The City of New York

POLICE DEPARTMENT

May 7, 2019

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2017-17036
Police Officer Emilio Ortega	:	
Tax Registry No. 916969	:	
79 Precinct	:	

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable David S. Weisel
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Steven A. Guerrero, Esq.
Department Advocate's Office
One Police Plaza, 4th Floor
New York, NY 10038

For the Respondent: Craig R. Hayes, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

CHARGES AND SPECIFICATIONS

1. Said Police Officer Emilio Ortega, while on-duty and assigned to the 79th Precinct, on or about August 12, 2016, did fail to provide his name and shield number to Minor A.

P.G. 203-09 (1) PUBLIC CONTACT - GENERAL
GENERAL REGULATIONS

2. Said Police Officer Emilio Ortega, while on-duty and assigned to the 79th Precinct, on or about August 12, 2016, did improperly use force against Minor B, to wit, said Police Officer did punch Minor B in the stomach/groin area.

P.G. 221-01 FORCE GUIDELINES
TACTICAL OPERATIONS
P.G. 221-02 USE OF FORCE
TACTICAL OPERATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before the Court on January 22 and February 12, 2019. Respondent, through his counsel, entered a plea of Not Guilty to the charges. The Department called Minor A and Minor B as witnesses, and 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.

Having reviewed all of the credible, relevant evidence in this matter, the Court finds Respondent **Guilty** of Specification No. 1 and **Not Guilty** of Specification No. 2, and recommends a penalty of the forfeiture of one vacation day.

ANALYSIS

Introduction

It is undisputed that on August 12, 2016, at approximately 2015 hours, Minor B and his brother, Minor A, were walking on the sidewalk within the confines of the 79 Precinct when Minor B spat on the ground. Respondent, who was on patrol, directed Minor B to stop walking, but he initially continued walking. Once

Minor B stopped, Respondent asked him for identification, which he did not have. Respondent arrested Minor B and placed him in the patrol vehicle. During the incident, Minor A filmed the encounter on his phone and asked Respondent repeatedly for his name and shield number (Tr. 18-19, 111-12, 124-26).

The disputed issues in the case are whether Respondent provided his name and shield number to Minor A, and whether he used excessive force, namely punches to the stomach and "groin" or genital area, while arresting Minor B.

Minor A testified that he was 16 years old at the time of the incident on August 12, 2016. He and his brother Minor B were at a store on the corner of [redacted] buying food. He and Minor B noticed a police vehicle and observed that officers were "looking inside and pointing" for approximately five to ten minutes. The brothers did not know if the police were pointing at them or someone or something else, and may have briefly discussed the issue. When they walked outside, Minor B "spit something out." Minor A was not sure what exactly Minor B spit out, but thought it was something like a hair or a bug. In response, one of the officers, Respondent, yelled out the window of his car, telling Minor B to stop and come to him because he spat (Tr. 11-14, 29-31).

According to Minor A, Minor B did not think that Respondent was actually calling him over just for spitting, so he continued to walk. As the brothers continued to walk, "they started telling us come here, come here, you spit, give me an I.D. And they ran up to us and they grabbed my brother" (Tr. 11-15, 29-31).

According to Minor A, Respondent asked Minor B if he had identification, and Minor B answered, "I don't have it, I'm just going to the store." Respondent then told Minor B that he would be arrested. When Minor B asked why, Respondent answered, "You want to spit, so

you're gonna get arrested." At that time, Minor B only possessed a school identification card but did not have it with him during the trip to the store. Minor A testified that he pointed to his home and told Respondent that he and his brother were just going to the store. Julian admitted, however, that neither he nor his brother offered to go home to retrieve Minor B's ID. Minor A felt that he could have done so "if they weren't so, like, eager to arrest him and get him in the car" (Tr. 15-16, 23-28).

Minor A described Respondent's demeanor as "very aggressive" and "yelling." He also testified that Respondent did not give Minor B "a chance to explain or anything." Respondent continued to tell Minor B that he would be arrested because he did not have ID. Respondent pushed Minor B against a gate, and Minor B tried to hold his hands in front of himself to avoid being handcuffed. Minor A testified that his brother "didn't know why he was getting arrested. He didn't want to get arrested." At that point, Minor A began to record the incident on his smartphone, and told his brother to "stop fighting back. Just let go of your hands, let them do what they have to do." Minor A admitted that his brother did not immediately sit inside the vehicle, despite being asked to do so "two or three" times. Minor A asked Respondent what Minor B was being arrested for, and Respondent explained that Minor B was spitting and did not have ID (Tr. 16-18, 36-39).

According to Minor A, Respondent began grabbing Minor B "roughly" and pulled him toward the car. Respondent's partner grabbed Minor B's other arm aggressively and roughly as well. Minor A asked Respondent for his name and shield number "at least ten times" and received no answer. Eventually, Respondent replied that he did not have to tell Minor A anything. Minor A ultimately read the name and number aloud for himself, so that he could "have a memory of it on the video" (Tr. 19-20, 22, 50).

Minor A testified that the officers then put Minor B's back against the car and were trying to push and slide him into the car. Minor B told them, "I'm not getting arrested for spitting." The officers told Minor B to enter the car and Respondent punched Minor B in the "stomach-groin area" around two to three times. Minor A described the punches as "an uppercut, but down low." The punches occurred on the other side of the car door from where Minor A was standing, but Minor A testified that he saw the punches because it was very close to him. Respondent did not acknowledge that he punched Minor B but Minor B screamed out, "He just hit me in my balls (Tr. 20-23). After the incident, Minor A went to his mother "immediately" and the pair went to the precinct to take Minor B home. Minor B was not issued a summons or desk appearance ticket.

Later that day, Minor B complained that his testicles hurt, and told Minor A that he had a mark on his stomach. Minor A photographed the mark with his phone, but he lost the phone approximately three to four weeks later in an unrelated incident before he could make any copies of the images. He sent the video of the police encounter to his mother at her request "so she could show the higher up, or whoever, when we got to the precinct." He did not tell his mother about the still photographs because he took them at a later time and his mother did not ask for them. He did not recall telling her about the photos. It never occurred to Minor A to send the photos to anyone at that time and he did not anticipate losing his phone (Tr. 23, 39-53, 59).

Minor B testified that he was 14 years old at the time of the incident on August 12, 2016. He was with his brother Minor A at the corner store getting groceries. The pair noticed police officers outside, talking to someone. Minor B denied that he discussed with Minor A why the officers were there. A few seconds after leaving the store, he spat on the ground. He heard an officer, Respondent, shout "hey" multiple times. Minor B

testified, "I didn't really think he was talking to me, so I continued to walk" (Tr. 63-66, 85-87).

According to Minor B, Respondent grabbed him, pushed him against a gate, and started asking him for ID. Minor B was shocked and told Respondent that he did not have ID. He asked Respondent why he was demanding ID and Respondent answered that it was because he had spat on the ground. Respondent continued asking for ID as Minor B argued that "you can't do this because I spit." Minor B did not tell Respondent why he did not have ID, nor did Respondent ask why. Respondent told Minor B that he would have to arrest him if he did not have ID, and took out his handcuffs. Minor B admitted that neither he nor Minor A offered to retrieve his ID from home, although Minor B did point out his home to Respondent. Minor B only "[p]ossibly" had a school ID at home in any case (Tr. 63-69, 85-91).

When Respondent and his partner grabbed him, Minor B "was trying to, like, stand still and, like, ask why is he doing this." He kept his hands still and held them together, because he was scared and did not want to be arrested. Minor A was present at the time, recording the interaction on his smartphone. Minor A told Minor B to stop and relax. The two officers handcuffed Minor B (Tr. 69-71).

Once he was handcuffed, Respondent and his partner began pushing him toward the car. Minor B admitted that "once we got to the car, I just stopped moving." The officers continued pushing him into the car and telling him to get in. Respondent was pushing Minor B's stomach while the other officer pushed his shoulders and chest. Minor B admitted that he kept his body straight, but denied using any physical force or attempting to run away. As this was happening, Minor A was asking Respondent loudly for his name and shield number, while Respondent himself was speaking loudly to Minor B, and other people in their

vicinity were speaking with raised voices as well. Minnr B did not recall whether Respondent turned to address Minnr A (Tr. 69-73, 80, 92-94).

According to Minnr B, after 30 to 45 seconds of pushing, Respondent punched him in the "groin" and stomach, twice, without warning. Minnr B described the punches as an uppercut. Respondent's hand was closed into a fist. After the punches, Minnr B was in pain so he crouched down, and Respondent pushed him into the vehicle. Minnr B described Respondent's demeanor as "upset" and "aggravated" because of Minor B's refusal to get into the car (Tr. 74-78).

Once Minor B was in the vehicle, he was driven to the precinct. He was told that he was stopped for spitting, but was not issued a summons or DAT and did not receive any paperwork afterward (Tr. 79).

Minor B testified that he suffered an injury due to the punch: namely, he had pain in his groin and blood in his urine. He felt the need to urinate after being released from custody but was physically unable to do so. He informed his mother of this. For one to two weeks he would experience pain when urinating. He explained that he did not go to the hospital because he and his family "probably had other stuff that we were doing" but could not recall any specific activity. After approximately one week, Minor B went to his family doctor, who determined from a urine sample that he had blood in his urine. This had not been visible to the naked eye. He was not prescribed any medicine and did not undergo any tests, such as an MRI or CAT scan. Minor B also remembered having a red mark "a couple of inches" beneath his navel, which his brother photographed, but these photographs were not distributed to investigators (Tr. 79-85, 95, 98-103).

The Department introduced **THE VIDEO** as Exhibit 1. It takes place at dusk (approximately 2015 hours in mid-August), and there is not much ambient light. It begins

with Minor A saying, "You can't do that. No you can't. You arresting him for spitting in public?" Next, Minor A appears to tell his brother to relax and stop (00:00-00:12). Minor A then asks, "Let go of him. You have nothing better to do? He's 14. What are y'all doing?" Respondent tells Minor A to "get his ID then." Other voices can be heard in the background (00:12-00:19). The officers escort Minor B down the sidewalk. Minor A asks Respondent repeatedly for his name and "badge number" (00:19-00:44). At 00:36, Respondent throws his free hand up and says something like, "I don't have to."

Minor A repeatedly says, "You can't do that," to which Respondent replies, "Yes you can." Respondent adds, "You call his parents?" (00:44-1:04). As they argue, a female bystander says, "Have mercy on him" (00:51-00:52).

Minor A then reads Respondent's name and shield number aloud, accurately. Respondent attempts to get Minor B into the vehicle, including telling him to turn his body a certain way, saying, "It's easier that way." Minor B is standing perpendicular to Respondent, and Respondent has his right hand on Minor B's left shoulder. Minor A then reads Respondent's name and badge number aloud (1:04-1:08). As he does so, Respondent bends down and makes contact with Minor B, near Minor B's waist, with Respondent's left hand. Minor B yells, "Ah, he just punched me in my balls" (1:08). Respondent and his partner push Minor B into the car. He cries out for several more seconds. Minor A asks, "What are you doing? What is wrong with you?" After Minor B's remark, he enters the car and Respondent says, "That's it." Another bystander says, "Really great work, guys" (1:08-1:18).

At trial, both Minor A and Minor B identified the punch as taking place at the 1:08 mark of the video. Minor A admitted that the police vehicle door was between himself and Respondent and Minor B at that moment (Tr. 53-58, 78).

RESPONDENT testified that on August 12, 2016, he was assigned to patrol in the 79 Precinct. At approximately 2000 hours, he observed Minor B "spit alongside the bodega." Respondent exited his vehicle and attempted to speak to Minor B about this. He asked if Minor B could speak to him, but he continued walking away. Respondent followed Minor B, told him he was speaking to him because he had spat on the sidewalk, and asked if he had ID. Minor B eventually told him that he did not have ID. Respondent testified that he had not been watching the two young men prior to Minor B's spitting, and explained that he and his partner parked on the corner of [redacted] to look for moving violations (Tr. 110-13, 122).

According to Respondent, he asked Minor A if he could get identification but neither brother said that they could do so. When Respondent told Minor B that he would need to arrest him, Minor B "got his both arms sort of together and placed them in front of his chest" and "tried to resist in a way not to get arrested." Respondent and his partner attempted to pry Minor B's hands apart to handcuff him. As this was happening, Minor B was "sort of leaning on" and "grabbing onto" a metal spiked fence, which also made arresting him more difficult. Eventually, he and his partner were able to handcuff Minor B. Minor A was recording the incident on his smartphone and saying "you can't do that" and asking for Respondent's name and shield number. Respondent admitted that when he was first asked for his name and shield number, he did not give them because he was in the process of arresting Xavier (Tr. 113-15, 128).

Respondent then brought Minor B to the patrol vehicle, at which time Minor B was more compliant but still resisting somewhat. Respondent conceded that he did not resist to a point warranting a charge of resisting arrest. Respondent brought Minor B to the passenger door on the driver's side of the car. He and his partner attempted to get Minor B

into the car rear first, consistent with their experience that doing so is the easiest way and avoids having arrestees hit their knees on the partition. They attempted to swivel Minor B into the backseat but he would not do so. Respondent put his hands around Minor B's shoulder and "maybe around his waist" to get him into the vehicle. Respondent denied striking Minor B or punching him anywhere. He estimated that it took "maybe around five or ten minutes the most" from the time he approached Minor B to the moment when he managed to place him in the patrol vehicle, including "maybe a minute" to get Minor B to sit inside the vehicle. After Minor B was placed in the vehicle, Respondent transported him to the 79 Precinct stationhouse "pretty much right away" (Tr. 115-17, 124-27, 129).

During the arrest, Respondent heard Minor A call out his name. On direct examination, Respondent testified that he himself provided his name and shield number to Minor A after arresting Minor B. On cross, however, when asked whether he "eventually provided your name and shield" after placing Minor B in the vehicle, Respondent answered, "I know with - when the mother was at the stationhouse later on, the mother - I gave the shield to the mother, the parent" (Tr. 117, 126).

When asked by the Court if he had any conversation with Minor A after placing Minor B in the vehicle, Respondent answered, "I might have spoken to him. I just don't remember the exact words. I might have told him we're taking his younger brother to the stationhouse. Tell his mother to come to the station house with proper I.D. [for herself]. That's what we do with juveniles." Respondent maintained, upon being asked if he gave Minor A his name and shield, "My procedure is always that if someone asks for it, I give it to them. I generally, I would say, give who's ever asking for it my name and shield number, yes. . . . I would say I did. But am I 100 percent sure? I normally do, yes." (Tr. 117-18, 127-29).

After arriving at the precinct with Minor B, Respondent and his partner brought him to the front desk, filled out a pedigree form, and ultimately brought him into the juvenile room after learning that he was 15 years old. They filled out a juvenile report and a juvenile complaint report, and called his mother to come to the precinct to provide ID to bring Minor B home. While sitting at the desk, Minor B did not complain of injuries or reque medical attention but did complain "about the way we had treated him." When Minor B's mother arrived, he was sent home with her. Since then, Respondent has seen Minor B "a couple of times throughout the years" because his home is within Respondent's sector (Tr. 118-22).

Analysis

Specification No. 2

Respondent is charged with an improper use of force, namely, punching Minor B in the stomach and "groin" area, although this appears to be a euphemism for Minor B's genitals, as he indicated on the video and at trial that he was struck in the testicles or penis. The Department submitted the in-court witness testimony of Minor B and Minor A as well as the bystander video shot by Minor A.

The Court does not credit the testimony of Minor A and Minor B that Respondent punched Minor B at least two times. A careful review of the video does not corroborate their allegations. At the time of the alleged punches, Respondent had been trying to get Minor B into the police vehicle for at least ten seconds. He appears to use some pressure against Minor B's midsection to accomplish this but it was not a punch, much less two or three punches. Although Minor B exclaims, "Ah, he just punched me in my balls," he does not sound as if he is dazed, in pain, or straining to speak. It sounds more as if he is exaggerating for effect. Additionally, there appear to be two disinterested bystanders

heard on the video. While it is unknown whether they were present exactly at 1:08 on the video, neither voice, nor Minor A for that matter, echoed the claim that a police officer had just punched a youth in the testicles.

The Court does not credit Minor A's description of taking photographs, now lost, of Minor B's injuries. He did not send these photographs to his mother, as he did with the video, and could not even recall whether he told her about them. It is not credible that [redacted] gave his mother the video, knowing that she wanted evidence of what happened so she could show it to police officials, but then failed to give her the photographs. Both the video and the photos would constitute evidence, so it is not credible that he would give his mother one and not the other.

Minor B's description of his injuries was not corroborated by medical records. He testified that he was physically unable to urinate after being released from custody until the next morning, and it hurt while doing so. This pain during urination continued for one to two weeks afterward. Only then did Minor B receive medical attention from his regular family doctor. This doctor found blood in his urine, not visible to the naked eye, during lab testing.

The Department failed to provide medical records to corroborate this testimony. But more than that, the Court cannot credit Minor B's account. Here, the Department's witnesses testified that a 14- or 15-year-old boy was assaulted by the police in the stomach or groin, and then became physically unable to urinate, yet medical attention was not sought for one to two weeks later. In fact, Minor B allegedly was experiencing pain that whole time. The lack of medical attention and documentation support a conclusion that Minor B was exaggerating and no punch occurred.

In contrast, the Court credits Respondent's testimony, as supported by the video, that he was attempting to place Minor B in the vehicle. Certainly, Respondent used some physical force to place Minor B in the vehicle, as he was not cooperating. But there was a lack of evidence to demonstrate that Respondent punched him. As such, the Department failed to prove by a preponderance of the evidence that Respondent punched Minor B, and he is found Not Guilty of Specification No. 2.

Specification No. 1

Respondent is charged with failing to provide his name and shield number to Minor A when requested. Minor A testified that he asked Respondent for his name and shield number "at least 10 times" and the video corroborates this claim. Minor A also testified that Respondent eventually told him that he did not have to answer. This too is corroborated by the video, as Respondent appears to respond by saying something along the lines of "I don't have to," while throwing his hand up at Minor A as if to say "leave me alone." Minor B testified that he also heard the requests but did not recall hearing Respondent answer. Finally, Respondent could not testify with certainty that he had provided his name and shield number to Minor A at the scene of the arrest, although he believed that he provided the information to their mother at the precinct.

In the Court's view, the Department proved by a preponderance of the evidence that Respondent more likely than not failed to provide his name and shield number to Minor A as requested and required. While it is understandable that an officer cannot always answer questions in the middle of making an arrest, Respondent could have done so after he got Minor B in the vehicle. His equivocation on whether he actually gave the information to Minor A first he affirmed that he did, then he said he gave the information to the mother at the stationhouse, then he said it was his general practice to give that information when

asked, and then he said he might have spoken to Minor A after the arrest at the scene – makes the Court unable to credit his initial testimony that he gave his name and shield to Julian. As such, the Court finds him Guilty.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 10, 1995. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Advocate recommended that Respondent forfeit three vacation days as a penalty for the alleged misconduct in this case. That recommendation covered the excessive force allegation, of which Respondent has been found not guilty (Tr. 147-48).

The Advocate cited two cases, *Case No. 2014-11400* (Jan. 29, 2015) and *Case No. 83731/08* (Apr. 29, 2009), urging for a higher penalty. The 2014 case, however, involved additional misconduct, issuing a summons without legal authority. And the 2008 case involved failure to give name and shield that the tribunal found led to the complainant's inability to identify the perpetrating officer, leading to a not guilty finding on more serious misconduct.

Cases in which the penalty is based solely on a failure to give name and shield nevertheless have resulted in penalties of three vacation days. See, e.g., *Case No. 2012-8083* (May 23, 2014) (14-year police officer with no prior disciplinary record). In another case, *Case Nos. 2014-12405-06-07* (May 27, 2016), a 10-year detective with no prior discipline forfeited one vacation day for failing to provide his shield number.

Respondent has a prior disciplinary record in his nearly 24 years of service with he Department. He could have given Minor A his name and shield number after getting Minor B into the car. This is, however, a minor infraction in light of all the circumstances. As such, the Court recommends Respondent forfeit one vacation day as a penalty.

Respectfully,

David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED

SEP 14 2018

JAMES P. O'NEILL
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER EMILIO ORTEGA
TAX REGISTRY NO. 916969
DISCIPLINARY CASE NO. 2017-17036

Respondent was appointed to the Department on July 10, 1995. On his last three annual performance evaluations, he received a 3.5 overall rating of "Highly Competent/Competent" for 2015 and 2016, and a 4.0 rating of "Highly Competent" for 2014. He has received four medals for Excellent Police Duty and two medals for Meritorious Police Duty.

[redacted]

In 2002, Respondent negotiated a penalty of the forfeiture of 10 vacation days for failing to investigate a report of narcotics sales and to recover or voucher purported narcotics in his presence. In 2015, Respondent negotiated a penalty of the forfeiture of 7 vacation days for: (i) stopping an individual without sufficient legal authority; (ii) searching said individual's vehicle without sufficient legal authority; and (iii) wrongfully punching said individual in the face.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials