



POLICE DEPARTMENT CITY OF NEW YORK

June 7, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Michael Smith
Tax Registry No. 942823
44 Precinct
Disciplinary Case No. 2015-13860

Charges and Specifications:

1. Said Police Officer Michael Smith, on or about August 29, 2014, at approximately 0750 hours, while assigned to the 44th Precinct and on duty, in the vicinity of Morris Avenue and East 172nd Street, Bronx County, wrongfully used force, in that without police necessity, he struck Person A multiple times about the face.
P.G. 203-11 – USE OF FORCE

Appearances:

For CCRB-APU: Cindy Horowitz, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, New York 10007

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

Hearing Date:
April 27, 2016

Decision:
Not Guilty

Trial Commissioner:
ADCT Nancy R. Ryan

The above-named member of the Department appeared before me on April 27, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The CCRB entered into evidence the interview of Person A and called Tamara Holmes as a witness. Respondent called Police Officer Michele Butera 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

It is undisputed that on August 29, 2014, at approximately 0750, Respondent and his partner, Officer Butera, were in uniform in a marked RMP in the vicinity of Morris Avenue and East 172nd Street in the Bronx. Person A was walking in the area using a walker. Respondent and Officer Butera stopped Person A by bringing him to the ground. Person A was face down on the ground as Respondent and Officer Butera attempted to handcuff him. Person A put his hands underneath himself and was kicking. During the encounter Person A bit, or attempted to bite, the officers and Person A was punched in the face area by Respondent several times. A bystander, Tamara Holmes, took pictures of part of the encounter between Person A and the officers.

There is a dispute over the order of the biting and punching.

Officer Butera testified that he and Respondent were responding to a radio run of a larceny in progress when they observed Person A, who fit the description of the suspect. (Tr. 45-46) When they told him to stop, he threw his walker aside and started to run onto the sidewalk away from them. (Tr. 46-47) Person A did not respond to

Officer Butera's commands to stop so Officer Butera put his hands on Person A's back and they both went down to the ground. (Tr. 48) Person A, who was lying face down on the sidewalk, did not comply with Officer Butera's instructions to put his hands behind his back and instead placed his hands under his stomach. (Tr. 49) Officer Butera tried to grab Person A's arm and Person A tried to bite Officer Butera's left hand. (Tr. 49) His lips brushed Officer Butera's arm but he did not break his skin. (Tr. 50) Officer Butera pushed Person A's head away with his arm. (Tr. 57) Officer Butera testified that Person A was about 5'11" and approximately 300 pounds and further described him as a strong man who kept resisting. (Tr. 46, 50) Officer Butera, after a few minutes of struggle, eventually got control of Person A's left arm and with the assistance of Respondent was able to handcuff Person A by using two sets of handcuffs. (Tr. 51-52) Officer Butera testified that he did not strike Person A and he did not see Respondent hit Person A, but he acknowledged that could have happened without him seeing it. (Tr. 52-53)

Person A was brought to the 44 Precinct but was not charged since the victim did not want to proceed with any criminal charge against Person A, who she described as her husband. (Tr. 53) Officer Butera sustained a shoulder injury when he was trying to handcuff Person A and went to the hospital. (Tr. 55) He testified that while he was still at the Precinct he observed Person A to be aggravated, nervous, loud and not standing still. Another officer sustained an injury in the precinct from Person A pulling back in a chair. (Tr. 54-55)

Respondent testified that he went to assist Officer Butera when he was on the ground with Person A. (Tr. 69) Officer Butera was on top of Person A's left side and Respondent was on top of Person A on his right side. Respondent described

himself as 6' 2" tall, weighing approximately 250 pounds and Officer Butera as weighing approximately 200 pounds. (Tr. 82-83) Respondent tried to pull Person A's right hand out from underneath him. (Tr. 70) Respondent testified that Person A started snapping at his hand and tried to bite him one time. His mouth came within inches of Respondent but he never touched him. (Tr. 84-85) Respondent further testified that in response to the attempted bite, he struck Person A in the face with two or three quick jabs to get his mouth away from his hand. (Tr. 71) Respondent did not try any other strategy to prevent from being bitten. (Tr. 86) Respondent testified that he was particularly fearful of being bitten and exposed to a possible infectious disease since he had previously been stuck with a needle and had to undergo a month of antiviral medicines which made him feel sick. (Tr. 72-73) After he was struck, Person A stopped trying to bite Respondent and he and Officer Butera were able to handcuff him. (Tr. 73-74)

After Person A was handcuffed, Respondent saw a woman with a phone out. He walked over to her and asked her if she saw Person A try to bite him. Respondent testified that she responded that she had heard Respondent say Person A was trying to bite him but she didn't see it. Respondent had his own phone out when he was talking to the woman to document their interaction. (Tr. 74-75)

After Person A was placed under arrest he was taken to the Precinct where he was declared an Emotionally Disturbed Person by the Desk Sergeant and was taken to the hospital by the Emergency Services Unit. (Tr. 76) Respondent testified that Person A apologized to him for trying to bite him. (Tr. 77)

The bystander who Respondent talked to at the scene, Ms. Tamara Holmes, also testified at the trial. She was on her way to work when she saw two police officers on top of a man. She was about four or five car lengths away from the officers who had their

backs to her. (Tr. 14-15) Ms. Holmes heard the man on the ground yelling so she pulled out her camera and walked a bit closer. She took some still photos. (CCRB Ex. 2A. 2B) Ms. Holmes testified that one officer, who looked Latino, was just holding the man down but the other officer, she described as Caucasian, was punching the man in the face. (Tr. 16) She further testified that the officer who did the punching had his knee on the man's back and had one hand holding his arm down while punching him with his other hand. (Tr. 18) The officer who did the punching, didn't say anything until he turned towards Ms. Holmes and then he started yelling, "Stop biting me." (Tr. 18) She did not see the man bite the officer. (Tr. 19) She acknowledged that at times the officer's body was obstructing her view of the man on the ground. (Tr. 20, 33-34) Ms. Holmes testified that she saw between four to seven rapid punches that the officer made with a closed fist to the side of the man's face. (Tr. 19) On cross-examination Ms. Holmes described the sequence of events as the officer punching the man one or two times, followed by a struggle, and then the officer turning around and saying stop biting me and then punching the man again. (Tr. 38) Person A had not been handcuffed at the time of the punches. (Tr. 35-36)

After the officers had the man handcuffed, Ms. Holmes started to walk away but the officer yelled. "Hey you," and she turned around. She testified that the officer got in her face, asked her her name and started questioning her as to whether she saw the man bite him. (Tr. 21, 25-27) She told the officer that she hadn't and then he asked her if it was OK with her that the man stole a cell phone. The officer got very close to her and had his camera in her face. Ms. Holmes walked away. (Tr. 26-27) On cross-examination Ms. Holmes admitted that she told CCRB that she turned around when the police called out to her because she didn't want to get shot in the back. (Tr. 40) When asked whether she

thought that even though she had done nothing wrong and had not hurt anybody she would just be shot in the back in cold blood by an officer, Ms. Holmes responded, "I'm black, yeah." (Tr. 40)

The other evidence presented in this case by CCRB consists of a transcript and audio CD of an interview they conducted with Person A. (CCRB Ex. 1A and 1B) In this interview, which is hearsay, Person A stated that he got into a fight at a hospital with a woman he described as his baby mama and she called the police. (CCRB Ex. 1A, 3-5) Person A left the area of the hospital and was walking with his walker when he saw a police car. (CCRB Ex. 1A, 6) In response to a question as to whether he ran before the officers got out of the car, he agreed it was before. (CCRB Ex. 1A, 12) After stating that he ran about five steps, he described his actions as walking faster than his usual pace with a walker. (CCRB Ex. 1A, 14) Person A initially stated that three or four officers tackled him to the ground and later said two or three officers used their shoulders to tackle him. (CCRB Ex. 1A, 16, 21) He told the CCRB Investigator that his shoulder and face hit a gate when he went down and that his face made contact with the ground causing him not to be able to see well since his head was bloody. (CCRB Ex. 1A, 22-25) Person A further stated that, "They said put my hands behind my back, but I wouldn't let them." His next statement is, "Then he punched me in my face." (CCRB Ex. 1A, 17)

When asked how he reacted to the officers grabbing his hands to handcuff him, Person A stated that, "I bit the officer." (CCRB Ex. 1A, 26-27) Person A then stated that the officers punched him in the face about four times before he bit them. When Person A is asked the order of events he stated, " They tried to handcuff me. I bit them because I was scared. Then he punched me in my face." (CCRB Ex. 1A, 27-28) In direct

response to the question of whether he bit them before or after the officers hit him. Person A stated, "Before." Then when the investigator questions him again asking, "You bit them before they hit you?" Person A then answers, "No. After, after, after."

Person A stated that just the one officer he bit hit him. (CCRB Ex. 1 A, 31) He describes the officer who punched him as the tall Puerto Rican one. (CCRB Ex. 1 A, 34-35) He said he hit him two or three times in his left eye. The investigator then asks him if it was three or four times and Person A responded, "Yes." (CCRB Ex. 1A, 32-33) When asked if he bit the officer at all during this time, Person A stated, "I think so." At this point in the interview when next asked if he bit him, "while he was punching you in the eye or did, or after the last punch," Person A responds, "Before." (CCRB Ex. 1A, 33) Person A later in the interview stated the officer punched him two times before he bit him and then three more times after he bit him (CCRB Ex. 1A, 37)

Person A at first states that he did not allow the officers to put his hands behind his back. (CCRB Ex. 1 A, 17-18) Person A then states that he allowed the officers to handcuff him. (CCRB Ex. 1A, 29) Then in response to questions about his actions while he was being handcuffed, Person A stated he was moving around and admits to the questioner that he was flailing and kicking. (CCRB Ex. 1A, 30-31)

Person A stated that after he was arrested he didn't receive any treatment for injuries and that, "they just put me in the crazy house." (CCRB Ex. 1A, 43) He stated that the tall Puerto Rican heavy set officer with black hair who hit him said, "This mother fucker bit me. That's why I fucked him up." (CCRB Ex. 1A, 49)

No photos of any injuries or medical records pertaining to Person A were offered in evidence.

In deciding whether the CCRB has met its burden of proof in this case, it is necessary to examine the credibility of the two CCRB witnesses. With regard to Person A it must be noted that the hearsay testimony of any witness must be given careful scrutiny since there is no opportunity for the trier of facts to observe the demeanor of the witness as they are telling their version of events, nor is there the possibility for the defense to test the version through cross-examination.

In this case I do not deem Person A's testimony to be credible. He changed his narrative concerning the crucial question of the order of the biting and punching repeatedly. In his first version, without being led by the investigator's questions, he has himself biting the officer before the officer hit him. As the questioning continues, the order of these events changes and ultimately presents a very confused picture of the incident. Person A also changes his version of how many times he was punched. In addition, Person A's description of the number of officers who tackled him conflicts with that of the bystander who took photos of just two officers and with that of the two officers as well. Person A also described the officer who punched him as Puerto Rican when the bystander described him as Caucasian. Respondent who admitted he punched Person A is Caucasian. Person A's hearsay statement is not sufficiently reliable to afford it any weight in this case.

With regard to Ms. Holmes, based on her vantage point with regard to the incident, in that the two large officers had their backs to her and were positioned over Person A, as well as on her own statement that her view of what Person A was doing was obstructed at times, it is not possible to draw any firm conclusion as to whether or not Person A attempted to bite the Respondent before Respondent punched him. Her account of Respondent's actions is also somewhat contradictory in that she attributes

Respondent saying the man is biting him only to cover his punching actions when he sees her with a camera and yet she then describes Respondent punching Person A in a second series of punches while he is now supposedly aware that he is being filmed. Finally, I find that Ms. Holmes did articulate a bias against the police when she stated that she thinks that a police officer would shoot an innocent person in the back without provocation. This belief may have tainted her view of the officer's actions in this case.

With regard to the testimony of Officer Butera and Respondent, they both testified in a calm and thoughtful manner on both direct and cross-examination. I credit their version of events and find that Person A was refusing to be handcuffed and did attempt to bite both Officer Butera and Respondent before Respondent punched him and before he was handcuffed.

The question to be decided becomes whether the punches were a justified use of force in this case. Patrol Guide Section 203-11 imposes the standard to be followed when force is necessary to achieve legitimate police goals. It mandates that members of service "at the scene of a police incident" use the "minimum necessary force." In this case both officers were having difficulty handcuffing Person A, who was a large man. When he went to bite Respondent, Respondent gave him two or three quick jabs to the face to get his mouth away from him. There was no documentary evidence, such as hospital records or photographs, of any injuries to Person A. In fact when he was presented to the Desk Sergeant upon his arrival at the precinct he was not sent for treatment of any injuries but rather was sent for observation as an emotionally disturbed person. With no documentary evidence to support injuries from the punches, it is more likely than not that the punches were in fact light jabs as described by Respondent.

I do not accept the CCRB arguments that the force Respondent used must be deemed excessive force because Officer Butera was able to deflect Respondent from biting him without punching him. With the officers each being in a different position in relation to Person A's mouth at different points during the struggle to handcuff him, it is not possible to say that because one officer did not need to resort to using punches that the other officer did not need to either.

I also do not find that Respondent had to evaluate every alternative he could have used before he chose to use three quick jabs to effectuate the arrest as suggested by CCRB. This incident happened in seconds and Respondent made an instantaneous decision to use the jabs, which did not result in any documented injuries, to protect himself from being bitten and to allow him to be able to handcuff Person A.

I find Respondent Not Guilty.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

JUL 27 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

APPROVED



WILLIAM J. BRATTON
POLICE COMMISSIONER