



OFFICE OF THE POLICE COMMISSIONER
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September 20, 2016

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Colin McGuire**
Tax Registry No. 944793
Transit Bureau District 4
Disciplinary Case No. 2015-13121

The above named members of the service appeared before Assistant Deputy Commissioner Jeff S. Adler on March 21, 2016, charged with the following:

DISCIPLINARY CASE NO. 2015-13121

1. Said Police Officer Colin McGuire, on or about July 14, 2014, at approximately 1630 hours while assigned to the Transit Bureau District 4 Command and on duty in the vicinity of the 125th Street 4, 5, 6 Subway Station, New York County, wrongfully used force in that he placed his hand around Person A's throat, thereby causing him to be held in a chokehold.

P.G. 203-11

USE OF FORCE

2. Said Police Officer Colin McGuire, on or about July 14, 2014, at approximately 1630 hours while assigned to the Transit Bureau District 4 Command and on duty in the vicinity of the 125th Street 4, 5, 6 Subway Station, New York County, wrongfully used force in that he placed his forearm around Person A's throat, thereby causing him to be held in a chokehold.

P.G. 203-11

USE OF FORCE

3. Said Police Officer Colin McGuire, on or about July 14, 2014, at approximately 1630 hours while assigned to the Transit Bureau District 4 Command and on duty in the vicinity of the 125th Street 4, 5, 6 Subway Station, New York County, wrongfully used force in that he kneed Person A about the head.

P.G. 203-11

USE OF FORCE

4. Said Police Officer Colin McGuire, on or about July 14, 2014, at approximately 1630 hours while assigned to the Transit Bureau District 4 Command and on duty in the vicinity of the 125th Street 4, 5, 6 Subway Station, New York County, wrongfully used force in that he repeatedly punched Person A about the head.

P.G. 203-11

USE OF FORCE

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POLICE OFFICER COLIN MCGUIRE

DISCIPLINARY CASE NO. 2015-13121

In a Memorandum dated April 29, 2016, Assistant Deputy Commissioner Jeff S. Adler found Police Officer Colin McGuire Guilty of Specification No. 2 and Not Guilty of Specification Nos. 1, 3 and 4, in Disciplinary Case No. 2015-13121. Having read the Memorandum and analyzed the facts of this matter, I approve the findings but disapprove the penalty for Police Officer McGuire.

I have considered the totality of the issues and circumstances in this matter, and deem that a lesser penalty is warranted. Therefore, Police Officer McGuire is to forfeit fifteen (15) vacation days, as a disciplinary penalty.


James P. O'Neill
Police Commissioner



POLICE DEPARTMENT CITY OF NEW YORK

April 29, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Colin McGuire
Tax Registry No. 944793
Transit Bureau District 4
Disciplinary Case No. 2015-13121

Charges and Specifications:

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P.G. 203-11 - USE OF FORCE

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P.G. 203-11 - USE OF FORCE

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P.G. 203-11 - USE OF FORCE

Appearances:

For CCRB-APU: Nichole Junior, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

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

Hearing Date:

March 21, 2016

Decision:

Specification 1: Not Guilty
Specification 2: Guilty
Specification 3: Not Guilty
Specification 4: Not Guilty

Trial Commissioner:

ADCT Jeff S. Adler

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on March 21, 2016.

Respondent, through his counsel, entered a plea of not guilty to the subject charges. CCRB called David Griffith as a witness and introduced video 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 Specification 2 for using his forearm to place an individual in a chokehold, and not guilty of the remaining specifications.

FINDINGS AND ANALYSIS

At about 1630 hours on July 14, 2014, Respondent observed Person A enter the 125th Street Lexington Avenue subway station through the emergency gate without paying the fare. Respondent approached Person A and asked him why he had gone through the gate; Person A responded that the female token booth clerk had given him permission. Respondent had Person A accompany him to the booth in an attempt to verify Person A's story. However, there was no female clerk there, and the male clerk on duty informed Respondent that he had not given Person A permission to go through the gate without paying.

Based on this information, Respondent asked Person A for his identification, with the intention of issuing him a summons for theft of services, a misdemeanor. A physical altercation between Respondent and Person A ensued, a portion of which was captured on videotape by a bystander, David Griffith. At issue is whether Respondent used his hand and his forearm to place Person A in chokeholds, and whether Respondent also wrongfully used force by kneeing and punching Person A about the head.

Person A did not appear at the trial, and no explanation was offered for his absence. A 54-second video showing a portion of the incident (CCRB Ex. 1), and 11 still photographs taken from that video (CCRB Ex. 1A-1K), were admitted into evidence. A BCI photograph of Person A, showing swelling to his left eye area, also was admitted (CCRB Ex. 2).

Griffith, who recorded the video with his phone and later filed a complaint with CCRB, testified that he was on his way home when he came upon the altercation. At that time, he did not know any of the parties involved. According to Griffith, he saw Person A sitting on the ground crouched forward, while Respondent had his left bicep and forearm underneath Person A's neck. Respondent's partner was to the side, holding Person A's right wrist which was handcuffed. (Tr. 23-

24) Griffith testified that he heard Respondent repeatedly tell Person A to place his arm behind his back and stop resisting. (Tr. 25) Griffith also saw Respondent strike Person A in the face several times with a closed fist, as Person A used his left hand to try to block his face from being struck. (Tr. 26) Five drops of Person A's blood could be seen on the ground following these punches. (Tr. 38)

According to Griffith, he initially observed Respondent's left forearm and bicep around Person A's neck in what appeared to be a tight grip. He also saw Respondent's left hand grab Person A's throat. Respondent later placed his right forearm around Person A's throat. At no point did Griffith see Person A physically strike or verbally threaten either Respondent or his partner. (Tr. 27-29, 36) Before the altercation was concluded, Griffith got on a train and left the location.

Griffith, a 44-year old pedestrian safety manager, was noticeably nervous at the start of his testimony, but settled in and was generally straight-forward in his account. He did become slightly combative, though, when answering questions about his 2015 conviction for Driving While Intoxicated and Resisting Arrest; he claimed that he pled guilty to the resisting charge even though he wasn't really guilty. (Tr. 45) He acknowledged that he did not see the beginning of the incident, and so he lacked some context for his observations. (Tr. 51) Griffith was unsure as to which station the altercation occurred, and mistakenly described it as occurring on the platform rather than the mezzanine. (Tr. 21, 40) But for the most part, Griffith's testimony was corroborated by the video footage.

Respondent testified that he initially explained to Person A that he intended to give him a summons for the farebeat and send him on his way. However, he had to ask five or six times before Person A finally responded to his request for identification. Respondent informed Person A that he just needed to do a name check, but Person A said he had somewhere to go and started to walk toward Respondent. Respondent placed his hand on Person A's chest to hold him against the wall.

(Tr. 72-74) Person A placed his hands on his own collar and said that he wanted to take his shirt off, which Respondent perceived as a threat; Respondent explained that a shirtless Person A would have a tactical advantage if they were to have a physical altercation, since Respondent would not have anything to grab onto. Respondent then pointed his OC spray toward Person A's facial area and sprayed, but Person A turned his face. Respondent dropped the canister, they grabbed onto each other, and a struggle ensued. (Tr. 75-76)

According to Respondent, he placed Person A in a headlock for the purpose of taking him to the ground with a move he described as a headlock takedown, since "where the head goes, the body goes." (Tr. 77) Respondent repeatedly told Person A to place his hands behind his back so that he could be handcuffed, but Person A resisted, by tensing up his body and by twisting and turning. (Tr. 78) Respondent acknowledged that he did punch and knee Person A, explaining that he did so in order to get Person A's body to untense so the officer could get the other arm and hand behind his back. (Tr. 80) Person A initially had only one arm handcuffed, and Respondent was concerned that the handcuff could be used as a sharp weapon by Person A. (Tr. 79)

When shown photograph 1A (taken from .01 mark of video), Respondent denied that his left arm was around Person A's neck, explaining that his forearm and bicep were actually around Person A's chin. (Tr. 108-110) Respondent denied that he put his hand around Person A's throat at the .16 mark (photograph 1B), explaining that he had placed his hand on Person A's chin area. (Tr. 110-11) Respondent did acknowledge, though, that beginning around the .36 mark of the video (photograph 1H) he did have his arm around Person A's neck. (Tr. 120-121) Respondent also admitted to kneeling Person A at some point during the altercation, not in the head but in the upper torso area. (Tr. 122)

Throughout his testimony, Respondent willingly answered questions about the incident, including extensive questioning about his training. He candidly acknowledged placing his arm around Person A's neck at one point during the altercation. None of Respondent's testimony was contradicted by what appears on the video, and this tribunal credits his account of what transpired.

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 area in the manner proscribed, that officer will have run afoul of the guidelines, and be subject to discipline. Here, after considering the testimony of Griffith, the video footage, and Respondent's own testimony including certain admissions, this tribunal is persuaded that the record established by a preponderance of the credible evidence that Respondent used his forearm to place Person A in a chokehold. However, the evidence did not prove that Respondent placed his hand around Person A's throat in a chokehold, or that Respondent used excessive force in kneeing and punching Person A.

The opening seconds of the video, as depicted in photograph 1A, are ambiguous as to whether a chokehold is being used against Person A. Although Griffith testified that he believed Respondent's left bicep was wrapped around Person A's neck, Respondent explained that at that point his arm was around Person A's chin, not throat. Given the way Respondent's arm is positioned,

the video evidence is inconclusive as to whether Respondent was exerting pressure on Person A's throat at that early point.

About a half minute later, the evidence of a chokehold becomes more compelling. Griffith testified that he saw Respondent place his arm around Person A's throat. By Respondent's own admission, he placed his arm around Person A's neck while the two of them were down on the ground. At about the .36 mark of the video, Respondent appears to wrap his right arm around Person A's throat area as he maneuvers Person A's upper torso further to the ground; Respondent maintains that hold for at least the next 16 seconds. Respondent's right hand is clasped around his own left wrist, as if to secure his grip on Person A. Even without any testimony as to the effect this grip had on Person A's ability to breathe, it was evident from the video that this hold may have prevented or hindered Person A's breathing or reduced his intake of air. Although the length of time of the hold is not dispositive, the 16-second duration here makes it even more likely that Person A's ability to breathe may have been impeded. The record has established, by a preponderance of the evidence, that Respondent used his forearm to place Person A in a chokehold, and I find him guilty of Specification 2.

The evidence is less persuasive with respect to the allegation that Respondent also placed his hand around Person A's throat in a chokehold, particularly without testimony from the victim himself. Although Griffith testified that he saw Respondent use his left hand to grab Person A's throat, Respondent explained that his hand actually was on Person A's chin area. Respondent's contention is not contradicted by the video evidence: at the .16 mark, as also depicted in photograph 1B, Respondent's hand may very well be on Person A's chin, rather than his throat; the video footage certainly isn't conclusive on this point. As such, Griffith could easily have been mistaken in concluding that Respondent was choking Person A at that point. Given the lack of

credible evidence to sustain the allegation that Respondent choked Person A with his hand, I find Respondent not guilty of Specification 1.

Respondent acknowledged punching Person A in the face and kneeling him in the upper torso. Resolution of the remaining two allegations involves a determination as to whether this conduct constituted excessive force under the totality of the circumstances. Those circumstances began when Respondent saw Person A enter the subway system through the emergency gate, without paying the lawful fare. Rather than rush to judgment, Respondent checked to see if the token booth clerk would verify Person A's story that he had been given permission; the clerk did not confirm Person A's story. Having determined that Person A's excuse was a lie, Respondent sought to deal with the situation by issuing Person A a summons. Respondent specifically informed Person A that if he cooperated, he could go on his way momentarily. However, Person A chose not to cooperate, delaying the production of his identification and expressing his intention to walk away before the summons was issued. When Person A started coming toward him, Respondent put his hand to Person A's chest to keep him against the wall. Person A then stated his intention to take off his shirt and made a motion as if to do so, which in this context Respondent reasonably perceived to be a threatening gesture, believing that Person A was preparing to fight and looking to gain a tactical edge. It is in this context that the physical altercation began.

In order to prevent Person A from taking off his shirt and coming back toward him, Respondent tried to spray him in the face with OC spray, but Person A turned his face. With the goal of getting Person A into a position where he could be handcuffed, Respondent took him to the ground. However, Person A ignored Respondent's repeated requests to put his hands behind his back and stop resisting, and continued to thwart efforts to handcuff him, by twisting and turning his torso and stiffening his body. Respondent then punched Person A several times about the face,

causing a small amount of bleeding. This tribunal credits Respondent's explanation that these punches were not gratuitous, but rather were designed to get Person A to comply so that he and his partner could handcuff him. Respondent was in a vulnerable position as he attempted to gain control of the uncooperative Person A. Only that amount of force necessary to overcome resistance and secure the individual was used, and I find Respondent not guilty of Specification 4.

The record is unclear as to when exactly Respondent kneed Person A in the upper torso. Respondent made a general admission that he did, indeed, knee Person A in the upper torso area, explaining that he did so in an attempt to get his body to untense. Other than that, there was no video evidence of how or when this kneeling occurred, and no testimony from Griffith that provides any illumination on this point. In the absence of any such evidence, and again taking into account how Person A was resisting a lawful arrest, I find Respondent not guilty of Specification 3.

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 9, 2007. 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 and be placed on one (1) year dismissal probation. Under the totality of the circumstances presented here, that recommendation is 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. Person A was twisting and turning his body, and tensing up in an attempt to avoid being handcuffed. Although there was no evidence that Person A punched or kicked Respondent at any point during the altercation, Respondent had no assurance that the resisting individual wouldn't do so at any moment. As Respondent testified, he was unsure whether Person A "was trying to get up to try and fight or I don't know what he was trying to do." (Tr. 79) Respondent was on the ground in a somewhat vulnerable position: his partner was preoccupied with holding onto Person A's handcuffed hand, and wasn't able to provide much additional help in getting Person A under control. Also, a crowd of people hovered nearby. Although Respondent was unaware at the time exactly how close the crowd was, and there was no indication that anyone in the crowd interjected themselves physically during the altercation, several of them were shouting complaints at Respondent during the incident. None of these surrounding circumstances justify Respondent's use of a chokehold, but they do provide important context for assessing the officer's conduct.

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 decorated 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. This tribunal is mindful that Respondent does not have the same track record as the lieutenant in that case, and that the arrest here was for a farebeat.

Respondent, who has been with the Department for eight years, has no prior disciplinary history. He used a prohibited chokehold for approximately 16 seconds, but did so while he was on the ground struggling to secure a resisting individual. 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





POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER COLIN MCGUIRE
TAX REGISTRY NO. 944793
DISCIPLINARY CASE NO. 2015-13121

On his last three annual performance evaluations, Respondent twice received an overall rating of 3.0 "Competent" and once received an overall rating of 3.5 "Highly Competent/Competent." [REDACTED]

He has no prior formal disciplinary history.

Jeff S. Adler
Assistant Deputy Commissioner Trials