The City of New York

POLICE DEPARTMENT

March 9, 2018

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In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2016-14996
Police Officer Jaspreet Gill	:	
Tax Registry No. 950495	:	
Midtown North Precinct	:	

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

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For CCRB: Andre Applewhite, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent: Stuart London, 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 SPECIFCIATIONS

1. Said Police Officer Jaspreet Gill, on or about October 25, 2015, at approximately 1655, while assigned to MTN PCT and on duty, in the vicinity of 59th Street and Columbus Circle, New York County, wrongfully used force, in that he used a chokehold against Yibin Mu.
   P.G. 203-11 – USE OF FORCE

2. Said Police Officer Jaspreet Gill, on or about October 25, 2015, at approximately 1655, while assigned to MTN PCT and on duty, in the vicinity of 59th Street and Columbus Circle, New York County, wrongfully used force, in that he grabbed the back of Mr. Yibin Mu's neck without police necessity. *(As amended)*
   P.G. 203-11 – USE OF FORCE

3. Said Police Officer Jaspreet Gill, on or about October 25, 2015, at approximately 1655, while assigned to MTN PCT and on duty, in the vicinity of 59th Street and Columbus Circle, New York County, wrongfully used force, in that he used pepper spray against Yibin Mu without police necessity.
   P.G. 203-11 – USE OF FORCE

SUMMARY OF FINDINGS AND RECOMMENDED PENALTY

The above-named member of the Department appeared before me on November 29 and December 7, 2017. Respondent, through his counsel, entered pleas of Not Guilty to the subject charges. CCRB called Ethan DeAngelo and Yibin Mu as witnesses. The tribunal received in evidence an audio recording of the November 4, 2015, hearsay statement of Person A, as well as a transcript of the interview (CCRB Ex. 1, 1A [hereinafter referred to as "Person A"]). The tribunal also received in evidence an audio recording of the November 10, 2015, hearsay statements of Person B, as well as transcripts of that interview and a November 9, 2015, interview (CCRB Ex. 2, 2A; Resp. Ex. B). 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. After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of Specification No. 1. I further find

Respondent Not Guilty of Specifications Nos. 2 and 3. I recommend that Respondent forfeit 10 vacation days.

ANALYSIS

The following is a summary of the facts which are not in dispute. On October 25, 2015, Respondent was on duty in the area of Columbus Circle Park, at 59th Street and Columbus Circle (T. 60, 63-64, 228; Hunter 3, 17). At approximately 1655 hours, Respondent observed several skateboarders in the park (T. 228-230). Skateboarding in the park is prohibited, and notice of the prohibition is posted in the park (T. 122, 226; §1-05(r)(3)(1), NYC Park Rules and Regulations; Respondent's Ex. F; Resp. Ex. B at 10). Respondent issued a warning to the group of skateboarders, then continued a foot patrol around the perimeter of the park, returning to the area of Columbus Circle after approximately five minutes (T. 229-230). Upon his return, Respondent observed Yibin Mu skateboarding in the park near a monument, and briefly skating on it, before returning to the pavement (T. 60, 63, 230-231; Hunter 7; CCRB Ex. 2A at 7; Resp. Ex. B at 3). Mu was approximately 22 years old at the time of the incident, and was enrolled as a student at [redacted] (T. 59-60).

Mu performed tricks on his skateboard in the vicinity of the monument (T. 60, 63, 230-231; Hunter at 7; Resp. Ex. B at 3). Mu stopped skateboarding when he saw Respondent, got off the board and held it in his right hand (T. 60, 63-64). Respondent walked toward Mu, instructed him to have a seat and told Mu that he was going to give him a summons (T. 120, 131). Mu had received a summons in the past for skateboarding in a different area (T. 128; 215).

The verbal encounter between Respondent and Mu, the particulars of which are in dispute, devolved into a physical struggle, part of which was captured on a video recording made by Person B (CCRB Ex. 3). In the first 13 seconds of the video, Respondent can be

seen entangled with Mu. The perspective of the videographer is off to the side of Respondent. As Mu twists his body around, the front of his body comes into view, and the viewer can see Respondent's left forearm holding Mu above his shoulder area. Mu continues to twist circularly and eventually loses his footing as his body rotates clockwise from his original standing position when the video begins. Respondent maintains his hold above Mu's shoulders, and then around Mu's neck until Mu starts falling toward the ground. Respondent releases his grip as he and Mu fall to their hands and knees. Mu attempts to scramble away, without fully standing upright but Respondent pursues him and jumps onto the right side of Mu's back, bringing Mu's left shoulder and back into contact with the pavement. Respondent then turns Mu's body so that Mu is on his stomach, with his left arm beneath his chest. During the process of Mu twisting with Respondent to the point where he falls flat to the pavement, Mu maintains his grip on his skateboard in his right hand (0:00-0:13).

The video then shows Respondent straddling Mu's back and attempting to handcuff him. The footage captures Mu yelling, "Do a report," "What are you doing?" "Did I do something wrong?" Respondent's voice is inaudible in the video. While lying on his stomach, Mu raises up on his right elbow, still holding his skateboard in his right hand. As Respondent straddles Mu's back, he can be seen reaching into his belt area, bringing a pepper spray canister toward Mu's face, then shooting a stream of pepper spray which appears to mostly miss Mu's face (0:13-0:24).

Mu continues asking, "Will you let me get up?" "What is my crime?" "What are you going to do?" "How am I resisting; I'm trying to get up." Respondent maintains a grip on the back of Mu's neck with his right hand as he reaches for Mu's left arm which is propping Mu up.

At approximately 1:28, Respondent reaches over Mu's head with the pepper spray canister in his left hand and again appears to discharge it near the right side of Mu's head (0:25-1:30).

At 2:05, Respondent reaches over Mu's back with his right hand and takes hold of Mu's wrist, moving it back toward Mu's lower back, as Mu continues to hold his skateboard. At 2:08, Mu finally releases the skateboard, permitting Respondent to bring his wrist behind his back and fasten one handcuff (1:28-2:16). At 2:24, Respondent reaches in front of Mu with his left hand and brings Mu's left hand from under his face to behind his back, where Respondent fastens the other handcuff to Mu's wrist (2:17-2:36). Respondent then takes hold of Mu's right elbow with his left hand, Mu's skateboard in his right hand and attempts to pull up on Mu. Mu rolls over to his left side and says, "What did I do wrong?" (2:36-2:42).

The following is a summary of the facts which are in dispute.

1. Yibin Mu

Mu had been skating for approximately 10 seconds when he first observed Respondent walking into Columbus Circle Park. After Mu realized that Respondent was walking in his direction, he got off of the skateboard, held it in his right hand, and waited for Respondent to approach (T. 60, 63-64).

Respondent walked approximately 50 feet into the plaza and stopped in front of Mu. Mu, still holding onto the skateboard, took one step in Respondent's direction and said, "Excuse me, sir, is there no skateboarding here?" According to Mu, Respondent said, "Give me that," as he reached for Mu's skateboard. Mu admitted that he pulled away from Respondent after Respondent "grabbed" him (T. 133). Mu then raised his left hand slightly, positioned the skateboard behind his back, and said, "Whoa, wait you didn't answer my question . . . where does it say there is no skateboarding?" (T. 60, 65-67). Immediately after that, Respondent used

his left hand to grab Mu's left wrist, and with his right hand, grabbed the back of Mu's neck (T. 60, 67-68). At this point, Mu was still holding onto the skateboard with his right hand (T. 72). Mu denied raising his skateboard during the encounter with Respondent (*Id.*).

According to Mu, Respondent next instructed him to "stop resisting arrest," to which Mu replied, "How am I resisting arrest? Where does it say there is no skateboarding?" (*Id.*). Mu took one or two steps back causing Respondent to tighten his grip (T. 69-70). Mu testified that Respondent then placed him in a chokehold (T. 70). Mu claimed that Respondent had his left arm around his neck in such a way that Respondent's bicep was in front of Mu's throat (T. 71). Respondent then employed a twisting maneuver to bring Mu down to the ground (*Id.*). Mu testified that he landed on the left side of his body, including his left elbow, wrist, and shoulder (*Id.*).

Respondent took Mu to [redacted] Hospital, where he was treated for exposure to pepper spray. Once Mu was discharged, he was transported to Midtown North Precinct for arrest processing. Mu was released from police custody the following morning (T. 61-62). Mu claimed that Respondent's use of force caused injury to the left side of his body, including his left elbow, wrist, shoulder, and hip. Mu was seen by a physician on October 27, 2015, complaining of neck pain (CCRB Ex. 5). Mu asserted that he sustained markings to his neck and left hip, in addition to being sore for approximately two weeks following the incident (T. 62, 87).

On further examination, Mu acknowledged that he had been the subject of media attention after his encounter with Respondent and considered his situation newsworthy, although he denied that the media attention affected his account of the incident (T. 95-98). Mu conceded that he had a pending civil lawsuit against Respondent, and the City of New York (T. 109). The

parties stipulated that the complainant did not sustain any fractures or broken bones from his encounter with Respondent (T. 114).

Mu maintained that Respondent only asked him to sit down after he had grabbed Mu's left arm and the back of his neck (T. 125, 131-32, 217). Mu acknowledged that he did not comply with the officer's instruction because he claimed that Respondent was "hurting [him]" (T. 121-22, 125, 185). When asked if anything prevented him from sitting down and accepting the summons, Mu answered: "self-preservation" (T. 125). Mu denied being asked by Respondent to produce identification before the physical struggle ensued (T. 124). Mu denied being aware of signs prohibiting skateboarding in the park at the time of the subject incident (T. 122).

Respondent warned Mu that he was going to get "pepper sprayed" (T. 75, 242-243). Respondent then took a canister of mace and sprayed it at Mu's face (T. 60, 242-243, 308; Person A 5; CCRB 2A at 9; CCRB 2B at 5). Mu was aware Respondent wanted to handcuff him when he was on the ground and did not give his hands to Respondent until he was pepper-sprayed (T. 147, 202-203, 206). At no time did Respondent restrict Mu's breathing (T. 159).

2. Person A

The tribunal received in evidence the November 4, 2015, statement of Person A to CCRB investigators (CCRB Ex. 1, 1A). According to Person A, she saw Mu skating in Columbus Circle Park, then saw him stop, pick up his board, and ask, "Can I skate here?" She looked up to see who Mu was talking to when she observed Respondent approaching him (Person A 3, 7, 14, 17). According to Person A, Respondent got within a few inches of Mu and attempted to grab his skateboard; Mu pulled the board away and said: "What are you doing, get away" (Person A 3).

Person A indicated that Mu appeared upset but was not behaving in a threatening manner (Person A

3, 15, 16, 18, 19-20, 44). A struggle then ensued between Respondent and Mu over the skateboard. During the struggle, A heard Respondent tell Mu, "Give me your skateboard" and Mu answered, "No. What did I do? What's going on?" Respondent released the board momentarily, grabbed Mu's left arm with his left hand, got behind Mu and said, "Give me your arm" (Person A 3, 4, 20-23, 25-27).

By this time, Respondent and Mu had moved about 1.5 car lengths away to the left of where Person A was sitting on the bench. Person A got up and walked by a crowd that was forming near Respondent and Mu. Respondent and Mu were still struggling when she observed Respondent's right hand on Mu's throat. Person A said it looked like Respondent was digging into his neck (Person A 4-5, 32-33, 78-81).

Person A asserted that Respondent told Mu to give him his arm about 10 to 15 times before he took Mu down to the ground. Once on the ground, Respondent and Mu continued their physical struggle. Person A next observed Respondent get on top of Mu, reach into his pocket, and proceed to pepper spray him. Person A indicated that Respondent directed Mu to give him his arms at least four or five times before he deployed the pepper spray. A could not recall whether she heard Respondent warn Mu before using the pepper spray (Person A 4, 5, 43, 48-49). Respondent then told Mu, "If you don't give me your arm, I will do this again." Mu eventually released the skateboard and gave Respondent both arms (Person A 6).

3. Person B

The tribunal received in evidence November 9, 2015, and November 10, 2015, statements of Person B to CCRB investigators (CCRB Ex. 2, 2A; Resp. Ex. B). Person B's name was provided to CCRB by Yibin Mu as a potential witness (Resp. Ex. B at 2). Person B was the person who created the video recording in evidence before the tribunal as CCRB Exhibit 3.

Person B said that he was sitting on a bench in Columbus Circle Park, watching Mu skateboarding when he saw Respondent walking toward Mu from Person B's right. Respondent told Mu that he wanted to talk to him. Mu "started away first, but then when – once he got his attention, he asked, 'Oh, is there no skateboarding allowed?'" Respondent told Mu to come closer, eventually standing next to each other. Person B stated that they appeared to be speaking calmly to each other, hearing Mu ask, "Is no skateboarding allowed?" (CCRB Ex. 2A at 3, 4, 8).

Person B stated that he saw Respondent attempt to grab for Mu's skateboard, and that Mu recoiled (CCRB Ex. 2A at 4). Person B stated, "I guess the cop thought that he was running away, so then he made a grab for his neck" (*Id.*, 9, 17, 20). Person B continued, "And when I started recording that's when the police officer had Mr. Mu kind of in a headlock and was trying to, I guess, do a hip toss, throw him to the ground . . . " (Resp. Ex. B at 7). Person B described the physical contact as Mu "stumbling backwards and the cop was trying to, like struggle to contain control of him" (CCRB Ex. 2A at 24-25). Person B explained further "I mean, it wasn't a clean toss either. It was like dragging him around by his neck kind of, you know, as you saw in the video" (CCRB Ex. 2A at 33).

Person B stated that it did not appear to him that Mu had any difficulty breathing when he was in the headlock but that it "looked painful . . . I don't know if it was long enough for him to not be able to breathe, so . . . It was all very quick . . . It was like a matter of seconds" (CCRB Ex. 2A at 47).

4. Respondent

At trial, Respondent testified that when he returned to Columbus Circle, he observed Mu skateboarding on the south side of the monument (T. 230-31). Respondent testified that he walked over to Mu and said "How you doing? Can I see some ID?" (T. 231). Mu told the

Respondent that he did not have any identification and asked him to explain what he had done wrong (T. 231-32). Respondent testified that he explained to Mu that skateboarding was prohibited in the park and directed his attention to the park signs posted behind where they were standing (T. 232). Respondent stated that Mu got loud and was yelling, "What did I do wrong?" (T. 232-33). Respondent observed someone appear to be recording the interaction on a cell phone off to his left (*Id.*). At this point, Respondent instructed Mu to have a seat since Mu was being loud and putting his arms up (*Id.*). Mu told Respondent that he did not want to sit down, so Respondent instructed him to put down his skateboard (*Id.*).

According to Respondent, Mu started to move back as if he was about to do something (T. 234). Respondent claimed that Mu raised his left hand in the air while holding onto the skateboard with his right hand (T. 234-35). Respondent reached for Mu's left arm with his right hand and placed his left hand on Mu's right shoulder (T. 234). Respondent explained that he placed his left hand on Mu's shoulder so that if he had swung the skateboard, it would not have hit him in the face (*Id.*). Respondent told Mu to relax, informed him that he was making things worse, and warned that if he continued, it was likely that he would be arrested (T. 235). Respondent testified that Mu remained uncooperative (*Id.*).

Respondent testified that Mu started pulling back as if to flee (T. 235). Respondent next leaned into the right side of Mu's body and placed his left hand around Mu's shoulder, as though he were hugging him (T. 235-36). Mu tried to pull Respondent's hand away, prompting Respondent to issue repeated instructions for Mu to give him his hands (T. 236-37). Respondent conceded that he did grab the back of Mu's neck with his left hand while using his right hand to hold Mu's left forearm (T. 284-85). Respondent testified that he had an open palm on the back of Mu's neck, holding it for approximately three to five seconds (T. 286, 292). Respondent

asserted that he had his left elbow raised to prevent Mu from swinging the board with his right hand (T. 285). Respondent conceded that he did not grab Mu's right hand, which is the hand that he held the skateboard with (T. 285). Mu continued to struggle and refused to give Respondent his hands (T. 237). At this point, Respondent decided to take Mu down to the ground (*Id.*).

Respondent then swung Mu around and extended his leg (T. 237). He explained that his left arm was getting close to Mu's neck, so he released Mu before he went down to the ground (T. 238, 297). Respondent asserted that his left arm was on Mu's shoulders during the take-down maneuver (T. 237). Respondent specifically denied employing a chokehold or making contact with Mu's neck with his left bicep, arm or hand (T. 237-38). Respondent conceded that he had made a previous statement to CCRB in which he stated that he was unsure of whether he made contact with Mu's neck (T. 294, 296).

Respondent testified that once Mu was on his stomach, he tried to crawl away so he positioned Mu between his knees and placed his hand on Mu's shoulder, to keep him down on the ground (T. 240). Respondent warned Mu that if he failed to give Respondent his hands, he would be pepper sprayed (T. 241). Mu did not give Respondent his hands and Respondent deployed the pepper spray (*Id.*). Respondent asserted that he believed the first shot of pepper spray missed Mu (T. 243).

As Respondent tried to pull Mu's arms back, Mu tensed up and clenched his fists (T. 242-43). Respondent again warned Mu that if he did not give his arms, he would be pepper sprayed again (*Id.*). When Mu did not provide Respondent his arms, Respondent sprayed him with pepper spray a second time (*Id.*). A few seconds later, Mu gave Respondent his hands, and he handcuffed him (*Id.*). Respondent conceded that he administered a total of three bursts of pepper spray directed towards Mu's eyes (T. 308).

Respondent testified that he was applying a continuum of force during the physical encounter with Mu. First, he tried to talk to Mu to gain his compliance; when that approach did not work, he grappled with Mu to secure his hands using the minimum amount of force. When this approach did not work, Respondent elected to use the pepper spray (T. 258).

Respondent asserted that he initially wanted Mu's identification but when Mu started getting loud, Respondent wanted him to put down the skateboard out of concern for his safety (T. 277-78). Respondent acknowledged that he did not verbalize this concern to Mu (T. 278). Respondent testified that he asked Mu for identification before Mu asked whether he could skate in the park (*Id.*).

Respondent testified that he determined to arrest Mu once Mu began moving away from him (T. 288-89). Respondent asserted that Mu was being physically non-compliant and raising his arms, which were factors he considered when deciding whether to place him under arrest (T. 289 90). Respondent asserted that he intended to arrest Mu, instead of issuing him a summons, for his refusal to accept a summons (T. 289).

Once Mu was handcuffed, Respondent walked him over to the south side of the monument and sat him down until back-up arrived (T. 242; Person A 5-6; Resp. Ex. B at 9). Respondent accompanied Mu to [redacted] Hospital to be treated for pepper spray exposure (T. 242). Once Mu was discharged, Respondent transported him back to Midtown North Precinct and processed his arrest paperwork (*Id.*). According to Respondent, Mu refused to provide the officers with pedigree information during arrest processing (T. 243). As Mu was searched incident to his arrest, Respondent discovered identification in Mu's pocket (T. 243-44). Mu was released from custody the next morning (T. 62).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account. *Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 (1st Dep't 1994).

In this case, each witness' recollection of the incident, whether in live testimony before the tribunal or hearsay statements, revolves around a central core of material fact. While Mu and Respondent have disparate and conflicting interests in this matter, their recollections of the event are strikingly similar. Mu claims that Respondent took physical hold of him after he refused to surrender his skateboard and began questioning whether he had done something wrong. Respondent readily concedes that he used force to bring Mu to the ground and eventually handcuff him because he was recalcitrant and did not follow his commands to put down his skateboard and motioned as if to flee. CCRB Exhibit 3 corroborates both Respondent's and Mu's testimony to a great extent. Both Person A and Person B describe Respondent's and Mu's actions in a manner consistent with the live testimony before the tribunal, as well as CCRB Exhibit 3.

I credit Respondent's testimony as mostly reasonable, forthright and logical, with some reservation. When considered against the entire body of evidence in the record, Respondent's testimony is more credible than that of CCRB's witnesses. Respondent's testimony is corroborated in several material aspects by independent evidence, as well as admissions made by Mu. Even though Respondent is an interested witness in this proceeding, his testimony was generally candid.

In contrast, Mu's testimony before the tribunal was halting, sometimes illogical and confusing. Mu also displayed a defiant evasiveness on cross-examination despite several

warnings from the tribunal that bordered on contumacy. As a witness who had a pending civil suit at the time of his testimony, his demeanor further revealed a desire to paint himself in the most flattering light. Mu made several damaging admissions which undercut his claim that he was subjected to force without sufficient justification. Based upon the foregoing, I find his testimony primarily embellished and self-serving but of some probative value.

I find Person A's hearsay statement to be probative in that it corroborates the elements of the struggle which are not in dispute: namely, that Mu continued to demand answers to his questions, apparently as a precondition of his compliance with Respondent's directions to give him his hands and that Respondent had to ask Mu to provide him with his hands numerous times before Mu finally acquiesced to his instructions. Similarly, I find Person B's statement to be corroborative of Respondent's testimony that Mu might have been trying to escape and that he was actively preventing Respondent from handcuffing him before being pepper-sprayed.

Person A's assertion that she saw Respondent's hand grasping Mu's throat, however, stands alone in the body of evidence before the tribunal. Neither Mu's testimony nor the videotape of the encounter supports such an assertion. When considered against Respondent's admission that he grabbed the back of Mu's neck, as well as video evidence, it appears that Person A misspoke by using "throat" and "neck" interchangeably (Person A 80, 83).

As set forth below, the real value of Person B's testimony is on the issue of whether Respondent employed a chokehold.

1. Use of Chokehold

The Patrol Guide is controlling in this case. Section 203-11 imposes the standards to be followed when the use of force is necessary to achieve legitimate policing goals. It specifically

requires that members of service "at the scene of a police incident" use the "minimum necessary force" and that they "employ non-lethal alternatives, as appropriate." Section 203-11 warns uniformed members of service that "excessive force will not be tolerated."

It is within this context that the Patrol Guide proscribes the use of chokeholds by officers as they carry out their duties. Section 203-11[1] states in pertinent part:

> Members of the New York City Police Department will NOT use chokeholds. A chokehold shall include but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air.

The Patrol Guide in effect at that time and now rules out chokeholds as a force option. Moreover, as written, what constitutes a chokehold under the Patrol Guide is broadly defined, and *mens rea* is not a delineated factor.

The sole factual issue to be determined then is whether, irrespective of his mental state, Respondent's arm made contact with Mu's windpipe or throat in a manner which may have hindered his breathing. I find that, based on a preponderance of the credible, relevant evidence, Respondent used a chokehold as defined by Patrol Guide 203-11.

In reaching this finding, I am mindful that the circumstances under which Respondent attempted to effect Mu's arrest were challenging: Respondent was working alone, trying to restrain an actively resisting suspect who refused to release his grip on a large blunt object.

Respondent asserted that while he never made contact with Mu's neck, he nevertheless released his grasp of Mu's shoulder as they were both falling to the ground because he was

[1] While the provisions of Section 203-11 have been revised and incorporated into the Force Guidelines now outlined in Section 221-01, the definition of chokehold remains unchanged.

concerned that he had come too close to Mu's neck, creating a potential *de facto* chokehold situation. CCRB Exhibit 3 corroborates Respondent's factual assertion that he released Mu.

The enlarged photograph of CCRB Exhibit 6, which CCRB contends establishes that Respondent made contact with Mu's neck, is by itself inconclusive concerning that issue. The photograph shows Respondent's arm above Mu's shoulder area but also could be construed as depicting contact between Respondent's elbow and Mu's upper chest. Thus, using this blowup alone it was indeterminate precisely where Respondent's arm came to make contact and whether prohibited pressure was exerted.

The pivotal piece of evidence, however, is CCRB Exhibit 3, which shows, at 0:00-0:02, Respondent's arm shift upward off Mu's chest and get closer to his throat as Respondent attempts to complete a hip throw. It is in connection with this piece of evidence that Person B's statement is critical: his description that Respondent appeared to be "dragging [Mu] around by his neck kind of, you know, as you saw in the video" adds a narrative to the visual depiction of Respondent's actions which enhances the probative value of CCRB Exhibit 3.

Mu testified that he had markings on his neck from what he described as a chokehold. Mu testified that CCRB Exhibit 9 in evidence displayed "the front damage to my throat . . . from Officer Gill's left bicep and forearm" (T. 90). An examination of the photograph shows what appears to be a small red contusion on Mu's throat. In conjunction with the evidence discussed above, this is evidence that there was contact between Respondent's arm and Mu's throat. While this does not seem to be substantial evidence of compression of Mu's windpipe or throat, it is some evidence that there was contact between Respondent's arm and Mu's throat. Indeed, Mu confirmed that his breathing was never restricted by Respondent.

Thus, despite the issues with Mu's credibility, and Respondent's denial, CCRB Exhibit 3 shows Respondent's left arm moves into a position, however briefly, which appears to have made contact with Mu's throat in a manner which may restrict his breathing. Based on the foregoing, I find that CCRB has met its burden of proof by a preponderance of the evidence that Respondent used a chokehold in violation of Patrol Guide 203-11. Accordingly, I find him Guilty of Specification 1.

2. *Wrongful Use of Force*

Based upon Mu's admissions under oath that he was pulling away from Respondent, I find that Mu consciously refused to follow Respondent's directions to sit down, to surrender his skateboard and to give Respondent his hands. This finding is supported by Respondent's testimony and the video recording in CCRB Exhibit 3, as well as Person A's and Person B's statements.

Under these circumstances, Respondent's attempt to gain physical control of Mu's body by grasping the back of his neck was reasonable. An important factor weighing in favor of the reasonableness of Respondent's use of force is that from the initial portion of the struggle with Mu, up to the point and including where he was lying prone on the pavement, Mu continued to maintain possession and control of a blunt instrument, his skateboard, in his right hand.

Therefore, I find that CCRB has failed to meet its burden of proof by a preponderance of the evidence that Respondent's actions were without police necessity. Accordingly, I find Respondent Not Guilty of Specification 2.

3. Wrongful Use of Pepper Spray

The use of pepper spray by members of the service was governed by then Patrol Guide Section 212-95, which sets forth, in pertinent part:

> Use of pepper spray is proper when used in accordance with Article 35 of the Penal Law and Department procedures.
>
> * * * *
>
> O.C. pepper spray may be used when a member reasonably believes it is necessary to effect an arrest of a resisting suspect, for self-defense or defense of another from unlawful force.

As set forth above, there is sufficient evidence to support a finding that Mu was actively resisting Respondent. Mu admitted in his testimony that he pulled back from Respondent; refused to surrender his hands to be handcuffed; attempted to rise off the ground after he had been brought to the pavement by Respondent; and refused to surrender his hands to be handcuffed as he lay on his stomach on the ground. Mu's actions are corroborated by CCRB Exhibit 3 and Respondent's testimony, as well as the statements of Person A and Person B. It is undisputed that Respondent was conducting a solo patrol. Based upon Mu's disproportionately obstinate reaction to being told he would receive a summons, given the relatively minor nature of the violation, it was reasonable for Respondent to use pepper spray to overcome Mu's resistance as they struggled on the ground and effect his arrest.

Therefore, I find that CCRB has failed to meet its burden of proof by a preponderance of the evidence that Respondent's actions were without police necessity. Accordingly, I find Respondent Not Guilty of Specification 3.

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 6, 2011. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB has requested a penalty of the forfeiture of 30 vacation days and a one-year period of dismissal probation. Based upon the totality of the circumstances, I find that recommendation excessive.

In previous cases, respondents found guilty of violating Patrol Guide 203-11's prohibition on the use of a chokehold have been issued penalties from 15 to 25 days (*Disciplinary Case No. 2015-14310* [March 28, 2017][Sixteen-year police officer, with one prior adjudication for failure to safeguard his firearm, forfeited twenty-five (25) vacation days for (i) wrongfully using a chokehold on a civilian without necessity; (ii) wrongfully restricting or hindering said civilian's breathing and (iii) damaging the individual's property by using his sweatshirt to mop up urine. Respondent was one of several transit officers who took a resisting teenager into custody by bringing him to the ground, after another officer discharged pepper spray, and handcuffing him. Respondent then picked him up and began to walk him toward the nearby precinct. The complainant alleged that as he lifted and walked him, Respondent placed one arm around his neck, "adding more pressure to my breathing." Surveillance video confirmed that Respondent put an arm around his neck for five seconds, corroborating the complainant's testimony that he felt pressure on his neck]; *Disciplinary Case No. 2015-13121* [September 20, 2016][Ten-year police officer with no prior disciplinary history forfeits 15 vacation days for wrongfully using force by placing his forearm around an individual's throat, thereby causing him

to be held in a chokehold. Respondent confronted an individual who had entered the subway system without paying. When he asked the individual for identification, a physical altercation ensued during which, at one point, Respondent wrapped his forearm around the individual's neck in a chokehold for 16 seconds]; *Disciplinary Case No. 2014 12925* [February 16, 2016][Twenty-one-year police officer with two prior disciplinary adjudications forfeited 15 vacation days for placing an individual in an unauthorized chokehold. The record established that Respondent grabbed an individual's throat with one hand and maneuvered his body away from a fence. It was reasonable to conclude from the video footage of the incident that some level of pressure was applied to the throat area that may have hindered the individual's breathing. This penalty took into account the struggle that was occurring when the chokehold was used]).

In this case, Respondent was conducting a solo foot patrol. As he attempted to detain Mu to issue him a summons for skateboarding, Mu began backing away from him while holding a skateboard in his hand. Given the potential for Mu fleeing the scene or becoming an aggressor while wielding a blunt instrument, Respondent took measured steps toward establishing physical control of Mu's body. As Mu struggled, the record establishes that Respondent sought to avoid employing a prohibited chokehold as he attempted to utilize a hip throw to bring Mu to the ground but was unable to sufficiently control both Mu's movement and the force of the throw to avoid his arm coming in contact with Mu's throat.

While the prohibition against the use of chokeholds takes no account of the actor's mental state, I find it mitigating that Respondent's use of a chokehold appears to have been inadvertent and brief. Accordingly, I recommend that Respondent forfeit 10 vacation days.

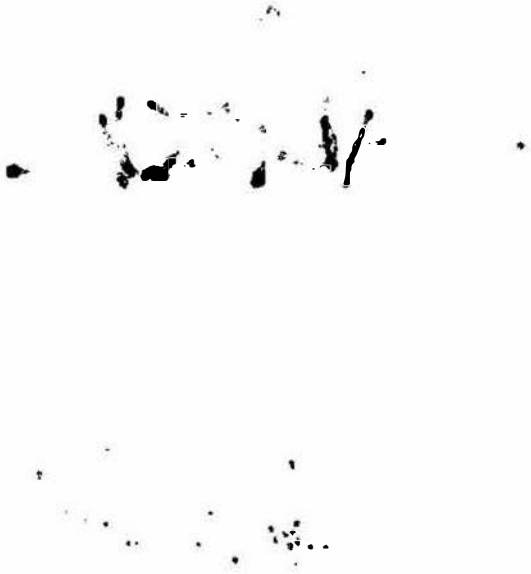
Respectfully submitted,

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

APR 17 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 JASPREET GILL
TAX REGISTRY NO. 950495
DISCIPLINARY CASE NO. 2016-14996

1. Respondent was appointed to the Department on July 6, 2011.

2. On his last three annual performance evaluations, Respondent received overall ratings of 4.0 "Highly Competent" in 2016, 4.5 "Extremely Competent/Highly Competent" in 2015, and 3.5 "Highly Competent/Competent" in 2014.

3. [redacted]

4. On February 10, 2016, Respondent was placed on Level 1 Force Monitoring for receiving three (3) or more civilian complaints over the course of one year; that monitoring was completed on March 8, 2017.

5. Respondent has no prior disciplinary history.

6. For your consideration.

Paul M. Gamble
Assistant Deputy Commissioner Trials