February 12, 2024

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Atisha Samuel**
Tax Registry No. 962772
Midtown North
Disciplinary Case No. 2022-24578

Police Officer Jason Brown
Tax Registry No. 950110
Midtown North
Disciplinary Case No. 2022-24576

The above named members of the service appeared before Assistant Deputy Commissioner Anne E. Stone on October 10, 2023, charged with the following:

DISCIPLINARY CASE NO. 2022-24578

1. Police Officer Atisha Samuel, on or about January 2, 2020, at approximately 2100 hours, while assigned to Midtown North and on duty, in the vicinity of 30 Rockefeller Plaza, New York County, wrongfully used force, in that she used physical force against Angeles Canastuj-Barreno and brought her to the ground, without police necessity.

P.G. 221-02, Page 2, Prohibition 11 **USE OF FORCE**

2. Police Officer Atisha Samuel, on or about January 2, 2020, at approximately 2100 hours, while assigned to Midtown North and on duty, in the vicinity of 30 Rockefeller Plaza, New York County, abused her authority as a member of the New York City Police Department, in that she failed to obtain language interpretation services for Angeles Canastuj-Barreno, without police necessity.

P.G. 203-10, Page 1, Paragraph 5 **PUBLIC CONTACT –**
(now encompassed by A.G. 304-06) **PROHIBITED CONDUCT**

P.G. 212-90 **GUIDELINES FOR INTERACTION WITH LIMITED ENGLISH PROFICIENT PERSONS**

DISCIPLINARY CASE NO. 2022-24576

1. Police Officer Jason Brown, on or about January 2, 2020, at approximately 2100 hours, while assigned to Midtown North and on duty, in the vicinity of 75 Rockefeller Plaza, New York County, wrongfully used force, in that he pushed Matthew Garcia without police necessity.

P.G. 221-02, Page 2, Prohibition 11 — **USE OF FORCE**

2. Police Officer Jason Brown, on or about January 2, 2020, at approximately 2100 hours, while assigned to Midtown North and on duty, in the vicinity of 75 Rockefeller Plaza, New York County, was discourteous to Matthew Garcia by saying in sum and substance, "You want to come at me again asshole?", "Come at me again you fucking asshole," without police necessity.

P.G. 203-09, Page 1, Paragraph 2 (now encompassed by A.G. 304-06) — **PUBLIC CONTACT – PROHIBITED CONDUCT**

P.G. 200-02 — **MISSION, VISION AND VALUES OF THE NYPD**

3. Police Officer Jason Brown, on or about January 2, 2020, at approximately 2100 hours, while assigned to Midtown North and on duty, in the vicinity of 75 Rockefeller Plaza, New York County, abused his authority as a member of the New York City Police Department, in that he threatened Matthew Garcia with the use of force without police necessity.

P.G. 203-10, Page 1, Paragraph 5 (now encompassed by A.G. 304-06) — **PUBLIC CONTACT – PROHIBITED CONDUCT**

In a Memorandum dated December 14, 2023, Assistant Deputy Commissioner Stone found Police Officer Atisha Samuel not guilty of all Specifications in Disciplinary Case No. 2022-24578, and Police Officer Jason Brown, not guilty of all Specifications in Disciplinary Case No. 2022-24576.

I have reviewed and considered the entire record in this matter, and approve of Assistant Deputy Commissioner Stone's findings and recommended penalty for Police Officer Samuel. However, concerning Police Officer Brown, I disapprove of the not guilty finding of Specification No. 2 only, and determined that the misconduct merits discipline.

After careful consideration of the video evidence presented at trial, the circumstances surrounding Police Officer Brown's use of force, and the Department's Disciplinary System Penalty Guidelines, I have determined that a penalty is warranted. Therefore, I direct that Police Officer Brown be found guilty of Specification No. 2 in Disciplinary Case No. 2022-24576 and be penalized five (5) vacation days, as a disciplinary penalty.

Edward A. Caban
Police Commissioner

POLICE DEPARTMENT

December 14, 2023

In the Matter of the Charges and Specifications - against –	:	
Police Officer Atisha Samuel Tax Registry No. 962772 Midtown North	:	Case No. 2022-24578
Police Officer Jason Brown Tax Registry No. 950110 Midtown North	:	Case No. 2022-24576

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

Before: Honorable Anne E. Stone
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Nishat Tabassum Esq.
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100 Church Street, 10th Floor
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For Respondents: Craig Hayes, Esq.
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To:
HONORABLE EDWARD A. CABAN
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2022-24578

1. Police Officer Atisha Samuel, on or about January 2, 2020, at approximately 2100 hours, while assigned to Midtown North and on duty, in the vicinity of 30 Rockefeller Plaza, New York County, wrongfully used force, in that she used physical force against the Vendor[1] and brought her to the ground, without police necessity.

   P.G. 221-02, Page 2, Prohibition 11 — USE OF FORCE

2. Police Officer Atisha Samuel, on or about January 2, 2020, at approximately 2100 hours, while assigned to Midtown North and on duty, in the vicinity of 30 Rockefeller Plaza, New York County, abused her authority as a member of the New York City Police Department, in that she failed to obtain language interpretation services for the Vendor, without police necessity.

   P.G. 203-10, Page 1, Paragraph 5 (now encompassed by A.G. 304-06) — PUBLIC CONTACT -- PROHIBITED CONDUCT

   P.G. 212-90 — GUIDELINES FOR INTERACTION WITH LIMITED ENGLISH PROFICIENCT PERSONS

Disciplinary Case No. 2022-24576

1. Police Officer Jason Brown, on or about January 2, 2020, at approximately 2100 hours, while assigned to Midtown North and on duty, in the vicinity of 75 Rockefeller Plaza, New York County, wrongfully used force, in that he pushed Matthew Garcia without police necessity.

   P.G. 221-02, Page 2, Prohibition 11 — USE OF FORCE

2. Police Officer Jason Brown, on or about January 2, 2020, at approximately 2100 hours, while assigned to Midtown North and on duty, in the vicinity of 75 Rockefeller Plaza, New York County, was discourteous to Matthew Garcia by saying in sum and substance, "You want to come at me again asshole?," "Come at me again you fucking asshole," without police necessity.

   P.G. 203-09, Page 1, Paragraph 2 (now encompassed by A.G. 304-06) — PUBLIC CONTACT -- PROHIBITED CONDUCT

   P.G. 200-02 — MISSION, VISION AND VALUES OF THE NYPD

[1] The Vendor is a minor whose identity is known to the Tribunal.

3. Police Officer Jason Brown, on or about January 2, 2020, at approximately 2100 hours, while assigned to Midtown North and on duty, in the vicinity of 75 Rockefeller Plaza, New York County, abused his authority as a member of the New York City Police Department in that he threatened Matthew Garcia with the use of force without police necessity.

P.G. 203-10, Page 1, Paragraph 5 (now encompassed by A.G. 304-06)	PUBLIC CONTACT -- PROHIBITED CONDUCT

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on October 10, 2023. Respondents Samuel and Brown, through their counsel, each entered a plea of Not Guilty to the charged misconduct. CCRB-APU called Matthew Garcia and Sarah Sklaw as witnesses and introduced into evidence video footage of the events; the Vendor, a twelve year-old undocumented immigrant, and her father did not appear before the Tribunal. Respondents testified on their own behalves. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all of the evidence in this matter, I find both Respondents Not Guilty of all charges and specifications.

ANALYSIS

The following is a summary of the evidence presented at trial. On January 2, 2020, both Respondents were police officers in the 18 Precinct, commonly referred to as Midtown North. Respondent Samuel was working at the Rockefeller Christmas Tree Detail and Respondent Brown was assigned to the House of Worship Auto ("HOWA"). (Tr. 45, 75) Officers assigned to the Rockefeller Christmas Tree Detail are instructed that unlicensed vending[2] in the vicinity of the tree "can[not] [be] allow[ed]." (Tr. 45)

[2] NYC Administrative Code § 20-453 states, "It shall be unlawful for any individual to act as a general vendor without having first obtained a license."

At around 2100 hours, Respondent Samuel observed the Vendor selling light-up balloons, without a general vendor's license, near the Christmas tree. She approached the Vendor on two occasions, each time explaining that she couldn't sell balloons in the area without a license and directing her to leave. Each time the Vendor left briefly, and then returned. The third time Respondent Samuel saw the Vendor return, she decided to issue a summons on the scene. She asked the Vendor for identification, which she said she did not have. Respondent Samuel informed the Vendor that she was being placed into custody, and grabbed her arm. At some point while taking the Vendor into custody, Respondent Samuel swept her foot under the Vendor's foot, bringing her to the ground. She immediately stood back up and began pulling away from Respondent Samuel and Respondent Samuel brought her to the ground a second time. (Tr. 45-50)

Respondent Samuel got the Vendor to her feet and walked her over to her supervisor, Sergeant Kalogeropoulos. She informed him that the Vendor spoke primarily Spanish, and he called another officer, Police Officer Ricardo, to the scene to provide translation services. Officer Ricardo and his partner, Respondent Brown, arrived a little more than ten minutes later, five minutes after the Vendor's father arrived. (Tr. 54-55, CCRB Ex. 2 at 11:51, 16:38) The Vendor's father was informed in Spanish that his daughter was going to be transported to the precinct. The Vendor grabbed onto her father; he did not move or cooperate with the officers and did not tell his daughter to go with them. The father was eventually arrested for Obstructing Governmental Administration.[3] (Tr. 56)

Matthew Garcia was recording with his cell phone as Officer Ricardo and Respondent Brown were placing the Vendor into an RMP. Initially, Mr. Garcia was recording from about

[3] The arrest of the Vendor's father is not an issue in this case.

fifteen feet away, but at some point, he came up behind Respondent Brown, who pushed him back into a barricade. (Tr. 28, 78-79) Mr. Garcia got immediately to his feet and Respondent Brown retorted, "You wanna come at me, asshole?" (CCRB Ex. 3A at 00:09; CCRB Ex. 4A at 00:07-18)

Respondent Samuel – Case No. 2022-24578

Respondent Samuel is accused of wrongfully using force against the Vendor by bringing her to the ground, without police necessity, and failing to obtain interpretation services. Neither the Vendor nor her father appeared to testify, and no CCRB interviews with them were presented to the Tribunal[4]. With regard to Specification 1, the sole evidence introduced by CCRB-APU was surveillance footage from the night of the incident, which appears to be low-resolution and possibly internally compressed, which is not unusual since security footage tends to be high in volume and must be stored for set periods of time. The recording was also taken from quite a distance, which is not ideal and makes it extremely difficult to discern exactly what is transpiring. The images are blurry, the color is muted, and it is hard to make out individuals. However, because of the blinking lights of the balloons held by the Vendor, she is identifiable and it is possible to pinpoint the Vendor and Respondent. In the video, Respondent Samuel can be seen holding the Vendor her by the arm, before Respondent Samuel brought the Vendor to the ground the first time. The Vendor immediately stood back up and began pulling away from

[4] CCRB-APU offered into evidence a series of e-mails with attachments depicting screen-shots of handwritten notes as well as text and "WhatsApp" messages from the night of the occurrence. These were introduced through the testimony of Sarah Sklaw, who was working at New Sanctuary Coalition, an organization that provided support and services to immigrant families at the time of the occurrence. Ms. Sklaw was the author of the notes and a participant in the messages. Neither the Vendor nor her father were parties to the text and "WhatsApp" messages. The messages were between Ms. Sklaw and a colleague from New Sanctuary Coalition, and Ms. Sklaw and her own father, discussing that she had been reached out to by the Vendor's parents about an incident that occurred at the tree resulting in their daughter being taken into custody. These double hearsay messages were of very limited probative value other than to show that the Vendor's parents reached out to this organization close in time to the incident. (CCRB Ex.5)

Respondent Samuel, again in a circular motion, and Respondent Samuel brought her to the ground a second time. A group of people can be seen, comprised of both visitors to the tree and some people who seemed to be watching the events with the Vendor. (CCRB Exs. 1,1A)

Also introduced into evidence was a twenty-nine-minute cellphone video, recorded by an observer on the scene. It begins shortly after the Vendor is taken into custody. The video shows the Vendor sitting on a bench, intermittently crying and wiping her face with her hands, while Respondent Samuel and her sergeant are standing a couple of feet in front of her. The individual recording the video is heard repeatedly asking the Vendor, in English, whether she needs medical help. At first, the Vendor can be seen shaking her head in the negative, then she nods yes, when the individual states in sum and substance: "Do you complain of your leg, yes? Yes?" (CCRB Ex. 2 at 00:29-00:32) and continues with the individual calling 911 for an ambulance. (CCRB Ex. 2 at 00:30-01:12) The video shows a conversation between the individual recording and a woman who claims she saw Respondent Samuel throw the Vendor to the ground. (CCRB Ex. 2 at 04:30-06:02) Additionally, the Vendor also states, in English "That's not my mom...," when two women approach the scene and Respondent inquires about their identity. (CCRB Ex. 2 at 14:52-14:55)

Respondent Samuel recounted the events of that night in a calm and deliberate fashion, and I credit her testimony. She testified that she has worked the Rockefeller Center Christmas Tree detail "many" times, and that one of the major concerns in the "chaotic" atmosphere is illegal vending. She recalled officers assigned to the Rockefeller Christmas Tree Detail are instructed that unlicensed vending in the vicinity of the tree "can[not] [be] allow[ed]." (Tr. 45) She explained that vendors who have a license are easily identifiable by a badge they wear around their necks. When confronted with an unlicensed vendor, Respondent Samuel's normal

practice is to give the person a warning, and if they continue selling after that, to issue them a summons. (Tr. 45-47)

With respect to the incident in question, Respondent described giving two warnings to a female who she testified she believed was in her twenties. She did confirm that the Vendor was physically smaller than her; Respondent Samuel described herself, at the time of the incident, as 5 feet, 3 inches tall and weighing approximately 135 pounds. Respondent Samuel detailed that when she asked the Vendor for ID after seeing her selling balloons a third time, the Vendor responded, in accented English, "Why are you bothering me? Why are you here?" After deciding to detain the Vendor when she did not present ID, Respondent Samuel recalled that she began "pulling away in a circular motion" while still holding onto the balloons. According to Respondent Samuel, the Vendor continued to pull away despite being told to "stop resisting" and a crowd formed, "agitating the situation." Concerned about the crowd and about the possibility of the Vendor fleeing and "to stop everything from going any further," she "took [her] foot and swept it under [the Vendor's] foot to gain control of her," a tactical move she learned in the Police Academy. This maneuver brought the Vendor to the ground; Respondent Samuel opted not to handcuff her at that point because she just wanted to get away from the crowd that "was still yelling and coming closer." Instead, she brought the Vendor immediately to Sergeant Kalogeropoulos. (Tr. 50-52)

Respondent Samuel recalled that she told Sergeant Kalogeropoulos that the Vendor "speaks Spanish" and that although she understood English well enough to leave the area when directed to and to speak some words in English, "I didn't think she was fully fluent." That is when the sergeant called Officer Ricardo to come to the scene to act as an interpreter. While waiting for the Spanish-speaking officer to arrive, neither Respondent Samuel nor Sergeant

Kalogeropoulos asked the Vendor any questions. When Officer Ricardo arrived he was able to communicate with the Vendor, and contact her father to come to the location. Officer Ricardo then explained to both the Vendor and her father that she was to be transported to the Precinct. Respondent Samuel went on to describe the Vendor's behavior when it was time for the officers to escort her to the RMP: "As we were taking -- we were going to take the daughter into the RMP, the daughter latches onto the father, not trying to let go and comply us with us..." She stated that the Vendor's father was instructed in Spanish that "the daughter has to come with us, and [that he needed] to release her and let her go. Trying to calm the situation down...We had to separate them from each other . . ." (Tr. 53-56)

Specification One: Excessive Force

Respondent Samuel stands charged with wrongfully using force against the Vendor without police necessity. Patrol Guide 221-02 sets forth that officers should "apply no more than the reasonable force necessary to gain control." In addition Patrol Guide 221-01, sets forth several factors to be considered when determining whether a use of force is reasonable, including actions taken by the subject, duration of the action, whether the subject is actively resisting custody, whether the subject is attempting to evade arrest by flight, number of subjects in comparison to the number of MOS, as well as size, age, and condition of the subject in comparison to the MOS.

Respondent Samuel admitted that she brought the Vendor to the ground twice while trying to take her into custody. Her testimony about the interaction was not contradicted by anything depicted in CCRB's Exhibit 1 and its sub-clip, 1A. In those videos, Respondent Samuel, who was by herself, can be seen holding onto the Vendor and both of them fall to the ground. The Vendor immediately gets back to her feet and can then be seen pulling away from

Respondent Samuel; they then turn in a circle. In order to stop the motion, Respondent Samuel used a technique she learned in the Police Academy to bring the Vendor to the ground by sweeping her feet out from under her.

The evidentiary record in this case is particularly scant and devoid of independent evidence supporting CCRB's force charge. The Vendor did not testify in the proceedings and the sole evidence offered by CCRB-APU in support of Specification 1 consisted of poor quality, grainy surveillance video (CCRB Exs. 1 and 1A), which did not contradict, and in some respects supported Respondent Samuel's account of what happened. Additionally, CCRB Exhibits 3 and 4 show the Vendor's lack of cooperation when being escorted to the RMP, which lends credence to Respondent Samuel's description of her as uncooperative. Ultimately, the burden lies with CCRB to establish the misconduct charged by a preponderance of the credible evidence. While it is undisputed that force was used against the Vendor, there is insufficient evidence to make a determination about whether that force was unreasonable.

Accordingly, I find that the CCRB-APU did not establish that Respondent Samuel wrongfully used force against the vendor, and therefore find her Not Guilty of Specification 1.

Specification 2: Failure to Obtain Interpretive Services

Respondent Samuel has also been charged with failing to obtain language interpretation services for the Vendor. Patrol Guide 212-90 requires members of the Department who encounter a person who has limited proficiency in English to "determine if a bilingual member of the service is readily available (on scene, on duty within command, etc.) to interpret and whether their use is appropriate."

Respondent Samuel testified that although the Vendor spoke in accented English, she appeared to understand enough to know that she was being told she could not sell balloons in

that area, as evidenced by the Vendor leaving briefly and returning twice. Respondent Samuel recounted that the Vendor asked and answered questions in English when confronted about her activities, including asking, in sum and substance, "why are you bothering me?" Indeed, at the beginning of CCRB's Exhibit 2, the Vendor can be seen responding to questions posed to her in English by nodding or shaking her head. (CCRB Ex. 2 at 00:00-00:30) Additionally, Complainant also is heard at one point in that video stating, in English "That's not my mom..." (CCRB Ex. 2 at 14:52-14:55)

In spite of this, Respondent Samuel relayed to Sergeant Kalogeropoulos that the Vendor was not "fully fluent" in English. (Tr. 53) He promptly ordered a Spanish-speaking officer, who was on duty within the confines of Manhattan North, to come to the scene to assist with a more precise translation. The additional data section of Patrol Guide 212-90 advises: A person who is considered [Limited English Proficient] may require interpretation or translation services in one situation, but may not require those services in a different situation... If doubt exists regarding whether a person requires language assistance services...the person should be considered [Limited English Proficient] and this procedure complied with.

The Vendor did not testify before the Tribunal, nor was a CCRB interview presented. Indeed, no evidence was offered to show that the Vendor's understanding of English was so limited that she did not understand the instructions given by Respondent Samuel when they first encountered each other, which would have required Respondent Samuel to obtain interpretation services earlier.

Based upon the foregoing, I find that the CCRB-APU has failed to prove by a preponderance of the evidence that Respondent Samuel failed to obtain language interpretation services and therefore I find her Not Guilty of Specification 2.

Respondent Brown – Case No. 2022-24576

Respondent Brown is charged with wrongfully using force without police necessity, discourtesy and threatening to use force without police necessity. These charges all relate to Respondent Brown's interaction with Matthew Garcia, which occurred approximately a half an hour after Respondent Samuel's detention of the Vendor.

Mr. Garcia testified that he is a licensed vendor who takes photographs of tourists by the Rockefeller Christmas tree. He observed the Vendor after she had been detained, when she was being taken to the RMP and explained, "...the way the cops was on the girl, it wasn't like -- like, the way the force was, it wasn't right. And I started recording." Mr. Garcia went on to describe his interaction with Respondent Brown: "I started recording, and the cop picked me up and threw me. And after I got up, he said come at me again." He denied trying to "go for" or "trying to harm" Respondent Brown. (Tr. 22-24) On cross-examination, Mr. Garcia described being about 15 feet away from where Respondent Brown and Officer Ricardo were attempting to place the Vendor into the RMP and recording the interaction with his cellphone. He observed the Vendor "fighting" with the officers who were "grabbing her by the throat". (Tr. 23-26) Mr. Garcia acknowledged running at the officers, and getting within one foot of Respondent Brown, but claimed that he did so because he was acting as a "good citizen" by recording the incident, "[b]ecause I felt like they were just doing too much." (Tr. 28-29)

Although he testified that he went to the hospital that night for injuries to his ankle and his back, no medical records were entered in evidence. (Tr. 23) Mr. Garcia stated that he turned over the cellphone video of the incident he recorded to CCRB, although it apparently was not produced in discovery, nor was it presented as evidence in the hearing. (Tr. 25-27)

CCRB entered into evidence the full body-worn camera recordings, as well as clips, of both Respondent Brown and Police Officer Ricardo. (CCRB Exs. 3, 3A, 4 and 4A). In the footage from Respondent Brown's body-worn camera, he and Officer Ricardo can be seen having some difficulty walking the Vendor to the RMP, their progress apparently hindered because of her lack of cooperation. (CCRB Ex. 3 at 02:15-03:07) While they are standing near the vehicle, Mr. Garcia can be heard saying, "14 years-old." Respondent Brown turns and Mr. Garcia is standing behind him, closer than arms-length from him. Respondent Brown yells, "get out of the street." He then steps towards and pushes Mr. Garcia, on the chest, causing him to fall into a barricade. Mr. Garcia immediately gets back to his feet and starts moving towards Respondent Brown. Respondent Brown yells, "You wanna come at me, asshole? Get out of the street." He then walks away towards the RMP. Unidentified members of the crowd are heard saying, "What are you doing?" and "You can't push him like that!" Respondent Brown, who has turned back to the RMP, can be heard saying "Don't tell me the fucking law, asshole." (CCRB Ex. 3A, 4A)

At trial, Respondent Brown recounted the events of the night in question, starting with his arrival at the location with Officer Ricardo, who provided interpretation services. (Tr. 76) Respondent Brown recalled bringing the Vendor to the RMP, and that as he was trying to get her inside "something from behind came around my right side and made contact with me." (Tr.78) He went on to describe in further detail the interaction with Mr. Garcia: "No, it was bang, bang. I felt like an arm come flying around me from my right side, where my gun is…I turned around and he was against me… I pushed him back to create distance and he went back…I didn't know what his intention was or what he was trying to do, whether he was trying to interfere with the girl." (Tr.78-79) Respondent Brown acknowledged having previously been in situations where

members of the public were recording an arrest, but could not recall another in which an individual came up behind him and "interfered." The push was the sole physical contact he made with Mr. Garcia (Tr. 80)

Respondent Brown then recounted that in response to seeing Mr. Garcia jump up and start coming towards him, he yelled "come at me again, asshole." (Tr. 81) When asked why he chose to phrase it that way he explained, "In my mind, it was the best method at that time to de-escalate it. We still had to get -- the kid was still not in the back of the car. The doors were open. The crowd from when it originally started had got significantly bigger. So as far as to avoid contact again and to have them disperse, that was the best method." (Tr. 82) He denied on cross-examination that he was trying to instigate a fight with Mr. Garcia in making this comment. Respondent Brown stated that there was no further force used against Mr. Garcia, who was not arrested and left the location shortly thereafter. (Tr. 82, 89)

Specification 1: Excessive Force (Push)

Respondent Brown stands charged with wrongfully pushing Mr. Matthew Garcia without police necessity. While Patrol Guide 221-02 directs officers that any application of force must be reasonable under the circumstances, it also requires members of the NYPD to take necessary action to protect life and personal safety of all persons present, which in this case included the Vendor and Officer Ricardo. It is undisputed that Respondent Brown used force against Mr. Garcia by pushing him on the chest, and that as a result of that push he fell towards the ground, landing on a barricade. The question for this Tribunal is whether there was a police necessity that required the use of force.

Respondent Brown testified credibly about a hectic situation. He and Officer Ricardo were attempting to place an uncooperative minor into an RMP, there were citizens observing the

situation, who were yelling at the officers, and some of them, like Mr. Garcia were recording. Rather than staying at a safe distance, Mr. Garcia rushed towards Respondent Brown, coming up behind him and getting within an arm's length. Respondent Brown responded quickly by turning and pushing Mr. Garcia once, in order to "create distance." While Mr. Garcia had every right to record the arrest of the Vendor, and indeed, to verbally object to it, he did not have the right to physically interfere[5]. I do not believe that Mr. Garcia was simply trying to get a closer view for his recording. His actions as described by himself and Respondent Brown could reasonably be perceived as posing a danger to the safety of the officers and the Vendor, as illustrated by the body-worn camera recordings of both officers.

The Tribunal finds that Respondent Brown had a rational response to actions which he reasonably perceived as threatening, in large part because of the very close proximity of Mr. Garcia to Respondent Brown in close vicinity to his firearm. His response was limited to a single push backwards that immediately neutralized that threat by creating distance between Respondent Brown, the minor Vendor, and Mr. Garcia. The limited extent of the force supports a finding that it was not a punitive response to an individual recording a police encounter. For the foregoing reasons, I find Respondent Brown Not Guilty of Specification 1.

Specifications 2 and 3: Discourtesy and Threat of Force

Respondent Brown is charged with being discourteous to Matthew Garcia as well as wrongfully threatening him with force. It is undisputed that, as charged, Respondent Brown did say to Mr. Garcia "You wanna come at me, asshole?" Respondent Brown has admitted to making this statement to Mr. Garcia, and the body-worn camera recordings capture the comment.

[5] The Tribunal did not have the opportunity to review what it considers an important piece of evidence, the cellphone video of the incident recorded by Mr. Garcia, which may have shed light on his intent when approaching Respondent Brown.

The Tribunal notes that CCRB-APU also charged Respondent Brown with making a second, specific statement to Mr. Garcia, "Come at me again, you fucking asshole;" and as proof, during summation, directed the Tribunal to CCRB Exhibit 3 at 03:33. (Tr. 115) After careful review of the entire recording, paying particular attention to that specific clip, it is clear that Respondent Brown did not make the statement as charged. He did state, "Don't tell me the fucking law, asshole." This statement, while unprofessional and discourteous, is materially different from, and not interchangeable with the language that was charged. Additionally, there is no evidence regarding who the statement was directed to, as there were multiple bystanders on the scene, many of whom were expressing disagreement with the actions of the officers. Respondent Brown was not asked about the second comment, and therefore had no opportunity to provide context or explanation about his behavior.

While the Tribunal in an administrative proceeding may sua sponte amend the pleadings, they may only do so when the amendment would not prejudice the respondent; "[N]o person may lose substantial rights because of wrongdoing shown by the evidence, but not charged." *Dept. of Correction v. Jenkins*, OATH Index No. 3070/09 (Dec. 16, 2009), quoting *Murray v. Murphy*, 24 N.Y.2d 150, 157 (1969); *see Dept. of Finance v. Smyth,* OATH Index No. 1285/11 at 3 (Mar. 9, 2011). Thus, the Tribunal is limited to consideration of the statement made to Matthew Garcia "You wanna come at me, asshole?" and must decide— (i) whether that statement rises to the level of discourtesy, in violation of Departmental Guidelines, and (ii) whether that statement constitutes a wrongful threat of force.

Calling a member of the public an "asshole" is rude and discourteous on its face, and, in general, is not the kind of language the Department tolerates from officers in the course of regular conversations with members of the public. However, the circumstances surrounding

Respondent Brown's encounter with Mr. Garcia were far from regular. As previously noted, Respondent Brown was dealing with an uncooperative arrestee, who by that point he knew to be a juvenile. A crowd was at a major tourist attraction the day after New Year's, and expressing discontent with the officers' actions. Mr. Garcia rushed up behind Respondent Brown getting within an arm's length, an act which was reasonably perceived as threatening, warranting a single push to keep him back, as described above. After being pushed away by Respondent Brown, Mr. Garcia jumped back up and began to come towards him again. Respondent Brown reacted to this behavior by yelling, "You wanna come at me, asshole?"

The Tribunal has previously found that, under certain circumstances, the use of a discourteous word, such as "asshole," does not always rise to the level of sanctionable misconduct. *See Disciplinary Case No. 2022-27455* (Oct. 10, 2023) (Officer found Not Guilty of discourteously stating, "Don't do that shit in my face" to a motorist who rolled up his window during a car stop and proceeds to open the driver's side door. The objective of the words spoken by Respondent was to communicate a directive to an individual who was being issued a summons. While the language was unbecoming, and should not be part of a police officer's normal vernacular, the circumstances presented at that moment absolved Respondent from discipline for using it.) In the instant case Respondent Brown's language was a warning to Mr. Garcia, who had started coming towards him a second time, not to get physical again. While not the ideal solution, the use of profanity is preferable to physical engagement, and had the desired effect. Based on this recent precedent and having carefully considered the circumstances under which Respondent Brown made this comment, I find he is Not Guilty of the misconduct charged in Specification 2.

The final question for the Tribunal is whether the comment in question constitutes a wrongful threat of force against Mr. Garcia, in violation of Department guidelines. I credit Respondent Brown's testimony that far from being a threat, he intended the words to serve as more of a warning, in the hopes that they would cause Mr. Garcia to pause before rushing towards Respondent Brown again. I found Respondent Brown's explanation that he wanted to ensure the minor Vendor was safely placed into the RMP and then to leave the busy location, thereby avoiding further contact or any type of physical altercation with Mr. Garcia, to be sincere. Indeed, almost immediately after Respondent made the comment, the officers were able to get the Vendor into the RMP and transport her to the precinct without further incident.

I find the comment in this case was a warning, of a sort, not to engage the officers further and hold up the transport of the Vendor. To be sure, Respondent Brown could have conveyed that in a more professional, even-handed manner. However, based on the foregoing, I find that CCRB-APU has failed to prove by a preponderance of the credible evidence that his statements constituted a wrongful threat of force against Mr. Garcia in violation of P.G. 203-10, as in effect at the time. I therefore find Respondent Brown Not Guilty of Specification 3.

Respectfully submitted,

Anne E. Stone
Assistant Deputy Commissioner Trials

DISAPPROVED
FEB 12 2024
EDWARD A. CABAN
POLICE COMMISSIONER