



POLICE DEPARTMENT CITY OF NEW YORK

May 15, 2017

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Patrick Fyvie  
Tax Registry No. 938513  
46 Precinct  
Disciplinary Case No. 2016-16422  
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**Charges and Specifications:**

1. Sergeant Patrick Fyvie, on or about January 23, 2016, at approximately 1700 hours, while assigned to the 46th PCT and on duty, in the vicinity of [REDACTED] wrongfully used force, in that he used a Taser against Kenneth Jones without police necessity, while Kenneth Jones was standing.  
P.G. 203-11 - USE OF FORCE
2. Sergeant Patrick Fyvie, on or about January 23, 2016, at approximately 1700 hours, while assigned to the 46th PCT and on duty, in the vicinity of [REDACTED], wrongfully used force, in that he used a Taser against Kenneth Jones without police necessity, while Kenneth Jones was on the ground.  
P.G. 203-11 - USE OF FORCE

**Appearances:**

For CCRB-APU: Jonathan Fogel, Esq.  
Civilian Complaint Review Board  
100 Church Street, 10<sup>th</sup> floor  
New York, NY 10007

For the Respondent: Matthew Scheiffer, Esq.  
The Quinn Law Firm  
Crosswest Office Center  
399 Knollwood Road – Suite 220  
White Plains, NY 10603

**Hearing Date:**

April 7, 2017

**Decision:**

Guilty of Specifications 1 and 2.

**Trial Commissioner:**

ADCT Nancy R. Ryan

## REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on April 7, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called Kenneth Jones as a witness. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

## DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

## FINDINGS AND ANALYSIS

It is undisputed that on January 23, 2016, at approximately 1700 hours, Respondent was on duty, in uniform, assigned as the Patrol Supervisor in the 46 Precinct. He arrived at [REDACTED] [REDACTED] Mr. Kenneth Jones, who resided at that address, was inside his apartment. Respondent kicked open the apartment door. Respondent and Mr. Jones were in Mr. Jones' bedroom when Respondent Tasered Mr. Jones. Respondent and Mr. Jones offer different versions of the details of their encounter.

Mr. Jones testified that he is [REDACTED] [REDACTED] [REDACTED]. He acknowledged that the injury has affected his memory about this case. He has previously been convicted of two felony drug possessions and some misdemeanors. He currently has a lawsuit pending pertaining to this incident. (Tr. 13-15)

According to Mr. Jones, he had been moving boxes and removing garbage at his apartment on the afternoon of January 23<sup>rd</sup> when a neighbor had complained about him. He received an intercom call from security that some police officers wanted to come to his

apartment to speak to him. He told security he didn't want to speak to them, but the police came to his door, identified themselves as police and started banging on his door. Mr. Jones testified that he asked them if they had any warrants and when they said they didn't he told them to just leave their card. (Tr. 15-18) The police partially opened his door and then broke the chain lock to gain entry. Mr. Jones testified that he ran, "in fear for his life" into the back bedroom of his apartment. Several police officers, including Respondent, entered the bedroom. Mr. Jones testified that he went to the far end of the bedroom and raised his hands while screaming that he didn't have a weapon. (Tr. 18-20) Mr. Jones further testified that within two seconds after the police entered his bedroom and without saying anything to him, the Respondent discharged his Taser, which hit him in the center of his chest. Mr. Jones felt like he could not control his muscles. (Tr. 21) As he was falling, an officer wrestled him to the floor. He was then placed in handcuffs. He testified that he never took any steps towards Respondent, nor did he ever touch or threaten Respondent or indicate that he was going to hurt himself. He testified that he owned a bracelet with metal studs, which were not sharp, but he doesn't remember if he was wearing it that day. (Tr. 22-24)

Respondent testified that as of January 23, 2016, he had been a sergeant for less than a month. (Tr. 59) He had been requested to go to the scene that night by officers who had responded there based on a 911 call from one of Mr. Jones' neighbors who felt threatened by him to the degree that she needed a knife to defend herself. (Tr. 59-60) When Respondent arrived at the scene there were officers standing in the hallway outside of Mr. Jones' closed apartment door. The officers told Respondent they had verbal contact with Mr. Jones but that he wasn't opening the door. Respondent testified that he tried to establish a rapport with Mr. Jones by asking him his name. Mr. Jones told Respondent that he wouldn't tell his name, but he put an

envelope under the door with his name and address on it. Respondent further testified that he then asked Mr. Jones if he was on medication and Mr. Jones responded that he was. He said he wouldn't tell Respondent what it was, but would write it down and also place that under the door. Mr. Jones did not do this. (Tr. 60)

Another officer on the scene ran Mr. Jones' name and Respondent learned that Mr. Jones had a prior gun possession arrest and had previously resisted arrest as an emotionally disturbed person. (Tr. 60-61) Based on Mr. Jones' behavior of slipping the envelope under the door, his acknowledgement that he was on medication and his prior history, Respondent believed that Mr. Jones was an emotionally disturbed person. (Tr. 61) Mr. Jones then partially opened the door while keeping the latch on. While Respondent could not see him, Mr. Jones was now talking to Respondent and asked him if he served in the military. When Respondent answered no, Mr. Jones began yelling telling the police he was going to fuck them up. (Tr. 61) Respondent testified that Mr. Jones also told them he was ready to die.

Respondent heard the sound of things being broken in the apartment and made the decision to enter the apartment. (Tr. 62) Respondent testified that while normally the Emergency Services Unit would respond to a situation such as this, Respondent thought they would take too long to arrive that evening because there was a winter storm occurring. (Tr. 69) Respondent kicked the door twice and the latch broke. The police entered the apartment, which was dark. Respondent observed broken items on the floor. He called to Mr. Jones to come out. Mr. Jones said he was in the bedroom. Respondent proceeded to the bedroom which is where he saw Mr. Jones for the first time. (Tr. 62) There were other police in the bedroom when Respondent gave Mr. Jones verbal commands two to three times to put his hands over his head, and to turn around, interlock his fingers, and get down on the ground. Respondent saw a spiked bracelet on Mr.

Jones' wrist. Respondent described Mr. Jones' behavior when he first observed him as "erratic" in that he wasn't following the verbal commands, was shouting over the verbal commands and was moving his hands back and forth near his torso. (Tr. 63-66) At this time two police officers were roughly five feet from Mr. Jones and Respondent was approximately nine feet from Mr. Jones. (Tr. 66)

Respondent testified that he thought Mr. Jones could not be safely taken into custody because of the spiked bracelet. He also determined that the use of pepper spray would not be appropriate since it could get on the other officers in the room and would not stop Mr. Jones from hitting someone with the spiked bracelet. He also determined that the use of an asp was not an appropriate tactic since he would have to get too close to Mr. Jones to use it. He testified he used the Taser on Mr. Jones because, "to grab that wrist to handcuff him, you put yourself in immediate danger, me and my cops, himself if, you know, he goes a little bit too aggressively." (Tr. 67) After he discharged his Taser, Mr. Jones went to the ground and officers went to handcuff him. Respondent testified that Mr. Jones started to tuck his arms underneath himself and the officers weren't able to grab the wrist with the bracelet on to put handcuffs on him, so Respondent deployed the second round of the Taser. After the second round from the Taser, Mr. Jones had his wrist with the bracelet up in the air and an officer grabbed it and handcuffed it. (Tr. 67-68)

Mr. Jones was taken into the hallway to wait for EMS to arrive. Respondent testified that while Mr. Jones was in the hallway he continued to threaten to kill the police and threatened neighbors who passed by. (Tr. 68-70) Respondent did not voucher the bracelet because he usually only vouchered arrest evidence and Mr. Jones was not arrested. (Tr. 70-71)

Respondent signed a Less Than Lethal/Rescue Equipment report that he testified that his lieutenant typed up. Respondent testified that when he reviewed the form he did not notice that it incorrectly noted that the Taser had only been deployed once instead of twice and that the form failed to indicate that Mr. Jones possessed the bracelet, which the Respondent considered to be a dangerous instrument and the most important factor in his decision to use the Taser. (Tr. 74-76, 89)

On cross-examination, Respondent acknowledged that from the time he entered the room Mr. Jones remained in a corner of the room and never took a step towards Respondent before he was Tasered. (Tr. 77) Respondent also agreed that Mr. Jones never tried to kick or hit any police officers, nor did he throw any objects at them. (Tr. 79) Respondent also did not see Mr. Jones hit himself nor did he see any evidence of Mr. Jones having injured himself. (Tr. 80) Respondent testified that he could not hear what Mr. Jones was saying while he was inside the bedroom with him. (Tr. 81-82) Respondent also agreed that he did not see Mr. Jones with any gun, or knife, nor did he see any bulges in his pockets or any outlines of any weapon in his clothing. (Tr. 82) The only object Respondent claimed to be a weapon in this case was the bracelet that he testified that Mr. Jones was wearing. He acknowledged that Mr. Jones made no attempt to remove the bracelet or to hit himself with it. (Tr. 82-83) Respondent never told the officers who approached Mr. Jones to be careful of the bracelet. (Tr. 96-97)

Respondent was also questioned on cross-examination about his training. He agreed that he was trained to never use force against an emotionally disturbed person unless there is no other way to protect life against imminent danger; that only the minimum amount of force necessary to arrest an emotionally disturbed person should be used and that if there is time to negotiate with an emotionally disturbed person, he should take all the time needed to do so and that the situation



should not be rushed. (Tr. 84) He further agreed that he was trained to use one Taser discharge then to reassess the situation and that only the minimum number of cycles necessary to take someone into custody should be used. (Tr. 100) Respondent testified that he discharged his Taser after he gave his two verbal commands to Mr. Jones and that it took only a couple of seconds after he entered the bedroom to give those commands. (Tr. 84-86, 104) Respondent testified that prior to entering the bedroom, he had been interacting with Mr. Jones for approximately 10 minutes. (Tr. 104) He further testified that he was trained to give a warning if feasible and that although the red dot from the Taser was on Mr. Jones, he did not give any verbal warning before firing his Taser in this case. (Tr. 86-87) Respondent acknowledged that he Tasered Mr. Jones a second time about a second after the first cycle had ended. (Tr. 100-01) During that one second interval, Respondent acknowledged that Mr. Jones did not wave his hands or kick or punch anyone. (Tr. 101-02) When he was Tasered the second time, Mr. Jones was [on the ground] on his side and the bracelet was under him. (Tr. 102-03)

Respondent is charged with two specifications of wrongful use of force for using his Taser on Mr. Jones while he was standing in the bedroom (Specification 1) and a second time while Mr. Jones was on the ground in the bedroom. (Specification 2) Under Patrol Guide Section 203-11 which was in effect at the time of this incident, all members of the service must use minimum necessary force at the scene of a police incident. The section specifies that, "only that amount of force necessary to overcome resistance will be used to effect an arrest or take a mentally ill or emotionally disturbed person into custody." Another relevant section of the Patrol Guide concerns the procedures to be followed in using a conducted energy device ("CED"). Patrol Guide Section 212-117, effective on October 28, 2015, was in effect at the time

of this incident. Under that section the following actions must be taken in using a conducted energy device:

- "15. Assess situation and determine if the use of a CED would be appropriate.
- 16. Consider the totality of the circumstances when deciding the minimum amount of force necessary to overcome resistance when effecting an arrest or when taking a mentally ill or emotionally disturbed person in to custody. Some factors to consider when determining the appropriate use of force include but are not limited to:
  - a. officer/subject size disparity
  - b. officer/subject strength disparity
  - c. officer/subject strength disparity
  - d. officer's perception of the subject's willingness to resist
  - e. officer's perception of the immediate threat to the subject, members of service and bystanders
  - f. subject's violent history, if known
  - g. officer's location is a hostile environment
  - h. officer's perception of the subject being under the influence of a stimulant/narcotic which would effect pain tolerance and violence.

Note CEDs should only be used against persons who are actively physically resisting, exhibiting active physical aggression or to prevent individuals from physically injuring themselves or other person(s) actually present. Members of the service are reminded of the availability of Emergency Service Unit.

- 17. Issue an appropriate warning, consistent with personal safety, to the intended subject and other members of the service present prior to discharging the CED.

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When a CED is used against a subject it shall be for one standard discharge cycle and the member using the CED must then reassess the situation. Only the minimum number of cycles necessary to place the subject in custody shall be used."

In this case, Respondent perceived he was dealing with an emotionally disturbed person.

The court acknowledges that Respondent also had information prior to entering the apartment that the Respondent had a criminal history which included the possession of a weapon and had information that there had been some type of encounter with a neighbor that day. However, based on the totality of the circumstances here, I find that the Respondent's use of the Taser on each of the occasions he fired it at Mr. Jones constituted an unnecessary use of force.



By Respondent's own testimony, there were at least three officers in the bedroom with Mr. Jones and Mr. Jones was standing at least five feet away from the nearest officer. While Respondent testified that he had interacted with Mr. Jones for approximately ten minutes before he entered the bedroom, Respondent only had visual contact with Mr. Jones once they were both in the bedroom. Respondent waited mere seconds before he fired the first Taser round at Mr. Jones. Respondent, at this time, according to his own description of events, did not see any weapons on Mr. Jones, except the bracelet which clearly could not be used as a weapon from the 5 to 10 feet distance Mr. Jones was from the officers. Also according to Respondent's own testimony, Mr. Jones, while possibly moving his arms around his torso area, did not move towards the officers. Respondent also did not even wait to fire the first Taser round until he could hear what Mr. Jones was saying to him. Respondent did not give any verbal warning, to Mr. Jones that he was going to fire the Taser at him, as required under the Patrol Guide procedure in effect on this date. Respondent, by his own testimony, acknowledged that he was trained to never use force against an emotionally disturbed person unless there is no other way to protect life against imminent danger. Respondent's description of the situation in this case did not convey the existence of any immediate threat from Mr. Jones, either to the officers or to himself, prior to Respondent's deployment of the first Taser firing.

It is also clear, based on Respondent's own testimony, that by firing the second Taser round almost immediately after the first one, Respondent did not sufficiently reassess the situation, as is required under the Patrol Guide. Again by Respondent's own testimony, at the time of the second Taser round, the bracelet, which was the only item Respondent even considered to be a weapon, was underneath Mr. Jones, who was lying on the ground after receiving five seconds of electric shocks.

Based on the above, I find Respondent Guilty of Specifications 1 and 2.

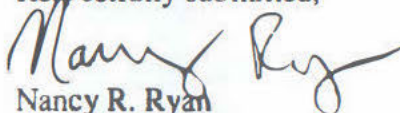
### PENALTY RECOMMENDATIONS

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 11, 2005. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB has requested a penalty of the forfeiture of 25 vacation days. Based on two prior cases involving the discharge of a conducted energy device I recommend a penalty of the loss of 15 vacation days. In one prior case a penalty was negotiated in which a nine year sergeant with no prior disciplinary record pleaded Nolo Contendere and forfeited five vacation days for wrongfully using a Taser on an individual without assessing the circumstances of the situation and determining if the use of the device was appropriate. In another case, a ten-year sergeant with no prior disciplinary record who was found guilty of specifications including discourtesy and failing to call EMS to the scene (neither of which are charged in this case) and the wrongful use of a Taser, forfeited 15 vacation days (Disciplinary Case No. 2014-12534, signed February 4, 2016). In the present case, while Respondent did not have additional specifications, he wrongfully used the Taser two times. While he had only recently become a sergeant prior to the incident, this should not mitigate the penalty since the training he received on the use of the conducted energy device should have been very fresh in his mind.

**APPROVED**  
SEP 19 2017  
James P. O'Neill  
POLICE COMMISSIONER

Respectfully submitted,



Nancy R. Ryan  
Assistant Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM  
SERGEANT PATRICK FYVIE  
TAX REGISTRY NO. 938513  
DISCIPLINARY CASE NO. 2016-16422

On his last three performance evaluations, beginning with the most recent, Respondent received an overall rating of 3.5 "Highly Competent/Competent," a 3.0 "Competent," and a 4.0 "Highly Competent." [REDACTED]

He has no prior disciplinary history.

Nancy R. Ryan  
Assistant Deputy Commissioner Trials