



POLICE DEPARTMENT

February 12, 2020

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In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2019-20158
Police Officer Keynes Pena	:	
Tax Registry No. 945276	:	
Transit Bureau District 12	:	

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

Before: Honorable Paul M. Gamble  
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Ifeamaka Igbokwe, Esq.  
Suzanne O'Hare, Esq.  
Civilian Complaint Review Board  
100 Church Street, 10<sup>th</sup> Floor  
New York, NY 10007

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

To:

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

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## CHARGES AND SPECIFICATIONS

1. Police Officer Keynes Pena, on or about July 2, 2018, at approximately 1840 hours, while assigned to TB DT12 and on duty, in the vicinity of the Subway station of East 149th Street and Third Avenue, Bronx County, wrongfully used force, in that he used a chokehold against Person A.

P.G. 221-02, Page 2, Prohibition 11

P.G. 221-01

P.G. 221-02

USE OF FORCE

FORCE GUIDELINES

USE OF FORCE

## REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on December 11, 2019.

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

Civilian Complaint Review Board (CCRB) called investigator Emilia Mancini as a witness.

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. Having reviewed all of the evidence in this matter, I find Respondent Guilty, and recommend that Respondent forfeit 10 vacation days.

## ANALYSIS

It is undisputed that on July 2, 2018, at approximately 1840 hours, Respondent and his partner, Police Officer Hassan, apprehended Person A for fare evasion at the Third Avenue and East 149th Street subway station. There was a physical encounter as Person A attempted to leave through the turnstiles, and Respondent grabbed Person A's upper body. At issue is whether, in the course of grabbing Person A, Respondent used a chokehold.

CCRB investigator Emilia Mancini testified that she was the investigator assigned to the present matter, which CCRB initially received through IAB (T. 7-8). She viewed the video of the incident (CCRB Ex. 1), and identified Respondent as well as Police Officer Hassan and



civilian, Person A (T. 9-10). She testified that the video depicted the turnstile area of the subway station at Third Avenue and East 149th Street and that Person A was leaving the station with Police Officer Hassan holding his arm while Respondent was behind him (T. 10-12).

Mancini further testified that CCRB attempted, unsuccessfully, to contact Person A six times: four phone calls and two letters or emails (T. 13-14). She acknowledged that according to IAB's report, Person A admitted: (1) to using the emergency gate to enter the station; (2) that he was grabbed and taken to the ground; and (3) that he complained of aggravating a pre-existing back problem, but that he never complained of a chokehold or neck injuries (T. 15-16).

CCRB Exhibit 1 shows Person A running to leave through the turnstiles when he is caught from behind by Hassan and Respondent (CCRB Ex. 1: 00:06). Respondent's arm appears to be near Person A's neck for a total of seven seconds, from 00:06 to 00:13 of the video. During that time, Respondent's right elbow is on top of Person A's right shoulder, and Respondent's forearm comes straight across Person A's neck, while Respondent's wrist is directly below Person A's chin. At the 00:07 mark, Respondent's right arm is clearly visible coming across Person A's right shoulder to the area of his neck; Respondent's hand is clutched in a fist and is not grabbing any part of Person A's chest. At the 00:08 mark, Person A's upper body jerks back and to his left, as he is pulled by Respondent. Hassan grabs Person A's arm at the 00:09 mark. After Person A falls at the 00:13 mark, Hassan and Respondent handcuff him. Person A remains lying on the floor for approximately two minutes until the end of the video (CCRB Ex. 1).

Respondent testified that at the time of the incident, he was working with his partner, Police Officer Hassan, on the 2 and 5 train platforms (T. 21). They noticed Person A going through the emergency gate, and asked why he did so (T. 22). Person A replied that he was "headed somewhere" (*Id.*). Respondent asked for his ID in order to use his Department phone to

check whether Person A had any warrants (T. 22-24). Respondent discovered that Person A “had a pending warrant where he had to see the judge” (T. 24). Respondent told Hassan that Person A was “good to go,” which he explained was code to take Person A into custody (T. 25). Respondent’s intention was to prevent Person A from “catch[ing] on to the fact that he had to come back with [them], so he wouldn’t try to flee”; nevertheless, Person A turned around and ran away (*Id.*). Respondent caught up with him at the turnstiles, approximately 20-30 feet away (T. 25-26)

Respondent testified that he grabbed Person A, and applied pressure with his elbow to Person A’s shoulder while grabbing his chest; he also described his actions as applying pressure to Person A’s shoulder and back (T. 26, 28). At that time, Person A stopped running but continued “pulling forward” in an effort to escape (T. 27). Respondent brought Person A to the ground, where he remained “because he claimed he had a previous back injury” (*Id.*). Person A was placed in custody, and charged with theft of services, criminal trespassing, and resisting (T. 28).

Respondent denied making contact with, or applying pressure to, Person A’s neck or throat area (T. 26-29).

On cross-examination, Respondent was shown the video of the incident (CCRB Ex. 1), and maintained that he saw himself simply grabbing Person A by the shoulder and holding his chest (T. 34). Respondent acknowledged that the top of Person A’s head and shoulder were visible on either side of his arm, but denied making contact with Person A’s neck (T. 36-37). He stated

that Person A had in fact moved his head down at that moment towards his arm (T. 45). In response to questioning by the Tribunal, while viewing the video, Respondent conceded that his right elbow and the crook of his arm were sitting on Person A’s shoulder, with his forearm appearing to be near Person A’s chin, but said he did not recall whether his forearm was ever actually under his chin as “it happened really fast” (T. 49). Respondent also admitted that, in his



CCRB interview, he said that the video appeared to show that his arm was around Person A's neck, but insisted that he was simply describing what "it looked like" in the video rather than his actual memory of the incident at that time (T. 38-39).

Respondent is charged with using a chokehold against Person A. The Patrol Guide states, "Members of the service **SHALL NOT**...use a chokehold" (emphasis in original). It defines a chokehold as follows: "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" (emphasis added) (P.G. § 221-01). It is a broad definition and *mens rea* is not a delineated factor.

This Tribunal must determine, therefore, whether Respondent's arm made contact with Person A's throat or windpipe in a manner which may have prevented or hindered his breathing (*See, e.g., Disciplinary Case No. 2016-14996* [April 17, 2018] [Respondent guilty of using a chokehold where his "left arm moves into a position, however briefly, which appears to have made contact with [the complainant's] throat *in a manner which may restrict* his breathing"] [emphasis added]; *see also Disciplinary Case No. 2014-12925* [February 16, 2016] [Respondent guilty of using a chokehold because "it is reasonable to conclude that there was some level of pressure applied to the throat area in a way that *could* hinder breathing or reduce the intake of air.... Respondent's act of grabbing and holding [the complainant's] throat, and exerting pressure to physically manipulate him, was *readily capable of hindering* [the complainant's] breathing"] [emphasis added]).

I find that CCRB has met their burden of proof by a preponderance of the credible, relevant evidence that Respondent used a chokehold as defined by P.G. § 221-01. In the video, Respondent's elbow is on Person A's shoulder and his wrist is under his chin. As a result, Respondent's forearm is clearly lined up with Person A's neck. Respondent himself acknowledged that his forearm can be seen near Person A's chin, although he maintained that he

never grabbed the neck in such a way as to choke Person A. In the video, Person A is jerked backwards while Respondent's forearm is directly in front of his throat, and it appears that Person A is pulled by his neck. With Respondent's arm around Person A's neck, pulling Person A backwards, essentially "neck-first," it is logical to conclude that Respondent's arm must have applied pressure to Person A's neck. This action more likely than not could have prevented or hindered Person A's breathing because Respondent's arm was positioned in a manner likely to restrict Person A's breathing if he pulled him backward.

Based upon the foregoing, I find Respondent Guilty of the sole specification and charge.

### PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined (*see Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 240 [1974]). Respondent was appointed to the Department on July 18, 2007. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

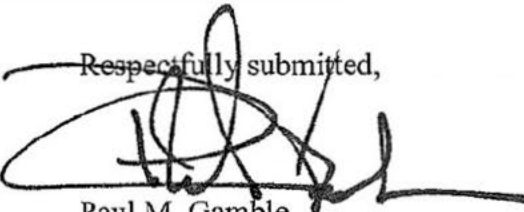
CCRB has requested a penalty of the forfeiture of 10 vacation days. Based upon the totality of the circumstances, I find that recommendation to be reasonable.

Respondents in similar cases involving chokeholds have forfeited between 10 and 15 vacation days (*Disciplinary Case No. 2016-14996* [April 17, 2018] [Six-year officer with no disciplinary record forfeited 10 vacation days for wrongfully using a chokehold. Video evidence showed Respondent's arm briefly making contact with complainant's throat in a manner which may have restricted breathing, thereby constituting a prohibited chokehold]; *Disciplinary Case No. 2016-15000* [July 6, 2018] [Fifteen-year sergeant with no disciplinary record forfeited 10 vacation days for (i) holding an individual in a chokehold and (ii) restricting said individual's breathing. Video showed Respondent's arm lifted up against a complainant's neck in a way that would have restricted breathing for approximately three seconds]; *Disciplinary Case No. 2014-*



12925 [February 16, 2016] [Twenty-one-year police officer with prior discipline forfeited 15 vacation days for placing an individual in a chokehold. Respondent grabbed an individual's throat to maneuver his body away from a fence, applying a level of pressure to the throat area that may have hindered that individual's breathing]). In these cases, the lower penalty was applied to respondents without prior discipline, while the higher penalty was applied to a respondent with two prior adjudications.

In this matter, Respondent used a chokehold against a subject that was not using violence; he was also assisted by his partner. As in the other 10-day penalty cases cited above, the complainant was in a chokehold for a brief period of time: in this case, approximately seven seconds. Therefore, I recommend that Respondent forfeit 10 vacation days.

Respectfully submitted,  
  
Paul M. Gamble  
Assistant Deputy Commissioner Trials

**APPROVED**

APR 21 2020

DERMOT SHEA  
POLICE COMMISSIONER



## POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials  
To: Police Commissioner  
Subject: CONFIDENTIAL MEMORANDUM  
POLICE OFFICER KEYNES PENA  
TAX REGISTRY NO. 945276  
DISCIPLINARY CASE NO. 2019-20158

Respondent was appointed to the Department on July 18, 2007. On his last three annual performance evaluations, he received 4.0 overall ratings of "Highly Competent" for 2014, 2015, and 2016. He has been awarded one medal for Meritorious Police Duty. [REDACTED]

Respondent has no formal disciplinary history.

For your consideration.

Paul M. Gamble  
Assistant Deputy Commissioner Trials