



POLICE DEPARTMENT

February 7, 2023

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In the Matter of the Charges and Specifications :

- against - :

Police Officer Nicholas Canepa :

Tax Registry No. 950150 :

71 Precinct :

Case No.

2021-23505

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At:

Police Headquarters
One Police Plaza
New York, NY 10038

Before:

Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU:

Nishat Tabussum, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent:

Craig Hayes Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

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

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CHARGES AND SPECIFICATIONS

1. Police Officer Nicholas Canepa, on or about May 15, 2019, at approximately 1830 hours, while assigned to the 121 Precinct and on duty in the vicinity of 40 Roxbury Street, Richmond County, wrongfully used force in that he used a chokehold against another person¹ when he placed his hand on that person's throat without police necessity.

P.G. 221-01, Page 3, Prohibition 2
P.G. 221-02, Page 2, Prohibition 11

FORCE GUIDELINES
USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on January 10, 2023. Respondent, through his counsel, entered a plea of Not Guilty to the charged misconduct. The Civilian Complaint Review Board called no witnesses but offered video and photographic 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 the evidence, the Tribunal finds Respondent Not Guilty.

ANALYSIS

In this case, the Tribunal is tasked with deciding whether the actions taken by Respondent on May 15, 2019, as charged in the sole Specification, constituted a chokehold in violation of the Patrol Guide.

The facts, in this case, are largely undisputed. On ^{Sunday} May 19, 2019, at approximately 1830 hours, Respondent arrived at 40 Roxbury Street, Richmond County, in response to a "10-85" call for assistance (T. 21-22). During that tour of duty, Respondent was the driver for the operations lieutenant, Lieutenant Green (*Id.* at 21, 32). Upon his arrival, Respondent encountered an

¹ The Tribunal knows the identity of this person. Because he did not appear to testify, I will not include his name in this memorandum and will refer to him as "the individual."

individual who was on the ground, surrounded by police officers (T. 22). These police officers, including Lieutenant Green, eventually placed the individual in handcuffs and brought him to his feet (T. 36-37; CCRB Ex. 1 at 01:21). As the individual was being escorted to a patrol car for transportation to the 121 Precinct, he began struggling and had to be carried to the vehicle (T. 22-23; CCRB Ex. 1 at 01:44-01:51). As Respondent, and other police officers, moved the individual toward the street where the police vehicle was parked, he continued to struggle by kicking, flailing and spitting (T. 23-24, 30). During this struggle, Respondent reached his left hand toward the individual's throat and made brief contact with it (T. 24, 31, 37-38; CCRB Ex. 1 at 02:04). After Respondent removed his hand from the individual's throat, the individual began calling out, "Are you choking me?" (T. 25; CCRB Ex. 1 at 02:05-02:07).

Respondent and the other police officers continued carrying the individual to the police car and stood him up against it, held by Lieutenant Green (T. 25-26). After the police officers moved away from Lieutenant Green, the individual explained to the individual that his daughter², who had been left unsupervised, would be taken care of as he was processed at the precinct (CCRB Ex. 1 at 02:16-03:19).

Respondent testified that he was indeed the police officer whose left hand was recorded reaching for and touching the individual's throat (T. 38). He explained that when he reached for the individual, he was attempting to take hold of his shirt or his shoulder to gain greater physical control of his body in response to his continued resistance (T. 24, 38-39). He testified further that when his hand made contact with the individual's throat, he immediately realized he was in danger of using a prohibited maneuver and pulled his hand back (T. 24-25). Respondent denied ever squeezing the individual's throat or closing his grasp around it (T. 25, 40). He testified

² CCRB offered evidence that the individual was the father of a minor child who remained at the location.

further that he believed it was necessary to reach for the individual's shirt to stabilize him, as the individual could have been dropped by the police officers who were carrying him because of his resistance (T. 39-40).

Respondent acknowledged that he knew what a chokehold was and that it was prohibited by the Patrol Guide (T. 32-34). He conceded that he did not employ de-escalation techniques before he made contact with the individual's throat (T. 29-30).

I credit Respondent's testimony as candid, forthright, and credible. While he has an interest in the outcome of this proceeding, his in-court testimony was consistent with, and corroborated by, the independent evidence (*i.e.*, the body-worn camera recording) regarding his actions concerning the individual during the incident.

Specification One: Use of a Chokehold

I find that CCRB has failed to meet their burden of proof by a preponderance of the relevant, credible evidence that Respondent used a chokehold.

The Patrol Guide states, "Members of the service **SHALL NOT** ... use a chokehold" (emphasis in original). It defines a chokehold as follows: "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. . . ." (emphasis added) (P.G. § 221-01).

Proof that a Member of Service's hand made contact with a suspect's throat does not *ipso facto* establish the use of a chokehold: the essential element of a chokehold is pressure on the throat or windpipe (*See Disciplinary Case No. 2016-14996* [Apr. 17, 2018]; *Disciplinary Case No. 2015-14310* [Mar. 28, 2017]). Based upon a careful evaluation of the trial record, there is insufficient evidence from which the Tribunal may find that Respondent exerted pressure on the individual's throat.

First, there is no direct evidence that Respondent used a chokehold. CCRB argued that the CCRB Exhibits 1 and 1A showed Respondent's hand making contact with *and applying pressure to* the individual's throat (emphasis added). I have reviewed the body-worn camera recording in CCRB Exhibit 1 and the still photograph taken from it in CCRB Exhibit 1A: neither exhibit displays either Respondent's hand closing on the individual's throat or Respondent's hand in a closed position around the individual's throat. What it does show is Respondent's open hand approaching the individual's throat, the web between his thumb and forefinger making fleeting contact with it, and Respondent instantaneously withdrawing his hand once it made contact with the individual's throat. Respondent categorically denied closing his hand around the individual's throat; CCRB did not present testimonial or hearsay evidence from the individual, or from any other witness, directly asserting that he did.

Similarly, there is no circumstantial evidence that Respondent used a chokehold. CCRB did not offer any medical records that could establish forensic evidence of an injury to the individual's throat, which could support an inference that Respondent caused such injury through the application of force. This Tribunal cannot draw a reasonable inference that Respondent applied pressure if no factual premise supports such an inference.

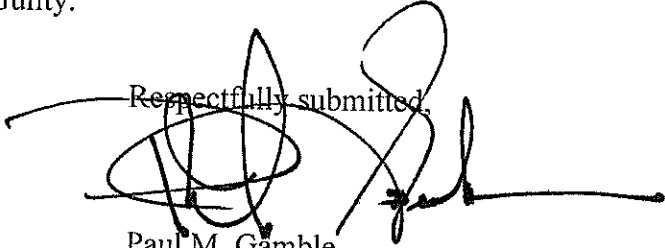
While CCRB argued that the individual's statement, "You choking me? You choking me man?" is itself evidence that he was, in fact, choked by Respondent, the argument lacks merit for several reasons. First, as stated above, there is no other credible evidence that Respondent applied pressure to the individual's neck that would support the individual's exclamation. Second, the video recording, which shows Respondent's hand making contact with the individual's neck in the manner described above, also shows that the contact was so brief that the counter on the video did not tick off a second before Respondent terminated the contact. Third,


the individual was not available to explain, either in testimony before the Tribunal or in a hearsay statement, what he meant by that exclamation. While the individual may well have feared that Respondent was about to apply a chokehold to his throat, the independent evidence does not support a finding that he did.

Thus, there is no credible evidence that Respondent exerted any pressure on the individual's throat. Since establishing the application of such force is essential to proving a chokehold, CCRB has failed to meet its factual burden.

I, therefore, find Respondent Not Guilty.

Respectfully submitted,


Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

JUL 13 2023
EDWARD A. CASAN
ACTING POLICE COMMISSIONER