



POLICE DEPARTMENT

November 13, 2014

MEMORANDUM FOR: Police Commissioner

Re: Police Officer David Marconi
Tax Registry No. 940420
Narcotics Borough Brooklyn South
Disciplinary Case No. 2010-9939

Police Officer Frank Calafiore
Tax Registry No. 941484
106 Precinct
Disciplinary Case No. 2013-9940

The above-named members of the Department appeared before me on April 28, 2014, charged with the following:

Disciplinary Case No. 2010-9939

1. Said Police Officer David Marconi, on or about January 24, 2012, at approximately 2130 hours, while assigned to the 106th Precinct and on duty, in the vicinity of [REDACTED], Queens County, abused his authority as a member of the New York City Police department, in that he frisked Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 – STOP AND FRISK

2. Said Police Officer David Marconi, on or about January 24, 2012, at approximately 2130 hours, while assigned to the 106th Precinct and on duty, in the vicinity of [REDACTED], Queens County, abused his authority as a member of the New York City Police department, in that he searched Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 3 – STOP AND FRISK

Disciplinary Case No. 2013-9940

1. Said Police Officer Frank Calafiore, on or about January 24, 2012, at approximately 2130 hours, while assigned to 106th Precinct and on duty, in the vicinity of [REDACTED] [REDACTED] Queens County, did wrongfully use force against Angel Martinez, in that Officer Calafiore used a chokehold against Angel Martinez.

P.G. 203-11 – USE OF FORCE

The Civilian Complaint Review Board (CCRB) was represented by Alan Alvarez, Esq. Respondents Marconi and Calafiore were represented by Stephen Worth, Esq.

Respondents, through their 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

Disciplinary Case No. 2010-9939

Respondent Marconi is found Guilty of Specification Nos. 1 and 2.

Disciplinary Case No. 2013-9940

Respondent Calafiore is found Not Guilty of Specification No. 1.

SUMMARY OF EVIDENCE PRESENTED

The parties stipulated into evidence as Court Exhibit (CX) 1, a summary of the June 18, 2012 CCRB interview of Person B, a security officer who observed part of the incident. In the interview, Person B stated that at approximately 9:00 p.m. on January 24,

2012, he was conducting his routine patrol in the vicinity of [REDACTED] in Queens. There he observed Respondents in plainclothes with Angel Martinez handcuffed on the ground. He did not see the events leading to Martinez being handcuffed. Nor did he see Respondents punch, kick, strike, or use any physical force against Martinez. He did not hear Martinez complain of any injuries. Martinez did not appear to be injured. Person A, who was also present at the scene, was screaming about police harassment and saying that Martinez was not resisting arrest. Person B did not see Respondents frisk, search, or physically interact with Person A in any way. Person B did not hear Martinez make any statements to Respondents or ask them any questions. He did not hear Martinez or Person A ask Respondents for identifying information.

CX 1 also contains a summary of the March 30, 2012 CCRB interview of Person C. In the interview, Person C stated that he was locking up his laundromat on the day in question when he observed Martinez and Person A riding their bicycles on the sidewalk. Martinez backed away from Respondents when they approached him. When Respondents attempted to arrest Martinez, he began screaming and cursing at them. Both Martinez and Person A were acting "crazy." Respondents did not strike Martinez or put him in a chokehold. According to Person C, Respondents did not do anything wrong.

The parties also stipulated that while Martinez alleged that he had been placed in a chokehold, he did not complain of any neck or throat injury when he went to the hospital the day after the incident.

The CCRB's Case

CCRB called Angel Martinez as its sole witness and entered into evidence as CCRB Exhibit (CCRBX) 2A the out-of-court statement of Person A.

Angel Martinez

Martinez is 23 years old and employed as the dispatcher for a car service. He has never been convicted of a crime. He has filed a lawsuit regarding the events that took place on January 24, 2012. He testified that at around 9:30 p.m. that day he and his friend, Person A, rode their bicycles to the store to buy chips. They left the bicycles on the sidewalk when they entered the store. When they exited the store, they got back on the bicycles and pushed them with their feet toward the street. They were not pedaling the bicycles. Before they made it to the street, Respondents approached in an unmarked vehicle. Martinez was wearing a backpack and had chips in his hand. He did not have any weapons on his person. To his knowledge, Person A was not carrying weapons either. CCRBX 1 is a photograph of the location.

Respondents, who did not identify themselves as police officers, instructed Martinez and Person A to get off their bicycles. Martinez and Person A proceeded to lay the bicycles on the ground. The vehicle driver (Respondent Marconi) patted down the outside of Person A's pants. The pat down lasted a minute at most. Meanwhile, Respondent Calafiore began to approach Martinez and "go for [his] pocket." At that point, Martinez stepped back with his hands in the air. Martinez repeatedly asked Respondent Calafiore, "What's the reason for you stopping us? What's your probable

cause for...frisking me?" Respondent Calafiore did not respond. Martinez was scared and confused. He did not know if he was getting arrested.

Respondent Calafiore grabbed Martinez's left hand, swung him around, and slammed him on the hood of a van. Martinez was not resisting and did not feel such force was necessary. When Respondent Marconi saw what was going on, he approached to provide assistance. Both Respondents wrestled Martinez to the ground. Martinez, who was scared for his life, had his hands behind his back at that point. Respondent Calafiore placed Martinez in a chokehold for a period of two or three minutes. Martinez testified that Calafiore "ended up by my head." By chokehold he meant that Calafiore "had . . . my neck around his arms" and "my throat was on his forearm." Martinez added, "I don't know how to explain it." Martinez was barely able to breath, and he reached up with his left hand in an attempt to release the hold. Martinez tried telling Respondent Calafiore that he could not breathe, but it was hard for him to speak due to the pressure on his neck. Respondent Calafiore tightened the chokehold.

Meanwhile, Respondent Marconi tugged at Martinez's pants, laid on top of him, and pinned Martinez's legs down with his body. Martinez's right hand was already behind his back, but his left hand remained instinctively at his neck area. Respondent Marconi punched Martinez twice in the stomach before successfully placing him in handcuffs. Even after Martinez was in handcuffs, Respondent Calafiore continued the chokehold and slammed his face into the ground before bringing him to a standing position and placing him in the car. By this point, Martinez was "pretty belligerent" toward Respondents. He explained, "I'm asking them throughout the entire ordeal, why am I arrested? Why did I get stopped? Are you even a police officer? Because

throughout the entire time not one word was said. Not even stop resisting. You're under arrest. Nothing was said. The only thing I heard from the officer throughout the entire ordeal was get off your bikes." By the end of the incident, a small crowd of three to four people had gathered in the area. One of the people, a security guard, approached to ask what was going on.

Martinez was released from court at about 10:30 a.m. the next day. He had pain all over his body and was at Franklin Hospital by noon. He described his pains: "Muscle pains. Soreness. The most was the periodic pain that I got in my gut after the event. It was just this pain I never felt before. I informed the doctor of that." In addition, he was black and blue underneath his eyes, and there were scrapes and a lot of redness on the side of his face. When asked why he never mentioned to the medical providers anything about his throat or neck, he explained, "To tell you the truth that wasn't my main importance. I may have had some neck pain. But the abdominal was the one I was most concerned with and the lacerations on my wrists."

On cross-examination, Martinez stated that he did tell the doctors at the hospital about his neck, but the doctors did not note it in the medical records. At the time of the incident, Martinez was [REDACTED] years old and Person A was [REDACTED] years old. Martinez had previously been stopped by the police on two or three occasions. On the day of the incident, he was wearing a sweater with front pockets. Respondents did not order him to take his hands out of his pockets, as his hands were not in the pockets. He had a bag of chips in one hand and his bicycle in the other. He assumed Respondents were police officers by the manner in which they approached.

Martinez knew that it was a violation to ride his bicycle on the sidewalk. Though he and Person A did ride their bicycles on the sidewalk on the way to the store, they were no longer engaged in that activity when Respondents stopped them. He reiterated that he and Person A were on their bicycles, but they were walking instead of riding.

Martinez conceded that he resisted arrest, but this occurred only after he was slammed into the van. He explained that he resisted “in a sense that [he] was working against the strike that [Respondents] were using.” He conceded that he was not compliant with Respondents as they tried to handcuff him. He did not recall exactly how Respondent Calafiore got him in a chokehold. He reiterated that the chokehold lasted two to three minutes and that his breathing was greatly restricted during that period. He did not lose consciousness. Photographs that Martinez’s girlfriend took after the incident did not show any injuries to his neck. At no point did Martinez push Respondent Calafiore. Martinez is seeking money damages in federal court, but he did not know the amount he is seeking.

On redirect examination, Martinez testified that the laundromat was ten to 15 feet from the corner where the incident took place. It was dark, and there was no streetlight at the corner.

CCRB Interview of Person A

CCRBX 2A and B are the transcript and compact disc recording of a February 15, 2012 CCRB interview of Person A. In the interview, Person A stated that after exiting the store on January 24, 2012, he and Martinez were walking on the sidewalk with their bicycles in between their legs. Respondents stopped them and told them, “Put the bikes

down and get off the bikes.” Person A put his hands up and allowed Respondent Marconi to search him. Respondent Marconi patted the outside of Person A’s front and back pockets, and he squeezed the contents. Respondent Marconi then inserted his fingers into the two front pockets. Person A had a wallet, iPod, phone, and lip balm in his pockets. Respondent Marconi did not pull any of the items out, nor did he say anything to Person A. When Respondent Calafiore went to search Martinez’s pockets, Martinez asked if there was probable cause to conduct such a search. Respondent Calafiore proceeded to pat down Martinez’s pants pockets. When Respondent Calafiore went to go in Martinez’s pants, Martinez moved back a little bit. At that point, Respondent Calafiore grabbed Martinez’s arm and tried to turn him around. Martinez tensed up his body and stood firm. Respondent Calafiore slammed Martinez against a car, and Respondent Marconi turned in that direction to help Respondent Calafiore wrestle Martinez to the ground. Respondent Calafiore placed Martinez in a chokehold while Respondent Marconi punched him in the abdomen. Martinez complained that he could not breathe and asked Respondent Calafiore to loosen the chokehold, but it seemed that Respondent Calafiore only tightened his grip. Person A described the chokehold as Respondent Calafiore having one arm right under Martinez’s chin. The chokehold lasted at least one minute. At one point, Respondent Calafiore released the chokehold and placed his knee on Martinez’s face, still trying to get Martinez in handcuffs. Respondent Marconi ultimately handcuffed Martinez. In total, Respondent Marconi punched Martinez seven to ten times. Even after Martinez was in handcuffs, Respondent Marconi punched him one more time in the stomach and Respondent Calafiore punched him once in the face. The entire incident lasted two or three minutes.

Respondent's Case

Respondents testified in their own behalf.

Respondent Calafiore

Respondent Calafiore, a nine-year member of the Department, is currently assigned to the Queens South Blast unit. On January 24, 2012, he and Respondent Marconi were working together in the 106 Precinct's anticrime team. At approximately 9:30 p.m., he observed Martinez and Person A exit a deli and ride their bicycles on the sidewalk toward the street. The area was amply lit with streetlights. Because riding a bicycle on the sidewalk is an infraction, Respondents had a right to stop Martinez and Person A. Moreover, because there had been a few robberies in the area committed by people on bicycles, Respondents wanted to talk to them.

Respondent Calafiore approached Martinez and instructed him to get off of the bicycle. As soon as Martinez got off the bicycle, he put his hands in his pockets. Respondent Calafiore instructed him to take his hands out. Respondent Calafiore explained that he did this for his safety, as he did not know if Martinez was armed. He received training while in the Police Academy that during street encounters an officer should always be able to see a suspect's hands since the "thing they could hurt you would be their hands not being able to see them." Respondent Calafiore asked Martinez twice to remove his hands from his pockets. Both times Martinez refused to comply. This raised Respondent Calafiore's level of suspicion. He explained, "At that point refusing my commands and him not complying with them, it made me believe that he was now hiding something. Possibly a weapon."

Respondent Calafiore approached Martinez and went to grab his arm. At that point, Martinez pushed Respondent Calafiore away. Respondent Calafiore told Martinez that he was under arrest and instructed him to place his hands behind his back. When Respondent Calafiore went in to effect the arrest, Martinez pulled away. Respondent Calafiore and Martinez wrestled for a few minutes while standing. Martinez tried to move away by flailing his arms, and Respondent Calafiore could not bring him down to the ground. It was only when Respondent Marconi came over to assist that Respondents were able to place Martinez on the ground and get his hands behind his back. Martinez, who was lying facedown with his arms underneath his body, resisted throughout the entire cuffing process. At one point, Respondent Calafiore placed his weight on top of Martinez's body to keep him on the ground, and Respondent Marconi struck Martinez in the side in order to make Martinez release his arm. Respondents did not use any more force than was necessary to get the handcuffs on Martinez. At no point did Respondent Calafiore punch Martinez, slam him onto a car, or place him in a chokehold.

Respondents transported Martinez to the station house and processed the arrest. At no point did Martinez request medical attention. Respondent Calafiore did not see any marks or injuries on Martinez's neck.

On cross-examination, Respondent Calafiore testified that upon initiating the encounter he identified himself as a police officer. He did not observe drugs or weapons on Martinez. Martinez told Respondent Calafiore not to touch him. While on the ground, Respondent Calafiore positioned his weight on top of Martinez's shoulders and head area. Respondent Calafiore conceded that it was possible his body weight made it

difficult for Martinez to breath. Respondent Calafiore neither arrested nor issued a summons to Person A.

Upon questioning by the Court, Respondent Calafiore provided his definition of a chokehold: "A chokehold would be putting pressure on the neck from either my hands or arm. Actually choking somebody. Whether you're choking him with your hands or choking with your forearm or arm." He reiterated that at no point did he place Martinez in any sort of chokehold. What he did instead was place his weight over Martinez's upper body for the purpose of preventing Martinez from standing back up and continuing the struggle. Respondent Marconi had to strike Martinez twice before Martinez released his arm to be handcuffed.

Respondent Marconi

Respondent Marconi, a nine-year member of the Department, is currently assigned to Narcotics Borough Brooklyn South. He testified that he approached Person A after observing Person A riding his bicycle on the sidewalk. Because bicycle riding on the sidewalk is a violation, Respondents had a right to approach Person A and Martinez. Respondents wanted information from them because there had been a lot of reports of robberies and larcenies committed by people on bicycles.

Respondent Marconi, who was in plainclothes at the time, told Person A, "Let me see your hands. Get off the bikes." Person A was compliant, and Respondent Marconi saw a bulge in Ramos's pocket. Respondent Marconi asked what the bulge was, and Person A replied that it was a wallet. Though the object did appear to be a wallet, Respondent Marconi wanted to confirm for his safety that it was not a knife or firearm. He asked

Person A to go into the pocket and slowly remove the object. Person A was again compliant. Respondent Marconi also patted down Person A's waistband before running over to assist Respondent Calafiore with Martinez. Respondent Marconi explained that he saw Martinez push and wrestle with Respondent Calafiore. It took both Respondents to bring Martinez down to the ground. At that point, Respondent Marconi was by Martinez's legs, and Martinez started kicking him. Respondent Marconi moved up to Martinez's mid-waist area, where Martinez had his arms underneath his body. Respondent Marconi asked him numerous times to stop resisting and to release his hands. Martinez refused to comply, so Respondent Marconi punched him twice in the abdomen area. It was only after the second punch that Martinez became compliant and Respondents were able to handcuff him.

At no point during the encounter did Respondent Marconi see Respondent Calafiore use a chokehold or anything close to a chokehold. He did not see Respondent Calafiore's arms anywhere near Martinez's neck. Respondent Calafiore was on top of Martinez's shoulders, which he claimed was consistent with the training that officers receive on how to subdue an individual who is trying to get up and fight. At no point while in transport or at the command did Martinez complain of soreness to his neck or request medical attention. The only offense that Respondent Marconi observed Person A commit was riding his bicycle on the sidewalk. At his discretion, Respondent Marconi let Person A go.

On cross-examination, Respondent Marconi testified that though there was nothing specific about Martinez and Person A to make him believe they were burglars, they fit the general description of "males on bikes robbing and breaking into cars."

When

Respondents first approached Martinez and Person A, the men were neither under arrest nor free to leave. Person A was not combative like Martinez. Respondent Marconi did not recall sticking his finger into Person A's pockets. He prepared a Stop, Question and Frisk Report (UF-250) on Person A. The UF-250 was entered into evidence as CCRBX 3. The only offense that Respondent Marconi observed Person A commit was riding his bicycle on the sidewalk. When asked why then did he note on the UF-250 that the stop was based on suspicion of criminal possession of a weapon, Respondent Marconi explained,

"Because after my initial stop, you can't put violations on [a UF-250]. It has to be a felony [or misdemeanor]. At that time I saw a suspicious bulge. I went for it. I asked Mr. Person A to pull it out. So I did stop him and question him about that suspicious bulge which I thought at the time might have been a possible weapon."

Respondent Marconi also noted on the UF-250 that circumstances that led to his stop of Person A were actions indicative of engaging in a drug transaction, furtive movements, and actions indicative of engaging in violent crimes. He explained that he checked the box for "actions indicative of engaging in drug transaction" because the deli Person A went to was a location known for drug activity. Respondent Marconi checked the box for "furtive movements" because Person A placed his hands in his pockets, and he checked the box for "actions indicative of engaging in violent crimes" because Person A fit the description of the burglaries and larcenies involving men on bicycles.

Respondent Marconi testified that in addition to the bulge in Person A's pocket, the bulky clothes Person A was wearing made him fear for his safety. He explained, "He had a sweatshirt on. I couldn't see his waistline. I'll make sure there's no knife, gun or any weapon that could possibly hurt me or my partner or any people around us."

Respondent Marconi conceded that Person A was not engaged in any type of criminal conduct. He did not issue Person A a summons.

Respondent Marconi testified that he was not paying attention to what Respondent Calafiore was doing while on top of Martinez. Respondent Marconi was more concerned with getting Martinez's hands.

The parties stipulated that Person A had numerous contacts with the police prior to the January 2012 incident.

FINDINGS AND ANALYSIS

It is undisputed that on January 24, 2012, Respondents stopped Person A and Angel Martinez after seeing them leaving a store while riding their bicycles on the sidewalk.¹ Respondents knew that the store from where the two men left on their bicycles was a location for robberies. Having been advised that robberies were being committed by men on bicycles, Respondents approached Person A and Martinez. Respondents never arrested or issued a summons to Person A.

Disciplinary Case No. 2010-9939

Specification Nos. 1 and 2

The Court finds that Respondent Marconi searched Person A before he frisked him and will address the specifications in the chronological order that Respondent Marconi's conduct occurred.

¹ While Person A and Martinez admitted that they rode their bicycles on the sidewalk before entering the store, they both indicated that when they left the store they were not actually pedaling, but walking the bicycles while sitting on the seats.

Specification No. 2 alleges that Respondent Marconi searched Martinez without sufficient legal authority.

When both Respondents stopped Martinez and Person A, Respondent Marconi approached Person A.

Martinez testified that he only saw Respondent Marconi pat the outside of Person A's pockets. Thus, CCRB is basing its charge on the sworn statement made by Person A on February 15, 2012 to CCRB.

The Administrative Prosecutor explained that on the morning of this hearing Person A had expected to secure a ride to Manhattan from Pennsylvania, where he lived, but was unable to do so. Instead, the Administrative Prosecutor submitted Person A's statement and the recording of his interview. (CCRBX 2A and 2B)

This Court has previously found hearsay declarations insufficient to support findings of guilt in cases that pose close questions of credibility. *See Case No. 77005/01*, p. 6 (May 27, 2002). Because Person A was not subject to cross-examination and there was no evidence that corroborated his statement, it is not reliable. Therefore, this Court cannot credit the statement by Person A and relies on Respondent Marconi's testimony.²

Respondent Marconi testified that he approached Person A and Martinez "to inquire information." There had been robberies at that location by men on bicycles. Person A and Martinez were also breaking the law by riding their bicycles on the sidewalk. When Respondent Marconi approached Person A, he asked him to get off his bicycle. Person A complied, and at Respondent Marconi's request, placed his hands in the air. Respondent's attorney asked Respondent Marconi what happened next:

² Problems with the reliability of [REDACTED] statements are also more fully discussed in the analysis of Respondent Calafiore's case, Specification No. 1, Disciplinary Case No. 2013-9940.

- A: And then I saw a bulge in his pocket.
Q: What happened next? Take us through it.
A: So then I saw a bulge in this pocket. I asked him what that is. He said it's his wallet.
Q: Did it appear to be a wallet?
A: It appeared to be a wallet.
Q: Did you know for a fact that it was a wallet?
A: I did not know for a fact.
Q: Did you want to know for a fact what it was?
A: Yes, for my safety.
Q: Because you wanted to make sure it wasn't --
A: I wanted to make sure it was not a knife or a firearm.
Q: Did you ascertain what it was?
A: Yes.
Q: How did you do that?
A: I asked him to go into his pockets slowly and remove the object.
Q: Did he?
A: Yes, he did.

By asking Person A to take the object out of his own pocket, Respondent Marconi effectively conducted a search of Person A's pocket. (*See Matter of Bernard G.*, 247 A.D. 2d 91, 94 (1998) where the police asking the defendant "to empty his pockets ... was the equivalent of searching his pockets themselves.") Under the facts of this encounter, the Court does not view Person A as having given consent.

In Respondent Marconi's direct testimony,³ he did not articulate a strong reason to believe that he was in danger. He thought that the object that appeared to be a wallet might be a weapon, but was not sure. He was also led by his attorney to explain that he might be in danger. However, if he really believed that the object could have been a threat to him, it is unlikely he would have asked Person A to lower his hands and pull it out of his pocket.

³ On cross-examination, Respondent Marconi stated he saw a "suspicious bulge" in Person A's pocket, but this did not resurrect the equivocating testimony in his direct examination.

Even if Respondent Marconi had articulated a reason to believe he was in danger, or if this Court found that Respondent Marconi had a good faith basis to believe that he was in danger, Respondent Marconi exceeded his legal authority by searching Person A' pocket. When a member of the service reasonably suspects a person has committed, is committing or is about to commit a felony or a misdemeanor, and has stopped that person and reasonably suspects danger of physical injury from the person, the officer may then conduct a frisk. If the frisk reveals an object which may be a weapon, the officer may then conduct a search. *Patrol Guide Procedure* 212-11. Thus, if Respondent Marconi believed the object in Person A' pocket was a weapon, he was only authorized to conduct a limited patdown of Person A' pocket. *Matter of Bernard G., supra*. Respondent Marconi failed to articulate any justification for a more intrusive search. *See also Case No. 80356/04*, p. 8 (August 12, 2005) where "Respondent had a right to frisk for a weapon only if he feared for his safety, but not to search and pull out what he believed to be a wallet."

Therefore, Respondent is found Guilty of Specification No. 2.

In Specification No. 1, Respondent Marconi is charged with frisking Person A without sufficient legal authority.

After Respondent Marconi asked him to remove the object from his pocket, Person A complied. In his testimony, Respondent Marconi did not specifically identify the object.⁴ Since he never testified that the object was a weapon or anything he considered a threat, the Court is left to conclude that the object was not dangerous.

⁴ In the CCRB interview (CCRBX 2A, p. 30), Person A stated that the object inside his pocket was a wallet.

After viewing this object, Respondent Marconi then patted Person A' waistband. He explained that he did this because Person A was wearing a bulky sweatshirt. Respondent Marconi said, "I couldn't see his waistline." He wanted to "make sure there's no knife, gun or any weapon that could possibly hurt me or my partner or any people around us."

After ascertaining that Person A had nothing dangerous in his pocket, Respondent Marconi did not articulate a basis for conducting this frisk. He stated only that he wanted to "make sure" there was no weapon that "could possibly" hurt anyone. Respondent Marconi gave no specific reason to suspect that Person A was carrying a weapon in his waistband. He failed to articulate that he saw anything to justify frisking Person A' waistband. An officer needs an independent, reasonable belief of immediate danger to himself in order to frisk that person, not conjecture. Thus, Respondent Marconi did not have sufficient legal authority to conduct the frisk of Person A' waistband. *Patrol Guide* §12-11 (2); Legal Bureau Bulletin, Vol. 1, No. 3, p. 3 (Mar. 31, 1971); *People v. DeBour*, 40 N.Y.2d 210, 223(1976); *Case No. 9648/13* (June 17, 2014).

Therefore, Respondent Marconi is found Guilty of frisking Person A without legal authority.

Disciplinary Case No. 2013-9940

Respondent Calafiore stands charged with the wrongful use of force by using a chokehold against Angel Martinez.

Martinez and Person A claimed that Respondent Calafiore placed Martinez in a chokehold. Both Respondents denied this. There were two very different versions from Respondents and the complainants, not just about whether a chokehold took place, but

about the events that led to the alleged chokehold. What follows are summaries of these versions, a discussion of inconsistencies, and findings of credibility.

Respondents' Testimony

The testimonies of Respondent Calafiore and Respondent Martinez were consistent.

While Respondent Marconi approached Person A, Respondent Calafiore approached Martinez. Respondent Calafiore stated that he identified himself as a police officer and told Martinez to get off the bicycle. As soon as Martinez got off the bicycle, Martinez put his hands in his pockets. Not being able to see Martinez' hands, Respondent Calafiore was concerned for his own safety. Respondent Calafiore instructed him to take his hands out of his pockets and Martinez refused. Respondent Calafiore asked Martinez again and Martinez again refused to comply. Respondent Calafiore then became suspicious that Martinez was hiding a weapon.

Respondent Calafiore approached Martinez and went to grab his arm. Martinez pushed Respondent Calafiore away. Respondent Calafiore told Martinez that he was under arrest and instructed him to place his hands behind his back. When Respondent Calafiore tried to arrest him, Martinez pulled away. Respondent Calafiore and Martinez wrestled for a few minutes while standing. Martinez tried to move away by flailing his arms, and Respondent Calafiore could not bring him down to the ground.

Meanwhile, Respondent Marconi had finished his frisk of Person A. He saw Martinez push and wrestle with Respondent Calafiore. Respondent Marconi ran over to assist his partner and bring Martinez down to the ground.

Respondent Calafiore placed his weight on top of Martinez's upper body, specifically Martinez' shoulders, to keep him from standing up and struggling. Respondent Calafiore denied ever placing Martinez in any sort of chokehold.

Respondent Marconi never saw Respondent Calafiore use a chokehold. He did not see Respondent Calafiore's arms anywhere near Martinez's neck. He saw Respondent Calafiore on top of Martinez's shoulders.⁵

When Martinez was down on the ground and Respondent Marconi was by his legs, Martinez started kicking him. Martinez had his arms underneath his body. Respondent Marconi "asked him numerous times [to] stop resisting" and to release his hands. Martinez refused to comply, so Respondent Marconi punched him twice in the abdomen area. It was only after the second punch that Martinez became compliant and Respondents were able to handcuff him. Respondents did not use any more force than was necessary to get the handcuffs on Martinez.

While Respondents transported Martinez to the station house and processed the arrest, Martinez never requested medical attention. Respondent Calafiore did not see any marks or injuries on Martinez's neck.

Angel Martinez' Testimony

Martinez testified that when Respondents approached Martinez and Person A they told Martinez and Person A to get off their bicycles. Martinez and Person A complied. Respondent Calafiore approached Martinez and started to "go for [his] pocket." Martinez stepped back with his hands in the air. He kept asking Respondent Calafiore, "What's

⁵ Respondent Marconi did not specify what part of Respondent Calafiore's body was on top of Martinez' shoulders.

the reason for you stopping us? What's your probable cause for...frisking me?"

Respondent Calafiore did not respond and Martinez did not know if he was getting arrested.

Martinez denied ever pushing Respondent Calafiore. Instead, he testified that Respondent Calafiore grabbed his left hand, swung him around, and slammed him onto the hood of a van. Martinez testified, "[T]he force he was using scared me" and "[t]here was no reason" for it. Martinez did not resist.

Respondent Marconi saw what was happening and came to help. While Martinez was "still on the van," Martinez testified, "they both were on me." Both Respondents wrestled Martinez to the ground. Martinez had his hands behind his back.

Martinez claimed that Respondent Calafiore placed him in a chokehold for a period of two or three minutes. Martinez was barely able to breathe, and he reached up with his left hand to try to get the officer to release the hold. Martinez tried to tell Respondent Calafiore that he could not breathe. But because of the pressure on his neck, it was hard for Martinez to speak. He did not lose consciousness.

Meanwhile, Respondent Marconi tugged at Martinez's pants, laid on top of him, and pinned Martinez's legs down with his body. Martinez's right hand was already behind his back, but his left hand remained at his neck area. Respondent Marconi punched Martinez twice in the stomach before successfully placing him in handcuffs.

Even after Martinez was in handcuffs, Respondent Calafiore continued the chokehold. When Martinez lifted his head, Respondent Calafiore slammed his face into the ground and put his knee into Martinez' face. After two seconds of leaving him on the

ground, Respondents picked him up before bringing him to a standing position and placing him in the car.

Martinez was now “pretty belligerent” toward Respondents. Martinez conceded that he resisted arrest, but that this occurred only after he was slammed into the van. He explained that he resisted “in a sense that [he] was working against the strike that [Respondents] were using.” He conceded that he was not compliant with Respondents as they tried to handcuff him.

By the end of the incident, a small crowd of three or four people had gathered in the area. One of the people, a security guard, approached to ask what was going on.

Martinez is seeking monetary damages in federal court for this incident.

There are some problems with Martinez’ testimony which seriously impact his credibility. First and foremost, Martinez’ claim that he was placed in a chokehold was not supported by any medical documentation. The day after this incident, Martinez went to the hospital. His treatment consisted of an x-ray of his abdominal cavity and painkillers. The records showed no treatment for any injury to the neck or throat area and no complaint of a chokehold or injury to the neck or throat.

Although he testified that he “may have had some neck pain,” Martinez never mentioned it to the doctors because he was “most concerned with” the abdominal pain. Then on cross-examination, Martinez claimed that he did tell the doctors at the hospital about his neck, but the doctors did not note it in the medical records. Not only did Martinez contradict his own earlier testimony, but he contradicted CCRB’s stipulation that he never complained to the hospital about any neck or throat pain or injury.

Photographs that Martinez's girlfriend took after the incident were not submitted as evidence. Martinez admitted that the photos did not show any injuries on his neck or anything to indicate that a chokehold occurred.

Martinez could describe the position he was held in, but could not explain or remember how Respondent Calafiore and he ended up in that position.

- Q: Now tell us how it is exactly that Officer Calafiore put you in a choke hold?
A: To tell you the truth, I don't remember.
Q: Well, this is a vivid incident in your life, right?
A: Pretty much.
Q: You went immediately to the hospital and the precinct to complain about it, right?
A: Yes, I did.

When asked how he was put in a chokehold, Martinez explained:

Well when we went down to the ground, I don't know how Calafiore got around to my head, the head of my body, but he was laying down. I was facing – I was on the right side of my body and he had his, I would say right arm underneath my head. So my neck was around his muscle area.

Martinez explained that by muscle area he meant "biceps." The following colloquy ensued:

- Q: You know how it is that the two of you ended up in that position?
A: I can't give you details on the moves that were made to go into that position, no.
Q: In fact that's what you always said. Somehow he put me in a choke hold, right. When you were asked repeatedly, how did he put you in a choke hold. You said somehow he got me in a choke hold, right?
A: Correct.

It is not credible that Martinez could remember everything else about the physical contact he had with Respondents but was consistently vague about this major event. Martinez did not even explain why he could not remember how he was placed in a chokehold.

In sum, Martinez' credibility was undermined by the lack of medical corroboration, his inconsistent statements about what he told the doctors, the lack of

corroboration of injuries in photographs, and his inability to describe how he was placed in a chokehold.

Person A' Hearsay Statement

Person A statement corroborated part of Martinez' story that Martinez was slammed into a car and then held in a chokehold that made it hard for Martinez to breathe. Person A also corroborated that a security guard witnessed some of the event and that others from the store gathered outside.

However, Person A made claims that contradicted Martinez' testimony. While Martinez did admit to at one point resisting Respondents, Person A asserted that Martinez "would not have like moved in any type – or like to resist in any type of way" but was "standing firm" and "tensed up his body." Person A said the chokehold lasted 45 seconds and Martinez stated it lasted two or three minutes.

Most significantly, Person A embellished that Respondent Marconi punched Martinez seven or more times and contradicted Martinez himself. Person A also claimed that both Respondents punched Martinez after Martinez was handcuffed. Specifically, Person A stated that Respondent Marconi punched Martinez one more time in the stomach and Respondent Calafiore punched him in the face. In sum, Person A's hearsay statement was not credible.

Hearsay Statements by Two Neutral Witnesses

Two interviews given by CCRB failed to corroborate Martinez' version of events. (Court X 1).⁶ In one interview, Wilfredo Person B stated that, while he was conducting his routine patrol as a security officer, he saw Respondents with Martinez handcuffed on the

⁶ After CCRB interviewed these witnesses, neither CCRB or Respondent's attorney were able to locate them.

ground. He did not see the events leading to Martinez being handcuffed. Nor did he see Respondents punch, kick, strike, or use any physical force against Martinez. Martinez did not appear to be injured.

CCRB summarized its interview of Person C, who was locking up his laundromat when he saw Martinez and Person A riding their bicycles on the sidewalk. Person C saw Martinez back away from Respondents when they approached him. Martinez “began screaming and cursing at them” when Respondents attempted to arrest him. The summary states that “Martinez and Person A were acting ‘crazy’” and that Respondents did not put Martinez in a chokehold and “did not do anything wrong.”

Conclusion

Respondents’ testimonies were credible and consistent with each other. Martinez’ testimony that he was placed in a chokehold was uncorroborated by his medical records and by photographs taken by his girlfriend. Martinez’ credibility was also diminished by his inconsistent statements about what he told the doctors, by stating that he did not mention any problems with his neck and throat at the hospital and then later claiming on cross-examination that he did. While Person A, Martinez’ co-complainant, said that Martinez was placed in a chokehold, the credibility of Person A’ hearsay statement was lessened by its embellishment on how many times and when Martinez was punched. Martinez and Person A’ statement seemed to indicate that Person B, the security officer, was present and would support their version of events. However, Person B did not do so or even see anything before Martinez was handcuffed. The statement made by Person C, another neutral witness, indicated that Person C saw the entire interaction between Respondents

and the complainants. Person C stated that Respondents did not place Martinez in a chokehold. Finally, Martinez could not remember or describe how he and Respondent Calafiore ended up in a chokehold position. He did not even explain why he could not remember or describe how it happened. In an otherwise well remembered story, this is a serious gap in the foundation of the sole charge against Respondent Calafiore. Thus, CCRB failed to prove by a preponderance of the evidence that Respondent Calafiore placed Martinez in a chokehold.

Accordingly, Respondent Calafiore is found Not Guilty of placing Martinez in a chokehold.

PENALTY

Disciplinary Case No. 2010-9939

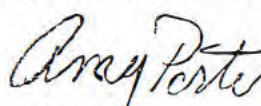

In order to determine an appropriate penalty, Respondent Marconi's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent Marconi was appointed to the Department on January 9, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB recommended a seven vacation day penalty for Respondent Marconi. They based their recommendation on Person A's statement that Respondent Marconi patted down his pockets and then went inside his pockets. Neither Person A's statement nor Marconi's brief testimony is credited by this Court. Instead, Respondent is found guilty by his own forthright testimony. Respondent was mistaken on the elements of frisk and search and, as an experienced officer, should have known better. However, he did not

deliberately violate the rights of Person A, but conducted the frisk and search believing he was entitled to do so.

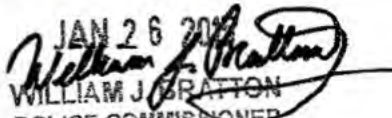
Therefore, it is recommended that Respondent Marconi forfeit three vacation days.

Respectfully submitted,

Amy J. Porter
Assistant Deputy Commissioner – Trials

APPROVED

JAN 26 2018

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER MARCONI
TAX REGISTRY NO. 940420
DISCIPLINARY CASE NO. 2010-9939

For his last three annual performance evaluations, Respondent received ratings of 3.5 in 2013, 4.5 in 2012 and 2011. Respondent has one medal for Excellent Police Duty and one for Meritorious Police Duty.

[REDACTED]

[REDACTED]

Respondent has no prior formal disciplinary record.

For your consideration.

 PM

Amy J. Porter
Assistant Deputy Commissioner Trials