



POLICE DEPARTMENT CITY OF NEW YORK

February 7, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Yahaira Llano
Tax Registry No. 955072
Narcotics Borough Queens South
Disciplinary Case No. 2015-14484

Charges and Specifications:

1. Said Police Officer Yahaira Llano, on or about April 13, 2015, at approximately 2100 hours, while assigned to Patrol Borough Brooklyn North and on duty, in the vicinity of [REDACTED] Kings County, did wrongfully use force against Malik McLeod in that she struck Malik McLeod in the face with a closed fist.
P.G. 203-11 - USE OF FORCE

Appearances:

For CCRB-APU: Timothy Jones and Raasheja Page, 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 Date:

November 28, 2016

Decision:

Guilty

Trial Commissioner:

DCT Rosemarie Maldonado

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on November 28, 2016. Respondent, through her counsel, entered a plea of Not Guilty to the subject charge. CCRB called Malik McLeod and Police Officer Jean Prinston as witnesses. Respondent testified on her 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 the charged misconduct.

FINDINGS AND ANALYSIS

This case arises out of Respondent's use of force during an encounter with Malik McLeod on the evening of April 13, 2015. The following facts are uncontested.

Respondent and her partner, Officer Jean Prinston, were working a night tour within the confines of the 75 Precinct in Brooklyn. They were in uniform and assigned to a foot post with an estimated radius of five blocks. (Tr. 99-101, 116-18) At approximately 2100 hours, they encountered McLeod at a private parking lot [REDACTED] McLeod was trying to gain entry into his girlfriend's mother's vehicle as she had locked her keys inside the car. Respondent and her partner approached and McLeod's need for assistance opening the car door was discussed. (Tr. 16-18, 120) All witnesses provided slightly different accounts regarding the sum and substance of what was said, but agreed that after a brief conversation, they separated. Seconds later, Officer Prinston called McLeod to come toward the officers and he

complied. (Tr. 20, 121) Shortly thereafter, Respondent punched McLeod once time in the area of the face. McLeod suffered no injuries. (Tr. 76, 130-31)

Surveillance footage captured the following:

20:57:00- As Respondent and Officer Princeton walk toward a gray vehicle, McLeod emerges from behind the vehicle.

20:57:09- All three individuals move out of the camera's view.

20:57:22- McLeod reemerges, walking around to the driver's side of the vehicle. He appears to be pulling on the handle of the rear driver's side door. The officers are not in view.

20:57:35- McLeod walks away from the vehicle.

20:57:47- McLeod drops an item and picks it up.

20:57:53- The officers reemerge, standing on opposite sides of the vehicle. Both officers shine their flashlights into the vehicle and then look toward McLeod.

20:57:59- McLeod turns and walks back toward the officers.

20:58:12- McLeod stands facing the officers at a distance of approximately 2 to 3 feet. They appear to engage in conversation.

20:58:31- Princeton shifts over, angling himself behind McLeod, who continues to face Respondent.

20:58:40- McLeod steps back, turns toward Princeton and attempts to walk past the officers. Respondent walks behind McLeod and Princeton blocks him.

20:58:44- Respondent walks ahead to face McLeod. They appear to engage in conversation.

20:58:53- McLeod pulls his cell phone from his pocket.

20:59:12- Respondent moves closer to McLeod, who still has his phone in his hand.

20:59:25- McLeod gestures with his hands.

20:59:38- Both officers reach for McLeod. Respondent leans toward McLeod and punches him.

20:59:40- Respondent moves McLeod back against the vehicle and Princeton grabs his right arm.

21:00:00- They turn McLeod, who appears to be rear cuffed, to place his back to the rear of the vehicle.

(CCRB Exhibit ("CCRBX") 1; *see also* Tr. 38-51, 65-66; CCRBX 2 at 34-42).

Shortly thereafter, the mother of McLeod's girlfriend arrived and indicated that the vehicle belonged to her. McLeod was arrested for resisting arrest and because he had two open warrants. Ultimately, the criminal case was dismissed following a six-month adjournment in contemplation of dismissal. (Tr. 36-37, 52-53, 134-35; CCRBX 2 at 24-28)

The sole question before this tribunal is whether Respondent violated the Patrol Guide's mandate to use "minimum necessary force" when she punched McLeod. Respondent maintained she was justified as McLeod behaved in a non-compliant, agitated manner, which she perceived as a threat to her physical safety. Conversely, McLeod represented that he was complying and was punched in the face for "no reason."

McLeod recounted at trial that on the night in question, he was leaving his apartment on his way to a nearby deli when his girlfriend's mother, [REDACTED] informed him that she had locked her keys in her car. In response, he went to the parking lot and attempted to determine whether any of the car doors could be opened. (Tr. 16-17, 57-63) When McLeod saw Respondent and her partner, he asked if they could open the doors with their nightstick. Officer Princeton asked if he was trying to break into the vehicle, to which he responded, "[w]hy would I walk up to y'all if I was trying to break into a car?" He remembered the officers telling him he would need to call "people that open cars." (Tr. 17-19, 63-65, 77-79)

According to McLeod, the officers went their way and he walked in the direction of the deli. At that point, he dropped a MetroCard and stopped to pick it up. As he did so, the officers called him back and Respondent asked what he had dropped. The officers again accused him of trying to break into the car and requested that he produce identification. When he told them that the vehicle belonged to his "mother-in-law," the officers directed him to call her. McLeod explained that he tried to place the call via Wi-Fi because his phone service had been discontinued. Respondent observed this and commented, "I have an iPhone, that's not how you call somebody." (Tr. 19-23, 42, 45-48, 55-56, 66-70) McLeod did not explain that he had no cellular service and instead secured the phone in his pocket. When the officers ordered him to take his hands out of his pockets, he complied.

McLeod testified that he attempted to walk off, taking two steps back and to the left. Officer Princeton, however, cut him off and told him to stop moving. McLeod stated that he complied by positioning himself with his back against a nearby car and keeping his hands by his side. He recalled the officers asking more questions but did not remember specifically what was asked. It was then that Respondent, "out of nowhere," punched his lower left cheek. According to McLeod, Respondent gave him no directives to get back before she punched him and did not first place her hand on his shoulder.¹ He denied striking, kicking, swinging at or pushing Respondent or her partner before being punched. (Tr. 24-28, 45, 68-72, 80-81) He also denied screaming, cursing, or making any verbal threats or threatening gestures, though he conceded that he may have been talking with his hands. (Tr. 30, 49-50, 70-72, 88-91)

According to McLeod, the officers handcuffed him and he complied by placing his hands behind his back. (Tr. 28-30, 50-51) He testified that he called out to ask two people he

¹ At his April 24, 2015 CCRB interview, McLeod told an investigator that Respondent grabbed his shoulder and he asked why she was grabbing him before she punched him in the face. At trial, however, he insisted this took place after the punch. (Tr. 72-76, 92-96).

recognized to get his "mother-in-law." She came downstairs and informed the officers that the vehicle in question belonged to her. The officers told her McLeod had been trying to break into the car and she reiterated, "I told you that's my car and that's my son-in-law." (Tr. 31- 33) The officers informed him that he had a warrant and would have to come back to the precinct. He believed this was incorrect and had his girlfriend's mother get papers confirming the completion of court ordered community service. (Tr. 33-34) McLeod was transported to the stationhouse where he reported to the desk sergeant that Respondent had punched him in the face "for no reason." He asserted that the sergeant laughed and said, "[y]ou let a girl punch you in your face?" (Tr. 35-37)

At trial, Respondent recalled initially observing McLeod "yanking" the door handles of a vehicle. She did not recollect the specific nature of the conversation once they approached but did remember McLeod mentioning AAA assistance. (Tr. 119-21) She and Prinston then shined their lights into the car as McLeod quickly walked away. Prinston pointed out a purse on the seat, which Respondent explained gave her "a little hint...this kind of looks funny," especially because EMS workers in the area had reported their personal vehicles being broken into that week. (Tr. 121-22, 155-57) She agreed on cross-examination that McLeod did not have any visible "burglar tools" and had not broken any car windows. (Tr. 102, 155)

According to Respondent, Prinston called out for McLeod to return and they began questioning him further about the vehicle. Respondent did not recall the substance of their questions but remembered that McLeod seemed like he wanted to leave. She sensed he was getting aggravated as he began flailing his hands, speaking louder, cursing, and asking, "why the

[fuck] are you stopping me?" (Tr. 123-24, 136)² She also recalled McLeod attempting to make a phone call but having issues with his phone.

Believing this was a possible vehicle break-in, Respondent testified that she and Princeton formed "a cake cut," a sort of triangle with McLeod in the middle. He tried to walk away and Princeton used his body to cut him off. Respondent did not recall if they specifically told McLeod he was not free to leave, but she did remember asking for his identification. Respondent believed that McLeod was "getting more and more pissed off" after being blocked by Princeton and that he might try to push her out of the way. At that moment, she put her hand on his shoulder and told him, "stay right there, stay calm." (Tr. 125-29, 159) On cross-examination, she characterized this as a "warning" push. (Tr. 160) She contended that McLeod moved towards her flailing his arms "as if he was squaring off to hit [her.]" Believing he was about to strike her, Respondent punched him once using her right hand. She explained, "I felt he was going to strike at me because he couldn't flee towards Princeton. . . ." (Tr. 128-31, 160-63) Respondent felt justified in using "that minimal kind of force" because she felt threatened in the moment. (Tr. 135) She conceded, however, that McLeod never swung, spit, kicked or extended his arms to push or grab her. (Tr. 159-60) Immediately after the punch, she and Princeton each grabbed one of McLeod's arms and together they handcuffed him despite his resistance. (Tr. 131, 134, 163)

At the precinct, McLeod reported to the desk sergeant that Respondent punched him, which she confirmed. The fact that force was used during the course of McLeod's arrest was documented in the Command Log. (Tr. 131-33, Respondent's Exhibit ("RX") A) On cross-

² Portions of Respondent's June 4, 2015 CCRB interview were read into the record. During that interview, Respondent told the investigator that she did not recall McLeod using profanity. Though her counsel stipulated that the transcript was read accurately into the record, Respondent insisted that she did tell CCRB that McLeod was cursing. (Tr. 136-38) Similarly, when she was asked at CCRB what, if anything, McLeod was doing with his hands or arms, she stated she did not recall. She testified that the video refreshed her memory with regard to his flailing his hands (Tr. 139-40).

examination, Respondent acquiesced that on the arrest report, she had entered “none” in the “physical force” field. (CCRBX 3). She explained this was a mistake as she had forgotten to override the computer’s default response of “none.” She further agreed that the report’s narrative said nothing about the force used nor about McLeod acting in a threatening manner. (Tr. 144-49).

CCRB called Respondent’s partner, Officer Jean Princeton, to testify. He recounted that he and Respondent observed McLeod looking inside a vehicle and attempting to open the door. After approximately two minutes, they approached to ask if he needed help. McLeod indicated he did not and began to walk away. Princeton looked into the vehicle and saw a purse and an iPhone on the driver’s seat. He stated it “click[ed] in [his] head” that this might be an attempted burglary and he called to McLeod with the intent to stop him and ask more questions. (Tr. 101-07) He remembered McLeod saying the car belonged to his mother who lived upstairs. Princeton told McLeod to call his mother but recalled him responding that he did not have her number. Princeton testified that he then “tri[ed] to walk away again. That’s when I believe he push[ed] my partner and my partner hit him . . . He try to push my partner. He pushed my partner basically and [she] hit him.” (Tr. 107-08). At that point, the APU prosecutor asked that Princeton be deemed a hostile witness, characterizing his testimony as “completely contradictory” to the account he provided to CCRB investigators. Ultimately, it was agreed that Officer Princeton would not be subject to further questions and that his CCRB interview would be entered into evidence. (CCRBX 2; Tr. 108-13).

At his June 9, 2015 CCRB interview, Princeton stated that after calling McLeod back, he told him, “you can’t leave.” He did not, however, observe any bulges or see McLeod reaching into his pockets. McLeod asserted that he “[wasn’t] doing anything” and Princeton told him,

“Yes, but I’m asking you a question, you can’t leave. You’re not under arrest but you cannot leave.” McLeod took some steps and Princeton moved to block him. (*Id.* at 13-16, 19, 31 33, 36) McLeod continued “flailing” his arms as the officers tried to cuff him. According to Princeton, “that’s when he fled and [Respondent] did actually punch him.” (*Id.* at 17-24, 37-38)

The tribunal recognizes the inherent danger in random street encounters with suspects, especially when officers do not know whether an individual is armed. It is entirely reasonable that Respondent was concerned for her and her partner’s safety given that they had observed McLeod engaging in behavior consistent with a possible vehicle break-in. Even so, pursuant to the Patrol Guide, an officer may not use force where doing so is not necessary under the circumstances.

Here, as in any excessive force case, the threshold question is whether there was cause for force to be used. If there was not, any force used was unjustified. If there was cause, then the inquiry focuses on whether the amount of force exercised by respondent was reasonable. To make this determination, it is necessary to examine the context in which the force was used and the amount of force exercised. *Police Department v. Giglia*, OATH Index Nos. 1197-98/90 (Nov. 8, 1990), *aff’d sub nom. Gatto v. Brown*, 234 A.D.2d 22, 650 N.Y.S.2d 162 (1st Dep’t 1996).

Though there is no question that McLeod was punched, McLeod and Respondent’s accounts differ as to the key facts that indicate whether Respondent was justified in punching McLeod. Few things are more difficult, yet more fundamental to the role of a trier of fact, than the task of attempting to reconstruct the most probable nature of a past event on the basis of contradictory narratives from witnesses. In making such judgments, the factfinder should consider a wide range of factors, including the degree to which the witness’ account is logical

and comports with common sense and general human experience. For the reasons set forth below, I found McLeod to be the more credible witness and conclude that Respondent used excessive force when she punched him.

First, McLeod's testimony before this tribunal was straightforward and did not appear to be exaggerated or embellished. For example, he candidly stated that he was punched once and sustained no injuries. Second, although at trial McLeod was understandably troubled by his encounter with Respondent, he did not give the impression of harboring undue bias toward her or police officers in general. Third, there was no indication that McLeod filed a lawsuit relating to this incident. Thus, there was no evidence that he had a monetary incentive to taint his testimony at trial. Fourth, McLeod made a statement against interest by admitting that at a critical moment, he tried to step away from the officers.³

In contrast, I found that Respondent embellished her trial testimony in a manner that overstated McLeod's aggressiveness. It is particularly troubling that at her CCRB interview Respondent did not recall McLeod using profanity or flailing his hands or arms. At trial, however, Respondent changed her account to include this conduct, thereby portraying McLeod as an elevated threat. (Tr. 136-38) This factual embellishment had all the hallmarks of a transparent attempt to exaggerate the threat posed. This type of pivotal inconsistency cannot be ignored given that Respondent is facing disciplinary sanctions and has a motive to testify in a manner that absolves her of wrongdoing.

Respondent's partner also made inconsistent statements about the circumstances surrounding the punch. At trial, Officer Princeton testified that after being asked to call the owner

³ Though he contradicted himself on whether Respondent grabbed his shoulder before or after the punch, this inconsistency in a chronological detail was not sufficient to undercut the witness's otherwise straightforward account of what occurred.

of the car, McLeod tried to walk away and “that’s when . . . he push my partner and my partner hit him . . . He try to push my partner. He pushed my partner basically and my partner hit him.” (Tr. 107-08) Neither Respondent nor Prinston, however, had previously mentioned that McLeod had pushed Respondent. (Tr. 130, 160) In fact, at his CCRB interview, Prinston simply stated that while he questioned McLeod, “he’s walking away just like he’s trying to run and that’s when we’re trying to put him in cuffs . . . So that’s when he fled and Officer Llano did actually punch him.” (CCRBX 2 at 20)

Finally, the video in evidence does not support Respondent’s contention that a punch was reasonably justified. The video shows McLeod complying with the officers’ request to return after Officer Prinston called to him. He spoke to the officers for multiple minutes and, at one point, attempted to use his phone, as directed by the officers. Though the video captured him moving his hands and stepping away as they spoke, from the angle it was recorded it does not appear that McLeod was “flailing” or “squaring off” to strike, as described by Respondent. In sum, the record lacks sufficient support for Respondent’s assertion that McLeod was behaving in a threatening manner that warranted a punch to his face. As such, the CCRB has met its burden, proving that Respondent wrongfully used force when she struck McLeod in the face. Accordingly, Respondent is found guilty as charged.

PENALTY RECOMMENDATIONS

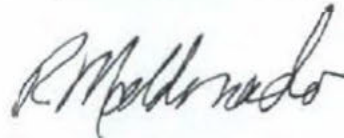
In order to determine an appropriate penalty, Respondent’s service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 9, 2013. Information from her personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The APU prosecutor requested a penalty of ten (10) vacation days. In recent cases, ten day penalties have been imposed in force cases even where an individual sustained injuries or where the use of force was more pronounced. *See Case No. 2015-13090* (October 25, 2016) (seven-year officer with no disciplinary history forfeited ten (10) vacation days for punching an individual, causing him to fall to the ground and sustain a laceration that required seven staples to the head. Video showed that at the time of the punch, the individual had ceased resisting arrest. The Police Commissioner disapproved ADCT's original penalty recommendation of five (5) vacation days); *Case No. 2014-12821* (February 18, 2016) (seventeen-year sergeant forfeited ten (10) vacation days for punching an individual in the face and stepping on his head, causing significant bruising to his eyes, lip and cheek); *see also Case No. 2015-14727* (June 22, 2016) (seven-year police officer with no disciplinary record negotiated a penalty of ten (10) vacation days for punching a handcuffed prisoner in the chest. A supervisor at the scene agreed the prisoner had been agitated but confirmed he was handcuffed and in the police van when Respondent punched him).

The tribunal believes that a lesser penalty is warranted here, given that the totality of force used was one brief punch, in furtherance of a lawful detention and arrest, that did not result in any injury. This is consistent with recent cases. *See Case No. 2015-13885* (October 14, 2016) (six-year officer with no disciplinary history forfeited five (5) vacation days for slapping an individual in the back of the head while effectuating an arrest); *Case No. 2013-10687* (January 7, 2016) (thirteen-year detective forfeited three (3) vacation days for wrongfully pushing a robbery suspect against the side of a van and then twisting the suspect's arm up behind his back). After

considering the relevant facts and circumstances in the instant matter and the recent precedent, I recommend that Respondent forfeit seven (7) vacation days.

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

AUG 03 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 YAHAIRA LLANO
TAX REGISTRY NO. 955072
DISCIPLINARY CASE NO. 2015-14484

Respondent was appointed to the Department on July 9, 2013. On her last three performance evaluations, she received 4.0 overall ratings of "Highly Competent" from 2014-2016. [REDACTED]

[REDACTED] Respondent has no disciplinary history.

For your consideration.

Rosemarie Maldonado
Deputy Commissioner Trials