POLICE DEPARTMENT

June 29, 2022

In the Matter of the Charges and Specifications - against -	:	
Lieutenant Special Assignment Eric Dym Tax Registry No. 933762 Housing PSA 7	:	Case Nos. 2020-22734 2021-23392
Police Officer Lorvin Fernandez Tax Registry No. 956643 Housing PSA 7	:	Case No. 2021-23391

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

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

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

For Respondent Dym: James Moschella, Esq.
Karasyk & Moschella, LLP
233 Broadway, Suite 2340
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For Respondent Fernandez: Craig Hayes, Esq.
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111 John Street, Suite 640
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To:

HONORABLE KEECHANT L. SEWELL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2020-22734

1. Lieutenant Eric Dym, on or about April 16, 2019, at approximately 1630 hours, while assigned to PSA 7 and on-duty, in front of 720 Courtlandt Avenue, PSA 7 stationhouse, Bronx County, abused his authority as a member of the New York City Police Department, in that he stopped [redacted] without sufficient legal authority.

   P.G. 212-11, Page 6, Paragraph 20 — INVESTIGATIVE ENCOUNTERS

2. Lieutenant Eric Dym, on or about April 16, 2019, at approximately 1630 hours, while assigned to PSA 7 and on-duty, in front of 720 Courtlandt Avenue, PSA 7 stationhouse, Bronx County, abused his authority as a member of the New York City Police Department, in that he frisked [redacted] without sufficient legal authority.

   P.G. 212-11, Page 8, Paragraph 36 — INVESTIGATIVE ENCOUNTERS

3. Lieutenant Eric Dym, on or about April 16, 2019, at approximately 1630 hours, while assigned to PSA 7 and on-duty, in front of 720 Courtlandt Avenue, PSA 7 stationhouse, Bronx County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the New York City Police Department, in that he directed that [redacted] be issued a summons for disorderly conduct without sufficient legal authority.

   P.G. 203-10, Page 1, Paragraph 5 — PUBLIC CONTACT – PROHIBITED CONDUCT

Disciplinary Case No. 2021-23392

1. Lieutenant Eric Dym, on or about March 17, 2019, at approximately 0145, while assigned to PSA 7 and on duty, inside the PSA 7 station house, Bronx County, did attempt to forcibly touch the sexual or other intimate parts of another person for the purpose of degrading or abusing such person when he pulled down Person A 's pants below his buttocks, when conducting a strip-search of Person A

   P.G. 208-05, Page 3, Paragraph C(1) — ARRESTS GENERAL SEARCH GUIDELINES

   P.L. §§ 110/130.52(1) — ATTEMPTED FORCIBLE TOUCHING

2. Lieutenant Eric Dym, on or about March 17, 2019, at approximately 0145, while assigned to PSA 7 and on duty, inside the PSA7 stationhouse, Bronx County, with the intent to cause physical injury to Person A did attempt to cause physical injury to Person A in that he sat on the back of Person A 's head, which restricted Person A breathing.

P.G. 221-02, Page 2, Prohibition 11	USE OF FORCE
P.L. §§ 110/120.00(1)	ATTEMPTED ASSAULT IN THE THIRD DEGREE

3. Lieutenant Eric Dym, on or about March 17, 2019, at approximately 0145, while assigned to PSA 7 and on duty, inside the PSA7 stationhouse, Bronx County, with the intent to cause physical injury to [redacted] did attempt to cause physical injury to [redacted], in that he punched, kneed, and kneeled on [redacted]'s head.

P.G. 221-01, Page 3, Prohibition 2	FORCE GUIDELINES
P.G. 221-02, Page 2, Prohibition 11	USE OF FORCE
P.L. §§ 110/120.00(1)	ATTEMPTED ASSAULT IN THE THIRD DEGREE

4. Lieutenant Eric Dym, on or about March 17, 2019, at approximately 0145, while assigned to PSA 7 and on duty, inside the PSA 7 station house, Bronx County, did attempt to forcibly touch the sexual or other intimate parts of another person for the purpose of degrading or abusing such person when he pulled [redacted]'s pants below his buttocks and touched [redacted]'s anus with his finger, when performing a cavity search of [redacted].

P.G. 208-05, Page 4, Paragraph C(4)	ARRESTS GENERAL SEARCH GUIDELINES
P.L. §§ 110 & 130.52(1)	ATTEMPTED FORCIBLE TOUCHING

Disciplinary Case No. 2021-23391

1. Police Officer Lorvin Fernandez, on or about March 17, 2019, at approximately 0145, while assigned to PSA 7 and on-duty, inside the PSA 7 stationhouse, Bronx County, with the intent to cause physical injury to [redacted] did attempt to cause physical injury to [redacted] in that he punched [redacted]

P.G. 221-02, Page 2, Prohibition 11	USE OF FORCE
P.L. §§ 110/120.00(1)	ATTEMPTED ASSAULT IN THE THIRD DEGREE

2. Police Officer Lorvin Fernandez, on or about March 17, 2019, at approximately 0145, while assigned to PSA 7 and on-duty, inside the PSA 7 stationhouse, Bronx County, with intent to cause physical injury to [redacted] did attempt to cause physical injury to [redacted], in that he stepped on [redacted]'s head.

P.G. 221-02, Page 2, Prohibition 11	USE OF FORCE
P.L. § 110 & 120.00(1)	ATTEMPTED ASSAULT IN THE THIRD DEGREE

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on January 6, 11, 24, and May 5, 2022. Respondents, through their respective counsels, both entered pleas of Not Guilty to the subject charges. The CCRB called Meghan Yetman, [redacted] and Thomas Juliano as witnesses. 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 reviewed all of the evidence in this matter, I find Respondent Dym Guilty of the misconduct charged in Disciplinary Case No. 2020-22734 and Not Guilty of the misconduct charged in Disciplinary Case No. 2021-23392. I recommend that he forfeit 18 vacation days. I find Respondent Fernandez Not Guilty of the misconduct charged in Disciplinary Case No. 2021-23391.

ANALYSIS

Disciplinary Case No. 2020-22734

The following is a summary of the facts that are not in dispute. On April 16, 2019, at approximately 1652 hours, Respondent and his partner, Sergeant Natalie Bautista, were driving[1] eastbound on 156th Street, approaching the intersection of Courtland Avenue, in the direction of

[1] Respondent testified that he was the passenger in the car, while Bautista claimed in her statement that Respondent was the driver (T. 501; Resp. Ex A1 at 9).

PSA-7, where they planned to end their tour (T. 498; Resp. Ex. A1 at 7-8). At about that time, [redacted] a case worker for CASES[2], was walking southbound on Courtland Avenue near 156th Street (T. 198, 205, 498-501; Resp. Ex. A1 at 7-8). Respondent made several observations of [redacted] and communicated them to Sergeant Bautista; they eventually reversed their direction of travel and returned to the intersection of Courtland Avenue and 156th Street (T. 504-09, 523-24; Resp. Ex. A1 at 21-23).

Sergeant Bautista turned southbound on Courtland Avenue, and then stopped to permit Respondent to step out of their car before resuming driving against traffic[3] (T. 509-20, 524-26; Resp. Ex. A1 at 24). Sergeant Bautista drove to the corner of Courtland Avenue and 155th Street, where she stopped her car, stepped out of it, and walked toward [redacted] who had continued walking in a southbound direction on Courtland Avenue (CCRB Ex. 4, Resp. Ex. A1 at 24). While she was approaching [redacted] Respondent, who had been trotting toward [redacted] caught up to them at the northeast corner of Courtland Avenue and 155th Street (T. 528-30; CCRB Ex. 4).

Both Respondent and Bautista placed their hands on [redacted] and directed him to stand near the wall of a bodega (T. 534-36; CCRB Ex. 4; Resp. Ex. A1 at 24-25). They then conducted a Level 3 stop and frisk, the justification for which is in dispute. [redacted] refused to identify himself during the encounter or provide identification to the police officers after they requested that he do so (CCRB Ex. 4; Resp. Ex. A1 at 26-27). [redacted] was placed under arrest and transported to PSA-9 by Police Officer Dominguez and his partner, who responded to Respondent's call for backup (CCRB Ex. 4, 16:37:10; Resp. Ex. A1 at 41). [redacted] was issued a summons for disorderly conduct, which was dismissed before he made an initial appearance in court (T. 258, 551-52; Resp. Ex. A1 at 38-39, 41-42).

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[2] CASES is an organization that provides community-based alternatives to incarceration.
[3] Courtland Avenue is a one-way street with a northbound direction of travel.

Respondent testified that his attention was drawn to [redacted] because "he had this heavy, hooded sweatshirt and over that a heavy, black bubble jacket. It was very dark clothing. It didn't seem like jackets for a warm day. It looked like winter clothes you would wear on a freezing cold January day" (T. 501). He detailed further, "From my baseline, it was 62 degrees out. I expected to see people walking, smiling. It's finally a warm day. What was peculiar to me is [sic] that [redacted] stood out. He has [sic] this heavy clothing and starts staring at the car as we were [sic] staring at him. So that struck me as odd. As he was walking – he was walking, appeared to be moseying along like a normal walk, leisurely. When he made eye contact with us, it drew my attention because he, kind of, was darting his eyes. He didn't have to turn his neck, but he wanted to look at us. At the same time, he would pat his pockets." Respondent testified that, based upon his experience, [redacted] body language was an indication that he may be in possession of a firearm "especially in that particular location in the proximity to where we're getting illegal firearms, shooting and unfortunately homicides" (T. 503-04).

Respondent testified further that "we obviously made the decision that we were going to continue our observation on him and potentially make [sic] an approach" (T. 508). He claimed that [redacted] then changed his pace: "He was, kind of, moseying, and then went to a foot pace" (T. 508). Respondent denied that he made the decision at that point to stop [redacted] but claimed to be "comfortable making an approach and then from there we could see if we get a reaction, raise our level of suspicion; we could also get to the point where we get to question" (T. 509).

Respondent testified that as he and Bautista backed up their vehicle, he observed [redacted] jacket pockets, one of which appeared to be weighted down, making it lopsided (T. 522). He recalled that as he approached [redacted] on foot, [redacted] seemed to be "trying to maintain contact with Sergeant Bautista and myself. He kept darting his eyes, looking around, back and forth, and

it raised my level of suspicion. In addition to that, with the weight of his pockets, he know [sic] that the police are going to be make [sic] an approach; it became obvious that he didn't stop. He continued in his tracks" (T. 529). Respondent explained further that, based upon his experience, those observations suggested that [redacted] would fight (T. 530).

He testified that when he and Bautista caught up with [redacted] he "could see his posture, his posture of his body, his muscles. I could see his jawline. It was an indication to me that he may have wanted to fight, and from my experiences where we stopped in the middle of the sidewalk, it's in our best, for safety purposes with pedestrian traffic, to guide him to the wall where we create a makeshift barrier that allows us to conduct the frisk, a stop, and also put him in a position where he can't have so much energy if he is going to get in a fight" (T. 534-35). Respondent testified further, "I immediately felt his arm muscle up, and I pinned it to the wall, because it felt like a jackhammer, and I felt if I let it go, I'm going to get punched in the face, along already with his presence. I saw he was about 6 foot 4, and he was a pretty big young man" (T. 535).

Respondent testified that as he was attempting to frisk [redacted] he was "muscling his body where I couldn't check, and felt like he was trying to intimidate me conducting this frisk. I kept touching his chest area. I couldn't tell if it was annoying him, pissing him off, or trying to conceal something. At this point, I was concerned that maybe there's an incoming trend of persons of interest, of subjects carrying firearm [sic] on their chest, because that's what I had just learned two days prior where I got an illegal loaded caliber .45 firearm on a defendant's chest. So I was trying to conduct this frisk. Every time I tried to touch him, he would raise his voice. The crowd would raise their voice [sic]" (T. 537-38).

Respondent recounted, "So, I asked Mr. [redacted] after I let his arm go a little bit, he cocked, and then I grabbed both of them with my hand to stop it. I said, 'What are you doing? You want to fight?' and he said, 'Yeah, I will.' So I had this level – I felt that he was trying to intimidate us from conducting the frisk. Every time that I tried to attempt – I did it over and over several times. I never felt confident that I got a good frisk along with the crowd distracting me" (T. 539).

Respondent testified that he then determined that [redacted] was "obstructing me from doing my job. He's trying to intimidate me. He's causing a crowd. I'm going to take him in" (T. 540). He explained his decision as follows: "Well, at the time, I kind of analyzed this, and I thought to myself, we can place him under arrest for obstruction of governmental administration. I felt that he intimidated or at least attempted to intimidate Sergeant Bautista and I from doing our job, which is a Terr[y] stop based on Level 2, and in addition to that, I had a large crowd" (T. 551).

The Tribunal received the February 7, 2020, hearsay statement of Sergeant Natalie Bautista (Resp. Ex. A1, A2). In her statement, Bautista asserted that as she and Respondent drove on 156th Street toward Courtland Avenue, she observed a person, later identified to her as [redacted] walking down the street with a "heavy winter jacket" on; this caught her attention because it "was hot outside" (Resp. Ex A1 at 7-8). She claimed that "one side of his jacket was like weighted more down than the other side of the jacket"; that he "kept like adjusting the pocket," and a woman across the street from [redacted] pointed at him (*Id.* at 8). Bautista asserted that those factors led up to the decision she and Respondent made "to stop [redacted] because they believed he "had a weapon on him" (*Id.* at 8, 23).

Bautista also asserted in her statement that [redacted] had been yelling from the beginning of their encounter with him and that his yelling caused "people to stop and look" (Resp. Ex. A1 at

29, 32). She contended that so many people gathered that she and Respondent had to call for backup to perform crowd control (*Id.* at 31). Bautista also claimed in her statement that she and Respondent decided to handcuff [redacted] and bring him to the precinct when things "started getting out of control" (*Id.* at 35). While she also claimed that [redacted] had threatened Respondent, Bautista could not recall the specifics of the alleged threat, asserting only "it had to do with fighting" (*Id.* at 39). According to Bautista, [redacted] yelling and threats were the bases for charging him with disorderly conduct (Resp. Ex. A1 at 38-39).

[redacted] testified that on April 16, 2019, at about 1630 hours, while walking back to his office, he was wearing "a black jacket, a thin black sweatshirt, and beige khakis." He had a personal mobile telephone, a work mobile telephone, work identification, and a wallet. [redacted] testified that he had his personal mobile phone in his hand while walking (T. 202, 204-05). He recalled that the temperature was in the "50s, 50, 60," and his jacket was open (T. 206).

[redacted] testified that he noticed an unmarked police car driving against traffic, following him (T. 207). He made eye contact with both officers for about "two seconds" and noticed that they were wearing vests (T. 208). [redacted] recalled that his work mobile telephone was in his coat pocket (T. 209). He continued walking at what he described as a "normal pace" until he heard a car door shut; he then looked behind him and saw Respondent walking "pretty fast" behind him and Bautista driving towards him, against traffic (T. 210, 212-13, 245-46). [redacted] denied patting his pockets or moving his body to shield any part of it from Respondent's view (T. 214). He testified that Bautista kept driving in the same direction and eventually "blocked me off" with her car (T. 214-15).

[redacted] testified that Respondent grabbed his right arm while saying "Stop," followed by Bautista grabbing his left arm before they pulled him toward the store they were in front of (T.

215-17). He testified further that when Respondent stopped him, he told [redacted] that he was a police officer and that [redacted] looked suspicious; Respondent also told [redacted] that "[he] look[ed] like [he] had a gun on [him]" (T. 216). [redacted] testified further that as Respondent and Bautista brought him to the store wall, he asked them, "What am I being stopped for?" (T. 220). He also observed several passersby near where he was stopped, including a "social worker for the Bronx Defenders," whom he later learned was Meghan Yetman (*Id.*). [redacted] testified that Yetman, while standing "about three feet away," asked Respondent and Bautista why [redacted] was being stopped; both officers told her to back up (T. 220-21). He recalled that Yetman backed up until she was about five feet away (T. 223). [redacted] testified that while he was asked for identification and had identification on his person, he did not provide it to Respondent or Bautista because he believed he had done nothing wrong (T. 246-47).

[redacted] detailed that Respondent and Bautista searched his coat pockets, pants pockets, and sweatshirt pocket during the stop (T. 224-25). He testified that both officers asked whether he had any weapons on him, and Respondent asked him several times "why I had a coat on in this type of weather" (T. 228, 243). [redacted] testified that he answered Respondent, "'Cause I was cold'" (*Id.*). As Respondent touched [redacted] chest area during the frisk, [redacted] told Respondent, "Don't touch my neck" several times (T. 235). Respondent then asked [redacted] if he needed medical attention, which he denied (T. 229-30). Respondent then asked [redacted] if he wanted to fight, to which [redacted] replied, "Yeah," explaining that he responded in that manner as a means of "standing [his] ground" in response to what he perceived as a threat by Respondent (T. 231-34, 236). [redacted] denied clenching his fists, pulling his hands away from Respondent and Bautista, or making any movements with his body to injure Respondent (*Id.*). He admitted interacting with one bystander, who called out his name as he was being placed in handcuffs; he assumed that she

knew him from his Instagram presence, and he asked her to contact his brother (T. 238-40).

[redacted] denied giving any instructions to bystanders to shout at Respondent or Bautista (T. 240-42).

The following summarizes the relevant portions of Sergeant Bautista's Body Worn Camera recording of the stop (CCRB Ex. 4).

16:31:55	Respondent is holding [redacted] by his right hand. [redacted] is wearing a synthetic jacket over a hooded sweatshirt. Respondent is wearing a ballistic vest over a short-sleeved t-shirt.
16:32:05	Off-camera voice of Yetman asks, "Did he commit a crime?" Respondent turns to his right and points, saying, "Ma'am . . ." Sgt. Bautista asks, "Who are you, his lawyer?" Respondent says, "Don't stand behind us, please," as Sgt. Bautista places her hand inside [redacted] left jacket pocket.
16:32:19	Sgt. Bautista's BWC turns to capture Yetman standing near the curb, wearing a dark shirt under a thigh-length coat. Sgt. Bautista is seen placing a mobile telephone in [redacted] left jacket pocket.
16:32:32	Man wearing a dark jacket walks southbound on Courtland toward 155th Street.
16:32:41	Respondent asks, "What are you doing? What are you doing . . . you want to fight with me?" [redacted] answers, "Yeah, I will." There is no indication that [redacted] breaks free from Respondent's control, assumes a fighting stance or makes a threatening movement.
16:33:07	Sgt. Bautista's BWC captures a verbal exchange between Respondent and Yetman; the camera captures a picture of a male standing near the front fender of a white vehicle wearing a hooded sweatshirt and a blue and white jacket.
16:33:19	Respondent asks [redacted] "Why are you acting like you have something on you?"
16:33:26	Respondent tells [redacted] "You're not complying, and you're telling me you're going to fight me."
16:35:17	Respondent handcuffs [redacted]
16:35:32	[redacted] asks a bystander to "Hit my brother up on the 'Gram."
16:35:50	[redacted] asks, "What's my charge?" Respondent says, "I'll tell you what, you say you want to fight me."
16:36:10	Person seen standing by the front fender of a white van wearing hooded top; design on chest.
16:36:22	Respondent tells [redacted] "It's 60 degrees out, and you're wearing a heavy jacket; . . . everybody else is wearing t-shirts."
16:36:40	Person walking northbound on Courtland wearing a light-colored jacket with a hood; a man wearing a dark coat walks from the curb toward the store.

16:36:48 Man walks out of the store and looks toward the area of the stop while wearing a camouflage field jacket, knit hat, and hooded garment underneath.
16:37:10 Police officer leads [redacted] from the scene to a police car.
16:37:15 Man walks toward the corner in a yellow head covering and yellow t-shirt.

At issue, in this case, is whether Respondent had a sufficient legal basis to: (1) perform a Level 3 stop; (2) perform a Level 3 frisk; and (3) issue a summons for disorderly conduct.

I find [redacted] to be a credible witness concerning the events of April 16, 2019. [redacted] admitted to filing a complaint with the Civilian Complaint Review Board at trial, but denied that he had pursued civil litigation against either Respondent or the Department. I take judicial notice that on February 16, 2022, several weeks after his testimony, [redacted] filed a civil action against Respondent Dym[4]. Based on this filing, I must consider [redacted] financial interest as a factor in my credibility determination.

I had the opportunity to observe [redacted] demeanor as he testified during the hearing and considered his testimony and Sergeant Bautista's Body Worn Camera video recording of the encounter. While [redacted] demeanor during his interaction with Respondent, as captured on the video recording, could be objectively described as annoyed, his reaction to the encounter did not appear to me to be disproportionate to the involuntary interruption of his freedom of movement and bodily integrity. His response to being subjected to what he considered an unwarranted stop and frisk was not of such magnitude to raise the issue of bias against the police. Considering the totality of the evidence, I find [redacted] in-court testimony logical, concise, and corroborated by the independent evidence in the case.

[4] The lawsuit names the City of New York, Respondent, Sergeant Natalie Bautista, Respondent Fernandez, and Police Officer Jose Tejada as defendants. Based upon the Tribunal's understanding of the trial record, neither Respondent Fernandez nor Police Officer Tejada was involved in [redacted] stop on April 16, 2019.

I find Respondent to be generally credible; however, a closer examination of his testimony concerning the inferences he drew from the observations he made revealed those inferences were not reasonably drawn from the information before him, irrevocably tainting the perceived belief of his authority to engage [redacted] in an investigative encounter.

Patrol Guide procedure 212-11 sets forth Department policy on conducting street encounters.

Specification 1: Stop without Sufficient Legal Authority

I find that CCRB has met its burden of proof by a preponderance of the relevant, credible evidence that Respondent stopped [redacted] on April 16, 2019, without sufficient legal authority.

A review of CCRB Exhibits 2, 3, and 4 shows an encounter between [redacted] and Respondent on the northeast corner of Courtland Avenue and 155th Street. The credible, relevant evidence establishes that the encounter began when Respondent began chasing after [redacted] and reached a critical phase when he grabbed [redacted] shoulder and wrist, along with Sergeant Bautista. I find that at that point, [redacted] was not free to leave. According to the Patrol Guide and well-established law, such a Level 3 stop had to be supported by reasonable suspicion that the suspect has committed, is committing, or is about to commit a crime (*Terry v. Ohio*, 392 U.S. 1 [1968]; *People v. DeBour*, 40 N.Y.2d 210 [1976]).

Courts have found initial approaches to request information, based upon a suspect's inappropriate dress for the weather, and acting oddly by walking in the middle of the street, to be based on objective, credible reasons (*People v. Moyaho*, 12 A.D.3d 692 [2d Dept. 2004]; *People v. Giles*, 223 A.D.2d 39 [1st Dept. 1996]). It has also been held that a suspect's nervous, furtive, or hesitant reaction after making eye contact with the police is an objective, credible reason for a

request for information (*People v. Diaz*, 22 A.D.3d 346 [1st Dept. 2005]; *People v. Flynn*, 15 A.D.3d 177 [1st Dept. 2005]; *People v. Belliard*, 309 A.D.2d 618 [1st Dept. 2003]).

In this case, Respondent testified that [redacted] first drew his attention because he looked back at Respondent when he looked at him: "He was staring back at us as we were staring at him" (T. 503). Whatever the significance of that behavior was to Respondent, it cannot be reasonably interpreted as furtive or nervous; thus, it provided no basis in law or fact for a request for information. Respondent also testified that as he followed [redacted] down Courtland Avenue, he saw [redacted] looking over toward Sergeant Bautista as she drove south on Courtland Avenue toward the corner of 155th Street. While Respondent characterized that behavior as furtive, it is equally plausible that [redacted] was merely taking note of someone driving the wrong way down a one-way street, arguably behavior that was dangerous to pedestrians and other motorists. Since [redacted]s behavior concerning Sergeant Bautista was equivocal, in the absence of additional information upon which Respondent could legally rely, I find that this does not establish an independent basis for a request for information. It is undisputed that neither Respondent nor Sergeant Bautista was in uniform; similarly, they were riding in an unmarked police vehicle. Even if, assuming *arguendo*, this Tribunal were to find, as the court did in *People v. Howard*, [redacted] actions did constitute "'furtive' movements," they were "at best ambiguous" (*see People v. Howard*, 50 N.Y.2d 583, 590 [1980]).

Respondent also testified that [redacted] dress made him stand out because he was wearing a "heavy hooded sweatshirt and over that . . . a heavy, black bubble jacket" when other people in the area were "wearing t-shirts" (T. 501; CCRB Ex. 4 at 16:36:22). The evidence in the record does not support this judgment. CCRB Exhibit 4, Sergeant Bautista's Body-Worn Camera

video, shows several people on the street dressed in coats and some with coats and sweaters beneath them.

I take judicial notice that in the Bronx on April 16, 2019, the weather at sunrise, 0651 hours, was sunny, 44 degrees with six mph winds. At 1551 hours, the weather was sunny, 65 degrees with ten mph winds (Time and Date, Past Weather in Bronx County, New York, USA – April 2019, https://www.timeanddate.com/weather/@5110253/historic).

Under the circumstances presented in this case, I find that Respondent's judgment that [redacted] was dressed inappropriately for the weather was subjective and not supported by the independent, credible evidence. Accordingly, I find that this judgment could not support a request for information. Assuming *arguendo* that the circumstances had supported Respondent's judgment about [redacted] clothing, it still would not have formed a basis for initiating a request for information without additional suspicious behavior on [redacted] part.

Finally, Respondent testified that [redacted] increased his pace once he began following [redacted] on foot (T. 508). The New York Court of Appeals held in *People v. Howard*, 50 N.Y.2d 583 (1980) that even when a police officer makes a lawful request for information, a citizen has the right not to respond. The citizen can refuse to answer, but can also walk away (*see People v. Grunwald*, 29 A.D.3d 33, 36 [1st Dept. 2006]). If the citizen should decide to run away, in the absence of any indication of criminal activity, that flight is an insufficient basis for pursuit by the officer (*People v. Holmes*, 81 N.Y.2d 1056 [1993]; *People v. Martinez*, 80 N.Y.2d 444 [1992]; *People v. Brogdon*, 8 A.D.3d 290 [2d Dept. 2004]). Only when the citizen's flight, in response to an approach by the police, is combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may it give rise to reasonable suspicion, the predicate for police pursuit (*People v. Sierra*, 83 N.Y.2d 928 [1994]).

CCRB Exhibit 2, the video recording looking northward on Courtland Avenue from 155th Street, does depict [redacted] walking down the east side of the street and Respondent trotting behind him until [redacted] stops to look at Sergeant Bautista, who emerges from her vehicle, then walks toward [redacted] Respondent catches up to [redacted] and the two police officers move [redacted] toward the right of the video against the wall of a bodega. In the view of the Tribunal, [redacted] pace appears to be uniform as he walks down the block until he stops near the northeast corner of Courtland Avenue and 155th Street, where he encountered Sergeant Bautista; thus, there is no evidence of flight in the record.

Respondent testified that he had made an arrest for possession of a weapon only days before in the immediate area, involving a defendant who had a .45 caliber pistol strapped to his chest and attached to his belt. The fact that Respondent arrested someone in the same area is insufficient to suspect [redacted] of criminal activity (*see People v. McIntosh*, 96 N.Y.2d 521, 527 [2001]["In determining the legality of an encounter under *De Bour* and *Hollman,* it has been crucial whether a nexus to conduct existed, that is, whether the police were aware of or observed conduct which provided a particularized reason to request information. The fact that an encounter occurred in a high crime vicinity, without more, has not passed *De Bour* and *Hollman* scrutiny"]).

I find by a preponderance of the relevant, credible evidence that Respondent seized [redacted] at the corner of Courtland Avenue and 155th Street; I further find that he lacked a sufficient legal basis. When he stopped [redacted] he had, at most, a hunch regarding possible criminal activity. There was no evidence that [redacted] had engaged in any suspicious behavior, despite Respondent's belief that he had done so. Despite Respondent's testimony that one of [redacted] pockets appeared to have been "weighted down" and that [redacted] "touched his pockets,"

there was no further evidence from which to suspect that the object weighing down the pocket was a firearm.

Based upon the foregoing, I find Respondent Guilty of Specification 1.

Specification 2: Frisk without Sufficient Legal Authority

I find that CCRB has met its burden of proof by a preponderance of the relevant, credible evidence that Respondent frisked [redacted] person on April 16, 2019, without sufficient legal authority.

As set forth above in the analysis of Specification 1, a "stop and frisk" of a suspect is a Level 3 stop under New York law and must be supported by reasonable suspicion to believe that the suspect has committed, is committing, or is about to commit a crime (*Terry v. Ohio, supra*; *People v. DeBour, supra*). Because I have found that Respondent lacked reasonable suspicion to stop [redacted] the frisk he conducted after initiating the stop also lacked reasonable suspicion.

I further find that no change in circumstances occurred that escalated the encounter to one where a Level 3 stop and frisk was warranted.

Based upon the foregoing, I find Respondent Guilty of Specification 2.

Specification 3: Issuing a Summons without Sufficient Legal Authority

I find that CCRB has met its burden of proof by a preponderance of the relevant, credible evidence that Respondent directed the issuance of a summons to [redacted] on April 16, 2019, without sufficient legal authority.

Respondent testified that he believed he had legal justification for issuing [redacted] a summons for Obstructing Governmental Administration (Penal Law § 195.05), based on his alleged failure to keep his hands raised and threatening Respondent. Respondent testified further that once he identified [redacted] at the precinct, he decided to exercise his discretion and only

authorize the issuance of a summons for Disorderly Conduct (Penal Law § 240.20). Based upon the credible, relevant evidence in the record, I find that Respondent lacked legal justification for issuing a summons charging disorderly conduct.

A person is guilty of disorderly conduct when, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he engages in fighting or tumultuous or threatening behavior (Penal Law § 240.20[1]).

According to Respondent's testimony, he believed that [redacted] was trying to deter him from conducting a frisk. [redacted] was issued a summons charging him with violating subsection 1 of the disorderly conduct statute, alleging: "Defendant was observed on public sidewalk causing a disruption acting in a violent and threatening manner; his action caused a crowd to gather" (CCRB Ex. 9).

"Critical to a charge of disorderly conduct is a finding that defendant's disruptive statements and behavior were of a public rather than an individual dimension. This requirement stems from the *mens rea* component, which requires proof of an intent to threaten public safety, peace or order (or the reckless creation of such a risk)" (*People v. Baker*, 20 N.Y.3d 354, 359 (2013). The standard for determining whether the "public harm" element has been met employs a holistic analysis: "To determine whether the record supports an inference that the requisite mens rea was present, we have employed a contextual analysis that turns on consideration of many factors, including 'the time and place of the episode under scrutiny; the nature and character of the conduct; the number of other people in the vicinity; whether they are drawn to the disturbance and, if so, the nature and number of those attracted; and any other relevant circumstance" (*People v. Baker*, 20 N.Y.3d at 360, citing *People v. Weaver*, 16 N.Y.3d 123, 128 [2011]]).

In this case, Respondent and Bautista conducted a stop in broad daylight on a street corner in the Bronx. The subject of the stop questioned the basis for the stop; he further expressed his annoyance at being subjected to detention and a protracted frisk. The Body-Worn Camera evidence shows that bystanders observed the initiation of the stop and those who came to watch it as it progressed. At no point during the encounter did [redacted] direct abusive or obscene language toward Respondent or Bautista, presaging the onset of violence. Moreover, despite the factual allegations of the summons, [redacted] displayed no behavior that could be construed as menacing or threatening. While the persons who observed the detention appeared to be questioning the basis for the stop and suggested that Respondent was engaging in arbitrary behavior, no one did anything more than express their judgment in public. His call for backup ameliorated any speculative danger of the bystanders becoming aggressive toward Respondent and Bautista, which resulted in several uniformed officers responding to the scene.

It is illogical for Respondent to assert that [redacted] threatened him when Respondent was the one who asked [redacted] if he wanted to fight. While [redacted] answered that he did, his response was equally as absurd as Respondent offering an invitation to mutual combat to someone he was in the process of detaining.

In sum, the absence of any evidence that [redacted] had the intent to cause public harm and the absence of facts supporting the allegations on the summons leads to the conclusion that Respondent lacked a sufficient legal basis for directing the issuance of a summons for disorderly conduct. Based upon the foregoing, I find Respondent Guilty of Specification 3.

Disciplinary Case Nos. 2021-23391, 2021-23392

Respondents are accused in these cases of attempting to assault [redacted] Person A [redacted], in violation of Penal Law Sections 110 & 120.00. Respondent Dym is also charged with

attempting to forcibly touch Person A, in violation of Penal Law Sections 110 & 130.52(1), while conducting a strip search of Person A's person inside the PSA-7 precinct cell area.

CCRB charged criminal law violations against Respondents to bring charges against them after the expiration of the 18-month statute of limitations for administrative charges (N.Y. Civil Service Law § 75[4]). While the Tribunal acknowledges that courts in Article 78 proceedings look to the words of the charge to determine whether the Criminal Exception applies, in order to support a finding of guilt at trial, this Tribunal requires proof by a preponderance of the evidence as to each element of the crime alleged. Without such a requirement, the exception would swallow the rule, since parties could simply mirror the operative language of a crime to overcome the statute of limitations, yet, at trial, proceed with proof of an ordinary disciplinary matter (*see Disciplinary Case No.* 2018-19734 [April 4, 2022], citing *Dep't of Education v. Oliver,* OATH Index No. 1889/13 at 5 ["This tribunal has eschewed attempts to 'circumvent the application of the statute of limitations simply by drafting . . . pleadings in a way which mirrors the Penal Law elements of crimes, without regard to what [the] evidence would actually show.'"], quoting *Human Resources Admin. v. Man of Jerusalem,* OATH Index No. 936/90 at 16 [Aug. 2, 1990]).

As this Tribunal has previously held, "[A]ny finding of guilt in this case must be predicated on CCRB proving, by a preponderance of the credible evidence, each element specified in the charges which conform to the charged Penal Law crimes and bars them from prosecuting Respondent for Patrol Guide administrative violations that do not include the elements of those charged crimes (*Disciplinary Case No. 2018-19274* [Aug. 19, 2019]).

CCRB offered the hearsay statement of Person A, video evidence from the PSA-7 cell area, and Respondent Fernandez's Body-Worn Camera. The Tribunal also received

testimony from Respondent Dym and Respondent Fernandez. After considering the relevant, credible evidence in the record, I find Respondents Not Guilty of the charged misconduct.

The following is a summary of the evidence that is not in dispute.

On March 17, 2019, at approximately 0145 hours, Person A was arrested at 156th Street and Westchester Avenue by a PSA-7 anti-crime team member, of which Respondent Dym was the supervisor. Respondent Dym testified that he had seen Person A with marihuana in his hand. Person A was asked for his name on the scene and refused to provide any information. Police officers seized the marihuana and placed Person A under arrest rather than issuing a summons. Once he was transported to PSA-7, the police officers conducted an inventory search at the front desk, which Respondent Fernandez recorded on his Body Worn Camera. They recovered. among other things, $1,646.34 in United States currency, a disposable lighter; two library cards; and a debit card in the name of a "Natasha Romanov"[5] (T. 559-64, 569-74, 784-85, 1013; CCRB Ex. 12)

While at the PSA-7 desk, Person A was asked for his true name several times. He initially provided an alias, Jonathan Cruz, but Respondents discovered the falsity of that identity (CCRB Ex. 18A at 4). When he eventually gave his true name and date of birth, a search of Department indices revealed that he was wanted in connection with an investigation into a past robbery (T. 578-79). Person A was then taken to the holding cell area to be lodged until detectives from the 43rd Precinct Detective Squad, the originators of the I-Card, could contact PSA-7. While in the holding cell area, Respondents and other police officers attempted to conduct a strip search of Person A 's clothing and person (T. 582-85, 600-05). A six and one-half minute physical struggle ensued, which involved using force against Person A Respondents and

[5] "Natasha Romanov" is a pseudonym for the cardholder, whose name is known to the Tribunal.

the other police officers were eventually able to lower Person A 's pants and underwear below his buttocks area, which they illuminated with a flashlight. The search revealed no contraband or weapons (T. 676).

Respondent self-initiated an Internal Affairs report based upon his use of force and completed a Threat, Resistance, Injury Report (T. 679).

Person A was transported to Lincoln Hospital on March 17, 2019, where he was treated in the Emergency Room at approximately 0901 hours (T. 679-80; CCRB Ex. 10). Person A made a follow-up visit to St. Barnabas on March 22, 2019, at approximately 1303 hours (CCRB Ex. 10).

On March 25, 2019, Person A was interviewed by CCRB Investigator Thomas Juliano. Investigator Juliano also took photographs of various parts of Person A 's body, which CCRB entered into evidence (T. 450-51; CCRB Exs. 11A, 11B, 11C, 11D, 11E, 11F).

The Tribunal received five video recordings in evidence, including Respondent Fernandez's Body-Worn Camera footage and four video recordings of the holding cell area of PSA-7 (CCRB Exs. 12, 13, 14, 15, 16). The Tribunal also received in evidence six still photograph "screen grabs" from the above-described video recordings (CCRB Exs. 17A, 17B, 17C, 17D, 17E, 17F).

In dispute in this case is whether Respondents, with the intent to cause physical injury, attempted to inflict such physical injury upon Person A during the search. Also at issue is whether Respondent Dym attempted either to forcibly touch Person A 's sexual or other intimate parts to abuse or degrade him or gratify Respondent Dym's sexual desires.

Because of the untimely service of charges, CCRB must establish each element in the charges, which conform to the charged Penal Law crimes; they are barred from prosecuting

Respondents for Patrol Guide administrative violations that do not include the elements of those charged crimes.

CCRB Exhibit 12 contains video images of Person A 's arrest, transportation to PSA-7, and his arrest processing at the front desk. While at the desk, police officers searched his person as he stood before the desk while handcuffed (CCRB Ex. 12 at 6:12-22:06). Among the evidence recovered was $1,646.34 in U.S. currency, which the police officers counted in Person A 's presence (*Id.* at 6:25-19:02). After being asked for his name several times, Person A gave the police officers the name " Person A and provided his date of birth (*Id.* at 18:20-19:32).

While Person A was being searched at the desk, Respondent Dym asked him, "Before you go into the cells, do you have anything on you I don't know about? In your crotch, in your undergarments? Do you?" to which Person A responds, "No" (CCRB Ex. 12 at 9:47-9:58). Dym then asked, "You sure?" but Person A did not respond (*Id.* at 10:01-10:02). Dym later says to Person A "Now listen, right now it's just a summons; once you walk through these doors, if you have something in your crotch or something that we don't know about and it turns up, it's automatically a felony, you understand me?" (*Id.* at 11:11-11:42). Person A responded by asking, "Like if I have a knife in my crotch right now? Is that what you're talking about?" (*Id.* at 11:44-11:46). Dym answered, "Knife, drugs," to which Person A replied, "I have none of that on me" (*Id.* at 11:46-11:51). Dym then says, "I'm asking you . . ." and Person A responds, "I just answered you [unintelligible]" (*Id.* at 11:51-11:53).

Respondent Dym testified that from the street encounter which led to Person A 's arrest, continuing through his arrest processing inside PSA-7, Person A (1) was evasive about his identity, going from providing no pedigree information to providing a false identification; (2)

was in possession of marihuana, and varying denominations of currency in several pockets; and (3) obliquely alluded to the prospect of a knife being hidden in his crotch (T. 576, 599-601).

Respondent Dym testified that he understood a "cavity search" to entail "touch[ing] someone in the orifices of their body" or "inserting a finger or hand to actually grab at that particular area" (T. 602-03). He denied having the intention to conduct a cavity search when he authorized a strip search (T. 603). He testified further that he communicated his decision to perform a strip search of Person A's person by telling the other police officers to "search his Bronx wallet," a code for a strip search (T. 604-05, 622). Respondent Dym conceded that he did not tell Person A at that time of his intention to conduct a strip search so that Person A would not have an opportunity to devise a means of avoiding the search (T. 605).

Respondent Dym testified that he remained at the front desk while the other police officers, including Respondent Fernandez, took Person A to the holding cell area (T. 626). Several minutes later, he heard some banging coming from that direction, which caused him to run there from the front desk (T. 628). When he arrived at the holding cell area, he saw Person A banging his head against the wall and struggling with the police officers as they were attempting to search him (T. 629-30). According to Respondent Dym, Person A was "weaponizing" his head and moving his hips to move the police officers away from him (T. 630, 640). At that point, Respondent Dym decided that they would conduct a strip search in the bathroom in the holding cell area (*Id.*). He testified that as soon as Person A stood up, he spat at Respondent Dym, who responded by pushing Person A's head and torso down (T. 637).

Respondent Dym then entered the holding cell where Person A was and attempted to calm him down by explaining the search process; despite this effort, Person A continued to struggle. He testified that he told Person A that the officers were going to conduct a strip search

and that they would complete it in the bathroom (T. 636-37). He testified further that he observed Person A clench his buttocks and "posture up" whenever the police officers placed their hands near his waist (T. 631).

Respondent Dym testified that as the police officers attempted to walk Person A toward the bathroom, he stiffened his legs and planted his feet to avoid entering the room (T. 642-44). He eventually decided to forgo the bathroom and brought Person A to the ground outside the holding cells (T. 642-44). As Person A continued to struggle, Respondent Dym admitted striking him several times with his hands and eventually his knees (T. 647-50, 659-60, 665; CCRB Ex. 14 at 4:46, 4:52, 5:25). He also used his leg to press down on Person A 's head to prevent him from spitting at the police officers and attempting to bite them (T. 661-62, 664). Respondent Dym denied striking Person A in his head, face, or neck (T. 666).

He testified further that he had his police officers conduct a "modified strip search," in which Person A s pants were pulled down below his buttocks (T. 668). The police officers visually inspected his crotch area to ensure that he was not concealing a weapon (*Id.*). Respondent Dym denied that either he or any other police officer touched Person A 's anus or anal cavity (T. 669). He conceded that his so-called "modified" search met the definition of a strip search as defined by the Patrol Guide (T. 670). Respondent Dym testified that Police Officer Gomez held a flashlight illuminating Person A 's buttocks area to see whether or not a weapon or contraband was visible; when he failed to detect a weapon, the police officers terminated the search (T. 671-72, 676, 678; CCRB Ex. 16, at 7:08).

Respondent Fernandez testified that he was working with the PSA-7 Anti-Crime team on March 12, 2019, when dispatched to 720 Westchester Avenue, where Person A had been stopped. By the time Respondent Fernandez arrived, Person A had already been handcuffed;

according to Respondent Fernandez, Respondent Dym directed him to transport Person A back to the precinct (T. 1011-12).

Once Respondent Fernandez arrived at PSA-7, he took Person A to the front desk, where several police officers searched Person A's person. Respondent Fernandez recorded the initial search on his Body Worn Camera (T. 1012-16; CCRB Ex. 12). Once the police officers completed the initial search, Fernandez took Person A to the holding cell area; while walking toward the cell area, Person A let his body go limp and attempted to throw himself to the floor (T. 1016-17). Fernandez, assisted by other police officers, brought Person A to a cell and tried to remove the handcuffs from Person A's wrists; Person A began moving his body and asked, "What are you doing?" (T. 1019). Fernandez testified that he intended to conduct a standard search of a detained prisoner involving belts and shoelaces (T. 1018). According to Fernandez, Person A said, "F U; you're not going to search me" (T. 1019). Fernandez replied, "Listen, I'm going to search you," to which Person A responded, "F U; you're not going to search me. That's not going to happen" (T. 1020). He testified that Respondent Dym then entered the holding cell and told Person A "We're just going to search you. We're going to take the handcuffs off you" (*Id.*). Person A again stated, "F U; you're not going to search me" (*Id.*).

Respondent Fernandez testified that Respondent Dym then directed him and four to five other police officers to remove Person A from the holding cell before conducting a further search. Once Fernandez removed Person A from the cell, he began struggling against the police officers, attempting to head-butt one officer and kicking Fernandez between his legs. Fernandez testified that once Person A kicked him, he responded by punching him twice in the back of his shoulders. At that point, Fernandez testified that he stepped away from Person A and the other police officers (T. 1021-23).

Respondent Fernandez testified that he approached Person A again when he was on the floor of the holding cell area, still struggling with the police officers and attempting to turn sideways several times. Fernandez grabbed Person A's hands, but Person A held Fernandez's fingers and applied force, causing him to release Person A (T. 1024). Fernandez testified further that he observed Person A attempting to kick at the police officers; in response to those attempts, Fernandez placed his leg on Person A's shoulders (T. 1025-26). Fernandez explained that on one of those applications of force, "[i]t looks like I brazed [sic] his face. That's what it looks like. That's not what I did" (T. 1026). He explained further that he attempted to press Person A's shoulders to the ground with his foot to restrain his movement (T. 1026-27). He continued to apply force to Person A's body until Person A said, "I'm done. I'm done. Just search me" (T. 1028).

Respondent Fernandez testified that on one of the holding cell videos, he appears to be kneeling on Person A's back; he explained that he was kneeling on the floor and had his other leg on Person A's back (T. 1028).

After the search, Respondent Fernandez asked Person A if he wanted to go to the hospital; Person A responded, "FU. Go fuck yourselves" (T. 1029). After Fernandez assessed his own injuries, he returned to Person A and asked again if he wanted to go to the hospital; on this occasion, Person A said, "Yes" (T. 1030).

CCRB offered the March 25, 2019 hearsay statement of Person A in evidence (CCRB Ex. 18). In his statement, Person A said that at about 0145 hours on March 17, 2019, he was stopped by police officers on Westchester Avenue, between East 162nd Street and Prospect Avenue (CCRB Ex. 18A at 3-4, 15). He admitted that the police officers searched him, seized

marihuana, and transported him to the PSA-7 stationhouse, where he was processed in front of the front desk (*Id.* at 4).

Person A stated that the police officers continued searching him but did so "on camera." They asked him questions and then took him to "the back." Person A stated that he then "fell" as he was brought to a holding area and that the police officers dragged him to a cell. According to Person A he sat down inside the cell and was then shackled by the police officers (*Id.* at 5).

Person A then claimed in his statement that someone told him to get up and pressed his head against a wall (*Id.*). The officers kept trying to throw him onto the floor and then brought him out of the cell toward a bathroom; Person A stated that he struggled against them because he did not know why they were taking him into the bathroom (*Id.* at 6). He continued to struggle with the police officers until they brought him back to the general cell area, after which they brought him to the floor (*Id.* at 6-7). Once he was on the floor, Person A stated that he was punched in his back and buttocks; further, the police officers put their knees on his back, shoulders, legs, and head (*Id.* at 7).

Person A in his statement, alleged that police officers "basically searched my ass" (*Id.* at 10). He asserted, "Basically, they had a glove on and then they ended up taking off my pants (*Id.*). He identified Respondent Dym as "a white officer, right, blue eyes, blonde hair . . . he was the one that basically put a glove on and put his finger in my ass. That's basically what he did. That's how everything stopped" (*Id.* at 10-11, 64-67).

I find Respondent Dym to be a credible witness concerning the arrest of Person A the strip search that followed, and his use of force during the strip search. I make this finding primarily because of his admissions to his use of force, which was corroborated by the independent video evidence. His uncontroverted testimony that he self-initiated a report to the

Internal Affairs Bureau concerning the strip search he authorized and performed and his use of force further enhanced his credibility.

I similarly find Respondent Hernandez to be a credible witness. He candidly admitted to his use of force, which was documented on the holding cell videos. The testimony he gave regarding his actions during the strip search of Person A was corroborated by the holding cell videos and Respondent Dym's testimony. I further find that Fernandez's credibility was bolstered by his offer of medical assistance to Person A although initially rebuffed, after a protracted physical confrontation.

I make a threshold finding that Respondent Dym was justified in conducting a "modified" strip search, as he described it, of Person A I find that Person A's response to the question of whether he was sure that he had nothing hidden in his crotch (*i.e.*, "You mean like a knife?") constituted sufficient grounds for Respondent Dym to reasonably suspect that a weapon may have been concealed on Person A's person in such a manner that it had not been discovered during previous searches (P.G. 208-05[1][C][1], eff. date 3/21/18). I find that Person A's statement created an issue of his possession of a weapon that had not previously existed; after such a spontaneous utterance, Respondents would have been professionally derelict in failing to conduct a thorough search before Person A was lodged in a holding cell (*see generally Disciplinary Case No. 2018-18387* [April 5, 2019]; *Disciplinary Case No. 2018-18681* [Jan. 7, 2020]).

Even if there lacked a sufficient legal basis to conduct a strip search at the instant Fernandez took Person A from the front desk to the holding cell area, by the time Person A declared three times in the holding cell that he would not permit the police officers to search him, the legal justification was manifest.

In the Tribunal's view, it is noteworthy that Person A never reported the purported sexual abuse to the Lincoln Hospital medical staff during either of his visits. During both visits, he claimed that he had been assaulted by the police, without any greater specificity, according to the examining physician's notes. Although it might be reasonable to consider Person A's possible reluctance to be more detailed in his complaint during a hospital visit in police custody, he was similarly reticent during his follow-up visit five days later after being released.

Based upon a comparison of the hearsay statement Person A provided, the video evidence of the interactions he had with police in the holding area, and the medical records of his visits to Lincoln Hospital, I find Person A to be an unreliable narrator. His statement is factually inaccurate in material respects and vague in others. He also offered implausible, self-serving explanations for his conduct, which further diminished his veracity.

For example, he asserted that the police officers did not give him a chance to "tell the truth" about his name (CCRB Ex. 18A at 34). Person A also asserted that he let himself fall to the ground as he was escorted to the holding area due to how the police officers were treating him (*Id.* at 38-39). Finally, he asserted that he resisted the police officers' attempts to strip search him because he did not know what they were trying to do, and his questions were not answered (*Id.* at 10, 53-55, 58-59, 63). Although Respondent Dym testified that he explained to Person A what a strip search would entail, such explanation did little to assuage Person A's concerns, whatever their basis.

In this case, we know in hindsight that Person A was unlikely to have struggled to the extent that he did because he feared the strip search would reveal evidence of a crime or the presence of contraband since none was recovered. While Person A did not testify at the hearing

and explain his resistance to going to the bathroom for a strip search, he had no legal justification for physically resisting Respondents' attempts to search him.

Finally, Person A refused to answer CCRB investigators when they asked him why he initially provided police officers with an alias instead of his true name (CCRB Ex. 18 at 35-36). His refusal to answer CCRB's question was nonsensical, given that they would ineluctably learn of the police officer's discovery of the I-Card associated with his true name. It was, therefore, breathtakingly obtuse on his part to refuse to answer a logical question *during an interview he initiated* in pursuit of his allegation of wrongdoing by Respondents. The totality of the circumstances supports an inference that Person A refused to answer because he believed that an accurate response to the question would paint him in an unfavorable light. His attempt to curate relevant facts is indicative of a desire to place his interests ahead of those of society, further eroding his veracity.

Disciplinary Case No. 2021-23392, Specifications 1, 4: Attempted Forcible Touching (Respondent Dym)

I find that CCRB has failed to meet its burden by a preponderance of the relevant, credible evidence that Respondent Dym attempted to forcibly touch the sexual or other intimate parts of Person A for the purpose of degrading or abusing such person by pulling down his pants below his buttocks when conducting a strip-search, as required by the Penal Law.

I further find that CCRB has failed to meet its burden by a preponderance of the relevant, credible evidence that Respondent Dym attempted to forcibly touch the sexual or other intimate parts of Person A for the purpose of degrading or abusing such person by pulling Person A's pants below his buttocks and touching Person A's anus with his finger while performing a cavity search of Person A

A person commits the crime of Attempted Forcible Touching when he attempts to forcibly touch the sexual or other intimate parts of another person for the purpose of degrading or abusing such person (Penal Law § 130.52[1]).

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime (Penal Law § 110).

The Patrol Guide defines a strip search as "any search in which an individual's undergarments (*i.e.*, bra, underwear, etc.) and/or private areas are exposed or in which an individual's clothing is removed, lifted up, or pulled down to expose undergarments or private areas" (P.G. 208-05[1][C][1] eff. date 3/21/18). A strip search is only authorized when the arresting officer "reasonably suspects that weapons, contraband, or evidence may be concealed upon the person or in the clothing in such a manner that they may not be discovered by the previous search methods" (*Id.*).

In Person A 's hearsay statement, he alleged unambiguously that Respondent Dym put on a glove and then inserted his finger into Person A 's anus (CCRB Ex. 18A at 11, lns. 15-21; 64, lns. 24-25; 65, ln. 25; 66, ln. 3). A review of CCRB Exhibits 14, 15, and 16 reveals that Respondent Dym never wore any gloves during the encounter. Two police officers did have gloves on, Respondent Hernandez and Police Officer Tejada[6]. At the point where Person A is finally placed on his stomach, Police Officer Tejada, now gloved, leans down toward Person A 's torso; at the same time, Respondent Dym stands up and watches as Police Officer Tejada examines Person A as Respondent Hernandez, Police Officer Molina and Police Officer Wreck restrain him (CCRB Ex. 14, 10:03-10:12; CCRB Ex. 15, 9:38-9:47; CCRB Ex. 6:53-7:02).

[6] Respondent Hernandez wears blue gloves from the beginning of the encounter in the cell area to its conclusion (CCRB Exs. 13, 14, 15, 16). Police Officer Tejada puts on blue gloves shortly before the end of the encounter (CCRB Ex. 13, 10:02; CCRB Ex. 15, 9:30).

Based upon the foregoing, I find it unlikely that Respondent Dym conducted the close inspection of Person A's naked buttocks area as Person A alleged: the video evidence demonstrates that he was standing over Person A as Police Officer Tejada did so, aided by another police officer, who was shining a flashlight on Person A's buttocks area.

I further find it unlikely that any police officer involved with the strip search inserted their finger into Person A's anus. I make this finding based upon: (1) the absence of independent evidence supporting Person A's allegation; (2) the inability of the Tribunal to explore Person A's recollection of the event under oath; and (3) Person A's failure to inform emergency room staff at Lincoln Hospital during two visits, that he had purportedly been digitally penetrated by police officers while in custody.

I have extensively reviewed the holding cell video evidence (CCRB Exs. 13, 14, 15, 16). I found no independent evidence to support Person A's allegation in Specification 4 that Respondent Dym touched Person A's anus with his finger while performing a cavity search. Had I found that there was sufficient evidence of such an improper touching of St. Preux during a cavity search, it would follow that it would have to had been done for other than a legitimate purpose since Respondent Dym acknowledged that a body cavity search could only be lawfully performed if authorized by a search warrant.

I note that after the strip search, Person A lay handcuffed on the floor of the holding area for approximately 40 seconds before one of the police officers pulled his pants up, and he was placed in a holding cell. While it would have been preferable for the police officers to have pulled up Person A's pants immediately after the strip search had concluded, this lapse does not meet the standard applicable to this case, to prove a deliberate attempt to humiliate Person A. Moreover, the video evidence shows, in particular, Respondent Dym and Person A breathing

heavily at the end of the struggle. Simple exhaustion could explain the failure to pull up Person A's pants at the conclusion of a six and one-half minute struggle involving up to five police officers.

Based on the lack of evidence in the record, I find Respondent Dym Not Guilty of Specifications 1 and 4.

Disciplinary Case No. 2021-23391, Specifications 1 & 2 (Respondent Fernandez)
Disciplinary Case No. 2021-23392, Specifications 2 & 3 (Respondent Dym)
Attempted Assault in the Third Degree

I find that CCRB has failed to meet its burden by a preponderance of the relevant, credible evidence that Respondents, with the intent to cause physical injury, attempted to cause physical injury to Person A by sitting on the back of Person A's head, which restricted his breathing.

I further find that CCRB has failed to meet its burden by a preponderance of the relevant, credible evidence that Respondents, with the intent to cause physical injury, attempted to cause physical injury to Person A by punching, kneeing, and kneeling on Person A's head.

A person commits the crime of Attempted Assault in the Third Degree when he, with the intent to cause physical injury, attempts to causes injury to such person (Pen. Law § 120.00). The Penal Law defines "physical injury" as "impairment of physical condition or substantial pain" (Pen. Law § 10.00[9]).

A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct (Penal Law § 15.05[1]).

A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime (Penal Law § 110).

It is significant that Person A never alleged in his hearsay statement that his breathing was restricted in any manner, despite the explicit language in Specification 3 against Respondent Dym. Furthermore, there is no medical evidence of any injuries consistent with restriction of his breathing.

Respondent Dym admitted in his testimony that he used "hand strikes" and "knee strikes" in his attempts to subdue Person A (T. 647-50, 659-60, 665). During one part of the struggle, he further admitted to placing his left leg on Person A's head to prevent him from spitting at the officers and "bucking" his head (T. 661-62, 664).

Respondent Fernandez admitted in his testimony that he punched Person A twice in the back of his shoulders after Person A kicked him between his legs (T. 1021-23). He further admitted that he placed his leg, and eventually his foot, on the back of Person A's shoulders to restrain him while he struggled on the floor of the holding cell area (T. 1025-28).

Person A admitted in his hearsay statement that he was resisting Respondents' attempts to search him by wiggling and turning (CCRB Ex. 18A at 38-39, 53-55, 63).

As a general matter, police officers are permitted to use reasonable force to overcome active resistance. When Respondents Dym and Fernandez used force against Person A he was under arrest. I find that the performance of a search of Person A's person was an authorized function they were entitled to perform. I further find that Person A's actions of head-butting police officers, kicking, squirming, and turning his body, while Respondents and other police officers attempted to search him, constituted active resistance (P.G. 221-02, eff. date 10/18/16). Since his actions provided a legal basis for the use of force, the only remaining question is whether the force Respondents used was reasonable.

Under the totality of the circumstances, I find that the force Respondents used was reasonable and intended to overcome Person A's resistance. Both Respondents candidly testified to their use of force and their reasons for doing so; their descriptions of the force and how they applied it appeared to be plausible and corroborated by the video evidence.

I have reviewed the video evidence extensively. I find that the force used by Respondents was proportional to the resistance offered by Person A and never escalated to the point where it became punitive (*See Disciplinary Case No. 2017-17276* [Oct. 26, 2018]; *Disciplinary Case No. 2016-15581* [June 15, 2018]; *Disciplinary Case Nos. 2015-14616 & 14617* [Dec. 19, 2016]).

While it was viscerally unpleasant to watch recordings of the struggle, Person A's dogged physical resistance warranted an equally determined joint effort by Respondents and three other officers to assure themselves that Person A did not have a weapon secreted in his crotch area.

Accordingly, I find Respondent Dym Not Guilty of Specifications 2 and 3 in Disciplinary Case No. 2021-23392. I further find Respondent Fernandez Not Guilty of Specifications 1 and 2 in Disciplinary Case No. 2021-23391.

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent Dym's employment history was also examined (*See* 38 RCNY § 15-07). Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent Dym, who was appointed to the Department on January 20, 2004, has been found guilty of stopping and frisking [redacted] without sufficient legal authority. He has also been found guilty of directing the issuance of a summons to [redacted] for disorderly conduct without adequate legal authority. The CCRB has recommended that Respondent forfeit 26 vacation days for the misconduct in this case. Under the facts and circumstances presented in the record, that recommendation is excessive.

The presumptive penalty for an improper stop, as well as an improper frisk, is three penalty days.

The presumptive penalty for an enforcement action involving either abuse of discretion or authority is 20 penalty days; the mitigated penalty is 10 days and the aggravated penalty is termination.

I find Respondent's rank and his position as a supervisor to be aggravating factors warranting a penalty enhancement of two days.

The record establishes that Respondent Dym stopped and seized [redacted] in the same instant; his actions, in the view of the Tribunal, were based upon a combination of supposition and speculation, which did not rise to the level of probable cause. While CCRB argued that [redacted] seizure was motivated by racial bias, I found no evidence to support such an accusation. While the Fourth Amendment permits police officers to be forward leaning in the interest of deterring crime, in this instance, Respondent Dym's actions exceeded the parameters set forth in long-established law.

The record further supports a finding that Respondent Dym directed the issuance of a summons based upon a misapprehension of the facts before him, rather than a punitive exercise of his authority. Given that the applicable Disciplinary Guideline is intended to cover a range of

possible enforcement actions, and that a summons is on the lower end of the enforcement spectrum, the presumptive penalty of 20 days appears to over-represent the severity of Respondent Dym's misconduct in this case. I note that [redacted] had to remain in police custody, and be transported to a precinct to verify his identity, only because he refused to provide identification at the scene. After balancing the foregoing factors, I believe that the mitigated penalty of ten days is more appropriate.

Based upon the foregoing, I recommend that Respondent Dym forfeit 18 vacation days.

Respectfully submitted,

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED
SEP 07 2022
KEECHANT L. SEWELL
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
LIEUTENANT SPECIAL ASSIGNMENT ERIC DYM
TAX REGISTRY NO. 933762
DISCIPLINARY CASE NO. 2020-22734

Respondent Dym was appointed to the Department on January 20, 2004. On his three most recent annual performance evaluations, he received 5.0 overall ratings of "Extremely Competent" for 2018, 2019, and 2020. Respondent Dym has been awarded one Commendation, four medals for Meritorious Police Duty and 15 medals for Excellent Police Duty.

Respondent Dym has no formal disciplinary history. He was placed on Level 1 Force Monitoring from June 27, 2019, to June 27, 2020.

For your consideration.

Paul M. Gamble
Assistant Deputy Commissioner Trials