



POLICE DEPARTMENT

January 10, 2020

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In the Matter of the Charges and Specifications :

- against - :

Detective Duane Percy :

Tax Registry No. 944884 :

Central Investigations Division :

Case No.

2017-18176

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At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU:

Claudia Avin, Esq.
Simone Manigo, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent:

Philip Karasyk, Esq.
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To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Detective Duane Percy, on or about June 8, 2017, at approximately 1120 hours, while assigned to Brooklyn North Gang and on duty, in the vicinity of Joralemon Street between Court Street and Boerum Place, Kings County, abused his authority as a member of the New York City Police Department, in that he stopped Person A without sufficient legal authority.

PG 212-11, page 4, paragraph 16

INVESTIGATIVE ENCOUNTERS

2. Detective Duane Percy, on or about June 8, 2017, at approximately 1120 hours, while assigned to Brooklyn North Gang and on duty, in the vicinity of Joralemon Street between Court Street and Boerum Place, Kings County, wrongfully used force, in that he handcuffed Person A and pushed her against a vehicle without police necessity.

PG 221-02, page 2, Prohibition 11

USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on December 5, 2019. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Civilian Complaint Review Board called Thomas Juliano, an investigator with the CCRB, as a witness, and introduced a hearsay statement of Person A. Respondent called Detective Paul Molinaro as a witness, 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. Having carefully considered all of the evidence in this matter, I find Respondent not guilty.

ANALYSIS

This case stems from a street encounter that occurred at approximately 1120 hours on June 8, 2017, in the area of Joralemon Street and Boerum Place in Kings County. On that date, Respondent, armed with an arrest warrant for Person B, observed a woman whom he believed to be Person B exit the courthouse of Kings County Supreme Court. Respondent followed and eventually detained the woman, at which point he learned that he had made a

mistake, and that the woman he stopped was in fact Person A. It is alleged that Respondent abused his authority as an MOS by stopping Person A without sufficient legal authority, and that Respondent used excessive force at the time of the stop.

Person A, who has a lawsuit pending against the Department, did not appear to testify. Instead, a recording of an in-person statement she provided to the CCRB on June 14, 2017, and the accompanying transcript, were admitted into evidence (CCRB Ex. 1, 1A). In that interview, Person A stated that when she was leaving Supreme Court at 350 Jay Street, she noticed a man or men following her. Respondent called out to her and asked for her name, but Person A was on the phone and did not answer. She continued walking, and Respondent again asked for her name. Person A told him her last name, but refused to provide identification, telling Respondent that he could go back to the courthouse and figure it out. Respondent made a phone call asking for a car to be brought around the corner, and Person A became nervous, so she tried to get into a cab to no avail. She then entered a bus and asked the driver to pull away because someone was following her; the driver initially did so but Respondent banged on the glass, showed a police badge, and the driver opened the door. Respondent also told a marked police car to stop in front of the bus to block it. (CCRB Ex. 1A at 3-6, 18, 22-23, 31, 34)

According to Person A, once she exited the bus Respondent "snatched me by my arms and threw me into the car that was parked in front of the bus." Respondent had his forearm into the back of her neck. Three more officers came out of the car to help him. While her body was pinned to the front of the car, Respondent put handcuffs on her with the help of the other officers. (CCRB Ex. 1A at 5-6, 34-35)

Person A acknowledged that she resisted the effort to detain her, moving her body in an attempt to turn and speak with the officers while she was being handcuffed because she was

scared and wanted to know what was happening. Respondent reached into her purse, looked through some papers and finally looked through her wallet. Respondent and the others stepped away from her once Respondent found Person A's identification. Respondent removed the handcuffs and the other officers then drove her home. Person A claimed that after the incident, she had pain in her back, wrist, and right ear, and went to Brooklyn Methodist Hospital later that day. (CCRB Ex. 1A at 8-11, 36-37, 39-45, 48)

Five days prior to her in-person interview, Person A spoke with a CCRB representative on the telephone. A recording of that conversation, and the accompanying transcript, were admitted as well (Resp. Ex. A, A1). In that call, Person A essentially provided the same account of what occurred. As with her later in-person interview, she described being followed, being asked for ID, attempting to get into a cab and then a bus, and the physical altercation that ensued. She did not, however, state that she provided her name to Respondent at any point during the pursuit. (Resp. Ex. A1 at 5-15)

Medical records for Person A from Brooklyn Methodist Hospital were admitted as CCRB Ex. 4. In those records, Person A complains of moderate back pain and left wrist and arm pain, resulting from a police officer assaulting her and holding her against the back of a car with his knee. Doctors recorded her complaints and prescribed pain killers. There is no indication of any tests being conducted that showed injuries to Person A. She is listed in the records as weighing 160 pounds with a height of 5'05", though her attached driver's license has her height as 5'02". Her date of birth is noted as [REDACTED] 1986. (CCRB Ex. 4 at 7, 24, 27, 38)

It was stipulated that Person A had convictions for grand larceny in 2007, petit larceny in 2012, loitering for the purpose of prostitution in 2005 and 2006, and five for disorderly

conduct. A photograph of Person A taken at the time of the CCRB interview was admitted as CCRB Ex. 3.

A DAS snapshot of the wanted individual, from her arrest on felony narcotics charges on September 29, 2016, was admitted into evidence (CCRB Ex. 2), as was her mugshot pedigree from that arrest (Resp. Ex. D). Those documents indicate that Person B, the person for whom there was an arrest warrant, was born on [REDACTED] 1977, and that she was 5'02" and 150 pounds.

Detective Paul Molinaro from the Brooklyn North Gang Squad testified that he was the lead investigator on a long term investigation into high-level distribution of narcotics and gang violence. Pursuant to that investigation, Person B was arrested by Respondent on September 29, 2016 for felony possession of narcotics (see Resp. Ex. B). In March of 2017, Person B was re-indicted on additional conspiracy charges, and on March 21, 2017 a Kings County Supreme Court judge signed a warrant for her arrest on the new indictment (Resp. Ex. C). Detective Molinaro discussed with Respondent the need to apprehend Person B in order to process her on the new indictment, and provided him the relevant paperwork, including the warrant. It was arranged that on June 8, 2017, Respondent, who had dealt with Person B in the past, and another detective (Detective Cruz) would go to Kings County Supreme Court where Person B was scheduled for a court appearance, with the aim of taking her into custody at that time. (Tr. 61-69)

Respondent testified that on September 29, 2016, he arrested Person B for possession of between a half kilogram and one kilogram of fentanyl, for which she was charged with criminal possession of a controlled substance in the second degree. Respondent was aware that Person B was re-indicted the following March, and an arrest warrant was issued. After being informed by Detective Molinaro that Person B was due in Kings County Supreme Court on June 8, 2017, Respondent and Detective Cruz went to the courthouse with the intention of arresting Person B

so that she could be fingerprinted and processed on the new indictment. Detective Cruz was upstairs inside the building, while Respondent was standing outside. Respondent had in his possession a copy of the warrant (Resp. Ex. C) as well as a mugshot of Person B that included her physical description (Resp. Ex. D). (Tr. 84-89)

When Respondent observed a woman, whom he believed to be Person B, exiting the building, he followed her for one-to-two minutes in order to observe her more closely and make sure he had the right person. Respondent testified that he viewed her from the left and the right, and even circled in front of her to get a better look, a technique called "boxing in." He estimated the woman's height to be between 5'02" and 5'05" and her weight to be between 130 and 145 pounds. He called Detective Cruz, who was in the courthouse, and told him that he was following an individual whom he believed to be Person B; Cruz did not arrive on the scene until after the incident had ended. (Tr. 90-91, 106, 120)

Once Respondent decided that the woman was Person B, he approached and greeted her, and she returned the greeting. Respondent testified that he identified himself as a police officer, showed her his Department shield and identification, and explained that he was looking for a wanted person. When Respondent asked the woman for her name and identification, she walked away quickly. Respondent followed her with his shield out, repeatedly identifying himself as a police officer and asking for her identification, but the woman did not comply. After a failed attempt to enter a taxi, the woman boarded a bus; Respondent promptly ordered the bus driver to stop, and the woman exited the bus. (Tr. 91-93, 102, 113, 124-126)

Respondent observed a marked RMP at the location with three plainclothes officers inside. He identified himself to the officers and asked for their assistance. The woman also walked over and questioned them regarding Respondent's identity, and they confirmed that

Respondent was a police officer. According to Respondent, the woman became irate, yelling loudly and raising her hands near Respondent's face. For his own safety and hers, Respondent decided to handcuff the woman as she was standing against the police car; she tensed her arms, shrugged her shoulder, and would not give him her hand behind her back, but he was able to handcuff her despite her resistance. The woman then stated that her identification was inside her purse, and Respondent immediately observed her driver's license, which he cross-referenced with the pedigree sheet that he had with him. Consequently, he realized that the woman was Person A not Person B. Respondent took a photograph of the license (Resp. Ex. H), then returned the purse to Person A without searching it any further. He removed the handcuffs from Person A, apologized to her, and provided his name, shield and command information. Respondent estimated that Person A had been handcuffed for less than 60 seconds. Respondent emphatically denied that he ever smashed Person A into the car or that he bent her over the hood, instead stating that she was merely placed against the front of the vehicle. (Tr. 93-95, 130, 133, 154-155)

After Person A was released, Respondent promptly called his supervisor to notify him of the stop, then returned to the courthouse to continue looking for Person B, who did not appear. Respondent recorded in his memo book (Resp. Ex. E) that he notified his sergeant that he had stopped and then released a 30 year old black female because she matched Person B's description. Respondent returned to his office, and prepared a UF-250 report for the stop and frisk (Resp. Ex. F) and a TRI report (Resp. Ex. G). (Tr. 95-101)

Specification 1 charges Respondent with abusing his authority by stopping Person A without sufficient legal authority, contrary to the requirements of Section 212-11 (16) of the Patrol Guide. That section states in a Level 3 *Terry* stop, "Upon reasonable suspicion that the

person has committed, is committing, or is about to commit a felony or Penal Law misdemeanor, stop and detain the person for the purpose of conducting a criminal investigation." The section also states that an officer in such a situation may "question the suspect to the extent necessary to determine whether there is probable cause to make an arrest." Here, it is undisputed that Respondent stopped Person A and questioned her about her identity. It also is undisputed that she was not, in fact, the woman for whom Respondent was looking. At issue is whether Respondent acted unreasonably in stopping Person A.

Respondent was armed with an arrest warrant for Person B, signed by a Supreme Court judge, in connection with a narcotics trafficking conspiracy, as well as a photograph of the wanted individual. He knew that Person B was due at the location for a court appearance that day, and reasonably expected to see her there. When Respondent observed Person A exit the courthouse, he mistakenly believed that she was the person for whom he was looking, and he pursued her. The subsequent encounter between the two parties is the subject matter of this dispute.

Whereas Person A did not appear to testify, and could not be questioned and challenged as to the details of her account, Respondent testified in a detailed and consistent manner regarding what transpired. Respondent came across as highly professional on the witness stand, and I credit his description of events. Specifically, Respondent took multiple steps to confirm the identity of the person he pursued before stopping her. From the start he believed that Person A was the woman for whom he had the warrant, yet he made efforts to view her from multiple angles before approaching her. Respondent then identified himself as a police officer, informed her that he was looking for a wanted person, and repeatedly asked her for her name and identification; Person A refused to provide her name or identification, and instead walked

away. After Person A continued to ignore his requests for identification, and made efforts to elude him, Respondent stopped and detained her, quickly determined that she was not the individual who was wanted, and promptly released her. To his credit, Respondent did not try to conceal the mistake he had made: he recorded the stop in his memo book, immediately reported what had occurred to his supervisor, and prepared the appropriate paperwork.

Although there were discrepancies in the appearances of the two women, there were resemblances as well. The medical records indicated Person A was 5'05" and weighed 160 pounds, though her driver's license attached to the records listed her as 5'02". Person B was approximately 5'02" and weighed 150 pounds. They both were black females, born approximately nine years apart.

This tribunal is mindful that Person A was not the person being sought, and was committing no crime at the time she was stopped. Although Respondent acted in good faith, a mistake was made and the wrong person was detained. Nevertheless, under these specific circumstances, I credit Respondent's testimony that he genuinely believed Person A to be the person for whom he had the warrant, and that he acted reasonably in briefly detaining her. This was not a situation where Respondent recklessly stopped an individual with little care as to whether she was the correct person. Rather, Respondent was extremely conscientious in the steps he took to confirm the identity of the person before stopping her. The credible evidence has failed to establish that Respondent abused his authority in stopping Person A without sufficient legal authority, and I find him not guilty of Specification 1.

Specification 2 charges Respondent with wrongfully using force against Person A in that he handcuffed and pushed her against a vehicle without police necessity, in violation of

Section 221-02 (11) of the Patrol Guide. That section instructs officers to "apply no more than the reasonable force necessary to gain control" of an uncooperative subject.

Here, the credible evidence has failed to establish that Respondent used excessive force against Person A. I credit Respondent's testimony that an irate and uncooperative Person A had her hands near his face, was yelling loudly, and that he used a minimal amount of force to lean her against the front of the car in order to briefly detain her and check her identification. Indeed, there is no confirmation in the medical records of injuries that would corroborate Person A's hearsay account of being forcefully slammed into the car. I also credit Respondent's testimony that Person A was only in handcuffs for less than a minute before being released; thus the amount of force used was limited and proportional to the situation.

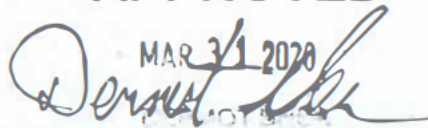
This tribunal is mindful that Person A went to the hospital, complaining of pain. However, under the totality of circumstances presented here, I am not persuaded that Respondent's use of force was excessive or unreasonable. Accordingly, I find Respondent not guilty of Specification 2.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED

MAR 31 2020

POLICE COMMISSIONER