



POLICE DEPARTMENT CITY OF NEW YORK

June 5, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Antonio Cannata
Tax Registry No. 943044
121 Precinct
Disciplinary Case No. 2015-14914

Charges and Specifications:

1. Said Police Officer Antonio Cannata, on or about May 23, 2015, at approximately 2042 hours, while assigned to the 121 PCT and on duty, in the vicinity of [REDACTED], Richmond County, placed Kenneth Cotter into a chokehold.
P.G. 203-11 - USE OF FORCE
2. Said Police Officer Antonio Cannata, on or about May 23, 2015, at approximately 2042 hours, while assigned to the 121 PCT and on duty, in the vicinity of [REDACTED], Richmond County, was discourteous, in that he spoke discourteously to Individual A by using the word "bitch."
P.G. 203-09, Page 1, Paragraph 2 - DISCOURTESY

Appearances:

For CCRB-APU: Jonathan Fogel, 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 Dates:

November 14, 2016 and March 21, 2017

Decision:

Specification 1: Guilty; Specification 2: Not Guilty

Trial Commissioner:

DCT Rosemarie Maldonado

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on November 14, 2016 and March 21, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called Kenneth Cotter as a witness. Respondent called Police Officer Jeffrey Maira and Police Officer Jonathan Glazer as witnesses. 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 1 and not guilty of Specification 2.

FINDINGS AND ANALYSIS

The following is a summary of the relevant, undisputed facts. On May 23, 2015, at approximately 2000 hours, Kenneth Cotter ("Mr. Cotter") and [REDACTED], Individual A, received a call from Individual B, [REDACTED] asking for a ride home. Upon arrival, they found him "covered in blood." He explained to his [REDACTED] that he had a physical altercation with an acquaintance, Person 1 after witnessing him attack his own [REDACTED]. Together, the family drove to the basketball court where the incident had taken place. There they observed a "melee of police officers" involving "half a city block" of people. It was a chaotic scene. (Tr. 17-19, 26-27; CCRB Ex. 1A: Pg. 4-5, 11-12; CCRB Ex. 2A: Pg. 3, 7-8; CCRB Ex. 3A: Pg. 3, 5-6; CCRB Ex. 4A: Pg. 7-8)

They exited their vehicle and spoke to the police about Individual B's involvement in the [REDACTED] domestic incident. The police listened and were courteous. (Tr. 19-20, 28-29, 53, 70-71, 133, 135, 116-117, 153-155) Person 1 was arrested for assaulting his relatives and eventually placed in an RMP from which he was "yelling" and "threatening the world." (Tr. 20-21, 29-30,

93; CCRB Ex. 1A: Pg. 5-6, 12; CCRB Ex. 2A: Pg. 11-12) When the officers became aware that Person 1 had also assaulted Individual B, they solicited his pedigree information because they believed he might be a third complainant. (Tr. 19-20, 52-53, 70-71, 93, 116-117, 133-135; CCRB Ex. 1A: Pg. 5-6; CCRB Ex. 2A: Pg. 11-12; CCRB Ex. 3A: Pg. 3-4; CCRB Ex. 4A: Pg. 7-8)

Testimony varies as to whether Mr. Cotter and his two relatives were calm and compliant during their interactions with the police. It is undisputed, however, that at some point Person 1 yelled at Individual B, who at the very least, "exchanged words" with Person 1 and was arrested after he responded. (Tr. 29-30, 36, 51-54, 59, 66-72, 94-96, 116-117; CCRB Ex. 1A: Pg. 5-6, 8; CCRB Ex. 2A: Pg. 26- 29; CCRB Ex. 3A: Pg. 11) Mr. Cotter reacted in response to his [REDACTED] detention and was also placed under arrest. (Tr. 21, 34-38, 55-57, 59, 73-74, 97, 156; CCRB Ex. 1A: Pg. 7-8, 18-19; CCRB Ex. 2A: Tr. 24-26; CCRB Ex. 4A: Pg. 8, 10) Individual A became distressed when she saw Mr. Cotter being restrained by the police, had physical contact with Respondent [REDACTED] (Tr. 59, 65-66, 97, 107-108, 118-122 139-140, 150-158, 164-165; CCRB Ex. 1A: Pg. 6; CCRB Ex. 2A: Pg. 21-23; CCRB Ex. 4A: Pg. 8-9, 12) It is further undisputed that as he attempted to detain Mr. Cotter, Respondent fell to the ground. (Tr. 22, 139) All three relatives were transported to the 121 Precinct. (Tr. 25-26, 59, 97; CCRB Ex. 2A: Pg. 6, 31) While in police custody, Individual A was treated [REDACTED] at [REDACTED] [REDACTED] Hospital. Mr. Cotter was treated for scratches and other injuries. (CCRB Ex. 1A: Pg. 17-18; CCRB Ex. 2A: Pg. 6, 34-36) They subsequently filed a lawsuit against the City of New York and the Police Department. (Tr. 44; CCRB Ex. 2A: Pg. 40) At the time of this disciplinary hearing, a settlement of \$5,000 for Mr. Cotter, and \$1,500 for Individual A, was still pending. (Tr. 44).

a. Chokehold

In dispute is whether Respondent engaged in misconduct by putting Kenneth Cotter in a chokehold as set forth in Specification 1. The Patrol Guide is controlling in this case. Section 203-11 sets the standard to be followed when the use of force is necessary to achieve legitimate police goals. It specifically requires that members of service "at the scene of an incident" use the "minimum force" needed and that they "employ non-lethal alternatives, as appropriate." "Deadly physical force" may only be used "as a last resort and consistent with Department policy and the law." Section 203-11 warns uniformed members of service that "excessive force will not be tolerated."

It is within this context that the Patrol Guide proscribes the use of chokeholds by officers as they carry out their duties. Section 203-11 states in pertinent part:

Members of the New York City Police 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.

In sum, although the use of deadly force is permitted, when necessary, the Patrol Guide rules out chokeholds as a sanctioned option. Moreover, as written, *mens rea* is not a delineated factor.

The following is a summary of the differing accounts presented on this one issue.

Mr. Cotter testified at trial that he told his Individuals B and C, "let's go" after Individual B had "some words" with Person 1 and the police asked them to "step back." He lit a cigarette and was about to leave when he saw Individual B, who was approximately ten feet away, being pushed and detained by the police. His reaction was to immediately "turn ... around" and say "whoa." Mr. Cotter insisted that he "didn't move" and remained "still in my one spot." The police immediately moved to detain him, "jumped from behind [his] right side," put him in a "headlock," "chok[ed]" him, and took him "down to the ground" where he was beaten. It was Mr. Cotter's testimony

that as he was put in a headlock, the “crook of [the] elbow” was used to put “pressure” on his “throat.” (Tr. 21-23, 34, 38-39, 42-43) According to Mr. Cotter, the pressure on his neck “was hard at first, then it looked like it slipped because of my height, and that’s when he jumped up to get more of a hold, and I bent down to relieve it and he fell down to the ground.” The entire incident was “really fast” lasting only “seconds.” (Tr. 22-23, 38-42)

Later in his testimony Mr. Cotter described the maneuver as follows, “Started out as like a headlock, I call a headlock, people call it chokehold, whatever. Left arm was on my throat, and like I said, when I moved forward that’s when the pressure was on me.” When next asked whether the pressure was “not in the front of your neck until you leaned forward,” Mr. Cotter said, “No, that isn’t what I said” and clarified that, “First ... I got chokehold before anything happened.” (Tr. 39)

When first asked during cross-examination whether the officer restricted his breathing, Mr. Cotter replied, “I prevented that from happening.” This trial testimony is consistent with the statement he made in his June 4, 2015, telephone interview with the CCRB:

Q. Was your breathing restricted at all?

A. No, no, he never got to wrap it totally around. (Tr. 40-41)

He later stated at trial, however, that his breathing had been restricted and explained that he had told CCRB the opposite because the maneuver had interfered with his breathing for only “a second.” (Tr. 40-41) Later in his cross-examination Mr. Cotter elaborated as follows:

Q. Now, as you sit here today, your claim is that it was restricted for a second?

A. I don't consider that restricted, but I was told that is restricted. I didn't allow it to get to that point. (Tr. 41-42)

The Administrative Prosecutor presented the CCRB interviews of three additional witnesses. During her June 17, 2015, CCRB interview, Individual C described Mr. Cotter and his relatives as “over excited, rowdy because Individual B got beat ... which was expected.” Initially, she

answered in the affirmative when the investigator asked whether an officer placed “the father into a chokehold or [had] his hands around his neck.” However, she could not identify the officer and when subsequently asked whether it was a “headlock with the arm” or whether the “officer’s fingers were ... around his neck,” she told the CCRB, “Truly I don’t know exactly.” (CCRB Ex. 4A: Pg. 10-11) Individual C also told the CCRB that, “I know Individual A wound up jumping on one of the cops back or something...to get him off of Individual B I think or something.” (CCRB Ex. 4A: Pg. 8-9). She later clarified that Individual A was trying to get the officers off of Mr. Cotter. (CCRB Ex. 4A: Pg. 12).

During his July 8, 2015 CCRB interview, Individual B stated that when the police shoved him his father said, “Whoa...That’s my son. He’s just trying to help, but why are you touching him?” (CCRB Ex. 3A, Pg. 4) In response, an officer suddenly put Kenneth Cotter in a “headlock” and “pull[ed] him onto the floor.” (CCRB Ex. 3A: Pg. 4, 7-8) Specifically, Individual B told the CCRB that the officer “literally had his arms wrapped around [REDACTED] neck...I actually seen [REDACTED] getting red like because he was choking him.” (CCRB Ex. 3A: Pg. 4, 8-9) He described the officer as using both of his arms and coming from behind Mr. Cotter and holding his arms around Mr. Cotter’s neck for five to seven seconds. (CCRB Ex. 3A: Pg. 9) Individual B also recalled [REDACTED] saying “Whoa... [REDACTED] He’s not doing anything wrong, he is just trying to help.” (CCRB Ex. 3A: Pg. 4) He told CCRB that the officer was named “Tanaca.” (CCRB Ex. 3A: Pg. 8)

Individual A admitted to the CCRB that her back was turned when the altercation between the police, Individual B and Mr. Cotter began. (CCRB Ex. 1A: Pg. 12; CCRB Ex. 2A: Pg. 16) She looked, however, when she heard someone say, “You’re choking me.” It was then that she saw a male “literally hanging from [REDACTED] neck.” (CCRB Ex. 1A: Pg. 6-7, 12-13;

CCRB Ex. 2A: Pg. 4, 17, 20, 40-41) She explained to CCRB that although she did not know the identity of the male, she reacted and “touched his back.” At that point, Individual A stated that she “got swarmed” and was accused of bringing down Respondent. (CCRB Ex. 1A: Pg. 6-7, 12-13; CCRB Ex. 2A: Pg. 4, 17, 19, 21)

Officer Maira, Respondent’s friend and partner of eight years, testified that several officers quickly intervened and took Mr. Cotter to the ground using a “body takedown” maneuver whereby Mr. Cotter was grabbed by the torso from the side and behind. This maneuver caused Mr. Cotter to go “forward” and be brought to the ground. (Tr. 57, 61-65, 75) Even though Officer Maira was facing Mr. Cotter, he testified at trial that he did not see which officers took Mr. Cotter down or handcuffed him. Specifically, he did not remember whether Respondent had participated in the takedown maneuver. (Tr. 57, 61-62) During cross-examination Officer Maira admitted that at his CCRB interview he told the investigator that he did not remember the exact maneuver used by the officers to bring down Mr. Cotter. (Tr. 64)

Respondent testified that he was standing between Mr. Cotter and his son when Mr. Cotter became upset and “charged” in his direction with a lit cigarette in his hand. Although Respondent seemed unclear as to whether Mr. Cotter was “charging” him, or was trying to get to his son, he ordered Mr. Cotter to “stop” and “get back,” extended his right hand and pushed him back. Mr. Cotter got closer, despite the two pushes, and continued to move in his direction. Respondent then grabbed Mr. Cotter by his wrist, and his elbow, to restrain him and place him under arrest. (Tr. 139, 143-145, 156) Despite this effort, Respondent was unsuccessful in gaining compliance. Respondent testified that he landed on his right side after he fell trying to take hold of Mr. Cotter’s wrist. (Tr. 139, 143-145, 163) He also recounted being grabbed by the back of his collar and feeling that he was being pulled down. As he fell, he let go of Mr. Cotter.

When he stood up he faced Individual A who apologized. He received some injuries including scratches on his hand and redness on his wrist. (Tr. 140-142; 164-165)

Respondent confirms that he is the only person who spoke to Individual A when he first got up from the ground. (Tr. 140-142, 150, 157, 164-166) Respondent further confirmed that he was the first officer to grab Mr. Cotter and that no other officer had their hands on Mr. Cotter at the time. Respondent denied placing Mr. Cotter in a chokehold or touching any other area of his body that day. (Tr. 143, 147-148, 157)

Officer Glazer testified that he was standing near the EMS ambulance somewhere between twenty to fifty feet away when he saw Respondent push Mr. Cotter back after Mr. Cotter began to charge towards Person 1. (Tr. 109-112) When asked to specify what occurred to Mr. Cotter during the "melee" of activity, Officer Glazer testified, "They grabbed him by the arms and took him down to the floor and they placed him into handcuffs." (Tr. 99) He also saw Individual A pull Respondent down by the back of his collar to the floor. (Tr. 107-109) Officer Glazer, however, also testified that he had only been looking in the "general direction" of Respondent "before it got physical" and could not recall if he was looking immediately before Individual A pulled Respondent to the ground. (Tr. 103-104, 106-108)

Despite the fact that force was used against each member of the [REDACTED] during a chaotic encounter, and that Mr. Cotter was allegedly hit while being restrained by the police, the sole issue in this case involves the moment when Mr. Cotter was first detained by Respondent. As set forth in detail above, their testimony with respect to this moment was diametrically opposed. Thus, it is left to this tribunal to try to sort out which version is closest to the truth. In making such an assessment, the trier of fact can consider factors such as witness demeanor, corroborating evidence, the consistency of witness accounts, each parties' interest in the outcome

of the case, potential bias and the degree to which testimony comports with logic and common sense. That assessment remains the exclusive province of the fact finder.

What constitutes a chokehold under the Patrol Guide is broadly defined. That definition, however, consists of two parts. There must be "any pressure to the throat or windpipe" and that pressure must be of the type that "may prevent or hinder breathing or reduce intake of air." Proof that there was contact on or about the frontal neck area is alone insufficient to support a finding that this proscribed tactic was used. After carefully considering the starkly conflicting accounts presented at trial, this tribunal concludes that the pressure first exerted on Mr. Cotter's throat was sufficient to fall within the scope of the Patrol Guide's two-pronged definition of a chokehold.

I believed Mr. Cotter's credible and compelling trial testimony that Respondent first "jumped from behind my right side" and positioned the "crook of his elbow" to put "pressure" on his "throat." I also credited Mr. Cotter's statement that when he felt the pressure he bent down "to relieve it." I base this assessment primarily on his demeanor at trial. First, Mr. Cotter came across as truthful and his deportment was that of a witness attempting to present the facts to the best of his recollection. His tone was, for the most part, calm and measured, not zealous or angry, and he did not demonstrate a general bias against the police. In fact, before this incident Mr. Cotter had never been arrested by the police. Second, although there is a pending \$6,500 settlement in a lawsuit relating to this incident, his testimony with respect to the chokehold itself seemed candid and he did not appear to exaggerate the length or scope of the hold. Third, even when Mr. Cotter's testimony seemed to conflict, his explanations were entirely convincing. For example, when on cross he was asked to clarify whether the pressure to the front of his neck

occurred after he bent down, Mr. Cotter responded with confidence and certainty, "No, that isn't what I said" and clarified that, "First ... I got chokehold [sic] before anything happened."¹

This tribunal acknowledges that Mr. Cotter's testimony was not impeccably reliable on all points. For example, I was not convinced that Mr. Cotter stayed in place and did not step toward Respondent when he first saw [REDACTED] being detained. However, on the issue of whether Respondent put pressure on his throat, his recollection and recitation of details did not strike this tribunal as fabricated. Likewise, although his testimony on whether his breathing was actually restricted was confusing, it struck this tribunal as honest. Even his statement that he "was told" his breathing "[was] restricted" seemed to be a genuine attempt to explain his statements as opposed to a deliberate evasion of the truth.

On the other hand, this tribunal was highly skeptical of Respondent's testimony that he only grabbed Mr. Cotter's arm. At trial I had the distinct impression that his assertions on this point were not only defensive but contrived. I also note that Respondent has an obvious interest in the outcome of this case and thus a strong motive to falsely deny any misconduct. The charges he faces are serious and carry the potential to negatively impact his employment, if proved. It also did not help his case that the testimony of his witness, Officer Glazer, became increasingly tentative the more specifically he was asked about the interaction between Mr. Cotter and Respondent. Moreover, the testimony of Respondent's friend and long-time partner, Officer Maira, that Mr. Cotter was placed in a body takedown maneuver, was more consistent with the complaining witness's version of events.

¹ The record also established by a preponderance of the credible evidence that Respondent was the officer who used a chokehold in this case. Both Mr. Cotter (Tr. 23-24) and Individual A (CCRB Ex. 2A, page 18-19) had consistent and similar descriptions of Respondent's actual physical appearance. Moreover, Individual B told the CCRB that the officer's surname was "Tanaka" or "Tanaca" – a name that is similar to Respondent's in that the t and c were transposed. (CCRB Ex. 3A, page 8) More importantly, Respondent himself confirmed that he was the first officer involved in a physical struggle with Mr. Cotter, that no other officers had their hands on him at that moment, and that he was the only one who first confronted Individual A when he fell. (Tr. 143-145, 163)

In sum, the preponderance of the credible evidence proved that Respondent exerted pressure to Mr. Cotter's throat that may have prevented the complaining witness from breathing. Accordingly, I find that Respondent did engage in the misconduct described in Specification 1.²

b. Discourtesy

In her June 4, 2015, telephone call with the CCRB, Individual A stated that after she was arrested and placed in an RMP, the officer who put her [Mr. Cotter in a chokehold] addressed her as, "You fuckin' bitch" and told her to "Shut your fuckin' mouth. You thought you were a fuckin' tough girl outside this car." (CCRB Ex. 1A: Pg. 9, 20-21) In her June 12, 2015, CCRB interview, she alleged that apparently the same officer told her, "Fuck you, you bitch. You thought you were a fuckin' tough bitch outside of the car. Suffocate." (CCRB Ex. 2A: Pg. 4-5)

Individual C stated in her CCRB interview that officers did call Individual A a bitch. She stated, "...yes they was calling the mother a stupid bitch. You know it was just they was calling the mother a stupid B. Then you your cunts..." (CCRB Ex. 4A: Pg. 12) She could not, however, recall which officer said this or what they looked like. (CCRB Ex. 4A: Pg. 12)

Individual B stated in his CCRB interview, "Not to sound too graphic they were like calling my mom like you know the B word bitch all that stuff..." While he was able to hear the officers, he stated that he "couldn't really see who it was but I heard them saying it..." (CCRB Ex. 3A: Pg. 16).

Respondent testified that once he gained control over Individual A and placed her in handcuffs, he escorted her to a police vehicle, sat her inside, closed the door, and left. (Tr. 166-

² It is important to note that this recommendation is not based on a finding that a headlock constitutes a chokehold or that pressure on an arrestee's neck caused by his or her own physical movement constitutes sanctionable misconduct.

168) He confirmed that he was the only one to place her in the police car and that she was in handcuffs. (Tr. 166-168) Respondent explained that while at the RMP there were "a few seconds" when he was alone with Individual A (Tr. 168) Respondent, however, denied calling Individual A a "tough fucking bitch." He added, "No. I would never talk to a man or woman that way." (Tr. 168)

In a hearsay case of this nature, particular attention must be paid to the evidence. This tribunal has held many times that while hearsay is admissible in administrative proceedings, and may be the sole basis for a finding of fact, it must be carefully evaluated before it is relied upon. The more important the evidence is to the case, the more critically it should be assessed. *See Police Department v. Acosta*, OATH Index No. 464/00 (Jan. 7, 2000). Where, as here, the statements of hearsay declarants are outcome-dispositive, administrative tribunals are reluctant to credit them as the sole basis of a finding of fact because "they have not withstood the test of cross-examination." *Police Department v. Lowe*, OATH Index No. 892/91 (June 3, 1991), citing *Transit Authority v. Maloney*, OATH Index No. 500/91 (Apr. 19, 1991), *aff'd sub nom. Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 (1st Dep't 1994).

Although the hearsay statements presented to this tribunal support the assertion that discourtesy was used, only Individual A was able to identify Respondent as the declarant. Accordingly, I find that the hearsay evidence presented was insufficient to find Respondent guilty of the misconduct set forth in Specification 2.

PENALTY RECOMMENDATIONS

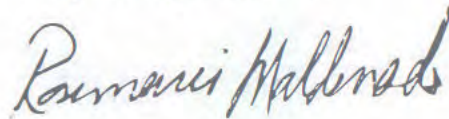
In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on January 10, 2007. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB recommended 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. This tribunal is mindful of the serious nature of chokehold offenses and that the Patrol Guide prohibits their use. Therefore, there needs to be accountability here, but the penalty must be commensurate with the misconduct and must take into account Respondent's personnel history.

First, Respondent was found guilty of the misconduct charged in only one specification. Second, Respondent has been with the Department for ten years and has no prior disciplinary history. Third, the chokehold was used against an individual who was an active participant in a decidedly chaotic situation. Moreover, Respondent was the first to make contact with the arrestee and did not receive assistance from other officers until after he was pulled by the collar and fell to the ground. Compare *Case No. 2015-14488* (Nov. 18, 2016)(ten-year officer forfeited twenty (20) vacation days as a penalty for a chokehold applied after back-up had arrived and the officer was less vulnerable and had other detention options); *Case No. 2014-12925* (Feb. 16, 2016)(twenty-one-year officer with two prior disciplinary adjudications forfeited fifteen (15) vacation days for using a hand chokehold); *Case No. 1998-73100* (Feb. 17, 2000)(highly rated lieutenant with fifteen years on the force forfeited fifteen (15) vacation days for grabbing a suspect by the throat, unholstering a firearm and threatening the individual).

Having considered the totality of circumstances and issues presented in this matter, I recommend that Respondent forfeit ten (10) vacation days as an appropriate penalty.

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

OCT 25 2017



JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ANTONIO CANNATA
TAX REGISTRY NO. 943044
DISCIPLINARY CASE NO. 2015-14914

Respondent was appointed on January 10, 2007. He has received an overall rating of 3.5 "Highly Competent/Competent" on his 2016 and 2015 evaluations, and an overall rating of 4.0 "Highly Competent" on his 2014 evaluation. [REDACTED]

He has no prior formal disciplinary history.

For your consideration.

Rosemarie Maldonado
Deputy Commissioner Trials