



POLICE DEPARTMENT CITY OF NEW YORK

March 1, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Claymont Defreitas
Tax Registry No. 952649
104 Precinct
Disciplinary Case No. 2016-15395

Charges and Specifications:

1. Police Officer Claymont Defreitas, on or about September 14, 2015, at approximately 0020 hours, while assigned to the 104 PCT and on duty, in the vicinity of [REDACTED], Queens County, wrongfully used force, in that he struck Person A with the door of a police vehicle, without police necessity.
P.G. 203-11 - USE OF FORCE
2. Police Officer Claymont Defreitas, on or about September 14, 2015, at approximately 0020 hours, while assigned to the 104 PCT and on duty, in the vicinity of [REDACTED], Queens County, wrongfully used force, in that he pushed Person A. without police necessity.
P.G. 203-11 - USE OF FORCE
3. Police Officer Claymont Defreitas, on or about September 14, 2015, at approximately 0020 hours, while assigned to the 104 PCT and on duty, in the vicinity of [REDACTED], Queens County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he threatened Person A with the use of force by driving his police vehicle toward Person A without sufficient legal authority.
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT
4. Police Officer Claymont Defreitas, on or about September 14, 2015, at approximately 0020 hours, while assigned to the 104 PCT and on duty, in the vicinity of [REDACTED], Queens 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 ability to take a photograph, without sufficient legal authority.
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

Appearances:

For CCRB-APU: Amanda Gayle, Esq. and Simone Manigo, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

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

Hearing Date:

December 14, 2016

Decision:

Not Guilty of Specification 1 and Guilty of Specifications 2, 3, and 4.

Trial Commissioner:

ADCT Nancy R. Ryan

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on December 14, 2016.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges.

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 not guilty of Specification 1 and guilty of Specifications 2, 3, and 4 of the charged misconduct.

FINDINGS AND ANALYSIS

It is undisputed that on September 14, 2015, at approximately 0020 hours, Respondent was in uniform driving a marked RMP when he responded to a bar at [REDACTED] in Queens. The area is both residential and commercial. While he was at the location, Respondent spoke to Person A. Person A had called 911 to complain that someone assaulted him in the bar. Respondent went into the bar to look for a possible perpetrator, but did not find anyone. After standing outside the bar for a while, Respondent got back into his RMP. Person A walked up to the car and Respondent opened the driver's side door in a way that it hit Person A. Respondent exited his RMP and pushed Person A. Respondent got back in his RMP. Person A bent down to look at the RMP vehicle number and Respondent drove off.

Person A did not appear to testify at trial. A transcript and audio tape of what is purported to be an interview of Person A by CCRB were entered into evidence. The audio tape of the interview is in Spanish. The purported transcript is in English. There was no testimony as to how the translation was made, nor any indication of the credentials of the person who did the translation. Without being able to verify that the translation was done by a properly credentialed Spanish interpreter, I have given no weight to the transcript. There is however a video of the incident and Respondent testified at trial. I have based my decision on that evidence.

The CCRB's position is that Respondent committed misconduct in that he wrongfully used force by striking Person A with the RMP door and then again when he pushed him. They further contend that Respondent committed additional misconduct by threatening the use of force by driving the RMP towards Person A and then by interfering with Person A ability to take a photo of the license plate of the RMP.

The Respondent in his trial testimony did not contest that the RMP door hit Person A or that he pushed Person A, but rather offered an explanation for his actions. He denied that he drove the RMP towards Person A and testified that he gave Person A sufficient time to write down the license number.

Specification 1 charges Respondent with a wrongful use of force in that he struck Person A with the door of the police car without police necessity. Respondent admits that as he was opening his RMP door it struck Person A in the face. (Tr. 30) In his testimony at trial he described the situation which led up to this event. Respondent testified that after arriving at the bar and speaking to Person A, he accompanied him into the bar to look for the man who Person A claimed had assaulted him. Respondent described Person A demeanor as "very angry." Respondent testified that after they exited the bar, Person A got very aggressive and started saying the police weren't doing anything. (Tr. 25) Respondent further testified that in response to Person A's statements, they took him back inside the bar three times that night to see if he could find the person. After the third attempt to locate the person, Respondent and other officers on the scene told Person A to leave the location because the boss of the bar didn't want him back inside the bar. (Tr. 25-26) Respondent testified that Person A was being verbally aggressive and cursing at the police. (Tr. 26-27) After he was told to leave the location multiple times, Person A finally moved two or three doors away from the bar. (Tr. 26) Respondent testified that his sergeant told him not to issue Person A a summons since he had just been in a fight. (Tr. 27) Respondent and his partner then drove a few blocks away from the bar and stopped to complete their paperwork. (Tr. 27-28) They returned to the bar when they heard on the radio that the sergeant was placing a male under arrest at the location.

(Tr. 28) Respondent parked the RMP near the bar and saw that Person A's brother was being arrested. Respondent testified that Person A, "approached the car cursing, cursing very aggressively, in a very aggressive manner." (Tr. 29) Respondent described his state of mind at this time as thinking about his own safety and about two police officers who had been shot in their car a few months before. (Tr. 30) Respondent testified that he asked Person A to step away from the car a few times but Person A did not comply. Respondent further testified that he opened the car door at this point because he felt, "it would be more safe for me to be out of the car standing instead of him standing over me." Respondent opened the door and pushed the door causing it to strike Person A in the face. This is visible in the video. (CCRB Ex. 1, at approximately 22:03) Respondent testified that he felt vulnerable while sitting in the car with someone standing over him because it is, "real hard for you to, like for you to get access to simple things like even your mace or even you asp.....you have the steering wheel right in front of you.....it's not a safe thing for you to sit in a car while someone who is being aggressive is just standing over you." Respondent described his goal when he opened the car door as, "[t]o pretty much get out of the car and be in like a safer position." (Tr. 30-31)

Based on Respondent's testimony, I find that his reasons for placing himself in a safe position gave him sufficient justification to open the car door with Person A standing next to it. An officer is in an extremely vulnerable position when seated behind a steering wheel while someone the officer perceives as aggressive is standing in an upright position right next to the officer's vehicle. While there is no audio on the video tape, it appears that before approaching Respondent's car, Person A is making statements directed at Respondent. (CCRB Ex. 1, at approximately 21:39-21:52) It is also clear on the video that

Person A walks right up to the window of the RMP while making some gestures with his hands and he appears on the video clip as a rather large person looming over the area where Respondent was sitting. (CCRB Ex. 1, at approximately 22:00) I further find that Respondent in this situation was acting out of concern for his own safety and did not intentionally use the door as an instrument of force against Person A. Respondent is therefore not guilty of Specification 1.

Specification 2 charges Respondent with wrongfully using force when he pushed Person A. Respondent has admitted he pushed Person A. The push is also visible on the video. (CCRB Ex. 1, at approximately 22:08) Respondent testified that once he got out of his RMP, Person A was still cursing at him and he pushed him because, "he was still in my safety zone. He was still close to me at the time. And also he was cursing in an aggressive manner." (Tr. 31) On cross-examination, after Respondent was confronted with his CCRB interview statement that Person A didn't say anything to him after he got out of his RMP, Respondent testified that he now wasn't sure if Person A cursed at him after he got out of the car. (Tr. 48-50) Respondent testified that he did not have any physical contact with Person A after that one push. (Tr. 31-32)

The video shows that Respondent did push Person A just once (CCRB Ex. 1, at approximately 22:08) Person A, however, did not appear to be physically threatening Respondent in any way at the time of the push. After being hit with the car door, Person A took several backwards steps away from the RMP and was essentially standing still, approximately an arm's length away from Respondent, when Respondent reached out and pushed Person A. Based on the video and the lack of a credible reason necessitating

this push, I find that the push was a gratuitous use of force and Respondent is therefore guilty of Specification 2.

Specification 3 charges Respondent with the unnecessary use of force in driving his police vehicle towards Person A. This portion of the incident is clear on the video. (CCRB Ex. 1, at approximately 26:30) Person A is visible standing in front of Respondent's RMP while the RMP starts to move towards him. Respondent, while initially testifying that Person A was standing next to the vehicle when he moved it, acknowledged after watching the video that Person A was standing in front of the RMP when he began to drive it. (Tr. 54, 57) It appeared to Respondent that Person A was attempting to write down the number of the RMP plate. (Tr. 33) Respondent testified that he moved his RMP at the time because he thought Person A was taking too long to write down the number of the RMP. He testified that he, "slightly hit the gas. Like, okay – I am saying to myself, 'Okay. Are you going to hurry up? Are you going to write this number down quick?' Because he shouldn't take that long to write those four digits." (Tr. 33) He further testified that it was not his intention to scare or threaten Person A with the RMP in any way and at no point did he hit Person A with the car. (Tr. 33) On cross-examination, Respondent admitted that he never asked Person A to step away from the car before he moved it. (Tr. 56)

I find Respondent guilty of Specification 3. Respondent did drive his vehicle directly towards Person A as he was standing in front of it. Respondent's explanation that he essentially just wanted to leave the area and thought Person A was taking too long writing down a license plate is no justification for moving a vehicle weighing thousands of pounds directly at a person. The fact that Respondent "slightly" hit the gas does not change the

situation that the vehicle was being moved towards someone standing right in front of it. As apparent on the video, Respondent drove very close to Person A and then proceeds to even move the RMP a second time towards Person A. Even if Respondent had to leave the scene in a hurry, which there is no evidence of here, he could have backed his vehicle up, since there was no other car behind it at the time. Driving his RMP directly at Person A was a threat of the use of force with no sufficient legal authority.

Specification 4 charges Respondent with interfering with Person A ability to take a photograph. As discussed with regard to Specification 3 above, Respondent was aware that Person A was attempting in some way to record the plate number of the RMP. The video shows Respondent driving directly at Person A as he is bending down apparently trying to take a picture of the front license plate. This movement of the car did interfere with Person A ability to take a picture of the plate and Respondent therefore is guilty of specification 4.

PENALTY RECOMMENDATIONS

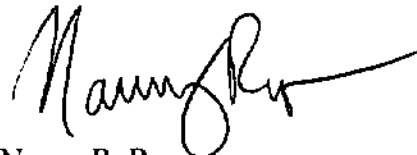
In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 11, 2012. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The CCRB has requested that a penalty of the forfeiture of 18 vacation days to cover the four charges. Respondent has been found guilty of three of those charges. In a previous case, a four-year police officer with no prior disciplinary record forfeited five vacation days for pushing a complainant without police necessity. Disciplinary Case No. 2013-10920, signed September 2, 2015 In a case concerning police interaction with a civilian using a camera phone, a ten-year lieutenant with no prior disciplinary record forfeited one vacation day for discourteously telling

the complainant in an aggressive manner, "Who are you, who are you? Take your phone. Get out of here." Disciplinary Case No. 2014-11998, signed October 14, 2015. In the case cited by the CCRB (Disciplinary Case No. 2015-13641) as resulting in penalty of 12 vacation day forfeiture for interfering with the reporting of a civilian, that penalty was actually imposed based on the Respondent being found guilty of three charges, including an unlawful stop and an unlawful arrest.

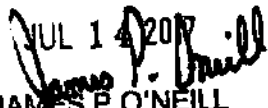
In this case, the most serious misconduct was driving a police vehicle directly towards a civilian. While fortunately no harm was done to the civilian, there could have been disastrous consequences if the car had hit him. No recent precedent was either cited by CCRB, or found by the court, for a similar fact pattern. While an appropriate combined penalty for Specifications 2 and 4 would be in the range of five or six days, the serious nature of Respondent's conduct resulting in a guilty finding for Specification 3 calls for a significant addition to the total penalty time. I recommend that the penalty to cover Specifications 2, 3, and 4, be the forfeiture of a total of 15 vacation days.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

JUL 14 2017

JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER CLAYMONT DEFREITAS
TAX REGISTRY NO. 952649
DISCIPLINARY CASE NO. 2015-15395

Respondent was appointed to the Department on July 11, 2012. His last three performance evaluations are as follows: he received two 4.5 overall ratings of "Highly/Extremely Competent" and a 4.0 "Highly Competent." He has received one medal for Excellent Police Duty. [REDACTED]

[REDACTED]

Respondent has no prior formal disciplinary history.

For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner Trials