



POLICE DEPARTMENT

January 15, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Johnny Mitchell
Tax Registry No. 945762
33 Precinct
Disciplinary Case No. 2011-4767

The above-named member of the Department appeared before me on October 25, 2013 and May 7, 2014, charged with the following:

1. Said Police Officer Johnny Mitchell, while assigned to Manhattan North Impact Response Team, while on duty, at about 2300 hours on March 19, 2010, at West 192nd Street and St. Nicholas Avenue, New York County, did use physical force against Person A without having police necessity to do so, to wit: Said Police Officer punched Person A in the face while arresting him for Disorderly Conduct. *(As amended)*

P.G. 203-11 USE OF FORCE

2. Said Police Officer Johnny Mitchell, while assigned to Manhattan North Impact Response Team, while on duty, at the date, time, and location, indicated in Specification # 1, did abuse his authority as a member of the New York City Police Department in that he frisked Person A without having the requisite legal authority to do so.

P.G. 212-11 STOP AND FRISK

The Department was represented by Nancy Lichtenstein, Esq., Department Advocate's Office, and Respondent was represented by Michael Martinez, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty of Specification Nos. 1 and 2.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department offered the out-of-court statements of Person A and Person B. The Department called Police Officer Giovanni Sanchez as a witness.

Out-of-Court Statement of Person A

Person A did not testify before this Court, but a transcript and audio recording of his Civilian Complaint Review Board (CCRB) interview held on March 22, 2010 was admitted into evidence. (See Civilian Complaint Review Board Exhibit [CCRBX] 2 and 2A). Person A did not dispute that he was sitting on the vehicle when Respondent asked him to move. He acknowledged that the situation quickly escalated and that a large crowd gathered near them. Person A had about ten of his own friends nearby. Person A averred that he and Respondent were exchanging racial and derogatory epithets at each other during the course of the entire interaction. Person A repeatedly recited the racial and derogatory language he used toward Respondent on that day, including: "What the fuck

man, you gay or something, you want to stick my finger up my ass or something... what ever you black mother fucker..."

Person A maintained that he did not put up resistance when he was approached by Respondent and the other officers. Respondent asked Person A for his identification. Respondent and Person A continued to exchange heated racial slurs. Person A said Respondent then threw him against a "cage" and "started searching me real rough..." It seems as if Person A was indicating that when Respondent was allegedly searching him, Respondent "was behind, but he wasn't - - he was reaching, he was grabbing me and going like that." Person A agreed that Respondent touched his chest area and also touched him "all over." Person A was then issued a summons and he was free to leave.

Person A walked about half a block away but continued yelling and screaming derogatory and racial epithets at Respondent and the other officers. As Person A was turning the corner, he noticed all the officers running towards him. There were between five to eight police officers. He said that the officers started "beating" him up and punching him "all over" and slammed him against a gate. He accused Respondent and other police officers of punching him. He said he was punched in the mouth and above his left eyebrow. He accused Respondent of throwing the first punch.

Person A asserted that the officers continued to hit him as he was being walked to the police van. Later in his interview he asserted that Respondent started to hit him while he was being taken to the police car. He also asserted that "somebody" was punching him. Person A said that in addition to being punched all over his body, "somebody cut me on my mouth, busted my leg." Person A said that Respondent told him that he sustained the bump above his left eyebrow by tripping and hitting himself against the police car.

Peson A stated that after he was punched, he was “slapped” against the gate and then he “blacked out.”

Person A was eventually taken to the precinct where he requested to be taken to the hospital. While hospitalized, Person A continued yelling his derogatory and racial epithets at the officers.

At the hospital a CT scan was conducted but returned with negative results.

Second Out-of-Court Statement of Person A CCRB interview December 1, 2010

A second, follow-up CCRB interview was conducted of Person A on December 1, 2010. (See CCRBX 1 and 1A). In this interview, Person A said that he ran into Respondent in a bar about two or three weeks after this incident. He and Respondent hugged and shook hands, and Respondent bought him and his friends a drink.

Out-of-Court Statement of Person B

Person B did not come in to testify. A transcript of his March 26, 2010 CCRB interview and audio were admitted into evidence. (See CCRB 3 and 3A). Person B stated that Respondent told him and Person A to get the “fuck” off the vehicle. Some words were exchanged between Respondent and Person A and then Respondent took Person A to the side and “slammed” him on the gate. He said Respondent “frisked” Person A. At the suggestive questioning by the investigator, Person B stated that Respondent frisked his “whole body.” He stated that Person A was held against the fence for about five minutes.

Person B did not observe what happened to Person A once he turned the corner. He heard Respondent say something but could not recall what it was. Respondent and

Person A were out of his field of vision for about one or two minutes before he saw Person A being walked to the van in handcuffs by Respondent. He said Respondent "slammed" Person A into the side of the police van. Person A's face and the front part of his body made contact with the van. About four officers then entered the van with Person A. Inside the van, Person B observed one or two punches thrown around Person A's chest and face area, but since it was dark outside, he could not tell which officer threw the punch. He also recalled that he observed a bruise on Person A's right eye.

Police Officer Giovanni Sanchez

Sanchez, Respondent's partner, testified that after [REDACTED] handed his identification, he began writing the summons. He said Person A continued "screaming and making - - flailing his arms so [Respondent] put him to the wall and frisked [Person A on his waist band] for weapons." Sanchez said he really could not recall the interaction between Respondent and Person A because he was busy writing the summons and that it was dark out. Sanchez assisted Respondent in placing the handcuffs on him because Person A had his hands above his head and was moving his wrists and arms to avoid being handcuffed. He did not observe Respondent punch or slam Person A face into the police van. At the hospital, Sanchez noticed some redness on Person A's face.

Respondent's Case

Respondent offered the testimony of Sergeant Steven Silverstein, Police Officer Rubiani Rosa and testified in his own behalf.

Sergeant Steven Silverstein

Silverstein testified that he responded to the scene for a 10-85 radio call, "Additional officer requested." Upon arriving to the scene, he noticed a crowd of people and one individual stopped by Respondent and Sanchez. He said neither officer had his hands on Person A and that they were just "interacting," and then issued him a summons. While walking away, Person A began shouting derogatory statements. The crowd had grown to about 20 or 30 people. Person A almost turned the corner when Respondent and other officers pursued him. Silverstein then lost visual of them for about 15 or 20 seconds as everyone turned the corner. He caught up with the officers and Person A and observed Person A in handcuffs. He did not observe any injuries on Person A at the scene or in the precinct; he did not observe Respondent punch Person A; he did not observe Respondent slam Person A's head into the van; and Person A did not complain about sustaining any injuries in Silverstein's presence. Person A was escorted to the precinct in Silverstein's van. In the precinct, Silverstein noted on the precinct Command Log that Person A had the odor of alcohol on his breath. If Silverstein had observed injuries on Person A, he would have noted it in the Command Log.

Police Officer Rubiani Rosa

Rosa testified that he responded to the scene after hearing one of the Impact officers come over the radio with a lot screaming in the background. He arrived at the scene and observed that Person A was irate and was shouting derogatory and racial epithets at the officers. There was a crowd of about 10 to 20 people and was getting larger and their aggravation was growing. He also observed people from the crowd

throwing eggs at the police officers. He did not observe Respondent punch Person A before or after he was placed in the van nor did he observe Respondent place Person A in handcuffs. He recalled that Respondent ordered Person A to place his hands behind his back because he was going to be placed under arrest but Person A was not complying with Respondent's orders and "flailed" his arms. Although Person A and the other officers were out of his field of vision because they turned the corner, Rosa made it to the corner just in time to observe Person A in handcuffs.

Respondent

On March 19, 2010, Respondent was assigned to St. Nicholas Avenue between 191 Street and 192 Street in Manhattan. Sanchez was his partner. Respondent was patrolling his post when he observed Person A sitting on the roof of a white BMW vehicle. Respondent said that prior to March 19, 2010, "upstanding" members of the community complained to him about people sitting on their cars.

Person A was with a couple of other people who were also leaning against the vehicle. Respondent asked Person A if that was his car and Person A told him "that was his cousin's car or something to that effect." Respondent then told him "listen, could you just get down from the car for me." Respondent stated that Person A was not complying and told him to "fuck off, and that I didn't like Spanish people, and that he was going to fuck me up if he ever saw me outside of my uniform." Respondent did not recall how many times he asked Person A to get off the vehicle, but agreed that it was more than once. The other people that were with Person A moved off of the vehicle.

Respondent and his partner continued walking on St. Nicholas Avenue, but Person A continued to yell at them and "trying to get people in the neighborhood riled up," and suggested that Respondent did not like Spanish people. Respondent decided to issue Person A a summons for disorderly conduct because a crowd was beginning to gather. Respondent noticed ■ Person A's eyes were bloodshot and that he smelled alcohol on his breath. Sanchez wrote the summons.

While a warrant check was being conducted, Person A continued with his "irate" behavior and threatened to "fuck [Respondent] up," and flailed his arms and acted "crazy." Respondent feared for his safety. He wanted Person A to turn and face a gate and as he turned toward the gate, Person A "slammed" his own hands "hard" into the gate. Respondent believed that Person A "was building up to, you know, punch me in the face or do whatever. So at that point I made a decision, I'm going to frisk this guy to see if he has any weapons or something like to hurt me while we're in this close proximity to one another." Respondent elaborated on cross-examination that he frisked Person A because "he made a threat to me and you're in my close proximity and definitely I'm in fear..." Respondent described the frisk as a "hands over the body type of thing." He felt a hard object in his pocket which turned out to be a Chapstick lip balm. By now, other police officers had already arrived at the scene.

There was a lot of yelling in the background when Respondent or his partner was communicating with the radio dispatcher. As a result, the radio dispatcher notified other police officers to respond to the scene.

Person A was not placed in handcuffs. He was issued a "C" summons for disorderly conduct and released. Person A walked about half of a block away and then

stopped and began cursing at Respondent. By now Respondent's supervisor, Sergeant Silverstein had arrived on the scene. Respondent told Silverstein that he already issued a summons to Person A and asked what more could he do. Respondent said the sergeant noticed all the yelling and the crowd forming and then told Respondent, "[Person A is] under at [this] point, meaning he's under arrest." Respondent believed that the sergeant instructed him to place Person A under arrest.

Respondent then approached Person A and attempted to place him under arrest but Person A did not comply. Respondent ordered Person A to turn around and place his hands behind his back. When Respondent put his hand on Person A, Person A put both of his hands up "like he was going to resist. I don't know if he was trying to hit me at that point, but, you know, we weren't going to allow it to get to that point so [Person A] was brought down to the ground." Respondent said there were four or five other officers who helped him subdue Person A. Respondent said his role in this was "Just helping to handcuff."

In addition, Respondent said he had to "take him at the time in order to get like - you know do like an arm bar in the sky and that was it." Respondent denied striking Person A. Respondent did not observe Person A commit a crime nor did he observe a bulge in Person A's pocket.

Person A was then escorted to the van and transported to the precinct where he was charged with one count of Disorderly Conduct. At the precinct, Person A laid on the ground and requested to go to the hospital because he was in "immense pain." Respondent did not accompany Person A to the hospital because he was processing the arrest paperwork. After finishing the arrest paperwork, Respondent went to the hospital

to maintain custody of [REDACTED]. Respondent did not observe any bleeding or bruising on Person A.

Respondent agreed that Person A likely went down face first because he had his hands behind his back at the time he was taken down. At some point after this incident, Respondent while at a club, ran into Person A who recognized him first. Respondent bought him a drink because Respondent's friend spilled a drink on Person A by accident. They shook hands and went about their way.

On May 18, 2010 Respondent was interviewed by the Civilian Complaint Review Board (CCRB). During that interview, when Respondent was asked if he believed Person A had a weapon, Respondent replied, "Just being noncompliant, you know. It definitely gives me a reason to - - you know, because my thinking I don't know what's next." During another CCRB interview, Respondent said he did not recall if he punched Person A in the face.

FINDINGS AND ANALYSIS

Respondent stands charged with (1) punching Person A in the face while arresting him and (2) frisking him without having the requisite legal authority to do so. Person A did not testify but a copy of his hearsay statement during his CCRB interview was reviewed. It should be noted that his demeanor during his interview cannot be determined. His absence also made it impossible to assess his credibility after his version of this event had been tested by cross-examination. Courts have held that: "Hearsay must be sufficiently probative and reliable before it may be accorded any significant weight. Courts rely upon a number of factors to assess the reliability and probative value of

hearsay, including the declarant's personal knowledge of the facts, the independence or bias of the declarant, the detail and range of the hearsay, the degree to which it is corroborated, the centrality of the hearsay evidence to the agency's case, and the magnitude of the administrative burden if the hearsay were excluded." Police Department v. Ayala, OATH Index No. 401/88 (August 11, 1989).

Specification No. 1

In dispute is whether Respondent punched Person A in the face while arresting him. Person A contends that he was beaten, and punched on numerous occasions by about five to eight police officers, including Respondent, from the time he turned the corner until the time he was finally seated inside of the transport van.

Person A alleges that all these officers, including Respondent, started punching him "all over," and then slammed him against the gate. He alleged that he was punched in the mouth and above his left eye brow and that Respondent threw the first punch striking him on his left eye brow. He then alleges that these officers and Respondent continued to hit him as they walked to the police van. In addition to accusing the Respondent of punching him, Person A said "somebody" was punching him also but could not identify who it was. This beating also made him blackout. Person A said that while he was being punched, Respondent told him, "Oh, that's how you got that this big bump. You tripped against this wire inside, the seats - - inside the van." Person A did not allege that he was struck by anyone while inside of the van. Thus, Person A's hearsay statement was not reliably corroborated.

As already stated, this Court cannot determine Person A testimonial behavior, nor can his account of the event be tested by cross-examination. This Court, upon reviewing the totality of the evidence, finds Respondent's account of the incident more credible than Person A's account. It is undisputed that Person A was agitated and frustrated with the situation. Respondent testified that Person A was not complying with his orders to place his hands behind his back, and when Respondent placed his hands on Person A to place him under arrest, Person A put both of his hands up as if he was going to resist. This led Respondent to "take [Person A] down...in an arm bar," causing Person A to go down face first because his hands were behind his back. Respondent placed Person A in handcuffs with the assistance of about four or five other officers.

Sanchez, Respondent's partner, also corroborated Respondent's contention that Person A was resisting arrest. He said Person A had his hands above his head and was moving his wrists and arms to avoid being placed in handcuffs.

Rosa testified that he did not observe Respondent punch Person A before or after he was placed inside of the van. Additionally, although Rosa did not actually observe Respondent handcuff Person A, he did observe Respondent order Person A to place his hands behind his back and Person A disregarded that order and "flailed" his arms.

Silverstein, the first supervisor on the scene, escorted Person A in his van. Silverstein testified that he neither observed any injuries on Person A at the scene of the incident or at the precinct, nor did Person A complain about sustaining any injuries while in Silverstein's presence. Silverstein also did not observe Respondent slam Person A's head into the van. Lastly, Silverstein said that if he had observed any injuries on Person A, he would have noted it on the precinct Command Log.

Moreover, Person A alleges that he was punched numerous times by about five to eight officers while being escorted to the van. There was a crowd of about 10 to 30 people who had gathered to watch what was going on. Out of the 10 to 30 people, the Assistant Department Advocate produced one eyewitness to this incident, Person B, and only his hearsay statement was presented at trial. Person B's interview statements are in conflict with Person A's interview statements. Person B did not observe Person A being placed in handcuffs. He also did not see any of the officers punch Person A while they walked Person A to the van. More importantly, during Person A's interview, Person A did not allege that he was slammed against the side of the van as part of the police beating, whereas, Person B says he observed Respondent slam Person A against the side of the van causing injury to his face. Further, Person B said about four officers sat inside of the van with Person A and then he observed punches being thrown at Person A, but Person B could not identify which officers threw the punches. This is yet another statement that is inconsistent with the allegations made by Person A did not allege being punched while he was seated inside of the van.

This Court turns to Person A's medical records in an effort to find corroborating evidence of having been beaten and punched on numerous occasions by about five to eight police officers. His medical records indicate that he was still aggressive and agitated with the police at the hospital. He told the attending nurse that he was "beaten about the head." The attending nurse noted that Person A had contusions and abrasions to the face, head, left neck, left shoulder, and back of his knee. This report was taken at 1:45 a.m. A CT scan was conducted and came back with normal results. A second report was then taken at 6:30 a.m. On this report, although Person A complained about the same

injuries as before, the nurse did not observe any contusions or abrasions where the first nurse had noticed them. Person A was diagnosed with a headache and discharged with over the counter Tylenol. Thus, the medical records contain inconsistencies and are inconclusive.

Person A's initial and minor abrasions and contusions stemmed in all likelihood from the take down maneuver executed by Respondent, and by the officers struggling to handcuff him. The take down caused Person A to go down face first. The other officers had to assist because Person A was moving his arms and wrist and not complying with Respondent's orders. Furthermore, Person A's hospital records are not dispositive of the beating that Person A alleges he received by the hands of about five to eight police officers. He stated he was continuously punched by about five to eight police officers, and at one point he even blacked out because of the beating. Such a beating would have likely resulted in more than a normal CT scan and more than just contusions and abrasions; but likely swelling to his head area. The diagnosis would also have been more than just a headache which, in the doctor's opinion, would be alleviated by over the counter Tylenol. In fact, such contusions and abrasions were unnoticeable by the attending nurse who interviewed him five hours later at 6:30 a.m.

Moreover, Person A alleges that all or most of these five to eight police officers were punching him. This Court cannot attribute all of the alleged "punches" by five to eight officers to a single officer, especially in light of Person A's untested interview testimony, and Person B's different version of the event. For the reasons already discussed above, this Court credits Respondent's account of the incident.

Accordingly, Respondent is found Not Guilty of Specification No. 1.

Specification No. 2

It is not in dispute that Respondent frisked Person A. It is however disputed that Respondent lacked the legal authority to conduct the frisk. According to Patrol Guide 212-11, reasonable suspicion is necessary before conducting a frisk. The Patrol Guide notes ten factors that contribute to establishing reasonable suspicion. For the purposes of this case, three contributing factors existed and thus reasonable suspicion was established — *demeanor of suspect, time of day or night, any overheard conversation of the suspect.*

Respondent's position that Person A was yelling, screaming and not complying with his orders was in one way or another corroborated by Silverstein, Rosa and Sanchez's testimony. All three gave similar accounts of the incident. They all testified that the scene was chaotic and that a crowd of between 10 to 30 people had formed. Some of the crowd members were aggravated and even threw eggs at Respondent. It was between 11:00 p.m. and 11:30 p.m. and dark out. Rosa and Silverstein responded to the location because of all the screaming they heard on the radio. In fact, Person A even admitted that he was yelling racial and derogatory statements at Respondent, and that there was a large crowd that had gathered.

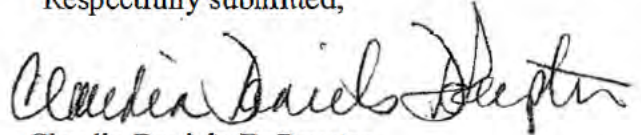
Given Person A's aggressive and irate behavior, coupled with the chaotic "riled" up crowd, it seems likely that Respondent began to fear for his safety during his interaction with Person A and Respondent testified to this fact. More importantly, Person A's overall demeanor including his blatant threat that he was going to "fuck" him up, his "flailing" hands and acting "crazy" suggests that Respondent credibly and reasonably believed that Person A, at one point, was going to strike him, or "punch" him in the face or "was

building up to, you know, punch me in the face or do whatever,” and to prevent a serious or injury to himself by a potential weapon, Respondent conducted a protective frisk.

Accordingly, Respondent is found Not Guilty of Specification No. 2.

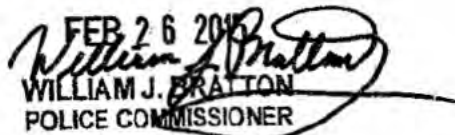
The Assistant Department Advocate failed to meet its burden by a preponderance of the credible evidence.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner Trials

APPROVED

FEB 26 2013

WILLIAM J. BRATTON
POLICE COMMISSIONER