



POLICE DEPARTMENT CITY OF NEW YORK

September 5, 2017

MEMORANDUM FOR: Police Commissioner
Re: Police Officer Daniel Kern
Tax Registry No. 954999
46th Precinct
Disciplinary Case No. 2016-15428

Charges and Specifications:

1. Said Police Officer Daniel Kern, on or about September 17, 2015, at approximately 0010 hours, while assigned to Patrol Borough Bronx and on duty, in the vicinity of Ryer Avenue and East 182nd Street, Bronx County, wrongfully used force against Xavier Puntiel in that he punched Xavier Puntiel, without police necessity.
P.G. 203-11 - USE OF FORCE

Appearances:

For CCRB-APU: Timothy Jones & Suzanne O'Hare, Esqs.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

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

Hearing Dates:

February 3 and June 16, 2017

Decision:

Not Guilty

Trial Commissioner:

ADCT Paul M. Gamble

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on February 3 and June 16, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. CCRB called Xavier Puntiel and Najae White as witnesses. Respondent called Police Officer Marco Morrone as a witness and 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 the charged misconduct.

FINDINGS AND ANALYSIS

The following is a summary of the facts which are not in dispute. On September 17, 2015, at approximately midnight, Xavier Puntiel and his relative, Person A, encountered Respondent and his partner, Police Officer Marco Morrone, on Ryer Avenue, near the East 182nd Street subway station (T. 188-189, 233-234). Respondent and Officer Morrone were assigned to a foot post at East 183rd Street and Ryer Avenue and had just left the 46th Precinct after a meal break (T. 188-189, 233). Puntiel was also accompanied by his girlfriend, Najae White; his son, [REDACTED]; and Person B (T. 25, 31, 137). Prior to meeting Respondent and his partner, Puntiel consumed approximately eight ounces of Ciroc vodka over a 90-minute period, flavored with ½ ounce of Monster energy drink, beginning at approximately 2200 hours (T. 27-28). According to hospital records obtained from [REDACTED] Hospital, Puntiel's BAC was recorded as a [REDACTED] on September 17, 2015 at approximately 0143 hours (T. 129-130).

At approximately 0000 hours, Puntiel's group passed Respondent and Officer Morrone on the sidewalk, Puntiel walking southbound and Respondent walking northbound on Ryer

Avenue (CCRB Ex. 1, #1145, 10:42-10:51; T. 189, 191, 233-234, 239). The groups became separated by approximately 10-15 feet before Puntiel and Person A turned around, then began walking in the direction which Respondent and Officer Morrone had gone (CCRB Ex. 1, #1145, 11:32; T. 191, 239). After walking northbound for 10-15 feet, Puntiel and Person A again reversed course and walked southbound on Ryer Avenue before stopping near a parked car, upon which Person A sat (CCRB Ex. Ex. 1, #1145, 12:17-12:30; T. 69-70). At about the same time, Respondent and Officer Morrone turned around and began walking southbound on Dyer Avenue toward Puntiel (T. 195, 241).

Respondent and Officer Morrone caught up to Puntiel and Person A, then initiated a confrontation, the facts of which are in dispute. Officer Morrone had a verbal exchange with Person A, after which he was frisked, then handcuffed (T. 195-197). Officer Morrone lost sight of Respondent but heard what sounded to him like a scuffle going on behind him, so he used his radio to call for assistance (T. 197). Respondent and Puntiel had a verbal and physical encounter which involved a short pursuit before Puntiel fell to the sidewalk (CCRB Ex. Ex. 1, #1145, 13:17-13:24; T. 251-253). Respondent struck Puntiel during the physical altercation which ensued and eventually handcuffed him (CCRB Ex. 1, #1145, 13:25; T. 250-253).

Officers from the 46th Precinct responded to the scene on foot and in police vehicles (T. 201). As the responding officers assisted Respondent and Officer Morrone, they each observed that Puntiel had a bloody lip and that Respondent's knuckles were bleeding (CCRB Ex. 3, 4; T. 201-202, 256).

The following is a summary of the facts which are in dispute.

After Respondent and Officer Morrone had gone 10-15 feet past Puntiel and Person A, Officer Morrone claimed that he heard the two men yelling "Fuck the police" (T. 192). He

testified that he turned around, looked in the brothers' direction and heard the brothers yell "You fucking faggots, pigs" and the words "bang, bang" (*Id.*). Officer Morrone also observed one of the brothers with his "hand stuck out as a firearm" (*Id.*). Officer Morrone found the gesture threatening and thought the two men intended to harm the officers (*Id.*).

Officer Morrone and Respondent stopped walking and directed the brothers to go home (T. 193, 206). Officer Morrone explained that it was getting late and the officers just wanted to finish their tour which ended at 0205 hours (T. 193-194). Thereafter, Officer Morrone and the Respondent continued walking to their post (T. 194). Officer Morrone testified that the two brothers continued following the officers (*Id.*). He alleged that the brothers were loud and yelling out "fucking faggots, you pigs" (*Id.*). Officer Morrone and Respondent again directed the two brothers to go home and, further, to stop following the officers at least two to three times (T. 206, 226). The brothers continued to follow the officers and Officer Morrone turned toward them (T. 194). At that time, Officer Morrone observed Person A holding an open bottle of Corona beer in his hand (T. 195). Officer Morrone testified that he decided to issue Person A an open container summons (*Id.*). Officer Morrone next walked over to Person A and directed him to stop walking (*Id.*). At this point, Person A placed the beer on the ground and jumped on the trunk of a parked car (*Id.*). As Officer Morrone was approaching, Person A jumped off the trunk (T. 196). Officer Morrone then asked Person A to provide his identification (T. 196). Officer Morrone testified that Person A told him that he did not have any identification on him (*Id.*).

Officer Morrone testified, that based upon Person A's threatening hand gesture, he decided to conduct a weapons search (*Id.*). As Officer Morrone frisked Person A he heard a commotion behind him (*Id.*). Officer Morrone testified that his attention was focused on Person A (T. 196-197). Officer Morrone next heard a scuffle and turned around (T. 197, 228). At this point, Officer

Morrone realized that Respondent was not within his sight, so he requested back up over the radio. then handcuffed Person A (*Id.*).

Officer Morrone testified that he walked Person A over "towards the back, and that's where [he] observed his partner trying to hold down Xavier trying to place him in handcuffs, and Xavier Puntiel continuously swinging" (*Id.*). He then observed Puntiel on his back, holding his arms tightly close to his body while Respondent attempted to handcuff him (T. 199). Officer Morrone stated that he was not able to assist Respondent in apprehending Puntiel since he had custody over Person A (T. 198). He also alleged that Puntiel "tried to take a swing" at Respondent although he could not be certain whether Puntiel connected (T. 199, 214-217)

Officer Morrone testified that Respondent and Puntiel were already on the ground when he walked over (T. 199). The scuffle occurred approximately twenty feet away from the location where Person A was frisked and handcuffed (T. 200). Officer Morrone stated that there were cars parked on the street which blocked his view of the sidewalk where the scuffle was located (*Id.*).

According to Officer Morrone, within a matter of seconds, approximately twenty officers from the 46th Precinct arrived at the scene (T. 201). When the officers arrived, Officer Morrone was holding onto Person A (*Id.*). He testified that he could not really see what was happening since the officers surrounded Respondent and Puntiel (*Id.*). He did notice that Respondent's hands were bleeding and that Puntiel had blood on his lip (T. 201-202).

Respondent testified that at or around 0000 hours, he and Officer Morrone were leaving the stationhouse and returning to their post, which was approximately two and a half blocks away (T. 234). As they walked north on Ryer Avenue, Respondent observed Puntiel, Person A, White and Person B walking southbound in the officers' direction (*Id.*). Respondent observed Puntiel and Person A staggering as they walked; he also heard the brothers speaking loudly from approximately

eight to nine car lengths away (T. 235). Based on his personal observations, Respondent surmised that the two men were intoxicated (*Id.*). Respondent also asserted that he recognized Puntiel as a known gang member (T. 236, 241)

The officers next walked past the group of four (T. 239). The officers continued walking for approximately 10 to 15 feet, at which time, Respondent looked over his shoulder (*Id.*). Respondent testified that he observed Puntiel and Person A stopped on the sidewalk (*Id.*). He indicated that Puntiel and Person A were being loud and disorderly (*Id.*). Respondent testified that the brothers were yelling "You fucking faggots, fuck you, fuck the police" while also making hand gestures, simulating a firearm, in the direction of the two officers (T. 240). At this point, Respondent and Officer Morrone directed the brothers to go home; Respondent and Officer Morrone then continued walking to their post (*Id.*).

Respondent and Officer Morrone walked approximately 5 to 10 steps heading northbound on Ryer Avenue when Respondent observed Puntiel and Person A following them (T. 240-241). At this point, the officers directed the brothers to go home for a second time (T. 241). Respondent testified that the brothers continued yelling slurs in the officers' direction; specifically, "Bang, bang, fuck you" (*Id.*). Respondent testified he was concerned for his safety, as well as his partner's (T. 244). Based on these concerns, Respondent and Officer Morrone approached the two brothers and asked for identification (T. 246). Respondent requested identification because he intended to issue the brothers summonses, either for disorderly conduct or for an open container (*Id.*). Respondent testified that he observed both Puntiel and Person A with open containers (T. 247).

Respondent testified that as he and Officer Morrone walked up to Puntiel and Person A, one of the brothers sat on the trunk of a parked car (T. 248). Respondent and Officer Morrone next followed the brothers into the street (*Id.*). Officer Morrone grabbed Person A, while Respondent

was attempting to get identification from Puntiel (T. 249). Respondent asked Puntiel for identification two to three times but Puntiel did not provide it (*Id.*).

Respondent believed that Puntiel was attempting to obstruct Officer Morrone from obtaining information from Person A, based upon his observation that Puntiel kept inching forward towards Respondent, Officer Morrone and Person A (T. 250). Respondent put his hand on Puntiel's chest and said "Listen, just get back" (*Id.*). Respondent described Puntiel's demeanor at this point as "enraged" (T. 251).

Respondent observed Puntiel break free from White and Person B, who were holding him back (*Id.*). Respondent testified that he intended to handcuff Puntiel (*Id.*). When Respondent went to grab Puntiel's arm, Puntiel slapped Respondent's hand down (*Id.*). Respondent attempted to place the handcuffs on Puntiel again but Puntiel turned around and ran away (*Id.*). Respondent chased after Puntiel across the street, yelling "Stop" (T. 252).

Respondent testified that Puntiel turned around abruptly, positioned himself into a fighting stance and swung at him (*Id.*). Puntiel threw a right hook in the direction of Respondent's head, which he blocked with his left hand; Respondent then punched Puntiel in his mouth (T. 252-253). Respondent initially claimed that he only punched Puntiel that one time but conceded that he had admitted to punching Puntiel twice in his statement to CCRB (T. 258, 261-262).

Puntiel fell to ground from the impact; Respondent then jumped on top of him and tried to handcuff him (T. 253). Respondent was unable to handcuff Puntiel because he was flailing his hands (*Id.*). When he eventually turned Puntiel over from his back onto his stomach, Puntiel locked his arms underneath his body, making it difficult for Respondent to place handcuffs on him (*Id.*). Eventually, Respondent and another officer were able to turn Puntiel over and picked him

up (T. 256). At this time, Respondent realized that he was bleeding from his knuckles (*Id.*). He also observed Puntiel bleeding from open wounds including his lip (*Id.*).

On cross-examination, Respondent denied striking Puntiel in the face when they were on the ground (T. 283). Respondent was confronted with CCRB Exhibit 1, #1135, at 13:24 (T. 283-284). In the top of the frame of the video, Puntiel backpedals, then falls to the sidewalk with Respondent falling down on top of him; Respondent raises his arm, pulls it back and swings in a punching motion. Despite this footage, Respondent maintained that he did not see himself in the video making a punching motion (T. 284-285).

Xavier Puntiel testified that on September 16, 2015, at approximately 2100 hours, he, White and Person B, a friend of his, met at a hair salon located on East 183rd Street and Grand Concourse, Bronx, New York (T. 25-26). Puntiel, White, Minor 1¹, Person B and Person A left the hair salon at approximately 2330 hours (T. 29, 36). The group next walked over to a corner store located on East 183rd Street and Grand Concourse, Bronx, New York (T. 29). Puntiel asserted that Person A purchased one beer from the store (T. 29). On cross-examination, he testified that Person A consumed the beer outside of the store and disposed of the container nearby (T. 96-97).

After leaving the store, the group walked toward the train station located at East 182nd Street – East 183rd Street and Grand Concourse (T. 33). The group decided to walk Pers.B home before taking the subway, so they walked eastbound on East 183rd Street toward Ryer Avenue before turning south and walking toward East 182nd Street (CCRB Ex. 2A, p. 19). Pers.B, White and Min1 walked a few feet ahead of Puntiel and Pers. A (T. 37). Puntiel testified that Respondent and Officer Morrone walked past him and Person A near the middle of the block (T. 35). Puntiel claimed that Respondent said, “Look at these faggots,” as the two officers passed (T. 38). Officer

¹ Minor 1 is Puntiel’s minor child.

Morrone allegedly laughed and the two officers continued walking north on Ryer Avenue towards East 183rd Street (*Id.*). Puntiel maintained that he did not verbally respond to either Respondent or Officer Morrone in regard to Respondent's comment; he did, however, acknowledge that Person A was being loud and screaming lyrics to a rap song (*Id.*). On cross-examination, Puntiel conceded that he did not assert that Respondent called Puntiel or Person A "faggots" in his earlier statement to CCRB (T. 118-119). Puntiel explained that he was "going through a lot" around the time that he provided the statement and simply forgot to include that fact (*Id.*).

Puntiel testified that Person A stopped in front of a building to talk to an unidentified male after the Respondent and Officer Morrone had passed (T. 39-40). Person A asked the man for a pull of his cigar and the two brothers continued walking on Ryer Avenue towards East 182nd Street (T. 40-42). Person A then walked over to a parked car on the street and sat on the trunk (T. 42-43). Puntiel testified that once Person A sat on the trunk, Respondent and Officer Morrone turned around and walked towards the two brothers (*Id.*). When the officers approached, Officer Morrone said to Person A, "Whose car is this? Why are you sitting on this car?" (T. 44). Person A answered, "No, I don't know whose car is it" (*Id.*). Officer Morrone then grabbed Person A, brought him across the street and placed him up against a truck that was parked on the street (T. 44-45). Puntiel claimed that he and Person B asked Respondent and Officer Morrone to explain why Person A was being arrested but the officers failed to answer (T. 46, 48). Puntiel testified that Respondent directed him to get back (T. 47). Puntiel backpedaled away from Respondent; he then turned around and Respondent tackled him to the ground causing him to land on his stomach (T. 48). Puntiel denied making any threatening comments or gestures (T. 49). Puntiel testified that Respondent sat on his back and proceeded to punch him in the eye, nose, lip and jaw (T. 50). He estimated that Respondent punched him at least six to seven times (T. 51-52).

As depicted in CCRB Exhibit 1, #1145, 13:17, Puntiel backpedaled away from the officers: he took two to three steps back, turned around and ran between two parked cars toward the side walk while Respondent chased him. At 13:24, the footage shows Puntiel falling backward and Respondent falling forward onto him. At 13:25, Respondent pulled his arm back and punched Puntiel.

Puntiel testified that he heard Respondent make a request for back up into his radio (T. 52). Puntiel estimated that around twenty to twenty five police officers responded to the scene (T. 53). He claimed that the responding officers looked on as Respondent struck him in the face (*Id.*). Puntiel testified that Respondent rear-cuffed his hands while he was on the ground, then conducted a search of Puntiel's person (*Id.*). Following the search, Puntiel was placed inside a marked police vehicle and transported to the 46th Precinct stationhouse (*Id.*).

Upon Puntiel's arrival at the stationhouse, he was taken into a back room and thrown onto a chair (*Id.*). Puntiel testified that an officer instructed him to remove his shoe laces despite being handcuffed (*Id.*). Puntiel claimed that he attempted to remove his shoe laces as directed but fell off the chair onto the floor beneath him (*Id.*). Puntiel claimed that the impact caused him to bleed from his nose (*Id.*). He testified that he screamed for help as he lay on the floor, while an unidentified police officer took out a phone and proceeded to record him as other officers looked on and laughed (T. 55-56). Puntiel was later strapped to a hospital stretcher and lifted into an ambulance (T. 55). Shortly thereafter, he was transported to [REDACTED] Hospital (T. 84-85).

Puntiel claimed that the Respondent's alleged use of excessive force caused him to sustain a bloody lip, a black eye, a bloody nose and a large bruise on the right side of his face (T. 51, 78). CCRB introduced two photographs, identified as CCRB Exhibits 3 and 4. CCRB Exhibit 3 depicts Puntiel with a facial bruise on the right side of his face (T. 79-80). CCRB Exhibit 4 depicts Puntiel

with a bloody lip (T. 80-81). Puntiel testified that both photographs were taken shortly after he was released from police custody (*Id.*).

Following the underlying incident, Puntiel commenced a civil suit against the City of New York, this Department and several uniformed Members of the Service, including Respondent and Officer Morrone (T. 91-92). Puntiel is seeking damages in the amount of five-million dollars (T. 23, 91).

Najae White testified that on September 16, 2015, at approximately 1900 hours, Puntiel arrived at her residence (T. 133). During this time, she did not observe Puntiel consume any alcohol (T. 134). White and Puntiel left her residence at approximately 1930 hours and took a cab to a hair salon located on East 183rd Street and Grand Concourse, Bronx, New York (*Id.*). White estimated that the cab ride was approximately ten minutes long (*Id.*).

Upon arriving at the hair salon, Puntiel had his hair braided while White waited at the salon with their son, Minor 1 (T. 135). She estimated that they were at the salon for approximately 2½ hours (T. 135). During this time, Person A arrived at the salon with a bottle of vodka (*Id.*). White observed Puntiel consume one cup of alcohol at or around 2100 hours (T. 136-137). She also observed Person A consume approximately 1 ½ cups of alcohol (T. 137). White opined that Puntiel was not intoxicated (T. 139).

White, Puntiel, Person A and Person B left the salon at approximately 2200 hours (T. 137). The group walked to a corner store located on Grand Concourse, Bronx, New York, where Person A purchased a beer (T. 138). White testified that Person A drank half of the beer inside of the store and left the remainder behind (T. 138-139). Shortly thereafter, the group left the store and headed toward the D train subway station, located on East 182nd Street (T. 139). They walked down Grand Concourse, turned left on East 183rd Street, then made a right on Ryer Avenue and headed south

(*Id.*). According to White, Person A and Puntiel suddenly stopped to smoke a cigarette with a few people they knew (T. 140). White did not want to expose her son to cigarette smoke so she and Person B continued walking on Ryer Avenue towards East 182nd Street (T. 140-141). Thereafter, Puntiel, Person A, Person B and White continued walking on Ryer Avenue (T. 141). Person A and Puntiel were reciting a rap song as they walked and were "pretty loud" (T. 143). At some point, the group crossed paths with Respondent and Officer Morrone, who were walking on Ryer Avenue in the opposite direction (T. 141-142). White testified that Respondent told Person A and Puntiel to "shut up" as he walked past (T. 143-144). Person A supposedly laughed in response (T. 144).

White then noticed Person A and Puntiel walking in the opposite direction on Ryer Avenue back towards East 183rd Street (T. 145). White and Person B were standing a few feet away from the brothers when she heard Officer Morrone yell out "Go home, go home" (*Id.*). Person A then walked over to a parked car and sat on its trunk (*Id.*). White did not hear Person A or Puntiel say anything to the two officers (*Id.*). Thereafter, Respondent and Officer Morrone approached Person A and asked him if he was the owner of the car (T. 145-146). Around this time, she observed Puntiel grab at Person A to get him away from the car (T. 146). Officer Morrone then grabbed Person A and pushed him up against a parked car (*Id.*). White, Person B and Puntiel were standing off to the side a few feet away (*Id.*). Puntiel asked the officers "why they were doing this to [REDACTED]" but the officers did not answer (T. 147). White stood near Puntiel and pled with him to go home (*Id.*). White observed Puntiel walk closer to the officers before Respondent directed him to back up (*Id.*). According to White, Puntiel was about to back up when the Respondent charged at him (T. 147-148). Puntiel fell onto the sidewalk and Respondent got on top of him (T. 149). White observed Respondent punch Puntiel approximately six times, in and around his face and

ribs (T. 149-150). White claimed that she did not observe Puntiel strike Respondent while he was on the ground but did hear him scream for help (T. 150, 156).

On cross-examination, White acknowledged that Puntiel is her boyfriend (T. 157). She went to the precinct day after Puntiel's arrest and met him when he was released (*Id.*). While White was aware that Puntiel filed a complaint with the CCRB regarding the incident, she did not provide a statement to the CCRB herself (*Id.*). White explained that she was not instructed by Puntiel's civil attorney to provide a statement although he directed Person B and Puntiel to meet with CCRB Investigators (T. 158). White was also aware that Puntiel has filed a civil suit against the City of New York arising from the incident (*Id.*). White denied knowledge of the specific monetary damages being claimed in that suit (*Id.*). White conceded that she had an opportunity to review the surveillance footage entered into evidence and identified as CCRB Exhibit 1 on at least one occasion prior to testifying before the Tribunal (T. 159). She viewed the footage at Puntiel's attorney's office in Puntiel's presence, although she denied speaking to him about her observations (T. 159-160).

Person B was interviewed by the CCRB on October 26, 2015. A transcript of her interview was entered into evidence as CCRB Exhibit 2. In her statement, Person B asserted that on September 16, 2015, at approximately 2030 hours, she met Puntiel at a hair salon located on East 183rd Street and Grand Concourse, Bronx, New York (CCRB Ex. 2 at 15-16). White and Person A were already at the salon when she arrived (*Id.*). Person B did not recall anyone drinking alcohol at the salon (*Id.* at 16-18). Puntiel, Person A and White walked her home after leaving the hair salon (*Id.* at 19). Person B asserted that Person A sipped on a beer as they walked on Ryer Avenue towards East 182nd Street (*Id.* at 4, 18-19). She claimed that she observed two officers walking in their direction and told Person A to put down the beer (*Id.*).

Person B saw Respondent and Officer Morrone walk past them on Ryer Avenue (CCRB Ex. 2 at 4). She alleged that the two officers kept looking at the group as they continued walking towards East 183rd Street (*Id.* at 19). Person B claimed to have recognized the Respondent from a prior police encounter, suggesting that Respondent had given Puntiel “a really hard time” (*Id.* at 19-20).

Person B asserted that no one said anything to the officers, and they said nothing to her group, as they walked past each other (*Id.* at 21-22, 24). Person B claimed that the group was engaged in conversation when the officers passed (*Id.* at 24-25). When asked to expound upon the substance of the conversation, Person B stated: “Oh, yeah, we were all [unintelligible] we were having a conversation. Because we were like oh, like I don’t know what, I don’t know what the conversation was. It was probably about like, was it about my feet? No, it was about something like, we were having some weird, it was conversation about like who’s best friend is who...like who, who loves who the most or that’s my best friend, oh no, that’s my best friend” (*Id.* at 24-25). Person B later added that Puntiel and White were arguing while she and Person A were saying “‘Oh, that’s my best friend,’ like ‘Oh, you’re my best friend’” (*Id.* at 25).

Person B observed Respondent and Officer Morrone walking halfway up the block towards East 183rd Street, then turning around (CCRB Ex. 2 at 23-24). The officers walked over to Person A, who was sitting on a parked car (*Id.* at 24). She estimated that Person A had been sitting on the car for approximately five minutes before the officers walked over to him (*Id.* at 26). When the officers approached, Officer Morrone asked Person A if he was the owner of the parked car (*Id.* at 26-27). Person A allegedly answered “no” (*Id.*). Officer Morrone then asked Person A for identification but he told Officer Morrone that he did not have his ID (*Id.* at 5, 26-27).

Person B stated that Officer Morrone directed Person A to get off the car, then searched him shortly thereafter (*Id.* at 5, 27-29). While Person A was being searched, Puntiel asked, "Why are you searching my [REDACTED]" (*Id.* at 30-31). According to Person B, Respondent said "mind your fucking business" (*Id.* at 5, 31). She also stated that she heard one of the officers say "shut the fuck up" but she could not be certain who said it (*Id.* at 33).

According to Person B, Respondent jumped over her and punched Puntiel in the face (*Id.* at 5-6, 31, 36-37). She claimed that Puntiel put up his hands to protect his face but she did not see him make contact with Respondent (*Id.* at 36-38). Person B next observed Puntiel backing up (*Id.* at 45). She asserted that Respondent pushed her out of the way and went after Puntiel (*Id.*). Respondent allegedly used his leg to trip Puntiel, causing him to fall onto the sidewalk on his back (*Id.* at 6, 41, 45-46). Person B then saw Respondent get on top of Puntiel and strike him in the face approximately four times (CCRB Ex.2 at 6, 39-40). Shortly thereafter, officers from the 46th Precinct responded to the scene. According to Person B, the responding officers surrounded Puntiel, who lay on the ground, while Respondent continued to punch him in his face at least three more times (*Id.* at 7, 40-41). Respondent and another officer then picked Puntiel up and shoved him into a police vehicle (*Id.* at 8, 42-43).

Person B went to the 46th Precinct stationhouse and claimed that the officers at the front desk would not let her inside (*Id.* at 9). Person B went across the street and waited with White (*Id.*). Sometime thereafter, she observed an ambulance approaching the stationhouse (*Id.*). Person B ran back to the stationhouse and saw Puntiel carried out on a stretcher (*Id.* at 10). Person B claimed that Puntiel fell off the stretcher and landed on the ground (*Id.*). Person B opined that Puntiel looked worse than he did when he was initially taken into police custody, suggesting that Puntiel may have been assaulted inside the stationhouse (*Id.* at 48).

Person B claimed that the officers let her inside of the stationhouse to retrieve A's belongings (*Id.* at 50). Person B asserted that she saw Person A inside of the stationhouse wearing only his boxers (*Id.* at 11, 50).

During her CCRB interview, B reviewed the surveillance footage entered into evidence as CCRB Exhibit 1, #1135 (*Id.* at 63-79). At about the 15:32 mark, the video shows Puntiel and stop, turn around and start walking in the opposite direction towards Ryer Avenue and East 183rd Street. When asked whether she knew where Puntiel and Person A were headed, B responded: "What the hell? Why are they, I know what he saying, but he's not talking to them. He's - they're - I guess they are walking back to like go back towards like the store or something, but they weren't talking to the cops and then they were like: okay, it's too late, like the store is probably going to be closed" (*Id.* at 67-68). According to Person B, Puntiel and Person A were walking back to the corner store to exchange the ice cream that was allegedly inside of the bag that Puntiel was holding (*Id.* at 68-70). B was then asked why Puntiel and Person A started walking back towards Ryer Avenue and East 182nd Street (*Id.* at 70). Person B stated ~~they~~ they were deciding whether to go back or to go to the store" (*Id.*).

Person B asserted that after reviewing the surveillance footage, she recognized some of the officers who responded to the scene (CCRB Ex. 2 at 78-79). She claimed that one of the officers, who appears in the video, had it out for Puntiel and had stopped him frequently (*Id.*).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account (*Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 [1st Dep't 1994]).

In this case, the fact-finding process is facilitated by the admission of video evidence which captured most of the relevant portion of the encounter between Respondent and Puntiel. While there are portions of the incident, as described by the witnesses for both sides, which are not captured on video, the absence of that evidence does not diminish the probative value of the video which is in evidence. While the video does not contain an audio portion, it nevertheless corroborates much of Respondent's testimony and contradicts much of the testimony offered by CCRB's witnesses.

Respondent was generally forthcoming in his testimony and admitted punching Puntiel after Puntiel threw a punch at him. Respondent's assessment of Puntiel and Person A's demeanor as being motivated by inebriation and the late hour, rather than a harbinger of something more sinister, rings true. Furthermore, Respondent's admonition to Puntiel and Person A to go home evinces a calm, judicious state of mind, appropriate to the circumstances. Respondent's description of the injuries to Puntiel's lip and face, as corroborated by CCRB Exhibits 2 and 3, are consistent with the number of punches he admitted throwing. The video evidence, as well as the photographic evidence of Puntiel's facial injuries, do not support a finding that Respondent punched Puntiel 6-7 times as he sat on top of him, then punched him repeatedly while the responding officers from the 46th Precinct looked on. While it is indisputable that Respondent is an interested witness in this proceeding, his testimony, for the most part, was logical and more reasonable than the version Puntiel testified to.

In contrast, Puntiel is an unreliable narrator of the events of September 17, 2015. First, he is an interested witness who stands to gain financially, depending on the outcome of his civil case against the City of New York. In addition, he has a previous criminal conviction which is a

factor weighing against his credibility. Finally, his testimony is self-serving and replete with exaggerations.

For instance, Puntiel admitted drinking the equivalent of six shots of vodka in a 90-minute period. While his Blood Alcohol Concentration was [REDACTED] when tested at 0143 hours that morning, he initially asserted in his testimony before the Tribunal that he was not drunk, although he later conceded that he had previously admitted to CCRB that he was drunk at the time of the encounter. A review of the video evidence in this case reveals that Puntiel appeared to be staggering as he walked down Ryer Avenue, corroborating Respondent's observation.

Second, Puntiel's assertion that the confrontation was instigated by Respondent when he directed a homophobic slur against Puntiel and Person A is more likely a case of convenient projection. Respondent's testimony, corroborated by Officer Morrone, asserted that it was Puntiel and Person A who directed a homophobic taunt at Respondent. Given Puntiel's state of intoxication, it is much more believable that he was verbally belligerent, as opposed to Respondent and Officer Morrone.

Third, Puntiel's accusation that officers from the 46th Precinct humiliated him by forcing him to untie his shoes while handcuffed, then videotaping him in the process, is absurd. The gratuitous inclusion of this anecdote strongly suggests that Puntiel is, above all, a fabulist willing to enhance his testimony with fictitious narratives calculated to paint himself as a victim in the eyes of the Tribunal.

Najae White's testimony has limited probative value, as she is partially credible and partially unreliable in her narration of the incident. As Puntiel's girlfriend, she may be considered biased in favor of his position; this tendency is apparent in her attempt to minimize his intoxication in the face of his [REDACTED] Blood Alcohol Concentration and in exaggerating the

number of blows struck by Respondent. On the critical issue of the punches Respondent threw, White testified that Respondent punched Puntiel "in his face and ribs" (T. 149). When asked how many times Respondent struck Puntiel in the face, she responded, "Six" (T. 150). There was no follow-up question as to how many punches Respondent allegedly threw to Puntiel's ribs, either on cross-examination or on re-direct. It is striking that Puntiel never testified that he was struck in his ribs. Respondent denied throwing any more than two punches to Puntiel's face and denied punching him anywhere else (T. 258-259, 262, 283). Based upon this discrepancy, her testimony on the issue of the number of blows allegedly struck is unreliable.

The balance of her testimony, however, corroborates Respondent's in several important respects: (1) that Puntiel and Person A were drinking before their encounter with Respondent; (2) that after leaving the hair salon, Person A purchased a beer, although she claimed he was not holding it when Respondent encountered him; (3) when Puntiel and Person A reversed course on Ryer Avenue to follow Respondent and Officer Morrone, Respondent shouted "Go home"; (4) when Respondent and Officer Morrone approached Person A he was sitting on the trunk of a car; (5) while Officer Morrone was questioning Person A, Puntiel walked closer to Respondent and was told to "Get back."

Person B's hearsay statement, similarly to Najae White's, has limited probative value, as she is partially credible and partially unreliable in her narration of the incident. Her assertion that Respondent reached across her to punch Puntiel in his face is directly contradicted by CCRB Exhibit 1, #1145: the recording shows no such action by Respondent at the point Puntiel begins moving away from him. Second, when Person B was confronted in her interview with CCRB Exhibit 1, #1135, and asked why Puntiel and Person A reversed course on Dyer

Avenue to walk in the same direction as Respondent, her answer that they were going to a bodega to exchange ice cream they had purchased earlier is dubious.

Similarly, her assertion that Puntiel fell off a gurney as he was being transported from the 46th Precinct to the hospital appears gratuitous and incredible. During Puntiel's testimony before the Tribunal, he made none of those assertions; it is unlikely that he would have omitted them if, in fact, they were true. In addition, Person B's volunteering that she recognized Respondent from a previous encounter with Puntiel, and also recognized other police officers, after reviewing the video recording of the incident, who had an animus against Puntiel, as well as her assertion without elaborating, is evidence of her anti-police bias.

Person B's statement, despite the infirmities discussed above, does corroborate Respondent's and Officer Morrone's respective testimonies in the following respects: (1) that Person A was carrying a beer in his hand when Respondent and Officer Morrone began approaching, because she told him to put it down; (2) that by the time Respondent and Officer Morrone caught up to Person A and Puntiel, Person A was sitting on a parked car; (3) that Officer Morrone asked Person A for identification, which he did not provide; and (4) that Puntiel landed on his back when he fell to the sidewalk, an assertion corroborated by CCRB Exhibit 1, #1145, 13:24.

Based upon the relevant, credible evidence in the record, I find that CCRB has failed to prove by a preponderance of the evidence that the punches Respondent admitted to throwing were without police necessity. I further find that neither the testimonial, nor the video evidence establishes that Respondent threw additional punches beyond that which he admits to. I further

find that Puntiel and White exaggerated the number of blows struck by Respondent in a self-serving attempt to enhance Puntiel's posture in his civil suit.

Accordingly, I find Respondent Not Guilty.

Respectfully submitted,

A handwritten signature in dark ink, appearing to be "Paul M. Gamble", written over a horizontal line.

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

NOV 17 2017

A handwritten signature in blue ink, appearing to be "James P. O'Neill", written over the printed name and title.

JAMES P. O'NEILL
POLICE COMMISSIONER