



POLICE DEPARTMENT CITY OF NEW YORK

August 2, 2016

MEMORANDUM FOR: Police Commissioner

Police Officer Emilio Estevez  
Tax Registry No. 944542  
41 Precinct  
Disciplinary Case No. 2015-13793

Police Officer Rafael Aquino  
Tax Registry No. 952417  
25 Precinct  
Disciplinary Case No. 2015-13792

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**Charges and Specifications:**

Disciplinary Case No. 2015-13793

1. Said Police Officer Emilio Estevez, on or about May 2, 2014, at approximately 2131 hours, while assigned to the 41<sup>st</sup> Precinct and on duty, in the vicinity of East 156<sup>th</sup> Street and Beck Street, Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he interfered with Person A's ability to photograph an incident, in violation of Patrol Guide Procedure 208-03.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED  
CONDUCT

2. Said Police Officer Emilio Estevez, on or about May 2, 2014, at approximately 2131 hours, while assigned to the 41<sup>st</sup> Precinct and on duty, in the vicinity of East 156<sup>th</sup> Street and Beck Street, Bronx County, was discourteous in that he stated to Person A, in sum and substance, "Do you even know how to spell amendment?"

P.G. 203-09, Page 1, Paragraph 2 - PUBLIC CONTACT - GENERAL

Disciplinary Case No. 2015-13792

1. Said Police Officer Rafael Aquino, on or about May 2, 2014, at approximately 2131 hours, while assigned to the 41<sup>st</sup> Precinct and on duty, in the vicinity of East 156<sup>th</sup> Street and Beck Street, Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he told Person A it was against the law to take photographs and he was not allowed to do so, in violation of Patrol Guide Procedure 208-03.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED  
CONDUCT

2. Said Police Officer Rafael Aquino, on or about May 2, 2014, at approximately 2131 hours, while assigned to the 41<sup>st</sup> Precinct and on duty, in the vicinity of East 156<sup>th</sup> Street and Beck Street, Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he interfered with Person A's ability to photograph an incident, in violation of Patrol Guide Procedure 208-03.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED  
CONDUCT

**Appearances:**

For CCRB-APU: Andre Applewhite, Esq.  
Civilian Complaint Review Board  
100 Church Street, 10<sup>th</sup> floor  
New York, New York 10007

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

**Hearing Date:**

May 6, 2016

**Decision:**

Not Guilty

**Trial Commissioner:**

DCT Rosemarie Maldonado

## REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on May 6, 2016.

Respondents, through their counsel, entered a plea of Not Guilty to the subject charges. APU introduced into evidence the out-of-court statements of Person A and Person B.

Respondents testified on their 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 Respondents not guilty of the charged misconduct.



## FINDINGS AND ANALYSIS

At issue is Respondents' interaction with a civilian bystander who was photographing an arrest. The following facts are not in dispute. On May 2, 2014, Respondent Estevez and his partner, Police Officer Polidoro, were in uniform as they conducted patrol in a marked RMP within the confines of the 41 Precinct. At approximately 2130 hours, they responded to a radio transmission of an assault in progress. Upon arriving at the scene, the officers met the complainant who indicated that she had been assaulted by her son. Officer Polidoro transmitted a description of the alleged perpetrator over the radio and both officers conducted a canvass of the area with the complainant. After approximately one minute, they observed two officers in pursuit of the suspect. The complainant confirmed that it was her son. (Tr. 12-15)

One of the officers pursuing the suspect was Respondent Aquino. When he heard the assault in progress radio transmission, he responded to the scene with his supervisor, Sergeant Hernandez. Almost immediately, they spotted a male who matched the description. Officer Hernandez jumped out of the vehicle and gave chase followed by Respondent Aquino. Respondent Aquino fell behind. By the time he caught up, the suspect was on the ground being arrested by other officers. He determined that the arrest was under control and, as such, did not participate in the actual apprehension. (Tr. 36-38).

As the arrest was unfolding, Person A and his wife, Elizabeth, were walking [REDACTED]. Person A observed a male running with two police officers in pursuit. He decided to photograph the arrest. (CCRB Exhibit ("CCRBX") 1 at 3-7). In dispute is the nature of officer's subsequent interaction with Person A did not testify at trial. Instead, APU relied on a January 20, 2015 CCRB interview, which took place approximately eight months after this police encounter. At that time, Person A told the CCRB investigator that he had observed two officers tackle a male to



the ground and a group of officers gather to assist. (CCRBX 1 at 8, 21). He decided to photograph the arrest "while maintaining a distance of roughly 25 feet." (*Id.* at 4). Person A alleged that shortly after he began taking pictures, a uniformed officer approached and told him that it was against the law to photograph the scene. When Person A "invoked [his] First Amendment right," the officer told him to move back. When Person A complied, the officer turned his attention to the arrest and Person A continued taking pictures. Person A identified this officer in the "second photograph"<sup>1</sup> he brought to CCRB and the investigator noted for the record that it was "a black or Hispanic male officer in uniform" who stood approximately 5'9". (*Id.* at 4, 9-10, 16-17). This officer was later identified as Respondent Aquino. (Tr. 39; CCRBX 4)

According to Person A, after the suspect was handcuffed an "Officer Hernandez" told him not to take pictures. When Person A again referenced the First Amendment, that officer threatened to arrest him for disorderly conduct. Although Person A questioned how he was being disorderly, he complied with the officer's order to "go across the street." The complainant identified "Officer Hernandez" as the individual in "fifth photograph" he brought to CCRB.<sup>2</sup> (*Id.* at 4, 11, 17-18).

Person A recounted that after the suspect was in the RMP, a "bald officer" addressed him by stating, "You know you're not supposed to be doing that." When the photographer referenced the First Amendment, the bald officer allegedly asked, "do you even know how to spell amendment?" Person A retorted that he knew how to spell "Civilian Complaint Review Board." According to Person A, the officer responded, "[s]ubmitting to a review board can't

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<sup>1</sup> The picture identified as the second photograph at the CCRB interview was entered into evidence at trial as CCRBX 4.

<sup>2</sup> The picture identified as the fifth photograph at the CCRB interview was entered into evidence at trial as CCRBX 7.



do anything.” (*Id.* at 5, 11-12) Person A alleged that both the “bald officer,” Hernandez and a third officer then pointed their flashlights at his camera to prevent him from taking pictures. (*Id.* at 13).

Person A explained that he was “verbally attacked” by a number of officers. He acknowledged responding, “[y]ou call yourselves officers and yet you don’t know the law. You’re violating 1<sup>st</sup> amendment rights. These are basic things you learn in the academy.” (*Id.* at 4-5, 22-23) He told the CCRB investigator that as he walked away a “plain clothes detective” started “complaining” and taunted him by asking whether he would take photos of a murder. After person A responded that he would, the detective warned that he had “crossed a line” and that next time he would be arrested. (*Id.* at 5, 21-24)

Person A explained at the interview that he waited months to notify CCRB of this incident because he had met with a precinct inspector and had been assured that the officers involved would be reprimanded and retrained. Only when person A failed to receive confirmation that the officers had been disciplined, did he file a complaint with the CCRB. (CCRBX 1 at 25-26)

person B did not appear at trial but spoke to a CCRB investigator on November 5, 2014. (CCRBX 2) She confirmed that soon after her husband began taking pictures, an officer told him he could not do so. When her husband asserted his right to do so, the officer simply asked them to stand back. person B stated she thought this officer was the individual closest to the camera in “photograph 2,” who was later identified as Respondent Aquino. (CCRBX 2 at 4, 12-13; *see also* Tr. 39)

After they crossed the street, she recalled another officer getting “kind of upset,” telling her husband, in sum and substance, “you’re not supposed to be taking pictures.” When her



husband referenced the First Amendment, this officer told him, "spell it, amendment." She recalled Person A stating that he would file a complaint with the CCRB and the officer answering that a complaint would be a "waste of time." It was after this exchange that the officer shone his flashlight at them because "he didn't want to be shown on the camera." (*Id.* at 4-5, 15-19) She suggested this officer might have been Hernandez from "photograph five"<sup>3</sup> but stated she was unsure. She believed, however, that her husband had his badge information. Person B approached an officer in a "white shirt" and told him, "your officer was very rude and I didn't like the way he was talking to us." The supervisor then directed the officers to return to their vehicles. (*Id.* at 5-6, 20-21)

At the end of her interview, Person B also recalled an undercover officer approaching, although her version of this interaction was notably different than her husband's account. He alleged that an undercover officer threatened to arrest him the next time he was taking photos. She remembered the officer stating, "Oh I see you 're taking pictures." According to Person B, after her husband explained that he frequently took pictures in the neighborhood, the officer responded, "Okay, that's good." (*Id.* at 22-23)

At trial, both Respondents denied the allegations of misconduct. Respondent Estevez recalled being very active in the apprehension of this suspect. He explained that because the suspect resisted arrest, it took at least four officers, including himself, to handcuff him. Respondent Estevez explained that his participation in restraining the suspect required his full attention. After the suspect was restrained, his participation continued because he placed the suspect in the RMP and was responsible for safeguarding him in the vehicle. (Tr. 14-16)

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<sup>3</sup> The picture identified as the fifth photograph at the CCRB interview was entered into evidence at trial as CCRBX7.



Respondent Estevez denied asking Person A about his ability to “spell amendment,” telling him that filing a CCRB complainant would be a “waste of time,” or using his flashlight during this encounter. (Tr. 18, 32-33) He emphasized at trial that because he was in the huddle of officers trying to control and restrain a resisting suspect, he was focused exclusively on that task and did not have interactions with bystanders at the scene. Moreover, he had no recollection of anyone photographing the incident or holding a camera. (Tr. 17, 20-22)<sup>4</sup>

When shown the photograph entered into evidence as CCRBX 6 at trial, Respondent Estevez asserted that “it [didn’t] seem to be [him]” in the photo but contended that he could not “possibly be sure” as the photo was “not clear.” (Tr. 27-28) When shown CCRBX 8, Respondent Estevez testified that he “believed he was the officer safeguarding the vehicle.” He then stated, however, that the “picture [was] not clear enough” for him to be “a hundred percent” certain.

Respondent Aquino recalled interacting with a civilian photographer. He recounted that there were numerous people at the scene, including one with a digital SLR camera, and that he directed them to “take a step back.”<sup>5</sup> (Tr. 39-40) He also told the crowd that, “If [they] want[ed] to take photographs, they [could] take them but they [would] have to ... step back or across the street ... ” away from the middle of the road. He denied making any statements indicating that taking pictures was prohibited. (Tr. 40-41, 56) Respondent Aquino also denied using his whistle or flashlight during this interaction. (Tr. 42, 55) He noted that his main focus was keeping the crowd back and ensuring that his fellow officers were safe. (Tr. 56-57)

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<sup>4</sup> On cross-examination Respondent Estevez was asked about his CCRB interview. Reading from a transcript, the Administrative Prosecutor asserted that when asked if anyone nearby the incident had attracted his attention, Respondent had told CCRB investigators, “No I’m paying attention with ... towards the defendant but I’m pretty sure there was a lot of people gathering.” At trial, Respondent acknowledged that he submitted to an interview but did not recall being asked this question or giving that answer. Similarly he did not recall later telling investigators, “I remember people gathering” (Tr. 19-21)

<sup>5</sup> Respondent Aquino identified himself as the individual on the left side of the photo marked as CCRB Exhibit 4.



Respondent Aquino identified the individual in the center foreground of CCRBX 6, not as Respondent Estevez, but as Officer Sanchez. He explained that he recognized Sanchez because "I know he's a little stocky. He's also bald-headed...." He could not pick out Respondent Estevez in the same photograph because he believed that at the time Estevez was "on the ground with the perpetrator." (Tr. 45-46)

While testifying, Respondent Aquino acknowledged that he had denied having any recollection of this incident at his CCRB interview. He suggested that his memory became refreshed as he was shown photos at the CCRB interview and discussed the incident with other officers, including Respondent Estevez, on "numerous occasions" after his first CCRB interview. (Tr. 61-62) Specifically, he explained:

As time has gone on, I've been able to bring more back of it. At the time when they presented the complaint against me, I wasn't sure what the complaint was for. . . . There were numerous arrests, numerous situations. It's hard to pinpoint. But after it being brought to my attention, things starting coming back as to the details of what happened, what occurred . . . I have a better recollection than at that moment when I was caught by surprise as to what was being brought in front of me. I had no idea what I was going down to CCRB for. (Tr. 58-61)

Case No. 13792-15- Respondent Aquino

Respondent Aquino is charged with engaging in misconduct by telling Person A that he was not allowed to take photographs and by interfering with his ability to take photographs. Respondent denied the allegations; thus a finding of fact must turn solely on an assessment of witness credibility. Having carefully considered the evidence and testimony, I find that the record failed to establish by a preponderance of the credible evidence that Respondent engaged in the charged misconduct.

It must be noted that APU relied primarily on the out-of-court statements of Person A and Person B to prove its case. It is well established that although hearsay is admissible in



an administrative tribunal, it must be sufficiently probative and reliable to be accorded probative weight. *Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't 1991), *lv. to app. den.*, 78 N.Y.2d 851, (1991). It is of note that the reliability of an out-of-court statement warrants particular scrutiny when, as here, it is both controverted and outcome-dispositive. See *In re Matter of 125 Bar Corp. v. State Liquor Auth. of the State of N.Y.*, 24 N.Y.2d 174 (1969).

Within this legal framework, I cannot make a finding of guilt supported solely by the hearsay statements of these married complainants. Without the benefit of cross-examination, this tribunal could not assess their demeanor and critical factors such as motive and bias were not aired. Furthermore, it would have been important to have a record as to what discussions the couple had about this event to determine whether each had an independent recollection of what transpired or whether they corroborated on the narrative. I was also troubled by the disjointedness of Person B's out-of-court statement and her comments that she was "nervous," "confused" and "not sure." Simply put, in this hearsay case, I could not find that the evidence was sufficiently corroborated or reliable to credit Person A's contested allegation that Respondent Aquino told him it was against the law to take photographs. Accordingly, Respondent Aquino is found not guilty of the misconduct set forth in Specification 1.

Specification 2 charges Respondent Aquino with interfering with Person A's ability to photograph. At his out-of-court interview, Person A accused multiple officers of shining their flashlights into his camera, but did not expressly identify Respondent Aquino as having done so. I note that at one point during the interview he is discussing Respondent Aquino with the investigator immediately prior to discussing the flashlight incident. However, his imprecise references to "this officer" were unclear, and therefore insufficient to identify Respondent



Aquino as the responsible party.<sup>6</sup> Moreover, Person B told the CCRB interviewer that the officer who first approached (Respondent Aquino), told her husband he could not take photographs then “just left us alone” after asking them to stand back. (CCRBX 2 at 3, 12-13)

In sum, this record is devoid of reliable evidence that Respondent Aquino actively impeded Person A’s ability to photograph a police incident. As such, Respondent Aquino is found not guilty of the misconduct set forth in Specification 2.

Case No. 13793-15-Respondent Estevez

Respondent Estevez is charged with interfering with Person A’s ability to photograph an arrest and discourteously asking him, “Do you even know how to spell amendment?” The evidence, however, fell short of proving these charges because the complainants’ out-of-court attempts to identify the offending officer were imprecise and problematic.

At his CCRB interview, Person A affirmatively identified the individual who engaged in the above charged misconduct as “the bald officer.” (CCRBX 1 at 5, 12-13) In addition, he agreed with the investigator’s assessment that this “bald officer” was “about 5’4” tall. (CCRBX 1 at 11, 13) Although it is not disputed that Respondent Estevez is bald, it appeared to this tribunal that he is between 5’8” and 5’9” – significantly taller than the 5’4” estimate denoted at

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<sup>6</sup> CCRBX 1, pp. 12-13 state in relevant part:

Persort A: No the first one was the younger slimmer guy. He was the first that approached me.

CCRB Investigator Ajayi (“CCRB”): The one we looked at before right?

Persort A: Yes.

CCRB: The one I said was probably Hispanic or black. Skinny build.

Persort A: Yes. This is the guy-he’s the one--

CCRB: That asked you if you could spell amendment. Okay I can’t really tell what’s going on in this photo. The sixth photo. A bunch of officers appear-some appear to be female officers. I think there are one or two female officers, right?

Persort A: No those are people in the crowd. This is one of the officers. You can’t really see his face but that’s one of the officers that ended up flashing his flashlight into my camera so I could no longer take photos.

CCRB: So more than one officer did that to you?

Persort A: Yes. It was him, Officer Hernandez and the bald officer.

CCRB: The bald officer we said was about 5’4”?

Persort A: Yes, and this officer here. This is when they were flashing their flashlights into my camera so I could no longer take photos and this is the plainclothes detective that made a comment towards ...

CCRB: This is a very tall officer, I would say 6’2”?

Persort A: Yes.

CCRB: Looks to be white or Hispanic. Has on a fitted hat with a NY Yankee emblem on the front of it. Can’t tell the color .. Has on a sweater



CCRB. Given this significant discrepancy, it is highly unlikely that Respondent Estevez could have reasonably been mistaken for measuring only 5'4".

The unreliability of Person A's description is compounded by photographs of the scene which appear to this tribunal to depict two officers who are bald. The CCRB investigator made a similar observation, noting that CCRBX 3 showed five officers, including one bald officer bent over the perpetrator with his back turned toward the camera and a second bald officer holding the perpetrator with his face partially turned toward the camera. (CCRBX 1 at 9) Respondent Aquino confirmed the identity of that second bald officer as Officer Sanchez whom he also described as "stocky." (Tr. 45-46)

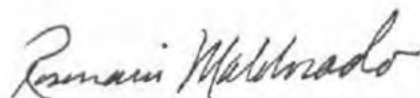
Furthermore, Person A's statements about "the bald officer" who "questioned whether [he] knew how to spell amendment" was not corroborated by his wife. Person B struggled with the identification of this officer. When asked if it was Officer Hernandez, who is depicted in CCRBX 7, she indicated that, "It might have been him" multiple times before acquiescing that she was uncertain. (CCRBX 2 at 14-15) She did not, however, make reference to a "bald officer."

Given the lack of precision and consistency between Person A and B's accounts, this tribunal finds these statements to be unreliable both as to the identification of the officer and the substance of his statements. Without a positive identification at trial, or the benefit of cross examination regarding their inconsistent recollections, I cannot determine by a preponderance of the credible evidence that it was Respondent Estevez who the complainants were referencing in their interviews or that he actually engaged in the charged misconduct. Accordingly, I find him not guilty of Specifications 1 and 2.



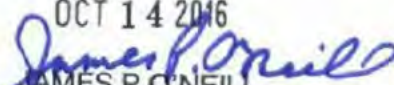
In making these findings, I must note that the tribunal found Respondents to be, at times, less than straightforward in their respective testimonies. It is certainly of concern that Respondent Aquino had no significant memories of this incident when he met with CCRB. Likewise, Respondent Estevez's inability at trial to identify whether he was the individual in certain photographs was not totally convincing. Respondents' questionable testimony on these issues, however, does not relieve APU of its burden of proof, particularly in a hearsay case. Given the numerous problems with the out-of-court statements in evidence, the proof was insufficient to sustain the charges.

Respectfully submitted,



Rosemarie Maldonado  
Deputy Commissioner Trials

**APPROVED**

OCT 14 2016  
  
JAMES P. O'NEILL  
POLICE COMMISSIONER