



POLICE DEPARTMENT CITY OF NEW YORK

May 18, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Manuel Gutierrez  
Tax Registry No. 948589  
40 Precinct  
Disciplinary Case No. 2016-16105  
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**Charges and Specifications:**

1. Police Officer Manuel Gutierrez, on or about February 13, 2016, at approximately 2330, while assigned to the 40 Precinct and on duty, in the vicinity of 26 Bruckner Boulevard, Bronx County, wrongfully used force, in that he used pepper spray against Person A without police necessity.

P.G. 212-95, Page 1, Paragraph 1 – USE OF PEPPER SPRAY

**Appearances:**

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

For Respondent: Michael Martinez, Esq.  
Worth, Longworth & London, LLP  
111 John Street – Suite 640  
New York, NY 10038

**Hearing Date:**

April 24, 2017

**Decision:**

Not Guilty

**Trial Commissioner:**

ADCT Jeff S. Adler

## REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on April 24, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. CCRB introduced the hearsay statement of Person A. 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 Not Guilty of the charged misconduct.

## FINDINGS AND ANALYSIS

At approximately 2330 hours on February 13, 2016, Respondent, his partner Officer Garcia, and two rookie officers responded to a call for a theft of services involving a cab. Specifically, the call alleged that a male Hispanic with a cast refused to pay his cab fare when it arrived at 26 Bruckner Boulevard in the Bronx. The officers responded to that location, "Club Miami," and spoke with the cab driver in his vehicle. The driver, Person B, informed the officers that he had quoted the passenger, Person A, and his four companions a \$30 fare, which the passenger had agreed to pay. However, upon arrival at the destination, Person A refused to pay the fare and went inside the club.

After speaking with Person B, the officers asked a bouncer at the club to have the passenger step outside. A short time later, Person A emerged from the club. The officers questioned Person A about the incident, and then Officer Garcia began to frisk the suspect. Person A pushed Officer Garcia's hand away, and Respondent sprayed him with O.C. pepper spray one time in his eyes. At issue is whether Respondent's use of the spray was without police

necessity. After considering the credible evidence in the matter, I find that Respondent's use of the spray was reasonable and appropriate under the circumstances.

Person A did not appear to testify. Instead, a recording of his statement to CCRB on February 22, 2016 was introduced into evidence, along with the accompanying transcript. (CCRB Ex. 1 and 1A) Hearsay evidence is admissible in an administrative tribunal, and a case may be proven with such evidence provided it is found to be sufficiently reliable and probative on the issues to be determined. See *Ayala v. Ward*, 170 A.D.2d 235 (1<sup>st</sup> Dept. 1991); *In the Matter of 125 Bar Corp. v. State Liquor Authority of the State of New York*, 24 N.Y.2d 174 (1969). To be sure, it is preferable to have testimony from a live witness, where opposing counsel has the opportunity to cross-examine, and the court can observe the demeanor of the witness. In the absence of such live testimony here, this tribunal listened carefully to the prior recorded statement of Person A, and reviewed the accompanying transcript.

In his statement, Person A claimed that he had traveled this route many times before, and the normal fare was \$15. He stated that the cab driver briefly got lost on the way, and then charged Person A and his fellow passengers \$30 upon arrival at Club Miami. Person A told him that it was an overcharge, and that the correct fare should be \$15. The driver ordered the passengers out of the cab and they complied. Person A again offered the driver \$15 for the ride, but the driver refused to accept the money, so Person A went inside the club. (CCRB Ex. 1A at 3-4)

According to Person A, about five or ten minutes later a bouncer told him to go outside, which he did. Outside, Person A was confronted by four or five officers. One of the officers started asking him about the incident with the cab driver, and Person A was relating his side of the story. The questioning officer, without explanation or warning, began to pat down

Person A, placing his hand over his pockets and in his waist area. Person A stated he pushed the officer's hand away and asked if he was being apprehended. Almost immediately, a second officer maced Person A in his eyes. The questioning officer then brought Person A to the ground and a knee was placed on his neck. Person A told the officers he had asthma and couldn't breathe, and one of the officers assisted him in regaining his breath by providing albuterol. (CCRB Ex. 1A at 5-7, 26-27, 38-42)

Person A explained that his right arm was in a soft cast and a sling at the time of the encounter, so he was "no threat" to the officers. (CCRB Ex. 1A at 28) Medical records confirming Person A's prior injury and cast were introduced as CCRB Ex. 2. Person A stated that he had not been drinking alcohol or taking drugs prior to the incident. (CCRB Ex. 1A at 11, 63) It also was stipulated that Person A had pleaded guilty to attempted forgery in the Bronx in 2003, VTL 509(1) in New York County in 2006, littering in New York County in 2013, and has one pending assault case.

Respondent testified that the cab driver Person B informed the officers what had transpired. Person B stated that he had set the \$30 fare with the passengers before departing, which they agreed to. The cab made a few stops along the way. Upon arrival, there was a dispute regarding the fare. The females who were with Person A offered to pay, but Person A, who was "acting very aggressive," told his companions to step out of the vehicle. Person A then refused to pay, and exited the cab as well. (Tr. 41-44, 57)

When Person A emerged from the club, the officers had him move away from the glass door area. Respondent described the club as notorious for shootings and other crimes. Person A was aggressive and loud, behaving like he didn't want to speak with the officers regarding what had occurred. Person A did state, though, that he didn't want to pay the \$30

fare since the usual fare was \$15. Other people were gathering around the officers. At this point, Respondent testified he considered this to be an arrest situation, and that Person A would be charged with theft of services. Officer Garcia began to pat down the suspect in his waist area, but Person A twice smacked the officer's hand away. Respondent also claimed that after being told to put his hands behind his back, Person A stepped back and clenched his fist as if to fight, though Respondent did not mention the fighting stance and fist in his CCRB interview. (Tr. 40, 46-50, 63-64, 68)

Respondent then sprayed Person A one time in the eyes with his pepper spray. Respondent explained that he considered this to be minimal use of force under the circumstances in order to gain control of the situation. He was concerned both for the safety of the officers and the safety of Person A, who had one arm in a cast; Respondent was concerned about being struck with the cast, and also wanted to avoid a physical struggle where McPherson's arm might be re-broken. (Tr. 50-51, 69, 90) Respondent acknowledged that he didn't see any suspicious bulges on Person A, and the suspect did not threaten the use of a weapon. (Tr. 59)

Once he was sprayed, a "very combative" Person A went to the ground, where he was handcuffed without further incident and removed from the scene. (Tr. 52, 70-72)

At the time of this incident, section 212-95 of the Patrol Guide instructed officers on the use of pepper spray devices. Specifically, O.C. pepper spray may be used when a member reasonably believes it is necessary to "effect an arrest, or establish physical control of a subject resisting arrest." The section also advises that the use of pepper spray will often reduce the potential for injuries that might occur if physical force were used instead of the spray.

Here, the credible evidence has established that this was an arrest situation. Based on the description of events provided by the cab driver, the officers were placing Person A under

arrest for theft of services. For the safety of the officers, it was reasonable for Officer Garcia to pat down Person A for weapons. This tribunal rejects the suggestion that the officers should have relied on Person A's having already been checked for weapons before entering the club.

The credible evidence also has established that while Officer Garcia was conducting his frisk, Person A smacked his hand away. Respondent described the smack, and even Person A acknowledged his culpability on this point, stating, "Maybe I was wrong for slapping or removing the officer's hand." Person A then backtracked, claiming that he removed the officer's hand but didn't actually slap it. Unfortunately, Person A did not appear to testify, and was not subject to cross-examination regarding the precise manner in which he "removed" the officer's hand. But in any event, Person A did admittedly interfere with the police effort to pat him down.


Respondent reasonably viewed this as a situation where he needed to act in order to establish control of a resisting Person A. Person A, who was approximately 5'9" 220 lbs., had just behaved aggressively according to the cab driver Person B, and now he was acting aggressively with the police, late at night, in front of a hostile crowd. Even with one arm in a cast, Person A was resisting arrest, and posed a safety risk to the officers. Respondent sprayed Person A once in the eyes, in order to gain compliance. This tactic allowed the officers to handcuff Person A quickly, and to bring him under control with minimal use of physical force. Under the totality of circumstances, Respondent's use of pepper spray on Person A was reasonable, and I find him not guilty.

Respectfully submitted,



Jeff S. Adler  
Assistant Deputy Commissioner Trials

**APPROVED**

SEP 29 2017  
  
JAMES P. O'NEILL  
POLICE COMMISSIONER