



POLICE DEPARTMENT

August 12, 2022

-----X
In the Matter of the Charges and Specifications :

- against - :

Police Officer Michael Kovalik :

Tax Registry No. 948368 :

Strategic Response Group 3 :
-----X

Case No.

2021-24419

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

Before: Honorable Josh Kleiman
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU:

Andre Applewhite & Dwayne Wright, 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
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To:

HONORABLE KEECHANT L. SEWELL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Police Officer Michael Kovalik, on or about May 29, 2020 at approximately 2000 while assigned to SRG 3 and on duty, in the vicinity of Barclays Center, Kings County, abused his authority as a member of the New York City Police Department in that he threatened individuals with the use of force by pointing his pepper spray canister in the direction of individuals without police necessity.

P.G. 203-10, Page 1, Paragraph 5
(now encompassed by A.G. 304-06)

PUBLIC CONTACT
PROHIBITED CONDUCT

2. Police Officer Michael Kovalik, on or about May 29, 2020 at approximately 2000 while assigned to SRG 3 and on duty, in the vicinity of Barclays Center, Kings County, abused his authority as a member of the New York City Police Department in that he threatened New York State Senator Zellnor Myrie with the use of force by pointing his pepper spray canister in the direction of New York State Senator Zellnor Myrie without police necessity.

P.G. 203-10, Page 1, Paragraph 5
(now encompassed by A.G. 304-06)

PUBLIC CONTACT
PROHIBITED CONDUCT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 29, 2022.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The CCRB called Investigator Rolando Vasquez and NY State Senator Zellnor Myrie 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. Having reviewed all of the evidence in this matter, the Tribunal finds Respondent Not Guilty.

ANALYSIS

On May 29, 2020, during a protest in front of the Barclays Center in Brooklyn, four days after the murder of George Floyd, several individuals were pepper sprayed by a uniformed member of the Department, including State Senator Zellnor Myrie. Several individuals in the

vicinity filed complaints with the Civilian Complaint Review Board (CCRB), which commenced an investigation of the incident. Senator Myrie, however, did not file a complaint with CCRB and did not cooperate with CCRB's initial investigation.

At the conclusion of the CCRB investigation, the officer who pepper sprayed the Senator could not be identified. In reviewing the body-worn cameras of officers known to be present, however, CCRB investigators observed an officer, positioned behind the Senator, move his outstretched hand, which held a pepper spray canister, over each of the Senator's shoulders in a quick motion. CCRB subsequently identified the officer, based on three letters visible on the officer's name plate and two numbers visible on his shield number patch, as Respondent.

It is undisputed by the parties that Respondent is not the officer who pepper sprayed the Senator. Rather, based solely on the hand movements described above, as depicted in 2-seconds of video evidence, CCRB has charged Respondent with abusing his authority by *threatening* individuals with force by pointing his pepper spray canister at them and separately charged him with doing the same in connection with the Senator.

Respondent does not remember the relevant arm motion captured on video and he was unable to identify the arm holding the subject pepper spray canister as his own. He did not deny, however, that the arm could have been his. (Tr. 156)

As set forth in more detail below, the Tribunal finds that while CCRB has proven by a preponderance of the evidence that the arm holding the pepper spray canister belongs to Respondent, CCRB has failed to prove that Respondent wrongfully abused his authority by threatening the Senator or others with force. Accordingly, the Tribunal finds Respondent Not Guilty of the two specifications with which he is charged.

Factual Background

Senator Zellnor Myrie testified that he attended the protest at the Barclays Center on May 29, 2020. Prior to appearing at the protest, he informed the former chief of Patrol Borough Brooklyn North, Jeffrey Maddrey, that he would be attending. He arrived at Barclays Center later in the afternoon accompanied by former Assemblywoman Diana Richardson.¹ Senator Myrie testified that he wore a neon green shirt with his name and title on the back “intentionally ... [i]n the event that anything would go awry, I was hoping to be easily identifiable, particularly to law enforcement.” He moved amongst the crowd, speaking with constituents in front of Barclays Center and then moved over to Flatbush Avenue. He heard a continuous automated message instructing the crowd blocking traffic on Flatbush Avenue that it was an “unlawful assembly” and ordering the crowd to disperse. (Tr. 77-78, 85-87)

He testified that he was trying to comply with the order to leave when he felt “what felt like bike tires in [his] back and arms.” Senator Myrie was “incredibly confused” as to why the officers were using force when he was walking away and trying to comply with the orders to vacate. Senator Myrie testified that he believed he was attempting to act as a “peacemaker” when he was pepper sprayed, which caused him “an incredible amount of pain.” He was subsequently arrested, but “was recognized by law enforcement officials to be a State Senator and was then released.” (Tr. 78-81, 91-92)

When asked if he was able to identify any officer as threatening him with pepper spray, Senator Myrie stated that he was not. When asked by CCRB why he did not cooperate with their efforts to interview him, Senator Myrie stated that he chose to focus his time on a federal lawsuit he filed against the NYPD. He made no mention of Respondent during his testimony. (Tr. 83-86)

¹ Former Assembly Member Diana Richardson is now the Deputy Borough President of Brooklyn. In the video evidence, she is depicted wearing a brown and white printed dress.

CCRB Investigator Rolando Vasquez, the assigned case investigator, testified that he was unable to interview any of the civilians present, nor any of the individuals who filed complaints with CCRB, as they were unresponsive to attempts to contact them. Additionally, Senator Myrie and Assemblywoman Richardson declined to respond to requests for CCRB interviews. (Tr. 38, 83-84)

Upon review of approximately 42 body-worn cameras, Investigator Vasquez identified Respondent as present in the vicinity and as the subject officer who raised a pepper spray canister near Senator Myrie's shoulders. Specifically, Respondent "extend[ed] his right arm holding a pepper spray canister in his hand over Senator Myrie's right shoulder and then moved it over ... [the Senator's] left shoulder in close proximity to [the Senator's] face." (Tr. 28-29) Investigator Vasquez was able to determine the arm depicted in the video to be Respondent's based upon certain visible letters on the officer's name plate and a partial shield number.² He clarified, however, that Senator Myrie had been pepper sprayed just prior to Respondent's hand movements by another officer who is depicted on video (Resp. Ex. B at 23:59:35Z), but who he was unable to identify during his investigation. (Tr. 25)

On cross-examination, Investigator Vasquez acknowledged that the body-worn camera footage he reviewed depicted a chaotic scene, in which the officers present were given different instructions by various supervisors. He further conceded that Respondent's own body-worn camera footage did not capture the hand movements at issue. (Tr. 44, 46).

² Investigator Vasquez identified the letters "O" and "V," and the last two letters "I" and "K." He was also able to identify the last two digits of the shield number, "0" and "1." (Tr. 37, 70)

Sergeant Olfano's body-worn camera (Resp. Ex. B) depicts the following:

- 23:56:42Z-23:59:18Z:³ Sergeant Olfano repeatedly tells groups of protesters, "Keep it moving." Fireworks are shot off from the street and crowd, and can be heard exploding.
- 23:59:19Z-23:59:21Z: A supervisor is heard stating, "Go in and grab a collar. Grab a body, grab one body." Sergeant Olfano follows the officers, with the bicycle officers leading the group, toward the crowd of protesters.
- 23:59:22Z-23:59:26Z: Senator Myrie, wearing a neon green shirt, is seen with his hands up in the middle of the crowd.
- 23:59:27Z-23:59:30Z:⁴ Senator Myrie is seen wrapping his arms around Assemblywoman Richardson, with his back toward the officers. Sergeant Olfano's arm with a gloved hand comes into view and pushes Senator Myrie back, while saying "get the fuck outta here." A protester ("P1") depicted on the right side of the screen, to the right of Senator Myrie, with their hair in a bun, wearing a black facemask around their chin, appears to be confronting police.
- 23:59:31Z-23:59:32Z: Respondent's arm holding pepper spray comes into view and the arm extends over Senator Myrie's right shoulder. Pepper spray appears to briefly be deployed. The stream is angled over the right shoulder of the Senator.⁵ Respondent's arm then moves over the left shoulder of Senator Myrie. Due to the angle of the canister and the camera, it cannot be determined whether pepper spray is deployed over Senator Myrie's left shoulder.
- 23:59:33Z-23:59:38Z: Sergeant Olfano pushes Senator Myrie's shoulder, then holds onto his elbow, then pushes on his lower back while saying, "come on, let's go, keep it moving." Senator Myrie

³ The Tribunal takes judicial notice that Department body worn cameras utilize a watermarked timestamp in Coordinated Universal Time (UTC), also known as Zulu time, denoted by a "Z" at the end of all watermarked timestamps (see Axon Camera Video Watermark Timestamp, *available at* <https://my.axon.com/s/article/Axon-Camera-Video-Watermark-Timestamp> [last visited July 26, 2022]). On May 29, 2020, Zulu time was four hours ahead of Eastern Daylight Time. Accordingly, a watermarked timestamp of 23:56:42Z equates to a local time of 19:56:42, or approximately 7:56 p.m.

⁴ CCRB Exhibit 4 includes excerpted clips of this time period from Sergeant Olfano's body worn camera, including a slow-motion version.

⁵ When questioned after its closing statement, CCRB asserted that the spray traveled toward "individuals" and not toward the Senator. (Tr. 185)

still has his arms around Assemblywoman Richardson and his back to the officers. P1 appears to be holding a bicycle and raising it such that the rear wheel is in the air in front of the officers.

23:59:39Z-00:00:16Z: Senator Myrie is seen being pushed out of the street toward the sidewalk by other officers. He stays in the street and continues to walk along the edges of the crowd.

00:00:17-00:00:27Z: Senator Myrie continues to walk in the street in the direction the officers are directing the crowd.

00:00:28Z: A supervisor says, "Everyone is under arrest."

Respondent's body-worn camera (CCRB Ex. 1) depicted the following:

23:56:42Z-23:57:16Z: Respondent tells a group of protesters, "You gotta move." Fireworks go off in the street directly in front of Respondent. A female protester can be seen running into Respondent and someone is yelling, "Are you fucking kidding me?" Fireworks are shot off from the street as the crowd cheers.

23:57:17Z-23:57:23Z: Respondent is continuing to tell the crowd to move. Assemblywoman Richardson is standing in the middle of the street. Respondent approaches her and says "Ma'am, hi, you gotta back it up." She responds, "Don't touch me." Respondent says, "You gotta back it up. Back it up and you won't get touched." Respondent then moves away and continues to assist with crowd control.

23:57:24Z-23:57:56Z: Senator Myrie is standing in the middle of the crosswalk, raising his arms in the air. He walks away from the officers, but then stops and turns at the sound of fireworks, standing in the middle of the street with his arms in the air. Assemblywoman Richardson is seen standing in the crosswalk, not moving, also with her arms in the air. Senator Myrie walks toward the officers.

23:57:57Z-23:58:43Z: An officer states, "movin' in, let's go." Respondent joins the line of police officers behind the officers with bicycles. The group of officers then walks toward the crowd again.

23:58:44Z-23:59:24Z: A supervisor states "we're going in here" and Respondent follows him. Assemblywoman Richardson stands with her

hands raised in the air in front of the police officers. Someone can be heard yelling, “eggs, eggs!”

- 23:59:20Z-23:59:30Z: An officer is heard asking, “what are you doing?” Another officer responds, “grabbin’ bodies, grab one body.” Senator Myrie is seen next to Assemblywoman Richardson. He is pointing his finger at the officers while moving towards the officers. An officer states, “get outta here, get the fuck out of here.”
- 23:59:31Z-23:59:33Z: Senator Myrie is seen wrapping his arms around Assemblywoman Richardson, with his back toward the officers. Assemblywoman Richardson shouts at the surrounding officers, “get the fuck off.” [It is at this time that Sgt. Olafano’s body-worn camera depicts the subject hand movements, which are not depicted on Respondent’s body-worn camera due to the angle of his body.]
- 23:59:33Z-23:59:37Z: An officer is heard stating, “that’s it, that’s it.” An officer wearing a black glove is seen grabbing Senator Myrie’s arm and pushing him. Respondent appears to be attempting to get around a line of officers to move in front of them.
- 23:59:38Z-23:59:43Z: Two officers appear to be escorting Senator Myrie out of the street. Respondent is behind one of these officers with his hand pushing against the officer’s back. Respondent finds an opening and appears to be moving in the direction of P1 with his hand outstretched. P1, however, quickly moves away from the officers and Respondent disengages his forward movement in the direction of P1.
- 23:59:44Z-23:59:54Z: Assemblywoman Richardson is heard yelling, “Get the fuck off of us.” Senator Myrie has his arms wrapped around her from behind. Respondent’s left hand is extended toward them as they move away. There is no pepper spray in his left hand. Senator Myrie is seen moving with Assemblywoman Richardson toward the sidewalk.
- 23:59:55Z-00:00:28Z: A protester appears to rush toward the police officers and begins pushing them.
- 00:00:29Z-00:00:41Z: Someone says, “Everyone is under arrest.” An officer falls to the ground when they begin to make arrests. Respondent is seen helping the officer off the ground and is heard asking, “Are you okay?”

Police Officer Kerr's body-worn camera (Resp. Ex. A) depicts the following:

- 23:59:00Z-23:59:21Z: Senator Myrie is seen standing at the front of the crowd in the crosswalk in the middle of the street with Assemblywoman Richardson next to him. He is holding hands with the people next to him and their joined hands are raised in the air. A woman is heard yelling "hold the line." P1 appears to be holding and positioning his bicycle to block the forward progress of the officers. Assemblywoman Richardson is position behind the rear tire of P1's bicycle.
- 23:59:21Z-23:59:26Z: An officer with a bicycle, standing in front of P1, raises his Department bicycle and pushes it against P1's bicycle. The front tire is also pressed against Assemblywoman Richardson's leg. She attempts to push the bicycle back. Senator Myrie steps in front of Assemblywoman Richardson, placing himself between her and police. Officer Kerr and other officers rush toward them.
- 23:59:27Z-23:59:34Z: The officer with the bicycle reaches down to unholster his pepper spray. He raises it and pepper sprays P1, who moves his bicycle and walks away from the officers. Respondent appears to watch this interaction and appears to move around the Senator and in the same direction as P1. At this time, Senator Myrie is seen walking away from the officers with bicycles.

For the entirety of all of the videos entered into evidence, an automated audio message, playing over a Department Long-Range Acoustic Device (LRAD) repeats, "This assembly is unlawful. If you do not disperse, you will be subject to arrest."

Respondent testified that he has been a member of the service for 15 years. He joined the police department after four years in the U.S. Army, during which he was deployed to Iraq. After joining the Department, he was assigned to the Department's Strategic Response Group (SRG), a specialized unit in which officers receive training targeted at some of the Department's more sophisticated equipment and tactics aimed at addressing complex incidents, such as [a]ctive shooting scenarios, special category missing persons, and crowd-control. (Tr. 125-26)

On May 29, 2020, Respondent was originally deployed to Union Square in Manhattan. After a call came over the radio announcing a “10-13” (officers in need of assistance) and “a Level 3, [indicating] a high-level of distress,” Respondent proceeded to the Barclays Center. Upon arrival, Respondent observed approximately 1500 protesters and approximately 45-50 officers. Respondent testified that he assisted the officers in “[holding] the lines” and protecting the entrance to the Barclays Center from being breached. Approximately “an hour, hour and a half” after arriving, Respondent and his fellow officers were ordered to activate their body-worn cameras, which Respondent did. (Tr. 127-32)

At some point, Respondent was instructed by superiors to move people out of the roadway. Respondent admitted that during efforts to remove individuals from the roadway, he “quickly” deployed his pepper spray at “an area where the crowd was pushing through the barricades and the bicycles.” Respondent testified that he did not observe himself deploy pepper spray on video. (Tr. 136)

Respondent did not recall seeing Senator Myrie at the scene until he observed him on video when he was interviewed by CCRB. Respondent testified that he is unaware of whether Senator Myrie was closeby when he deployed his pepper spray. He further did not recall interacting with Senator Myrie in any capacity. Rather, he testified that his focus at the time was on individuals “coming over the barricades.” (Tr. 138)

Respondent had no recollection of moving his hand over the Senator’s shoulders. Respondent did not deny, however, that the hand movements may have been his own. Respondent was adamant that at no point did he intend to threaten Senator Myrie with a use of force or with his pepper spray. Respondent testified that his memory was that he had re-holstered the pepper spray canister immediately after using it, but after reviewing the video evidence he

realized that he had failed to do so, which he believes was a product of the chaotic situation he was facing at the time. (Tr. 139-40, 149)

Findings

A threatened use of non-deadly force constitutes misconduct where a member of the service unreasonably seeks to “convey[s] the impression that disobeying their directives could result in imminent physical repercussions” (*cf. People v. Smith*, 22 NY3d 1092, 1094 [2014]). A use of force is reasonable where legally authorized and necessary to gain control or custody of a subject. The determination of reasonableness relies on a case specific analysis in which multiple factors are considered, some of which may include: (1) the nature and severity of the crime/circumstances, (2) the duration of the action, (3) whether the subject is actively resisting custody, (4) the number of subjects in comparison to the number of MOS, and (5) the presence of hostile crowd or agitators (*see* P.G. 221-01).

Department issued pepper spray constitutes a non-deadly, intermediate level of force. It is authorized when “used to gain or maintain control of persons who are actively resisting arrest or lawful custody or exhibiting active aggression, or to prevent individuals from physically injuring themselves, members of the service, or other persons” (P.G. 221-07). It may not be used upon a person who is merely “passively resisting”⁶ or in situations that do not require the use of physical force (*Id.*). The Patrol Guide further instructs: “In many cases, O.C. pepper spray will reduce or eliminate the need for physical force to effect an arrest or gain custody. It will often reduce the

⁶ Passive resistance is defined in the Patrol Guide as: “Minimal physical action to prevent a member from performing their lawful duty. For example, a subject failing to comply with a lawful command and stands motionless and/or a subject going limp when being taken into custody” (P.G. 221-07). Active resistance is defined as “physically evasive movements to defeat a member of the service’s attempt at control, including bracing, tensing, pushing, or verbally signaling an intention to avoid or prevent being taken into or retained in custody” (*Id.*).

potential for injuries to members and suspects that may result from physical restraint and it should be regarded as a possible alternative to such force and restraint, where practical” (*Id.*).

Importantly, the instant charges do not concern themselves with a use of pepper spray, but rather a threatened use. A threatened use of intermediate force where an arrest is valid does not invariably constitute misconduct. Indeed, such tactics may be reasonably used to deescalate encounters. Accordingly, the appropriate inquiry focuses upon the reasonableness, or lack thereof, of the subject officer’s threat of force under the totality of the circumstances present at the time.

Preliminarily, the Tribunal finds that CCRB has proven by a preponderance of the evidence that the hand movements at issue were those of Respondent. Respondent’s own body-worn camera places him in the vicinity of the conduct at issue. The body-worn camera of a second officer captures several characters visible on a nameplate and shield patch that match those of Respondent. And a tattoo displayed by Respondent at trial is not dissimilar from a mark observed on the subject officer’s arm in the video evidence.⁷

CCRB claimed at trial that its basis for Specification 1, charging Respondent with threatening individuals with force, is a single second in the video evidence (Resp. Ex. B at 23:59:31Z), during which Respondent’s hand, holding pepper spray, is observed over the right shoulder of Senator Myrie. As for Specification 2, CCRB claims that Respondent wrongfully threatened Senator Myrie from behind when he moved his hand holding the pepper spray

⁷ Respondent did not deny that he was the subject officer, but rather testified that he was unable to identify himself as the officer depicted in the 2-second clip CCRB presented to him and believed the arm in the video did not appear to him to be his. While the demonstrative stills captured by CCRB do not clearly show the arm attached to the body of the officer whose nameplate and shield patch are partially visible, a slow motion excerpt of the video (included on CCRB Ex. 4), clearly depicts the subject officer’s body and the subject arm to be connected.

canister over the Senator's left shoulder, a movement that is captured during the next second of the same video (Resp. Ex. B at 23:59:32Z).

The Tribunal finds that the record evidence fails to establish CCRB's burden as to either charge. At that time of the subject hand movements, Respondent reasonably understood that the officers on scene were being directed to move-in and make arrests.⁸ It is undisputed that the group of protesters far outnumbered the officers and that continuous warnings had been made to clear the streets. After the decision to make arrests was made, the video evidence establishes that the scene became more chaotic. Respondent credibly testified to observing, as depicted in the video evidence, physical confrontations between officers and protesters. Included among these was a confrontation between the Assemblywoman and an officer with a bicycle, including an effort by the Senator to shield the Assemblywoman after she was targeted for enforcement action. Another protester (P1) is observed using his bicycle to block the forward progress of an officer. Later, an officer is pushed to the ground and helped up by Respondent. Under these unique circumstances, it was not unreasonable for Respondent to hold his Department-issued pepper spray at the ready to dissuade protesters from physically engaging with him and other officers. Furthermore, the video evidence does not establish whether Respondent is aiming his pepper spray at the Senator or in the same direction he deployed his pepper spray a second earlier.

⁸ The decision to make arrests at this time was not baseless. The targets of the arrests were persons blocking traffic on Flatbush Avenue, a major thorough-fare in Brooklyn, who had refused to move despite incessantly-repeated requests to do so for hours. It is not disputed that the Senator and others were among those engaged in civil disobedience at the time and subject to the arrest order. There is little evidence to support the Senator's testimony that at the time of Respondent's alleged threat, he was seeking to leave the area. Just prior to the alleged threat, the Senator is depicted in the video evidence moving toward the line of police officers attempting to push protesters back and standing his ground. It was only after he was pepper sprayed, an act this Tribunal neither condones nor the legality of which it is asked to resolve, that the Senator turned away from the officers, placed his arms around the Assemblywoman, and was approached by Respondent. There is no evidence that Respondent observed the Senator being pepper sprayed.

The Tribunal is also mindful that unclear video evidence has the potential to mislead the viewer. A movement captured from a single angle may cause the eye to assume one thing which another angle may dispel. Here, while Sergeant Olfani's video evidence depicts Respondent's arm over the shoulders of the Senator, the only video evidence to do so, it fails to display the angle at which the pepper spray canister is being held and the direction of Respondent's focus. At no time does any of the video evidence depict Respondent touching the Senator or taking any enforcement action in connection with the Senator and no testimony or other evidence was received by the Tribunal claiming such action occurred.

Indeed, when the watermarked timestamps from Sergeant Olfani's body-worn camera (BWC) depicting the subject hand movements are matched to those of Respondent's BWC, a review of Respondent's BWC immediately before, during, and after this time period, appears to depict Respondent trying to move past the line of officers and around the Senator to address activity in front of the Senator. Accordingly, there is little evidence that Respondent's focus at the time is on the Senator. Respondent testified that his single deployment of pepper spray was to address protesters actively breaking through the police line (Tr. 136). While Respondent testified that he did not believe this use of pepper spray was captured on camera, he was not shown the deployment of pepper spray identified by CCRB after closing statements (Tr. 185), and, therefore, it is possible they are one in the same. Even if this is not the case, CCRB has failed to prove that, given the totality of the circumstances Respondent's actions were unreasonable.

The Tribunal further finds relevant to the disposition of these charges that Respondent is otherwise depicted in the video evidence as polite and professional when interacting with protesters. He is not depicted as using profanity with civilians, nor using excessive force, and does not appear to use unreasonably aggressive tactics.

Accordingly, the Tribunal finds that a preponderance of the evidence fails to support either of the specifications with which Respondent is charged. Respondent is, therefore, found Not Guilty of the charged misconduct.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'J. Kleiman', written in a cursive style.

Josh Kleiman
Assistant Deputy Commissioner Trials

APPROVED

A handwritten signature in dark ink, appearing to read 'K. Sewell', written in a cursive style.

JAN 12 2023
KEECHANT L. SEWELL
POLICE COMMISSIONER