



POLICE DEPARTMENT CITY OF NEW YORK

April 5, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Michael Carleo
Tax Registry No. 934580
Auto Crime Division
Disciplinary Case No. 2015-13373

Charges and Specifications:

1. Said Police Officer Michael Carleo, on or about January 17, 2014 at approximately 1325 hours, while assigned to the 113th Precinct and on duty, inside the 113th Precinct, 167-02 Baisley Boulevard, Queens County, wrongfully used force, in that he punched and kicked RONALD JOHNSON, without police necessity.

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, New York 10007

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

Hearing Dates:

January 14 and 20, 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 January 14 and 20, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Civilian Complaint Review Board called Ronald Johnson as a witness. Respondent called Sergeant Christopher Ward and Detective Robert DeFerrari 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

It was undisputed that the complainant in this matter, Ronald Johnson, was arrested following a car stop in front of his home by Respondent and other officers. He was taken to the 113 Precinct station house, where, after being placed in a cell, he received a severe injury to his face. What is in dispute is whether he fell and hit his head accidentally, as Respondent testified, or, as the CCRB alleged, he was punched and kicked by Respondent, leading to those injuries. Johnson also alleged that he received a lump on his forehead during this beating, but Respondent's witnesses asserted that this happened at the scene of the car stop when Johnson resisted arrest.

The following is a summary of Johnson's testimony. Johnson was a 48-year-old African American male. He testified that he lived on [REDACTED], Queens and worked with cerebral palsy patients for The Salvation Army. Johnson testified that on January 17, 2014, around 1300 hours, he was in his car, in front of his home, getting ready to go to work. As he sat and adjusted the radio, after about five minutes an unmarked police car with four officers in

plainclothes pulled up beside him. After about two minutes, Johnson was ready to leave, but the police vehicle was blocking him in. He saw the officers looking at him. When Johnson gestured to them that he wanted to go to work, the officer in the passenger seat rolled down the window and said, "[W]hat the F did [you] just say"? (Tr. 12-14, 16-21, 53).

Johnson testified that the officer kept berating him, saying, "Who the F you think you're talking to?" Johnson opened his door "to alleviate the problem" and explain that he lived there, but the officer opened his own door, pinning it against Johnson. The officer told Johnson to "get the F back in the car." Johnson kept screaming that he was trying to go to work, but all four officers got out of the car and "pounced" on him. Respondent punched him in the face, and he was slammed on the hood of the car and taken to the ground. Johnson was not injured as a result of this takedown, however (Tr. 21-25).

Johnson testified that he was taken to the 113 Precinct station house. He tried to plead his case before the desk officer, but the officers that arrested him told him to "shut the F up." Johnson was speaking "a little bit above my tone" but not "irate as screaming at anything." When he did not shut up, the officers grabbed him forcefully and took him to a location in the back of the station house where there were some empty cells. The officers threw Johnson into one of these cells. He landed while still handcuffed and the four original officers, including Respondent, "pounced" and began punching and kicking him. They were wearing steel-toed boots and "coming from everywhere," punching him anywhere they could find until they felt that they inflicted damage. Respondent kicked Johnson in the right eye, causing a severe injury. Respondent also kicked Johnson in the face. Johnson received a large lump on his forehead. Johnson denied hitting the toilet when he was thrown, and in fact averred that the officers threw him in a different area of the cell. Johnson contended that the officers left the cell when they saw how damaged his eye was. He could not approximate how many times he was kicked or

punched, but it was over five or six times. He did not have any broken teeth or ribs, but was bruised all over his body (Tr. 25-31, 58-64, 67, 74-78, 80-86, 89-91).

Johnson testified that an officer he described as "big" and "Italian" stayed with him at the cell. They spoke as his eye was leaking blood. After about 20 to 30 minutes, Johnson said, Emergency Medical Services came and he was taken to the hospital. He learned that his eye socket was fractured, requiring surgery. He remained in the hospital for three days and had to go to follow-up appointments (Tr. 30-35; CCRB Ex. 1, Mugshot Pedigree photograph showing bandaged and damaged right eye, and lump on forehead).

Johnson stated that his assigned counsel advised him to plead guilty. He wanted to go home, and pleaded guilty to disorderly conduct. Johnson asserted that he had been arrested in the past "[f]or minor things," like jumping a subway turnstile and disorderly conduct. He had been stopped by the police many times. On cross examination, Johnson admitted that this included fighting in front of his house with a landscaper whom he characterized as "a Mexican guy." Johnson knew that he was Mexican because he was "talking Mexican," as all landscapers in that area did. He indicated that he received an adjournment in contemplation of dismissal and did not know that he needed to return to court. About four years later, an officer told him during a traffic stop that he had a warrant on that case and he returned to court for it. He pleaded guilty to bail jumping. He admitted to various arrests for fighting with "people in the street," but this was because he had to defend himself. Johnson had been "randomly" beaten up by the police after street stops, and they had threatened to shoot him in the past. Johnson admitted, however, that he also had been arrested for resisting arrest (Tr. 15-16, 35-40, 42-44, 46-53, 55, 58, 64-69, 73).

Johnson agreed that he had filed a \$5 million lawsuit against the City and Respondent in this matter (Tr. 55-57, 87-88).

CCRB Exhibit 2 were Johnson's hospital records beginning at approximately 1500 hours on January 17, 2014. Johnson presented with a right eye that was swelling with blood, although he was able to open it and the pupil was reactive. He had swelling to the forehead but no loss of consciousness. Johnson was diagnosed at the outset with swelling to the face. His diagnosis upon admission to the hospital was laceration of the face and an orbital floor fracture with sequelae. His diagnosis upon discharge was orbital floor fracture with muscular impairment (99-100; CCRB Ex. 2, pp. 6, 8, 13).

Respondent and his witnesses testified consistently for the most part. Respondent was assigned in plainclothes to the 113 Precinct's Strategic Enforcement Team, along with Sergeant Christopher Ward, Detective Robert DeFerrari, and a fourth officer. They were investigating a pattern burglary and pattern robbery. The suspect was described as a male black, 45 to 55 years old, with a mountain bike. The reason for the stop of Johnson, according to Ward, was that he was coming from the side of the house and this was suspicious. DeFerrari stated that he first observed Johnson walking away from the car toward the house, but walked quickly back to his car when he noticed the officers. When Ward opened his door, Johnson opened his as well. This led to Johnson being extremely irate. He was placed under arrest for obstruction of governmental administration and other charges. Ward testified that Johnson violently resisted arrest and sustained a lump on his forehead at the scene. While Ward saw Johnson fall to the ground, he did not indicate that he saw the actual injury. DeFerrari observed Johnson on the ground but did not see how he ended up there. Respondent indicated that he fell to the ground with Johnson as he was trying to arrest him, but he did not recall seeing Johnson hit his head. He realized, however, that Johnson was not the suspect from the pattern (Tr. 102-06, 110-16, 118-19, 125-26, 130, 135-37, 149-51, 162-70, 174).

Ward testified that when Johnson arrived at the 113 Precinct with the officers, Ward went behind the desk and entered the prisoner's pedigree information into the command log. He also notified EMS at that time due to the lump on Johnson's forehead. According to Ward and DeFerrari, Johnson remained irate in front of the desk. Ward ordered that Johnson be taken to the rear cells. Respondent indicated that this was due to Johnson's demeanor and the safety of the other prisoners (Tr. 106-07, 120-21, 125, 130-31, 141, 151-54, 157, 170, 172-73; CCRB Ex. 3, command log entry).

The following is a summary of DeFerrari's testimony. DeFerrari, who stood 6'5" to 6'6" in height, testified that Johnson was not compliant with being searched, either at the desk or in the cell. Johnson did not give DeFerrari "permission" to search him, and "did not make it easy for [DeFerrari] to search him," but DeFerrari nonetheless was able to conduct the search. DeFerrari conceded that at the precinct, Johnson "was more compliant than he was out in the field, basically not as combative and not as aggressive as he was." In fact, Johnson seemed to calm down a little once he arrived at the cell. But when Respondent took the handcuffs off, Johnson began fighting. Respondent placed him in a bear hug and they went down to the ground. As that happened, DeFerrari heard a loud "bang" or "bong" as though something had hit the metal toilet in the cell. From DeFerrari's vantage point, he saw Respondent's back, with Johnson in front of Respondent, but they fell more or less side by side. Their heads were closer to the toilet than their feet. DeFerrari was about two to three feet away from them, and the cell was about six to eight feet wide. Once Johnson was brought under control, DeFerrari remained with him and tried to calm him down. DeFerrari did not see Respondent punching or stomping on Johnson (Tr. 131-33, 138-46).

The following is a summary of Respondent's testimony. According to Respondent, once they entered the room where the rear cells were located, Johnson was moving his torso back and

forth. His momentum pushed Respondent back but Johnson forward, leading Johnson to fall. After Respondent picked Johnson up and unhandcuffed him inside the rear cell itself, "he then was combative towards me." Respondent "grabbed him and we're moving in the cell in a confined space." Respondent said that their momentum moved them forward, resulting in Johnson's right side of face hitting the metal toilet. Respondent was directly behind him when this happened. Respondent heard Johnson cry out in pain and the sound of him hitting the toilet. Respondent denied that anyone kicked or punched Johnson in the head (Tr. 154-56, 173-76).

The officers informed Ward of what had occurred. Ward went to the cells and observed Johnson bleeding from his mouth. Respondent and DeFerrari were there. EMS already had arrived and began treating him (Tr. 107-09, 133, 156-57).

Respondent's Exhibit A was a written referral from the CCRB investigator to the New York City Office of the Chief Medical Examiner, and OCME's written response. The CCRB investigator presented OCME with two scenarios, each more or less matching the respective sides presented here at trial, apparently based on the statements given to the CCRB by Johnson, Respondent and others (Tr. 181-82). Account A, which hewed to Respondent's testimony, stated that after Johnson's hand was removed from the handcuff, he "moved his body 'every which way,'" causing his momentum to fall "to" the officer, leading them both to fall forward. Alternatively, the officer might have thrown Johnson to the ground. Johnson fell face first, hitting the right side of his face on the metal toilet and the floor, and the officer fell on top of him. This officer was 5'9" in height and weighed 210 pounds (Johnson's medical records, which also were sent to OCME, recorded Johnson's height as 5'11" and 200 pounds [CCRB Ex. 2, p. 8]).

Account B, which hewed to Johnson's testimony, stated that Johnson was punched by two officers in the face approximately five times each, and kicked in the face by one officer approximately five times.

The CCRB investigator asked OCME if either account was consistent with the documentary evidence, like the medical records, Johnson's arrest photograph, and photographs of the cell floor apparently showing droplets of blood (not introduced at trial). The investigator also inquired if either account was more feasible than the other (Respt. Ex. A, CCRB letter, p. 1).

A medical examiner from OCME wrote back to the investigator and gave her conclusions to a reasonable degree of scientific certainty. She said that although she could not see in the arrest photograph the lower right eyelid laceration described in the medical records, that laceration and the right orbital floor fracture were consistent with blunt impact injuries of the face. She added that while "[t]he recessed position of the reported lid laceration is not consistent with a simple fall to the ground," it "may be caused by either a punch or kick to face or a fall with the face striking a toilet seat." Finally, referencing Account B, the medical examiner concluded that the medical records and the photographs did not "provide evidence for 15 different blunt impact sites on the head" (Respt. Ex. A, OCME letter, p. 2).

The issue to be determined in this case is whether or not Respondent wrongfully used force at the 113 Precinct station house by punching and kicking Johnson without police necessity. The tribunal finds that the CCRB failed to prove by a preponderance of the credible evidence that Respondent engaged in the alleged misconduct.

Resolution of this matter rests in large part on a determination of witness credibility. In analyzing credibility, this tribunal may consider such factors as consistency of testimony, supporting or corroborating evidence, motivation, bias or prejudice, and the degree to which an account comports with common sense and human experience.

Key to this inquiry is the OCME analysis of Johnson's injuries. Although the specification against Respondent does not charge that he punched or kicked Johnson in the face specifically, Johnson's right orbital floor fracture was his most serious injury. The OCME letter referred to the "recessed position of the reported lid laceration," i.e., that the lid had recessed back into the skull, as being consistent both with being punched or kicked in the face, or with falling onto the toilet seat. Although this does not refer directly to the orbital fracture, in view of the fact that Johnson's arrest photograph visibly depicts a recessed right eye, the OCME letter is an indication that the injury could have happened the way Johnson described it or the way Respondent described it. Thus the case still comes down to credibility.

The Court did not find Johnson to be a credible witness. He exhibited a significant degree of hostility toward police officers. He claimed that the police "randomly" beat him up during street stops. In fact, "[t]hey do it to everybody in the neighborhood." The police had also threatened to shoot him. Johnson described various parties by ethnicity in a daft and disturbingly casual way. He also has a potentially significant monetary interest in that he filed a \$5 million lawsuit against the City and Respondent.

Most significant for the tribunal was Johnson's insistence that four police officers were continuously beating him in the cell until they saw blood and stopped. He testified that he was squirming on the ground and the four officers were punching and kicking him wherever they could find an opening. They were doing so until they could inflict damage. He did not know how many times he was struck, but it was at least five or six times.

Yet Johnson, for all the severity of his ophthalmic injury, did not receive the kinds of injuries one reasonably would expect from being pummeled by four officers until they satisfied their bloodlust. He did not suffer any broken teeth or ribs. The medical records note no loss of consciousness and no neck pain when Johnson presented at the emergency department (CCRB

Ex. 2, pp. 8, 10). Most significantly, Johnson apparently told the CCRB that two officers each punched him in the face about five times and one officer kicked him in the face about five times. This was the Account B that the CCRB investigator asked OCME about. The medical examiner responded that the medical records and photographs did “not provide evidence” for that many blunt impact sites. In sum, the medical and expert evidence contradicted Johnson’s version of events.

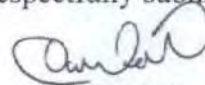
As the person on trial, and a defendant in the civil lawsuit, Respondent was an interested witness as a matter of law. See People v. Agosto, 73 N.Y.2d 963, 967 (1989); Coleman v. New York City Transit Auth., 37 N.Y.2d 137, 142 (1975). His testimony nevertheless was straightforward and reasonable. He stated the facts plainly, without exaggeration or obfuscation. The tribunal found his testimony to be credible.

The CCRB argued that Respondent was not credible when he testified that Johnson fell at the scene and was injured, and fell again on the way to the cell. Johnson denied being injured at the scene and said that the lump on his forehead came from the beating in the cell itself. The CCRB suggested that Respondent was inventing prior injuries to “cover” what occurred in the cell. That is, Respondent was trying to create a scenario in which the other injuries, like the lump, were not evidence of a significant beating but a prior injury (Tr. 195-96).

Ward, the sergeant, however, also testified that Johnson received the lump at the scene. Ward saw Johnson fall to the ground but he did not indicate that he saw the actual injury. His testimony that the lump occurred at the scene and not the precinct was nevertheless supported by the command log entry (CCRB Ex. 3). Ward noted in the log, for physical and mental condition of the prisoner, that there was “swelling to left side head,” and that medical attention was requested. Ward credibly indicated that he made this request for EMS upon Johnson’s arrival at the precinct, before he was taken to the rear cells, based upon that lump.

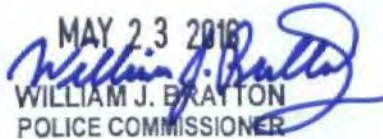
In sum, the evidence demonstrated that Johnson was not a credible witness, in that his exaggerated testimony of a beating by the officers was not supported by the forensic documentation. Further, he had a significant monetary interest in the case. Therefore, the CCRB failed to prove that Respondent wrongfully used force by punching and kicking Johnson at the 113 Precinct station house, and he is found Not Guilty.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED

MAY 23 2018

WILLIAM J. BRATTON
POLICE COMMISSIONER