POLICE DEPARTMENT

July 12, 2019

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2017-18036
Police Officer Carlos Gomez	:	
Tax Registry No. 955954	:	
Housing PSA 7	:	

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

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Penny Bluford-Garrett, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

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

To:

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

CHARGES AND SPECIFICATIONS

1. Said Police Officer Carlos Gomez, while on-duty and assigned to Police Service Area 7, on or about January 8, 2017, in the confines of Police Service Area 7, used excessive force against a handcuffed prisoner, to wit: Police Officer Gomez brought Person A to the floor with excessive force, causing Person A to fracture his jaw.

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

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on May 29 and 30, 2019. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Police Officer Jose Cordero, Lieutenant Lamont Gibson, Sergeant Matthew Tocco, and Sergeant Christopher Morano as its witnesses; and introduced the hearsay statements of Person A and Person 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. Having reviewed all of the evidence in this matter, I find Respondent guilty, and recommend that he forfeit 20 vacation days.

ANALYSIS

In the early morning hours of January 8, 2017, Respondent and several other officers from PSA 7 were driving in an unmarked van in the vicinity of Southern Boulevard and Boston Road in the Bronx. The officers observed two men at a bus stop smoking what appeared to be marijuana, and a third individual, Person A, possessing an open container of alcohol. All three were placed under arrest. Two of the arrestees, Person B and Person C, were completely cooperative; the third, Person A, was belligerent toward the officers from the start of the encounter. The three arrestees were transported to PSA 7 for processing. It is alleged that

at the desk, Respondent forcibly brought a handcuffed Person A to the floor, causing Person A to sustain a fractured jaw. At issue is whether under the circumstances, Respondent used excessive force against Person A.

Sergeant Christopher Morano of IAB testified that he interviewed Person A at [redacted]. Hospital on January 8. Two photographs of Person A, one of which shows him in a neck brace, were admitted into evidence (Dept. Ex. 2A, 2B). A portion of Person A's medical records from the hospital were introduced as well (Dept. Ex. 4). In those records, it states that Person A sustained a fractured mandible (jawbone) which required surgery. Sergeant Morano also interviewed Person B at Central Booking. (Tr. 58-59, 66, 69-70, 73)

Person A, who has an active lawsuit against the Department, did not appear to testify. A copy of the recorded statement he made to IAB was introduced into evidence, along with the accompanying transcript (Dept. Ex. 3, 3A). In that statement, Person A stated that he, his uncle (Person B) and friend (Person C) were on their way home from a party where they had been drinking. The officers handcuffed them and placed them in the police van for no reason. Person A stated that he did not resist, but he was mad and continued to question the officers as to why he was being arrested. Inside the van, the officers "jumped him," and one of the officers punched him in the left side of his jaw. Person A blacked out, and woke up in the hospital. He had no recollection of being brought to the precinct, and believed that he was taken straight to the hospital. (Dept. Ex. 3A at 6-10, 12-17, 20, 24)

Person B also did not respond to a subpoena to testify. A copy of his recorded statement to IAB, and the accompanying transcript, were admitted into evidence (Dept. Ex. 3, 3B). In his statement, Person B confirmed that Person A was drunk and upset with the officers, fighting their efforts to handcuff him. Person B stated that the officers did not punch, kick, or do anything physical to Person A in the van. At the precinct, all three arrestees were brought to the desk.

According to Person B, Person A continued to question why they were being arrested, and one of the officers, from behind, "picked him up and just slammed him." Person A landed on the left side of his face, was knocked out, and started to bleed out of his mouth and nose. Person B did not see Person A trying to shake off the officer before he was thrown to the ground. (Dept. Ex. 3B at 8-9, 11, 15-23, 25-26)

Police Officer Jose Cordero of PSA 7 testified that he was the driver of the van. He described Person A as irate from the start: Person A screamed and attempted to spit at the officers, and ignored Person B and Person C who were telling him to calm down. Person A dropped his body to the ground to avoid being placed in the van. During the ride to the PSA, Person A was kicking the seats and cursing. At the PSA, Officer Cordero escorted one of the other prisoners to a jail cell. When Officer Cordero returned to the desk, he observed Person A on the floor, bleeding from his face. Respondent was down on the floor with Person A. Officer Cordero did not see how Person A was brought to the floor. An ambulance was called, and Officer Cordero accompanied Person A to [redacted] Hospital; Person A continued to curse and spit, and refused to cooperate with the nurses.

(Tr. 12-18, 20)

Sergeant Matthew Tocco testified that he was the PSA 7 desk officer when Person A was brought to the stationhouse. Person A was "verbally combative," yelling at the officers. As the sergeant was looking down to enter pedigree information on a prisoner, he heard the sound of a body hitting the floor. Sergeant Tocco looked up and saw Person A down on the floor, along with Respondent. Person A appeared semi conscious, and there was a small trickle of blood coming from his mouth. Sergeant Tocco claimed that he did not see how Person A went to the floor. At no point did the sergeant see Person A trying to escape from the PSA. (Tr. 34-38, 40)

Lieutenant Lamont Gibson testified that he was the conditions sergeant on the date of the incident. When he asked Respondent what had occurred, Respondent stated that he feared that

Person A was trying to escape, so for the safety of himself and others in the command, he took his prisoner down to the floor Lieutenant Gibson testified that he prepared an Unusual Occurrence Report regarding the incident (Dept. Ex. 1). (Tr. 48-50)

Respondent testified that during his initial encounter with Person A at the bus stop, Person A was verbally abusive toward the officers, yelling and spitting toward them. Person A, who was approximately 5'10", 270 lbs., was combative, making it difficult to handcuff him. He threw his body to the ground to prevent being placed in the police van. Once in the van, Person A, who appeared visibly intoxicated, continued to curse loudly at the officers and threatened to sue them. In contrast, the other two arrestees, Person B and Person C, were compliant, and told Person A to calm down. Nobody struck Person A while he was in the van. (Tr. 93-96, 98, 106, 110-15)

Upon arrival at the PSA, Respondent held Person A by his forearm as he escorted him inside. Respondent testified that he brought Person A, who was rear-cuffed, to the desk. Respondent stood behind Person A, with the exit to the PSA about 10 feet behind them; there were no other officers between Respondent and the exit. As Respondent initiated a search of Person A's waist area, Person A told Respondent to get off of him, and used his shoulder and elbow to try to push Respondent away. Respondent testified that he saw Person A look over his shoulder toward the exit door, which made Respondent concerned that his prisoner might try to escape and possibly harm other police officers. No other officer was assisting Respondent in dealing with Person A, and Respondent did not ask for anyone's help. (Tr. 98-103, 118, 120, 130-31)

Person A then gave an additional thrust back with his shoulder, knocking Respondent off-balance, and causing him to stumble backward a step or two. Respondent testified that he feared losing control of his prisoner, and so he immediately grabbed Person A by the left forearm. Respondent then chose to pull Person A to the floor. Person A's face struck the floor along with his shoulder, and Respondent observed that Person A was bleeding from the mouth. Respondent

insisted that he was not intending to injure Person A, and that his only objective in bringing him to the floor was to prevent escape; Respondent felt that he had no other option to deal with Person A. (Tr. 103-05, 124-29)

Respondent testified that after an ambulance was called, Person A regained consciousness and resumed cursing at the officers, stating that he was going to sue them. Person A's arrest report was admitted (Dept. Ex. 5), showing that Person A was charged with the open container of alcohol, and with false personation for providing a false name. According to Respondent, a quantity of marijuana was recovered from Person A during a subsequent search at the hospital, and he was given a summons for that as well. (Tr. 106, 122)

Specification 1 charges Respondent with using excessive force against Person A, in that he brought a handcuffed Person A to the floor, thereby fracturing his jaw. The credible evidence has established that during his interaction with Respondent in the PSA, Person A sustained a fractured jaw, requiring surgery. The initial task is to determine what occurred inside the PSA leading to that injury. This tribunal must then decide whether, under the circumstances, Respondent's actions constituted excessive force.

Despite the presence of many individuals inside the PSA at the time of the incident, there were very few eyewitness accounts as to what transpired. Several officers claimed not to have seen what happened, including the desk sergeant who testified that he was focused on entering pedigree information at the time. The only specific accounts of how the injury occurred were the hearsay statements of Person A and Person B, and the testimony of Respondent.

Person A, who has a pending lawsuit against the Department, stated that he sustained the injury when he was punched in the police van. That claim is contradicted by every other witness account, and I reject it.

In his hearsay account, Person B, who is Person A's uncle, stated that he witnessed Person A being picked up and slammed to the floor by an officer at the desk. However, Person B did not appear to testify, and the court was not able to observe his demeanor. Person B was not subjected to cross examination on potential bias for Person A, or on the details of what precisely he was able to see from his vantage point. When asked to describe where exactly the officer grabbed Person A, Person B expressed some uncertainty, stating, "Yeah, by his – however he did it it must have been his waist -- because Person A's a big boy." (Dept. Ex. 3B at 22)

Respondent, in contrast, provided detailed, consistent testimony and was subjected to cross examination. He was respectful and professional on the witness stand as he described the sequence of events leading to his takedown of Person A. Respondent described how Person A was combative from the start of their encounter. At the desk, Person A thrust his shoulder into Respondent, knocking him backward. Respondent explained that he was concerned Person A, a large individual, was going to try to escape, so he pulled Person A to the floor, inadvertently causing Person A to sustain injuries. Having listened carefully to Respondent's testimony, and considering it in conjunction with the other credible evidence, I credit Respondent's account of how Person A was taken to the floor and injured.

However, even accepting Respondent's version of what transpired, I find that his use of force against Person A was excessive. Person A, who had been arrested for an open container of alcohol, was a handcuffed prisoner inside a police facility with several officers in the immediate vicinity. He was rear-cuffed and in a vulnerable position, particularly when Respondent pulled him to the floor. Because of this vulnerability Person A was unable to brace himself, and the impact with the floor fractured his jaw. Medical records corroborated the seriousness of the injury.

This tribunal is mindful that Respondent had to make a split-second decision, complicated by Person A's belligerent behavior. Person A's large size made it even more difficult for Respondent to maintain control of his prisoner in a safe manner. But that responsibility remained with Respondent, and if he required assistance he needed to ask for it. I reject Respondent's suggestion that under these circumstances, he had no other options; after taking a step or two backward, Respondent had Person A back in his grasp, so it was unlikely that the handcuffed Person A was going to make a successful run for the door. In Respondent's own words: "Once I regained control or regained balance, that is when I made the movement." There was no request for assistance, and no verbal order to the prisoner at that point; instead, Respondent acknowledged that "I chose to bring him down to the ground at that point," resulting in a serious injury to Person A's face. (Tr. 125-26)

Patrol Guide section 221-01 states that all MOS are responsible and accountable for the proper use of force. Police officers have a heightened duty of care toward prisoners in their custody. They are responsible for humane treatment and safekeeping of handcuffed prisoners. See, e.g., *Police Department v. Baksh*, OATH Index No. 1471/97 (Oct. 2, 1997). Under these particular circumstances, it was not reasonable for Respondent to pull down the handcuffed Person A who was unable to protect himself from a face-first fall. Respondent did not exercise an appropriate level of care for his prisoner, and it resulted in a serious injury that could readily have been avoided. The credible evidence has established that Respondent used excessive force against Person A, and I find him guilty.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to

the Department on January 8, 2014. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. Respondent has been awarded four (4) Department medals for Excellent Police Duty. Respondent has no disciplinary record.

Respondent has been found guilty of using excessive force against a handcuffe d prisoner inside a PSA. The Department Advocate argues that Respondent "had had enough" of Person A and threw him to the floor, fracturing his jaw. Based on that misconduct, the Department Advocate asks that Respondent forfeit twenty-five (25) vacation days.

Preliminarily, it is worth noting that if I had been persuaded by the credible evidence that Respondent deliberately slammed Person A to the floor simply because he was "fed up" with his prisoner, my penalty recommendation would have been higher than that requested by the Department Advocate. However, based on my finding that the injury was caused inadvertently, when Respondent failed to exercise due care of his prisoner, a lesser penalty is warranted.

On the one hand, Respondent's use of force, while excessive, was not gratuitous; Respondent was trying to maintain control of a combative prisoner who had momentarily knocked him off balance. Nevertheless, Respondent forcibly brought a vulnerable, handcuffed prisoner to the floor, fracturing his jaw, and there must be some accountability for such conduct. Taking into account the totality of circumstances and issues in this matter, I recommend that Respondent forfeit twenty (20) vacation days.

APPROVED

NOV 27 2018

JAMES P. O'NEILL
POLICE COMMISSIONER

Respectfully submitted,

Jeff S. Adler
Assistant Deputy Commissioner Trials

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER CARLOS GOMEZ
TAX REGISTRY NO. 955954
DISCIPLINARY CASE NO. 2017-18036

Respondent was appointed to the Department on January 8, 2014. On his last three performance evaluations, he twice received 4.0 overall ratings of "Highly Competent" and once received a 3.5 rating of "Highly Competent/Competent." He has been awarded four medals for Excellent Police Duty.

[redacted]

Respondent has no disciplinary record.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials