



POLICE DEPARTMENT CITY OF NEW YORK

October 13, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Victor Charles
Tax Registry No. 941538
Gang Squad Bronx
Disciplinary Case No. 2015-14488

Charges and Specifications:

1. Said Police Officer Victor Charles, on or about February 6, 2015, at approximately 2130 hours, while assigned to 23rd Precinct and on duty, in the vicinity of [REDACTED] New York County, placed George Vasquez into a chokehold.
P.G. 203-11 - USE OF FORCE

Appearances:

For CCRB-APU: Suzanne O'Hare, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

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

Hearing Date:

August 17, 2016

Decision:

Guilty

Trial Commissioner:

ADCT Jeff S. Adler

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on August 17, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. CCRB called George Vasquez as a witness, and introduced videotape footage of the incident. 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, I find Respondent guilty of the charged misconduct.

FINDINGS AND ANALYSIS

This case involves an encounter between Respondent and George Vasquez inside the vestibule of [REDACTED] in New York County. At about 2130 hours on February 6, 2015, Respondent followed Vasquez inside his apartment building for the purpose of arresting him for assaulting Person A. It is alleged that during the apprehension, Respondent used his asp to place Vasquez in a chokehold.

Vasquez, who was on parole at the time of the incident, testified via video from [REDACTED] Correctional Facility. Vasquez is serving time based on a felony criminal contempt plea in connection with this incident, as well as a parole violation. Vasquez admitted having prior convictions for robbery (where he displayed a replica gun and stole jewelry) and criminal possession of a controlled substance. He also acknowledged that he has a pending lawsuit against the police department in connection with this incident.

Vasquez testified that after a long day of work he was in front of his apartment building with Person A and [REDACTED]. According to Vasquez, he and Person A, [REDACTED]

██████████, were arguing over ██████████. He denied he was physical with Person A, claiming they merely had a "little debate". (Tr. 12, 53, 55)

As Vasquez entered the building with the intention of going up to his apartment, two officers followed him into the vestibule. Vasquez denied trying to prevent them from entering. After the police entered the building, Respondent placed Vasquez against the vestibule wall and repeatedly questioned him about Person A and ██████████, and where he was coming from. Vasquez admitted that he became upset and frustrated with the officers for repeating the same questions to him. Person A and ██████████ remained just outside the doorway. (Tr. 12, 18, 29-30, 50, 75)

Vasquez testified that after additional officers arrived, Respondent placed his asp over Vasquez's neck and pulled him backwards and down to the floor. The witness demonstrated how the asp was placed across his throat area, under his chin, and described how Respondent "choked (him) down to the floor." As it was happening, Vasquez felt pain to his neck and couldn't speak or breathe. While he was down on the floor, officers took turns hitting Vasquez about his body, even though he never resisted. (Tr. 17-18, 76-77)

As a result of the incident, Vasquez claimed to have suffered bruising under his neck. (Tr. 19) He also suffered other injuries while he was down on the floor, notably a wound to his right temple that required stitches. (Tr. 31) Medical records from ██████████ Hospital ██████████ (CCRB Ex. 3) confirm that Vasquez had a superficial laceration to his right temple. There is a notation on the second page that Vasquez denied suffering neck pain. The records also indicate that Vasquez had "alcohol on breath", though Vasquez testified that he had not been drinking. (Tr. 73) According to the records, EMS had to wait for ESU to arrive before treating Vasquez because the patient was uncooperative and violent. Vasquez stated that he took a photograph of

the bruise to his neck after he was bailed out from jail about two or three days later. (CCRB Ex. 1) (Tr. 20-21) A black-and-white mugshot of Vasquez from February 6, where no neck injury is visible, was also admitted. (Resp. Ex. A).

The parties stipulated that a police report was prepared reflecting an IAB interview with Vasquez at the hospital after the incident. According to the report, Vasquez told police that he and Person A had been arguing because Person A had been out drinking with her girlfriends. Further, Vasquez told police that Respondent was afraid to arrest him without back-up. The report also states that Vasquez told police he was afraid he'd lose his job if locked up since he was on parole. (Tr. 45-46, 82)

Respondent testified that while he and his lieutenant were on patrol, he noticed Vasquez and Person A grabbing and pushing each other in front of the building, and he saw Vasquez hit her in her face area with a closed hand. Respondent parked his car, and he and the lieutenant approached. Vasquez retreated inside the building and tried to hold the door shut against the police, but Respondent wedged his asp in the doorway preventing the door from shutting. Respondent entered the vestibule, placed Vasquez against the wall, and told him not to move, while the lieutenant radioed for back-up. Respondent also told Vasquez that he was under arrest and to place his hands behind his back, but a belligerent Vasquez refused to comply. It was Respondent's intention to arrest Vasquez for the assault he observed. (Tr. 88-89, 94-97)

While they were waiting for back-up to arrive, Vasquez continued to refuse to place his hands behind his back. According to Respondent, Vasquez forcefully pushed back off the wall and said, "Let's do this," which Respondent interpreted as a readiness to fight. Respondent still had the extended asp in his hand, since he was unable to retract it at that time. After a couple of minutes, back-up arrived, and Officer Carney joined them in the vestibule. (Tr. 98, 100, 103)

Respondent testified that he told Officer Carney that he was going to take Vasquez down in order to handcuff him. By taking Vasquez to the floor, Respondent explained, they would have greater control of the subject. Respondent then proceeded to pull Vasquez down to the floor where, after a struggle, Vasquez was placed in handcuffs. Specifically, Respondent insisted he grabbed Vasquez by the shoulders and pulled down and back to get him to the floor. Respondent acknowledged he still had his asp in his right hand, but maintained he did not use it to effect the takedown, and did not bring the asp into contact with Vasquez's neck, stating "at least I don't recall ever holding the asp in a loop kind of - to put any kind of force. I am grabbing his shoulders, grabbing him to come down to the ground." (Tr. 105-107, 115, 119)

After the arrest, Vasquez was brought to the precinct, where his behavior was so belligerent that EMS could not treat him. ESU came and "burrito-wrapped" Vasquez because he was so agitated and hostile, before taking him to [REDACTED] Hospital. (Tr. 109)

Section 203-11 of the Patrol Guide, which deals with the use of force by members of the service, emphatically declares that EXCESSIVE FORCE WILL NOT BE TOLERATED. All members of the service at the scene of a police incident are required to "use minimum necessary force." The section provides further guidance by stating that members of the Department will NOT use chokeholds. A chokehold "shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air."

This definition of what constitutes a chokehold focuses on the conduct itself rather than the intention of the officer. If an officer exerts pressure on a person's throat or windpipe in the manner proscribed, that officer will have run afoul of the guidelines, and be subject to discipline. Here, after considering the testimony of Vasquez and Respondent, and after reviewing the video

footage, this tribunal is persuaded, by a preponderance of the credible evidence, that Respondent did use his asp to place Vasquez in a chokehold.

Counsel for Respondent raised many valid credibility issues in connection with Vasquez, including his criminal history and his pending lawsuit against the police department. This tribunal agrees with counsel that Vasquez gave untruthful testimony regarding much of the surrounding circumstances. He minimized his altercation with Person A, minimized his efforts to keep the police from entering the vestibule, minimized his resistance to Respondent inside the vestibule, and minimized his belligerent and aggressive behavior afterward. Respondent, in contrast, was detailed and professional and presented well as a witness, though this tribunal is mindful that he has a clear interest in the outcome of this matter. The question, then, is whether there is sufficient corroboration of Vasquez's claim that Respondent used a chokehold against him.

The medical evidence isn't particularly helpful, and the photographs are inconclusive as well. However, the video footage from inside the vestibule provides valuable insight into what occurred during this encounter. (CCRB Ex. 2) At 21:22:30, Vasquez enters the vestibule for the first time, but then exits 19 seconds later. At 21:23:29, he re-enters, and appears to be pulling the door shut behind him; an object that Respondent identified as his asp can be seen wedged in the doorway keeping the door from shutting. Respondent enters at 21:23:45 and places Vasquez against the wall. During the next minute-and-a-half, Vasquez essentially remains facing the wall, though he continues to move his arms and body in different directions in a way that suggests non-compliance with Respondent's instructions not to move and to place his hands behind his back.

More significantly, at the 21:25:41 mark, the takedown occurs. Respondent still is holding the asp in his right hand, while his left hand is holding the back of Vasquez's shirt. Respondent testified that he grabbed Vasquez by the shoulders, but it appears in the footage that Respondent raises his right hand with the asp in it, bypasses Vasquez's right shoulder, and places the asp across Vasquez's throat. At the same time, Respondent's left hand releases its hold on the back of Vasquez's shirt, and appears to move around to Vasquez's left side. With the asp across Vasquez's throat, Respondent pulls back and down and brings Vasquez to the floor.

This video footage, combined with Vasquez's testimony, establishes that Respondent did place his asp to Vasquez's throat and applied pressure, which may have prevented or hindered Vasquez's breathing or reduced his intake of air. Such conduct constituted a chokehold as defined by the Patrol Guide, and I find Respondent guilty.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 10, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB recommends that Respondent forfeit thirty (30) vacation days. Under the totality of the circumstances presented here, that recommendation is somewhat excessive. On the one hand, this tribunal remains mindful of the serious nature of chokehold offenses, which is underscored by the Patrol Guide's emphatic prohibition against their use. There needs to be some accountability here, but the penalty must be a measured one, taking into account Respondent's history as well as the particular circumstances in which the chokehold was used.

The chokehold in this case was used against an individual who was resisting a lawful arrest. Respondent had just witnessed Vasquez hit Person A in the face with a closed hand, and now Respondent and Vasquez were inside a small vestibule. Despite Respondent's instructions not to move, Vasquez continued to move his arms and body about, and refused to place both hands behind his back. Although he denied that he had been drinking, the medical records indicated that Vasquez had alcohol on his breath. At one point, Vasquez said to Respondent, "Let's do this," which Respondent reasonably interpreted as Vasquez preparing to fight. None of these surrounding circumstances justified Respondent's use of a chokehold here, and he is guilty of the charged misconduct. But they do provide some context for assessing the officer's actions when determining an appropriate penalty.

In *Disciplinary Case No. 12925/14* (February 16, 2016), a 21-year officer with two prior disciplinary cases forfeited fifteen (15) vacation days for using a chokehold on an individual. There, like here, the individual was resisting arrest, though in that case there were other people physically intervening in the officer's attempt to handcuff the individual. In *Disciplinary Case No. 73100/98* (February 17, 2000), a highly rated lieutenant with 15 years on the force forfeited fifteen (15) vacation days where he approached a man he suspected of possessing a firearm and grabbed him by the throat; the lieutenant also unholstered his firearm and threatened the individual.

Respondent, who has been with the Department for 10 years, has no disciplinary history. In tight quarters, he used a prohibited chokehold to bring a non-compliant subject to the floor for the purpose of arresting him. However, the chokehold was applied only after back-up had arrived, at a time when Respondent was less vulnerable and had other options. Having

considered the totality of circumstances and issues presented in this matter, I recommend that Respondent forfeit twenty (20) vacation days as an appropriate penalty.

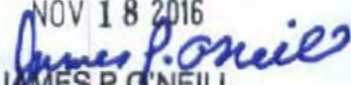
Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED

NOV 18 2016


JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER VICTOR CHARLES
TAX REGISTRY NO. 941538
DISCIPLINARY CASE NO. 2015-14488

Respondent was appointed to the Department on July 10, 2006. His last three annual performance evaluations were 4.5 overall ratings of "Extremely Competent/Highly Competent" in 2012, 2013 and 2014. He has received three medals for Excellent Police Duty.

Respondent has no prior formal disciplinary history. He was placed on Level 1 Force Monitoring from February 4, 2011 to February 4, 2013 for having three or more CCRB complaints in one year.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials