POLICE DEPARTMENT

February 7, 2020

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2018-18848
Police Officer Manuel Gutierrez	:	
Tax Registry No. 948589	:	
40 Precinct	:	

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

Before: Honorable Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Simone Manigo, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

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

To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Police Officer Manuel Gutierrez, on or about December 31, 2016, at approximately 1037 hours, while assigned to 040 PCT and on duty, in the vicinity of the Northwest corner of Cauldwell Avenue and East 149th Street, Bronx County, wrongfully used force, in that he used physical force against Person A, in that he hit Person A multiple times to the face, without police necessity.
   P.G. 221-02, Page 2, Prohibition 11 USE OF FORCE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on November 7, 2019, and December 16, 2019. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. CCRB presented a hearsay case. Respondent called Police Officer Isadore Rodriguez as a witness and 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 evidence in this matter, I find Respondent Not Guilty.

ANALYSIS

In this case it is undisputed that on December 31, 2016, Respondent was assigned to the 40 Precinct and was working a day tour. He was a field training officer and was working patrol with another field training officer, Isidore Rodriguez, to train Police Officer Soto. All three officers were in uniform in a marked van. At approximately 10:37 am, the officers stopped . Person A, who was using a cell phone while driving in the vicinity of Cauldwell Avenue and East 149th Street.

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The officers approached Mr. Nunez and asked for his license and registration, which he gave them. All three officers returned to their van. After several minutes, they returned to Person A. who was still in his car, and gave him a summons for the violation of driving while using a cell phone. At this point Person A got upset and begin cursing and yelling at the officers. The officers went back to their van but then returned. Person A was taken out of his car and ended up on the ground. Respondent hit Person A around the face area at least four times before Person A was handcuffed. Person A suffered lacerations to his face area and was transported to the hospital where he received three stitches.[1]

The issue in this case is whether the Respondent's strikes to Person A's face area were a justifiable use of force.

Person A did not appear to testify at trial despite CCRB's numerous attempts to contact him.[2] Person A also never gave a formal recorded statement to CCRB. CCRB offered into evidence a transcript from Person A's 50-h hearing which he gave as part of the lawsuit he brought arising out of this incident. (CCRB Ex. 1)

At his 50-h hearing held on November 28, 2017, Person A's account of what took place is similar to that of the Respondent and Officer Rodriguez up to the point where he is taken out of his car. In his 50-h hearing, Person A clearly acknowledges that he was using his cell phone while he was driving and that after he received the summons he cursed and yelled at the officers, "fucking ticket pirate." He states that the officers went back to their van after giving him the

[1] CCRB Ex. 6 is Person A's mugshot photo from the arrest. It shows bruising and blood in the area around his left eye. CCRB Ex. 5 are medical records documenting that Person A had a laceration in the area of his left eyebrow for which he received three sutures and was discharged.

[2] As Person A did not appear at trial to be cross-examined a list of his prior criminal cases was admitted into evidence as Respondent's Ex. A. [redacted].

ticket and "were ready to leave," but that after he yelled out one more profanity, the driver[3] of the van came back to Person A's car and opened the door and pulled him out. (CCRB Ex. 1 at 14-15, 17-18) Person A states that Respondent did a "maneuver" to trip him to the ground and then while Person A was face down, Respondent proceeded to punch Person A in the face. After Respondent threw Person A to the ground, the other two officers arrived and the male officer held Person A's hands while the female officer held his feet. At the same time, Respondent was punching him around the left eye area. (CCRB Ex. 1 at 19) Person A stated that he was punched before he was handcuffed. Person A also stated that he lost consciousness and was bleeding from his eye after the first punch. He was punched for thirty to sixty seconds. Later an ambulance came and took him to Lincoln Hospital where he received stitches. (CCRB Ex. 1 at 20-21) Person A stated that he was charged with disorderly conduct, resisting arrest and obstruction of governmental administration but that all charges were ultimately dismissed. (CCRB Ex. 1 at 25)

As part of their case, the CCRB also introduced video clips of portions of the incident. CCRB Ex. 2A-2B has two short clips taken from a camera across the street from where Respondent stopped Person A. The first clip (labeled "[redacted]") shows the initial approach by Respondent and another officer to the driver's side of Person A's car and then the officers' return to the van. The second clip (labeled "[redacted]") shows Respondent's and another officer's second approach to the driver's side of Person A's car and then again their return to the van, at which point a bus blocks the view of the scene until other police have arrived on the scene and Person A is under arrest. There is no audio portion of either video.

[3] Respondent acknowledges that he was the driver of the van.

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CCRB Ex. 3A-3E consists of five short video clips which were taken by Mr. [redacted] For the clip ending in "62," there is essentially nothing on it. In the video clip ending in "52," Person A states he had just been pulled over for listening to a voicemail on his phone and that he is waiting to see what happens with his constitutional rights. The clip cuts off and does not show the officers' initial encounter with Person A. Video clips ending in "51" and "76" are clips of Person A talking into his phone camera while he is waiting for the officers to return after they took his license and registration. In the two clips he states this is just another horror story with cops issuing malicious tickets. He states cops are out of control everywhere and he is just waiting for the cops to come back to see if they are following their patrol guide and their oaths.

The video clip ending in "24-40" has portions of the incident showing the officers giving Person A the ticket while he records their names and badge numbers. Beginning at 00:31, Person A is heard yelling, "fucking losers" and at 00:42 to 00:43 of the video, it appears at least his head is outside his car window. The video shows that the officers, who were back in their van, again approach Person A. At approximately 00:53, Respondent is at Person A's door and says what sounds like "get out of the car." There is no clear video of what happens next but Person A is saying, "you are assaulting me," while another male voice is saying, "put your hands behind your back," more than once during the approximate time frame of 1:15 to 1:33, at which point there is a sound that sounds like handcuffs closing.

CCRB also introduced a video into evidence (CCRB Ex. 4) which they represented was taken by a woman on a bus that was stopped across the street from the scene of the incident. The woman told CCRB she did not want to be involved in the case. (Tr. 30) The video shows Respondent making four hand strikes to the area of Person A's face. It also shows Officer Rodriguez in the area of Person A's torso and Officer Soto by his feet. Respondent makes the

first three hand strikes between 00:01 and 00:05 of the video. Officer Rodriguez appears to secure one arm from underneath Person A at approximately 00:07. At 00:13 Respondent delivers another hand strike and a handcuff is visible which is still not on Person A. Officer Rodriguez appears to continue grabbing at Person A's arms. At 00:30 the handcuff again appears to be visible and is still not on Person A. Officer Rodriguez continues to grab at Person A's arm and hand areas until he stands him up at 00:37, at which time Person A is handcuffed.

Respondent testified that he has been a member of service for close to ten years and has been, and still is, a field training officer since 2015. On the day of the incident he was training Officer Soto, who had just graduated from the academy. (Tr. 36) Respondent was driving the marked police van and was in uniform. Respondent described observing Person A using his cell phone while he was driving and then pulling Person A's car over by activating the police van's lights and sirens. The street where they stopped Person A had two lanes going eastbound and two going westbound, in addition to a parking lane. There was a bus stop at the location and the area was residential. (Tr. 38-41)

Respondent testified that he approached Person A on his car's driver's side while Officers Rodriguez and Soto approached the passenger side. Respondent asked Person A for his documents and Person A complied. All three officers returned to the police van to write up the summons. They returned to Person A about five minutes later. Respondent and Officer Soto were on the driver's side of the car and Officer Rodriguez was on the passenger side. Officer Soto handed Person A the ticket and Person A became "irate." (Tr. 40-41) Respondent testified that Person A was screaming and cursing but the officers all went back to the van and did not intend to do anything about the yelling. Respondent then saw Person A

with his head and half his body, from his torso up, out his car window, still cursing and now causing a "big scene." At this point Respondent decided to go back to Person A's car to issue Person A a citation for disorderly conduct. (Tr. 42-43)

Respondent went to Person A and asked him to step out of his car, which Person A did. Respondent attempted to place Person A's hands on the roof of his car but when Respondent went to grab Person A's hand, he spun around quickly and reached back into his car. Person A's whole body went into the car and Respondent was afraid he might be reaching for a firearm. (Tr. 44-45) Respondent, acting by himself, grabbed Person A and while taking him out of the car lost his balance and fell on top of Person A. While they were now both on the ground in the street about a foot or two into a lane of traffic with moving vehicles, Respondent told Person A more than once to give him hands. (Tr. 46, 69)

Officer Rodriguez, who had come around to the driver's side, was trying to handcuff Person A. Officer Soto was holding Person A in the leg area. Officer Rodriguez was able to get ahold of one of Person A's hands but he and Respondent could not release the other hand, which was under Person A's body. Respondent testified that at this point he decided to hit Person A "two or three" times to get him to release his second hand. Respondent hit Person A in the face because he, "had to get the situation under control," as it was dangerous with the cars passing by and the people starting to gather around the area. Person A was screaming at the time Respondent was hitting him. The punches caused Person A to bleed after what Respondent described as the third punch. After several strikes, Person A did release his hand and was handcuffed. Respondent initially denied he held the left side of Person A's face against the concrete but acknowledged after viewing the video (CCRB Ex. 4) that he did place his hand on Person A's head while it was against the concrete. He also testified after viewing the video

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that he hit Person A in the face four times. Respondent testified that no strikes were thrown after Person A was handcuffed and that Person A never lost consciousness. (Tr. 47-49, 76, 78, 80)

Respondent and Officer Soto called for an ambulance to meet them at the command as Person A had a laceration. Person A was taken from the 40 precinct to the hospital. (Tr. 49- 50)

Officer Rodriguez testified similarly to Respondent concerning the events leading up to the car stop of Person A. (Tr. 101-03) After the stop, Officer Rodriguez approached Person A's car on the passenger side while Respondent and Officer Soto approached the driver's side. Officer Rodriguez could not hear what was said on the driver's side. He was just observing the reachable areas inside the car. He and his partners went back to their van where Officer Soto prepared the summons. After about three to five minutes, all three officers returned to their previous positions outside Person A's car. Officer Rodriguez described Person A as getting "very aggressive" and screaming at the officers when he received the ticket. The three officers returned to their van. (Tr. 104-07)

Officer Rodriguez testified that when the officers were back at their van, Person A's screaming and shouting of profanities got even more excessive and his upper body was coming out of the car. Person A was attracting a lot of attention from people at the bus stop and cars were starting to slow down. The officers decided to issue a disorderly conduct summons and approached Person A's car again. Officer Rodriguez went to the passenger side of the car. While he was there he noticed there was a struggle between Respondent and Person A, so he ran to the driver's side of the car. (Tr. 107-10)

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When Officer Rodriguez got to the driver's side of the car, he saw Person A try to get back into the car by making a quick lunging motion inside it. Officer Rodriguez helped Respondent and Officer Soto grab Person A. There was a struggle and all three officers and Person A ended up on the ground on the side of the car near traffic. Officer Rodriguez landed on top of Person A. Officer Rodriguez called an "85" for assistance from other officers. While on the ground, Person A was not giving the officers his hands so they could handcuff him. He had his hands underneath his body and was squirming around. Officer Rodriguez was near Person A's torso and head area. He was trying to bring Person A's arms behind him but was not able to do it. Officer Rodriguez saw Respondent, who was in front of him, strike at Person A [redacted] at least twice to a portion of his body somewhere above his shoulders while Officer Rodriguez was still trying to get control of Person A's hands. Eventually he was able to handcuff Person A and then he picked him up and walked him to the van. An ambulance was called as Person A had a laceration to his face. The ambulance took Person A directly to the hospital. (Tr. 110-15, 118, 143, 146, 155)

Under Patrol Guide ("P.G.") Section 221-02, page 2 (11), a uniformed member of service shall not apply any more force than necessary to gain control. The member of service is also directed to comply with P.G. § 221-01 Force Guidelines. Under those guidelines, force may be used, among other purposes, when it is reasonable to place a person in custody. The force in all situations must be reasonable under the circumstances. One factor to consider in determining reasonableness is whether the subject is actively resisting custody. Active resistance is defined in PG 221-02, page 1, as including physically evasive movements to defeat a member of service's attempt at control.

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As an initial matter in examining the evidence in this case, it is true that, as counsel for the CCRB has pointed out, Officer Rodriguez and Respondent provide slightly different versions of how Person A was taken out of the car and whether the ambulance went to the precinct or the hospital first. However, I find that these to be minor discrepancies in testimony, which is not unexpected concerning an incident that happened about three years ago. Moreover, the charge concerns Respondent's actions once Person A is on the ground. For that portion of the incident, there is both video and testimonial evidence. I do not find any discrepancies in testimony concerning the events leading up to the point Person A is on the ground or how he was taken to the hospital to undermine either witness's credibility. Both Respondent and Officer Rodriguez testified in forthright manners on both direct and cross examination.

In this case there is no dispute that Person A was not struck after he was handcuffed. Person A himself stated this in his 50-h hearing and on the video clips in evidence no strikes can be seen after it appears the handcuffs have been secured. Respondent also testified that he did not strike Person A after he was handcuffed.

The issue, therefore, is whether the use of the hand strikes by Respondent was a justifiable use of force to place Person A in custody. The Respondent testified that he used the hand strikes to Person A's face area as a tactic to get him to release his hands from underneath his body so that the arrest could be effectuated by placing the handcuffs on Person A. It is clear from CCRB 4 that Officer Rodriguez is struggling to place handcuffs on Person A for at least 30 seconds. Officer Rodriguez can be seen grabbing at Person A's arms and is unable to secure them even with the assistance of Respondent and Officer Soto holding Person A. Person A's actions in failing to release his arms to be handcuffed meets the definition of active

resistance. The question then becomes whether the four hand strikes were a reasonable amount of force to be used to overcome that resistance. I find that they were.

As is clear in the audio portion of CCRB Ex 3, clip ending in "24-40," Respondent attempted to use verbal commands to gain compliance, but Person A was not following the Respondent's directives to put his hands behind his back. The area where the struggle ensued was in an active lane of traffic. As verbal commands were not working, the Respondent was justified in using the four quick strikes to Person A to get him to release his hands in order to effectuate the arrest as quickly as possible so that both Person A and the officers could get out of the dangerous position they were in. Respondent's testimony concerning his purpose in using the strikes is supported by the fact that Respondent used the force only before the objective of handcuffing Person A was completed. While it is unfortunate that Person A received a laceration to his head, the situation could have become much more disastrous for all four persons struggling in a lane of traffic for a prolonged period of time.

As I find Respondent's use of force to be a reasonable use of force to place a resisting subject in custody, I find Respondent Not Guilty.

APPROVED

APR 15 2020

DERMOT SHEA
POLICE COMMISSIONER

Respectfully submitted,

Nancy R. Ryan
Assistant Deputy Commissioner Trials