CCRB until nearly a year after the incident, raising more questions about his motives for initiating this complaint and the accuracy of his recollections over time.

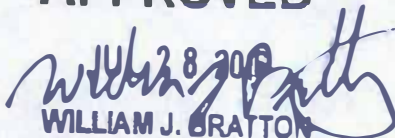
In sum, the credible evidence, including the video of the altercation, does not support a finding that Respondent wrongfully used force against Person A. Person A was doing all he could to prevent being handcuffed and this Court finds that the strike and resultant injury to his head were the unintended consequence of this resistance. Accordingly, Respondent is found Not Guilty.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED



WJB 28 2019
WILLIAM J. BRATTON
POLICE COMMISSIONER