



POLICE DEPARTMENT

January 5, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Michael Greaney
Tax Registry No. 947762
Warrant Section
Disciplinary Case Nos. 2013-10971

Police Officer Gerson Cabrera
Tax Registry No. 948727
44 Precinct
Disciplinary Case No. 2013-10991

The above-named members of the Department appeared before me on September 10, October 22 and October 24, 2014, charged with the following:

Disciplinary Case No. 2013-10971

1. Said Police Officer Michael Greaney, on or about June 19, 2012 at approximately 2300 hours, while assigned to the 44th Precinct and on duty, in the vicinity of [REDACTED] Bronx County, did wrongfully use force against Person A, in that he struck Person A about the head without police necessity. P.G. 203-11 - USE OF FORCE

2. Said Police Officer Michael Greaney, on or about June 19, 2012 at approximately 2300 hours, while assigned to the 44th Precinct and on duty, in the vicinity of [REDACTED] Bronx County, did wrongfully use force against Person A, in that he struck Person A about the chest without police necessity. P.G. 203-11 - USE OF FORCE

Disciplinary Case No. 2013-10991

1. Said Police Officer Gerson Cabrera, on or about June 19, 2012 at approximately 2300 hours, while assigned to the 163rd Command, Patrol Borough Bronx, and on duty, in the vicinity of [REDACTED] Bronx County, abused his authority as a member of the New York City Police Department, in that he arrested Person B without sufficient legal authority. P.G. 208-1, Page 1, Paragraph 3 - LAW OF ARREST

The Civilian Complaint Review Board (CCRB) was represented by Nicole Junior, Esq. Respondents Greaney and Cabrera were represented by Michael Martinez, Esq. Respondents, through their counsel, entered a plea of Not Guilty to the subject charges. CCRB called the following witnesses: Mark Francis, Janelle Diggs, William Diggs and Celia Holloway. Also introduced into evidence was the transcript of the recorded interview of Person A. 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.

After evaluating the testimony and evidence presented at the hearing, and assessing the credibility of the witnesses and hearsay declarations, this tribunal finds that there was insufficient evidence to support a finding that Respondent Cabrera engaged in misconduct by arresting Person B without sufficient legal authority. Accordingly, Respondent Cabrera is found Not Guilty of the charge set forth in Disciplinary Case No. 2013-10991. The preponderance of the credible evidence did establish that Respondent Greaney engaged in misconduct by wrongfully using force against Person A. Accordingly, Respondent Greaney is found Guilty of the charges set forth in Disciplinary Case No. 2013-10971.

FINDINGS AND ANALYSIS

The following facts are undisputed. On June 19, 2012, Respondent Cabrera and Officer Francis Flynn were assigned to work foot patrol as part of a Shooting Reduction Initiative in the 44 Precinct. The goal of the Initiative was to reduce violent crimes by deploying patrols in concentrated areas that had experienced spikes in shootings. Respondent Cabrera's post that day was a two block radius that encompassed College Avenue between 165th Street and 167th Street, Bronx County.

Person A, Mark Francis and Person B were friends who lived on this stretch of [REDACTED]. At about 2300 hours, they were standing in front of [REDACTED] with other neighbors when they heard a "commotion" and saw two men fighting about half a block away. The men were identified as I1 and I2, possibly from Teller

Avenue. They saw a crowd gathering around the fight and some of the onlookers were “egging them on.” At about 2300 hours, Respondent Cabrera and his partner were returning to their foot post. As they turned the corner of 164th Street onto College Avenue, they saw people congregating and heard loud yelling. They determined that it was a fight. As the police officers approached, I1 and I2 stopped fighting and ran toward 166th Street. Respondent and Officer Flynn did not try to pursue or detain them. They instead decided to clear the block. Respondent Cabrera and his partner gave repeated orders for the crowd to disperse and leave the street. Person B, Francis and Person A told the officers to go after the men who had fled and to leave the residents alone. Francis and others told the officers to “get the fuck out of here” and “do your fucking job.” Person B responded that he would not leave because he lived on the block and had done nothing wrong. The exchange escalated and Respondent Cabrera made the decision to arrest Person B for the purpose of issuing him a disorderly conduct summons at the precinct. Respondent Cabrera pulled out his handcuffs and told Person to place his hands behind his back. Person B resisted being handcuffed and reiterated that he would not leave. The officers attempted to physically restrain Person B and called for backup. Person B continued to resist and was maced by the officers. (Tr. 25-30, 58-59, 72-74, 201-205, 208-215, 224-225; CCRB Exs. 3, 4, 5; Resp. Ex. A)

The videos introduced into evidence recorded the events that occurred after Person B was first maced. Multiple police cars responded and a growing number of residents gathered around the stoop at 1029 College Avenue to observe and record the scene. The crowd became increasingly angry as a growing number of officers attempted to restrain Person B. The police used mace multiple times, spraying police officers, onlookers and Person B’s 14-year-old step-daughter.

Respondent Greaney was one of the officers who responded to the scene. Videos capture him charging toward Person B, grabbing his legs, and carrying him from the stoop to the sidewalk. As the officers handcuff Person B on the ground, Respondent Greaney crouched by Person B and held his foot. Person A was a few feet away videotaping the scene. Person A’s video captured Respondent Greaney looking up directly into the camera. Moments later he lunged toward the camera and hit it, pushing Person A back. The video then went blank. (Resp. Ex. A)

Disciplinary Case No. 2013-10991
Unauthorized Arrest Charge against Respondent Cabrera

The sole issue in this case is whether Respondent Cabrera engaged in misconduct when he initially decided to arrest Person B for disorderly conduct.¹ In ascertaining whether the CCRB met its burden of proving that Person B was arrested without sufficient legal authority, it is my responsibility to review the law and judge the reliability of witness accounts. The critical factual determination here is what occurred between Respondent Cabrera and Person B during their interaction immediately after the street fight ended. Specifically, this tribunal must examine: whether a lawful police order was communicated; whether the content of the order was clear; whether the civilian refused to obey a lawful order; and, the effect the refusal had on the event. Upon review of the record, this tribunal concludes that the charge was not substantiated by the weight of the credible evidence and recommends that it be dismissed.

The evidence presented supports a finding that Respondent Cabrera's order to disperse was lawful. In making this finding, I credited Respondent Cabrera's clearly articulated rationale for dispersing the crowd. He testified that even though the fight itself had broken up, the surrounding crowd raised significant safety concerns. Regardless of whether 8 or 20 people remained in the area afterwards, many of the onlookers were "egging on" the brawl instead of attempting to break it up. Respondent testified that based on his experience and training, such physical altercations can spiral out of control, spill over into the crowd or result in retaliation between rival groups. Given the late hour, the resulting noise and the potential for escalation, Respondent Cabrera decided that the best course of action was to clear the area. Accordingly, he and his partner ordered those remaining to leave the street. (Tr. 204-205, 228-230) This tribunal acknowledges that the civilian witnesses took issue with Respondent's order because they believed that the police should have instead pursued the two men who were

¹ CCRB concedes that Person B resisted arrest and did not file charges for the force used to subdue him.

fighting. Respondent Cabrera's decision to disperse the crowd, however, was reasonably calculated under the circumstances to maintain public order and was therefore lawful.

The record also supports a finding that Respondent Cabrera's order was unambiguously communicated to those lingering on the street, including Person B. Although at trial, Respondent Cabrera could not remember exactly what he first said to Person B, the CCRB witnesses all testified that they heard Respondent Cabrera's order. In fact, Pers. B responded to that police order by expressing his objection at being told to leave. (Tr. 30, 32; CCRB Ex. 4) The remaining factors at issue are whether Person B refused to obey a lawful order to clear the area and whether the circumstances surrounding that refusal justified an arrest for disorderly conduct. Patrol Guide Section 208-1 specifies the "conditions under which a uniformed member of the service may make an arrest." Paragraph 3 of that section authorizes an: "Arrest without a warrant [f]or a petty offense in [the officer's] presence (violations and traffic infractions)" when it is "believed to have been committed within [the] arresting officer's geographical area of employment" NYS Penal Law §240.20 sets forth the specific elements for a disorderly conduct arrest. This section of the Penal Law states in relevant part that:

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . [h]e congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse.... Disorderly conduct is a violation.

It is my conclusion that Respondent Cabrera's decision to arrest Person B was consistent with both Penal Law §240.20 and Section 208-1 of the Patrol Guide.

It is uncontested that Person B told Respondent Cabrera that he should pursue the people who started the fight and that he would not leave the street because he lived there and had not done anything wrong. I agree with CCRB that voicing a verbal objection alone might not be sufficient to effectuate an arrest for disorderly conduct. As set forth in the statute, a party must not only refuse an order, the refusal must be done "with intent to cause public inconvenience, annoyance or alarm, or recklessly creat[e] a risk." For the reasons set forth below, I conclude that Respondent Cabrera reasonably believed that

Person B's actions "recklessly created a risk" and therefore fell squarely within the conduct prohibited in Penal Law §240.20.

Overall, I found Respondent Cabrera's testimony to be more convincing than the testimony of the CCRB witnesses on these critical points. Respondent Cabrera credibly testified that the crowd started to move along when he first issued the order to disperse. Person B, who was at first standing in the street, became "angry" and voiced his refusal to obey Respondent's order in a loud voice that caught the attention of others in the area. Respondent Cabrera had seen Person B in the vicinity of the fight. He gave multiple orders to leave, but Person B continued to refuse. This back and forth lasted at least three minutes. According to Respondent Cabrera, he looked around and became especially concerned about safety because a crowd was gathering on the street once again, this time around them. Based on this assessment, Respondent Cabrera decided to remove Person B from the scene by effectuating an arrest and issuing him a disorderly conduct summons at the precinct. Person B refused to be handcuffed and resisted arrest. (Tr. 205-210, 224-225, 230-238) Under these circumstances, Respondent Cabrera's actions were reasonable and legally sufficient to justify this arrest.

CCRB attempted to prove that Person B was a mere bystander who calmly told Respondent Cabrera to do his job and then walked away. In sum and substance, the CCRB argued that it was Person B who had attempted to stop the fight and that it was Respondent Cabrera who escalated the encounter by continuing to argue with Person B and "jumping in his face" even when he attempted to leave. According to CCRB, Person B responded to Respondent Cabrera by putting his hands up in the air and reiterating that he did nothing wrong. The totality of the evidence on the record, however, was insufficiently reliable to support this version of events.

I base this credibility finding on my assessment of inconsistencies concerning material issues of fact. Specifically, there were conflicting accounts of the following points: whether Person B attempted to stop the initial fight; whether Person B walked away and Respondent Cabrera followed him; and, whether Respondent Cabrera told Person B that he was going to be arrested. These discrepancies were particularly significant in light of the fact that Person B did not appear at the trial to present his version of events or to face the rigors of cross-examination.

Mark Francis testified as follows. On the night at issue, he was standing with his friends, Persons A and B, in the street observing the fight. According to Francis, Person B stepped between the combatants in an attempt to stop it. When the police arrived he and his friends all told the officers to “find out what happened” and pursue the men who had been fighting. Their interaction “turned into a back and forth argument.” Francis testified that Person B was calm as he turned around and walked three to four feet away toward his residence. Francis contends that Respondent Cabrera persisted and complained that he “tried to be nice” but that they all “took advantage of his kindness.” Person B turned around and told Respondent Cabrera to do his job. Respondent Cabrera then “got in Person B’s face” and raised his voice. The argument between them lasted at least three minutes. According to Francis, Person B put his hands up and said he was not doing anything wrong. Respondent tried to grab his arm and bring it down. When he could not get Person B’s arm down, Respondent Cabrera began to mace him causing a crowd to gather. Francis testified that Respondent Cabrera never told Person B he was going to be arrested. (Tr. 26, 29-38, 45, 47-48, 67)

Janelle Diggs was a neighbor and friend of Person A and Person B. She also testified that Person B tried to break up the fight. Although she too recounted that Respondent Cabrera “jumped up into Person B’s face” and that Person B put his hands up in the air, she did not corroborate Francis’s statement that Person B voiced his objection and simply walked away. She contradicted Francis’s account in another important respect. She testified that Respondent Cabrera did in fact state that he was going to arrest Person B. (Tr. 74-77, 99-100) William Diggs, Janelle Diggs’ brother, confirmed that Person B was calm and “not yelling,” although he did not witness the original encounter. (Tr. 139, 165-166)

Person A did not appear at the hearing. Instead, his CCRB interview, which was conducted on July 19, 2012, was admitted into evidence as CCRB Ex. 4. It is important to note that although Person A was with Francis and Person B that night, his account of the events leading up to Person B’s arrest differs in significant ways. First, although he admitted that Person A, Francis and Person B walked toward the fight, he did not state that Person B attempted to intervene or break it up. It seems highly unlikely that Person A would have omitted this fact from his account if it had actually occurred. Second, Person A asserted that Respondent Cabrera specifically warned them to get off the street or they would be

arrested. More importantly, Person A contradicted Francis' and Diggs' testimony that Person B was calm and walked away. In fact, Person A stated that because Person B continued to refuse Respondent Cabrera's order, he "went to grab" Person B and tell him "let's go" and to advise him that it does not "make any sense arguing with them." Person A's statement acknowledges that Person B was not calm or walking away during his encounter with Respondent Cabrera and that Person B's behavior was such that he thought it necessary to get his friend to stop. (CCRB Ex. 4 pgs. 4, 18, 27-30) In sum, the totality of Person A's account supports this tribunal's finding that Person B was ordered to leave the street, repeatedly refused to do so and became agitated.

Accordingly, I find that the charge was not substantiated by the weight of the credible evidence and should be dismissed.

Disciplinary Case No. 2013-10971
Wrongful Use of Force Charge against Respondent Greaney

Respondent Greaney is charged with wrongfully using force against Person A and striking him without police necessity. Upon review of the record, this tribunal finds that the CCRB proved by a preponderance of the evidence that Respondent Greaney engaged in actionable misconduct when he struck Person A as he stood nearby and recorded Person B's arrest.

As set forth above, a number of officers had been unsuccessful in their attempt to subdue Person B when Respondent Greaney responded to the scene. Respondent Greaney immediately assisted the officers by grabbing Person B's legs and bringing him to the sidewalk. This maneuver allowed the officers to handcuff Person B. At issue is Respondent Greaney's conduct after he brought Person B to the ground.

It is undisputed that Person A was an onlooker videotaping Person B's arrest. Person A captured Respondent Greaney as he subdued Person B and crouched on the sidewalk holding Person B's foot to the ground. The videotapes entered into evidence document that as Respondent Greaney hunkered down on the sidewalk, he looked directly into Person A's

camera and within seconds lunged forward a few steps toward Person A and, without any verbal warning, bashed the camera. The recording ends at that point. (CCRB Ex. 3; Resp. Ex. A) At the CCRB, Person A claimed that the direct hit caused him to flip over a vehicle and onto the ground. (CCRB Ex. 4)

Respondent Greaney testified that he inadvertently struck Person A when he was trying to clear a path. Specifically, he explained that given the chaotic scene, it was a priority to transport Person B and the police officers to the precinct. He admitted that in the process of clearing a path to the police van, it was possible that he might have hit Person A in the chest, although he did not remember the person he made contact with that night. Respondent Greaney explained that he had been trained to clear this type of path without inflicting injuries. The technique required keeping his arms at chest level and moving them back and forth to “spread the crowd.” (Tr. 264-266, 271, 280)

The recordings did not support Respondent Greaney’s version of events. Accordingly, I did not credit his testimony that the force used in this case was inadvertent or needed to move Person A away from the arrest scene. I base this credibility finding on the factors set forth below. First, Respondent Greaney did not order the crowd to step back. He was completely silent as he lunged forward without warning. Second, he admitted that at the point of contact, at least one of his hands was not at chest level, as his training required, but at eye level. Third, his arm movements were not consistent with those he was trained to use to disperse a crowd. Instead the movement of one arm seemed calculated to directly hit the camera Person A was using to film. Fourth, at his CCRB interview, Respondent Greaney sarcastically stated that he said “thank you” to Person A after striking him. One might infer from this odd statement that Respondent Greaney was less than forthright in his statements and was harboring some hostility at being filmed. (Tr. 283-285)

In sum, this tribunal did not credit Respondent Greaney’s testimony. Accordingly, I find that the CCRB proved by a preponderance of the evidence that Respondent Greaney engaged in sanctionable misconduct by wrongfully using force against Person A.

PENALTY

Disciplinary Case Nos. 2013-10971

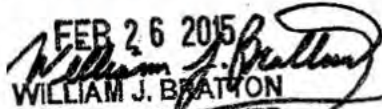
In order to determine an appropriate penalty, Respondent Greaney's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent Greaney was appointed to the Department on July 21, 2008. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB recommended the forfeiture of thirty vacation days as the penalty in this case. For the reasons set forth below, this tribunal recommends a five day suspension as the appropriate remedy.

In making this recommendation, I acknowledge that Respondent Greaney abused his position by wrongfully striking a bystander without police necessity. Although the record provides insufficient evidence to determine the extent of Person A's injuries, gratuitously striking an onlooker with a camera erodes the public trust. Moreover, Respondent Greaney was placed on Level I Force Monitoring from January 1, 2011 to July 23, 2014 – almost half the time he has been employed by the Department. On the other hand, this tribunal recognizes that Respondent Greaney has been an active member of the service for over six years. He has an impressive arrest record, very good ratings and has received numerous medals and commendations. This tribunal opines that a five day suspension strikes a balance between Respondent's employment record, the misconduct he engaged in and the Department's interest in ensuring that unwarranted uses of force will not be repeated.

Respectfully submitted,

APPROVED

FEB 26 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER



Rosemarie Maldonado
Deputy Commissioner of Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner Trials

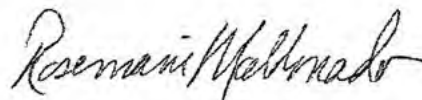
To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER MICHAEL GREANEY
TAX REGISTRY NO. 947762
DISCIPLINARY CASE NO. 2013-10971

Respondent was appointed to the Department on July 21, 2008. His last three annual evaluations were as follows: he received an overall rating of 4.5 "Highly/Extremely Competent" in 2012 and 2011, and a 4.0 "Highly Competent" in 2010. He has 19 medals for Excellent Police Duty and 3 medals for Meritorious Police Duty. [REDACTED]

Between January 19, 2011 and July 23, 2014, he was placed on Level I Force Monitoring as a result of having received three Civilian Complaint Review Board complaints during a one-year period. He has no prior formal disciplinary record.

For your consideration.



Rosemarie Maldonado
Deputy Commissioner of Trials