POLICE DEPARTMENT

May 12, 2025

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2022-24514
Police Officer Olga Dudka	:	
Tax Registry No. 967049	:	
90 Precinct	:	

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

Before: Honorable Paul M. Gamble, Sr.
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Mallika Kaushal & Brian Arthur, Esqs.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

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

To:

HONORABLE JESSICA S. TISCH
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Police Officer Olga Dudka, on or about November 22, 2019, at approximately 0045 hours, while assigned to the 90 Precinct and on duty, inside the subway station at Marcy Avenue and Broadway, Kings County, intentionally used force, in that she intentionally used a Taser against Complainant without police necessity, attempting to cause physical injury.

P.G. 221-08	USE OF CONDUCTED ELECTRICAL WEAPONS (CEW)
P.G. 221-01	FORCE GUIDELINES
New York Penal Law §110; §120.00 (1)	ATTEMPTED ASSAULT IN THE THIRD DEGREE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on April 9, 2025. Respondent, through her counsel, entered a plea of Not Guilty to the subject charge. The CCRB offered Complainant's hearsay statement and video evidence. Respondent testified on her own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all the evidence in this matter, I find Respondent Not Guilty.

PROCEDURAL HISTORY

The central issue in this disciplinary proceeding is whether Respondent engaged in sanctionable misconduct when, on November 22, 2019, she used a Taser against Complainant ("Complainant") during an encounter on the Marcy Avenue Station platform. In an administrative disciplinary hearing of this nature, this Tribunal would typically be required to determine whether police officers followed the Department's rules and regulations as they handled an encounter. Here, however, CCRB failed to preserve the Statute of Limitations

("SOL") and then served Respondent eleven months after the extended COVID SOL[1] had expired.

The charges were served on Respondent on December 6, 2022, three years and 14 days after the date of the alleged misconduct— November 22, 2019. In this case, the 18-month statute of limitations set forth in New York Civil Service Law § 75 was extended by an additional 228 days due to the COVID-19 pandemic. As such, the statute of limitations expired on January 5, 2022. When questioned by the Tribunal as to the reason for the delay in serving the charges, the CCRB attorney proffered that the CCRB investigation was hampered by the belated disclosure of evidentiary material from this Department; CCRB offered no facts in support of this assertion.

In most instances, the law prohibits the commencement of a disciplinary case where the service date is missed. An exception to this statutory deadline is permitted pursuant to the Civil Service Law where the misconduct "complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime."[2] However, relying on this crime exception to the limitations period frequently results in a greater evidentiary burden for the administrative prosecutor. Unlike disciplinary cases where charges are timely served, when the crime exception clause is invoked, it may be insufficient to prove misconduct by establishing that an officer violated Department rules. Instead, the administrative prosecutor must establish, by a preponderance of the evidence, the specific elements of each crime charged as set forth in the New York State Penal Law.[3] In sum, when charges are not served by the mandated deadline,

[1] Due to the COVID-19 pandemic, Gubernatorial Executive Order 202.8 tolled the SOL for all court proceedings in New York, including administrative trials. This gave all litigants, including CCRB, an additional seven months to serve the charges.

[2] New York Civil Service Law Section 75(4).

[3] *See Disciplinary Case No.* 2018-19274 (Aug. 19, 2019), citing *Aronsky v. Bd. of Ed.*, 75 N.Y.2d 997 (1990).

an NYPD disciplinary hearing is distorted into a quasi-criminal proceeding (*See Disciplinary Case Nos.* 2021-23558 & 23559 [April 12, 2024]).

More importantly, the general laxity in compliance demonstrated here deprived this Tribunal of the opportunity to evaluate this member of service's compliance with tactical guidelines and Department rules. In fact, as taught in the Police Academy, NYPD guidelines often impose a greater level of professional accountability than the Penal Law.[4] Unfortunately, this is not the first time a CCRB case has come before this Tribunal in this compromised procedural posture. This Tribunal would welcome a more proactive approach from CCRB in protecting the SOL rather than using the crime exception as an antidote for failure to preserve it.

ANALYSIS

Summary of the Facts

1. *Complainant's Statement*[5]

On January 31, 2020, CCRB Investigator Emily Devaney conducted a video interview with Complainant while he was incarcerated at Rikers Island. The parties stipulated to the admission of Complainant's recorded interview and a recording transcript (CCRB Exs. 1, 1A).

Complainant recalled that on November 22, 2019, at approximately 0045 hours, he was traveling southbound on the J train on his way to Coney Island. He wore black pants, a black shirt, a three-quarter length coat, and a "religious" head garb. According to Complainant, a man groped his buttocks as the train crossed the Brooklyn Bridge[6], and Complainant responded by striking the man's face with a "slapstick," a small metal retractable baton that he characterized as

[4] Police Student Guide, Ch. 4, *Use of Force* p. 5 (Oct. 2019)

[5] Complainant did not appear at the trial, despite CCRB's attempts to facilitate his presence.

[6] I take judicial notice that the "J" train crosses the Manhattan Bridge, not the Brooklyn Bridge.

a "defense item." He also had other so-called defense items on his person, such as a small blade and pepper spray, as he claimed he had been "attacked and harassed repeatedly" since moving to New York (CCRB Ex. 1A at 3, 9, 10, 12).

Although his original plan was to take the train to Coney Island, he instead got off the train at the next stop, Marcy Avenue Station, to seek help from "auxiliary security" (CCRB Ex. 1A at 4). Complainant alleges that he approached the security guards, neither of who were wearing badges, but who wore black uniforms with gray stripes, to explain the altercation. Throughout his CCRB interview, Complainant refers to Respondent and P.O. Horun as auxiliary security guards. CCRB's Exhibit 2 depicts both officers wearing standard blue NYPD uniforms rather than black uniforms with gray stripes as Complainant described.

Complainant described P.O. Horun and Respondent, respectively, as a "6'2", bald head, fair skinned" clean-shaven man in his "mid-30s or early 40s" with a "medium to muscular build" and a 5'2" woman with fair skin, dirty blond hair, and a slim build, in her "late 20s or mid-30s" (CCRB Ex. 1A at 14-16). There is no dispute that the two individuals Complainant referred to in his statement are Respondent and her partner; henceforth, they will be referred to in the summary of Complainant's statement as the male officer and the female officer.

As Complainant attempted to explain what transpired on the train, the male officer grabbed him by his jacket collar and the two "began to struggle" (CCRB Ex. 1A at 18). Complainant continued to try to explain that he was not the initial aggressor but to no avail. During the scuffle with the male officer, Complainant stumbled backward and fell onto a bench. The male officer was still standing with his knee between Complainant's legs, his hands on Complainant's body while holding handcuffs in one of his hands. Complainant could not recall exactly where the male officer's hands were on his body but offered that they were on his

"shoulder or still clutching onto [his] jacket" (CCRB Ex. 1A at 21). He admitted that at this point, he was trying to get the male officer off him by raising his body and getting up onto his feet (CCRB Ex. 1A at 18-20).

Complainant stated that at the same time he was struggling with the male officer, the female officer was "electrocuting" him. He claimed that she did not warn him that she was going to deploy the Taser, and neither officer told him to stop resisting. Complainant recalled that the female officer first deployed her Taser after the male officer had already struck Complainant in the face with the handcuffs. Two prongs punctured the skin on one of his hands. According to Complainant, she then "turn[ed] the volume of the thing up" and shocked him directly on his shoulder. P.O. Horun, the male officer, "started whipping the side of [his] face with the handcuffs" (CCRB Ex. 1A at 22-23). Complainant stated the prongs burned a hole in his jacket, shirt, and flesh. He claimed that he still had scars on his shoulder in the shape of the double prongs on the Taser. Complainant recalled saying during this portion of the encounter, "Stop electrocuting me. You already hit me several times. I'm not going anywhere" (CCRB Ex. 1A at 4, 22, 24).

Complainant stated that approximately six other police officers then arrived on scene. He reasoned that these officers were different from the two police officers he believed to be security guards, as the new officers had guns, badges, and full police uniform attire. The new officers then transported Complainant to a hospital. Complainant recalled that there was blood "all over" his face and that he sustained a concussion from the altercation. According to Complainant, an officer told him at the hospital they had to redo the police report because "they ripped the first one." After Complainant was released from the hospital, he remained in police custody. He

underwent arrest processing, where police officers confiscated his jewelry, wallet, and other personal items (CCRB Ex. 1A at 24- 26).

2. *Body-Worn Camera Evidence*

The parties stipulated to the admission of Respondent's body-worn camera recording, CCRB's Exhibit 2. The following is a summary of the relevant evidence contained in the recording[7]:

00:22-00:30: Complainant exits the train platform facing P.O. Horun and Respondent, then passes through the emergency exit next to the turnstiles. A bystander behind Complainant gestures to the officers, pointing at him.

00:30–00:39: Respondent grabs Complainant's right wrist as he continues walking through the emergency exit; he twice yells, "They assaulted me! They both assaulted me!" Respondent, still holding his wrist, grabs his open hand with her free hand, attempting to restrain him further. Complainant stops, turns to face her, and twice states, "Listen, I was assaulted on the train. I defended myself."

00:39–00:46: With both officers holding onto him, Complainant says, "Can I take my bookbag off at least? I was assaulted on the train, and I defended myself. I didn't do anything — why are you arresting me?" Respondent replies, "We'll figure this out."

00:46–00:56: Complainant responds, "No, you're going to have to shoot me;" he turns backward and breaks free of Respondent's grip, initiating a struggle with P.O. Horun. P.O. Horun grabs both of Complainant's shoulders as they tussle towards the turnstiles. Complainant raises his right hand toward P.O. Horun's face, and P.O. Horun grabs it, holding on as he forces Complainant backward into the doorway separating the turnstile area from the station lobby. Throughout the struggle, which lasts for about 10 seconds, Complainant repeatedly says, "You're going to have to shoot me, bro!" P.O. Horun forces Complainant down onto an empty bench using his body weight. Respondent can be seen with her Taser in hand, pointed at Complainant throughout the struggle.

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[7] CCRB's Exhibit 2 contains an interview of the alleged victim and a witness of the train assault (8:34-17:03). While this portion of the recording does tend to corroborate the content of the 911 call, as testified to by Respondent, it is not relevant to her state of mind at the moment she encountered Complainant, since it occurred well after the struggle in the subway station, with Complainant already in custody. It can, however, be considered on the issues of Respondent's credibility, Complainant's credibility, and Complainant's state of mind as he encountered Respondent.

00:56–01:10: Complainant continues struggling with P.O. Horun while he attempts to gain control. Respondent aims her Taser and fires it at Complainant's abdomen as he swats at the prongs several times, rendering the Taser ineffective. While out of breath, P.O. Horun twice instructs Respondent to "call an 85." P.O. Horun struggles with his handcuffs while trying to gain control of Complainant. Complainant keeps repeating, "You're going to have to shoot me, bro," while Respondent radios for backup.

01:10–01:32: With one knee between the Complainant's legs, P.O. Horun holds his wrists together. Complainant is seated on the bench with his left hand on P.O. Horun's gun belt. P.O. Horun instructs Respondent to tase Complainant again. As she reloads the Taser, Complainant yells to a bystander, "He assaulted me." To which the bystander responds, "No, he didn't. You're a liar." Complainant then tells the officers, "I have hemophilia type A; I need to go to the hospital."

01:32–01:49: While holding his handcuffs, P.O. Horun warns Complainant, "I'm telling you — you better not fight anymore." He instructs Respondent, "Go, tase him now," then yells at Complainant to "give me your f***ing hands," to which Complainant does not respond. P.O. Horun tells Respondent to perform a drive stun. Complainant, staring directly at Respondent, still does not respond. P.O. Horun then punches Complainant in the head with his right fist while holding his handcuffs. Complainant draws his left hand back and P.O. Horun forces him down sideways onto the bench. Complainant's left arm is extended outward, dangling over the bench.

01:49–02:49: Now bleeding from the punch, Complainant repeatedly shouts, "I have hemophilia," as P.O. Horun holds his head down. Respondent places the Taser on Complainant's right shoulder and tases him. Complainant groans in response to the Taser and whispers, "I have hemophilia type A." While handing off his radio to Respondent, P.O. Horun knees Complainant, waits a few seconds, and knees him again. Additional police officers arrive on the scene and move Complainant to the ground, where he is finally handcuffed.

3. *Respondent's Testimony*

Respondent detailed that she had been assigned to the 90 Precinct since graduating from the Police Academy in July 2019 (T. 29). On November 22, 2019, she was working a midnight tour with Police Officer Horun, her Field Training Officer (T. 30). There came a time when she received a call of "10-34, assault in progress, knife in the subway" from the dispatcher (T. 31, 51). The radio call provided a physical description of "a male, Black, 30 to 40 years old, wearing all black, black backpack, black sunglasses on the face and black scarf covering the

forehead" (T. 32). Respondent testified that the dispatcher informed her that the suspect had "assaulted somebody on the train with a knife, particularly stabbed the victim in the head on the train" (*Id.*). The dispatcher further advised her that the assault had occurred on a southbound J train, traveling from Manhattan into Brooklyn, that the next stop on the train would be Marcy Avenue and Broadway, and that the suspect was still aboard the train (*Id.*).

Respondent noted that since the Marcy Avenue subway station was within her sector, she and P.O. Horun responded. They were "a few blocks" away when they received the dispatcher's call. According to Respondent, they "rerouted," drove to the station, and "ran up the stairs" to the elevated train platform. She recalled that it was "a very long flight of stairs." When Respondent reached the top of the stairway and eventually the platform, she recalled seeing several people who pointed toward an individual, saying, "That's him, tase him" (T. 33).

Respondent testified that the people were pointing at a "male, Black, 30 to 40 years old wearing all black, black sunglasses on the head and a scarf over the head." This individual ("Complainant") was leaving the subway platform and walking toward Respondent and P.O. Horun. Respondent "already knew at that point that we would be dealing with [a] dangerous, unsafe situation that included a weapon," based upon the contents of the dispatcher's radio call. She testified further that she did not see a weapon in Complainant's possession at that time (Tr. 34).

Respondent recalled that as Complainant approached her, he said, "They molested me, you will have to shoot me," then aggressively swung his hands (T. 35). Respondent and P.O. Horun approached Complainant on either side of him with Respondent on her left and P.O. Horun on her right (*Id.*). They each took hold of one of Complainant's hands to place him under arrest, but Complainant then swung his arms, breaking Respondent's grip on his right hand (*Id.*).

Complainant continued to swing at P.O. Horun, as they moved toward the station's exit door (*Id.*).

According to Respondent, Complainant was "still fighting aggressively. He was not complying, and he kept swinging his arms around my partner's – partner's body" (T. 35-36). Respondent testified that P.O. Horun and Complainant eventually ended up on a bench as they continued to struggle. She testified further that "... the perpetrator still continued fighting, swinging his arms, being non-compliant. That's when my partner said, 'tase him.' At that point, I saw my partner was out of breath, completely. And my partner is a very tall, big officer. He – he worked out. At that time, he was having [a] hard time trying to have the perpetrator comply, since the perpetrator just kept fighting, fighting, nonstop" (T. 36). It was at that point that Respondent deployed her Taser for the first time (*Id.*).

Respondent used a "probe deployment" and aimed at the area of the body that is authorized by this Department, aiming for his stomach area and avoiding Complainant's head, heart or crotch area (T. 37). When she deployed her Taser, Complainant was on the bench. According to Respondent, her first deployment appeared to have had no effect, since Complainant "continued to – swinging his hands and arms" (*Id*). Respondent speculated that the deployment may have failed due to Complainant wearing multiple layers of clothing (*Id.*). She testified further that when the Taser deployment is effective, "the person just gets immobile because it temporarily, for a very, very brief time, pauses your movement. That's what I was trying to do, to just have him comply so we can stabilize the situation and prevent further danger ... to me, my partner, and members of the public since there were so many people" (T. 38).

Respondent recounted that she observed P.O. Horun was still having difficulty handcuffing Complainant; he could not handcuff Complainant on the bench, and Complainant

began reaching for P.O. Horun's gun belt. She could not see whether Complainant was reaching for P.O. Horun's baton or his gun. At that point, P.O. Horun told Respondent, "You have to drive stun him" (T. 38).

After P.O. Horun gave her that directive, she hesitated, giving Complainant a few more seconds in case he decided to cease his resistance. When she observed that Complainant still "did not comply," she placed her Taser in drive stun mode, walked over to him and pressed the Taser to his shoulder, before discharging it for one cycle (T. 38-39, 81). Respondent testified that she did so "to have him comply to stabilize the dangerous, volatile situation," as he "posed a danger to [her], [her] partner and … people on the scene" (T. 39, 50).

Respondent remembered that at the same time, P.O. Horun directed her to "drive stun" Complainant, he told her to "call 85," which meant calling for additional officers (*Id.*). As P.O. Horun gave her directions, he handed her his radio to make the call (T. 39-40). Respondent testified that after she deployed her Taser for a second time and additional police officers responded to the platform, they were able to handcuff Complainant with their assistance (T. 40).

Respondent next recalled that after Complainant had been handcuffed, she interviewed the victim of the train assault, identifying him as "Jim" (*Id.*). She testified that "Jim" had blood on the side of his head and he told her that it was from being struck with Complainant's retractable baton (T. 40-41, 42). "Jim" told Respondent that he was riding the train, listening to a podcast, when Complainant struck him in the head with a retractable baton without provocation (T. 42). While conducting a search of Complainant's person incident to his arrest, Respondent recovered a retractable baton from his jacket, two daggers, mace, and a "slapjack."[8] (T. 43; Resp. Ex. A).

[8] I take judicial notice that a "slapjack" or "sap" is a less-than-lethal weapon, usually made of leather wrapped around metal or metal shot.

On cross-examination, Respondent conceded that she could not see what may have been in Complainant's jacket pockets when she first encountered him. She saw no weapons until she recovered them after his arrest (T. 59, 60, 61). She further acknowledged that deploying a Taser in drive stun mode would be more severe than using it in probe-deployment mode, as in drive stun mode, there is direct contact with the suspect's body (T. 67).

Respondent testified further that while Complainant appeared to be reaching for something on P.O. Horun's gun belt, P.O. Horun was grasping Complainant's wrist (T. 84). She acknowledged that when Complainant said he had hemophilia, she did not ask him what that was (T. 84-85, 97). Respondent further acknowledged that when P.O. Horun told Respondent to use her Taser in drive stun mode against Complainant, even though he had not yet surrendered his hands to be handcuffed, Complainant was not moving or swinging his hands (T. 85-86). She testified further that when she did use her Taser for the second time, P.O. Horun was trying to hold Complainant down and immobilize him (T. 97).

When Respondent was questioned about whether Complainant tried to talk to her about the incident on the train, she responded, "He wasn't talking to me about the incident. He immediately started saying, 'You will have to shoot me' and 'I got molested'" (T. 101).

On re-direct examination, Respondent explained that she interpreted Complainant's statement, "You're going to have to shoot me," as him declaring that he was prepared to fight her and P.O. Horun (T. 106). She testified further that at the time he made that declaration, she believed that he possessed a weapon based on the dispatcher's call (*Id.*).

In response to questioning by the Tribunal, Respondent testified that she was wearing her standard NYPD uniform on the date of this incident, that she was not wearing anything gray, and that she did not observe any private security guards in the area (T. 112-13).

Credibility

It is long-settled that hearsay evidence is admissible in this Tribunal and may form the factual basis for a finding of misconduct if it is deemed reliable. The finder-of-fact must scrutinize the out-of-court statement for several credibility factors, including internal consistency, logic, and corroboration by independent evidence. The Tribunal must also consider whether fundamental fairness allows the statement to be credited despite the lack of an opportunity for Respondent to confront the declarant under oath during the trial. Based upon the totality of the circumstances, I find Complainant's hearsay statement credible with respect to certain factual assertions he made regarding how the encounter occurred, which were corroborated by either Respondent's body-worn camera video or his admissions; I find the balance of his statement unreliable.

In his statement, Complainant admitted to possessing an expandable baton and several edged weapons at the time he encountered Respondent; in addition, he admitted to striking a fellow subway passenger in his head with that baton before leaving the train at the Marcy Avenue stop. His claim of self-defense and the explanation for why he was carrying weapons in the New York City Transit system are self-serving statements that are irrelevant to the issues before this Tribunal. In addition, his failure to admit in his statement that he told the police officers that they would have to shoot him is more likely than not an attempt to minimize his resistance to arrest, which is another factor affecting his credibility.

Complainant also made several references in his statement to "auxiliary security guards." As stated above, I found that he was referring to Respondent and her partner. I further find that both police officers were wearing the standard blue NYPD uniform on the incident date. There is no logical explanation for why Complainant would refer to them in this manner, especially

considering he distinguished Respondent and her partner from police officers who arrived on the platform later as having "gun" and "badges" … "the police uniform." Even if, for the sake of argument, Complainant was confused on that date, it would still not explain why he described Respondent and her partner that way 71 days after the incident while incarcerated. Moreover, if Complainant honestly thought private security guards had assaulted him, it makes no sense that he would submit to a CCRB interview, since CCRB has jurisdiction over alleged police officer misconduct, not private security personnel.

Finally, Complainant referred to his headwear, and items in his backpack, as "religious" items. This assertion has no probative value, as it is likely a self-serving attempt at misdirection from the incontrovertible fact that he had weapons at the time of the encounter.

Based upon the foregoing factors, I find Complainant's narration of the incident unreliable.

In contrast, Respondent's testimony at the trial was clear, concise and had the ring of truth. The factual assertions Respondent made were logical and corroborated by independent evidence in the case, primarily her body-worn camera recording of the incident. I had the opportunity to observe her demeanor during her trial testimony and found her forthcoming and candid. While Respondent admitted to some lapses in recollection, they can be adequately explained by the passage of five years, four months, and 19 days from the date of the incident to the date of her testimony. Based on the totality of the circumstances, I found her testimony credible and reliable.

Attempted Assault in the Third Degree

As noted above, because Respondent was not served within the extended SOL period, a finding of misconduct cannot turn on whether Respondent's actions violated tactics set forth in

the Patrol Guide. Due to this procedural irregularity, instead of using the Departmental construct applied to most disciplinary hearings, CCRB has the burden of proving all elements of Attempted Assault in the Third Degree by a preponderance of the evidence.[9] The evidence in this case fell short of the burden of proof.

Under Penal Law Section 120.00 (1), a person commits the crime of Assault in the Third Degree when, with intent to cause physical injury to another, she causes such injury to that person. A person attempts to commit a crime, in violation of Penal Law Section 110.00, when, with intent to commit a crime, she engages in conduct which tends to effect the commission of such crime.

Therefore, CCRB has the burden of proving that:

i. Respondent attempted to cause physical injury to Complainant by using her Taser in drive stun mode[10]; and
ii. Respondent intended to cause physical injury to Complainant by using her Taser in drive stun mode.

Respondent admits that she used her Taser to stun Complainant but claims that she was legally justified in doing so. Specifically, the defense contends that the reasons Respondent used her Taser were (1) that she reasonably feared for the immediate safety of P.O. Horun and herself and (2) that her use of the Taser was necessary to overcome Complainant's resistance and effect his arrest. Since the defense of justification has been interposed, CCRB has the additional

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[9] It is well-established law that although CCRB must prove the elements of a crime under the Penal Law, it must do so by a preponderance of the evidence. This standard is much lower than what is required in criminal court proceedings: that is, proof beyond a reasonable doubt (*See Disciplinary Case No.* 2018-19274 [Aug. 19, 2019], citing *Police Dept. v. Baksh*, OATH Index No. 1471/97 [Oct. 2, 1997]; *see also Dept. of Correction v. Salinas*, OATH Index No. 1375/24 [May 17, 2024], aff'd, NYC Civ. Serv. Comm'n Case No. 2024-0308 [Oct. 7, 2024]; *Dept. of Correction v. Blanc*, OATH Index No. 2571/11 at 5 [Feb. 2, 2012]; *Dept. of Correction v. Battle*, OATH Index No. 1052/02 at 7-9 [Nov. 12, 2002], citing *Aronsky v. Bd. of Education*, 75 N.Y.2d 997, 1000 [1990]).

[10] Respondent used her Taser against Complainant in "cartridge mode-probe deployment" before she used it a second time in "drive stun" mode.

burden of disproving, by a preponderance of the evidence, Respondent's asserted defense (*See People v. Steele*, 26 N.Y.2d 526, 528 [1970], *People v. Clark,* 129 A.D.3d 1, 36 [2d Dept. 2015]). CCRB argued that at the time Respondent deployed her Taser in drive stun mode, Complainant was no longer resisting arrest.

There is no dispute that Respondent intentionally put her Taser against Complainant's arm, causing an electrical current to enter his body. Accordingly, the elements of Penal Law §120.00 (1) were established. In dispute is whether Respondent was legally justified in using force, as that defense is defined in the Penal Law.

Under New York Penal Law §35.30, "A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he or she reasonably believes to have committed an offense, may use physical force when and to the extent he or she reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force . ." Resistance to arrest raises the threshold level of reasonable force which may be used in response (Disciplinary Case No. 2018-19274 [Aug. 19, 2019], citing *Police Dept. v. Rotundi, et al*. OATH Index Nos. 919/97, 921/97 & 922/97 [Sept. 4. 1998]; Comm'r Dec. [Oct. 30. 1998]). While the reasonableness inquiry is rooted in the officer's individual belief, it is not a wholly subjective standard. The courts uniformly apply a standard that contains an objective component: the conduct of "a reasonable person" under similar circumstances (*People v. Goetz*, 68 N.Y.2d 96 [1986]).

It is uncontested that Respondent and her partner had probable cause to lawfully arrest Complainant for assault. They received a radio dispatcher's report of a person who had

committed an assault with a knife on a subway train and were directed to the Marcy Street station. Once they arrived at that station, they immediately observed Complainant, who was attempting to leave the station and whose clothing and physical appearance matched the description provided in the radio bulletin. At the same time, unidentified citizens pointed at Complainant to identify him to the police.

It is further uncontested that Complainant resisted arrest by initiating a prolonged physical struggle with P.O. Horun; Complainant admitted to struggling with P.O. Horun and Respondent's body-worn camera video corroborates that admission. In addition to Complainant's physical resistance, he: (1) stated several times, "You're going to have to shoot me," (2) ignored numerous commands from P.O. Horun to give him his hands, and (3) had his left hand near P.O. Horun's gun belt during the struggle. It is also uncontested that the radio report indicated that Complainant had a weapon.

Therefore, the issue before this Tribunal is whether CCRB disproved that Respondent's use of force was "necessary" to effect Complainant's arrest or to defend against what she "reasonably believed" was the "use or imminent use of physical force" by Complainant against P.O. Horun. I find that CCRB has not done so.

In New York State, the Court of Appeals has established that the standard for evaluating whether justification is disproved requires both a subjective and an objective analysis. As the Court explained in *People v.* Goetz, 68 N.Y.2d 96 (1986)[11]:

[11] While *Goetz* involved the use of the justification defense in a case involving the use of deadly force by a citizen, the principles set forth therein regarding the defense are generally applicable to cases where police officers use force of any type.

> Thus, consistent with most justification provisions, [the Penal Law][12] permits the use of deadly physical force only where requirements as to triggering conditions and the necessity of a particular response are met . . . As to the triggering conditions, the statute requires that the actor "reasonably believes" that another person is using or about to use deadly force .. . . As to the need for the use of deadly physical force as a response, the statute requires that the actor "reasonably believes" that such is necessary to avert the perceived threat.

It is well-established law that in making such determinations, the "critical focus must be placed on the particular defendant and the circumstances actually confronting him at the time of the incident" (*See People v. Douglas*, 29 A.D.3d 47, 50 [1st Dept. 2006], quoting *People v. Wesley*, 76 N.Y.2d 555, 559 [1990], citing *Goetz,* 68 N.Y.2d at 112-15). Courts are reluctant to closely second guess the "split-second decisions" of officers in difficult circumstances. Instead, the emphasis must be on whether an officer's conduct was objectively reasonable (*See Koeiman v. City of N.Y.*, 36 A.D.3d 451 [1st Dept. 2007], citing *Graham v. Connor*, 490 U.S. 386, 396 [1989]).

As such, determining whether Respondent "reasonably believed" physical force was necessary to either effect Complainant's arrest or defend P.O. Horun requires a two-part analysis. First, Respondent must have *actually* believed that Complainant was either: (1) using or about to use force against P.O. Horun and that Respondent's own use of physical force was necessary to defend that officer from imminent harm; or (2) her contemplated use of force was necessary to effect Complainant's arrest. Second, the Tribunal must find that a *reasonable person* in Respondent's position would have believed that, too.

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[12] The Court of Appeals has not directly defined the term "reasonably believe" in Penal Law §35.30 but has instead defined this term within the context of analyzing a parallel justification statute, Penal Law §35.15, which applies more broadly to all citizens invoking this defense.

a. Subjective Test

As noted above, the defense asserts that Respondent was justified in using her Taser in drive stun mode because she believed it was necessary to protect P.O. Horun from the imminent use of physical force; she also believed the use of her Taser was necessary to overcome Complainant's resistance and effectuate his arrest. Accordingly, the threshold inquiry focuses on Respondent's subjective belief. Specifically, this Tribunal must decide whether, at the moment she used her Taser against Complainant in drive stun mode, Respondent *actually* believed that the threat of physical force against P.O. Horun was imminent and that deploying her Taser in drive stun mode was *necessary* to stop that peril. In addition, the Tribunal must evaluate whether Respondent *actually* believed that deploying her Taser in drive stun mode was *necessary* to effect Complainant's arrest[13] (*See People v. McClellan*, 49 A.D.3d 1203, 1204 [4th Dept. 2008], quoting *Wesley*, 76 N.Y.2d at 559 [finder of fact "must first determine whether defendant 'actually believed that deadly physical force was necessary'"]). After careful review of the record in its entirety, this Tribunal finds that the preponderance of the credible evidence established that this was Respondent's actual belief when she deployed her Taser.

It is undisputed that once Complainant encountered Respondent and her partner, Complainant spontaneously claimed that he was "molested" and then asked for permission to take off his backpack. At that point, neither police officer knew what the contents of the backpack were; based upon the dispatch call advising that their suspect had committed an assault with a knife and the persons on the subway platform pointing at Complainant, it was reasonable for Respondent and P.O. Horun to be concerned that there was a weapon inside the backpack.

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[13] As noted above, the legal standard requires that this Tribunal evaluate Respondent's *actual* beliefs about what constituted imminent danger warranting force. At trial, Respondent specifically asserted that her decision to deploy her Taser was based on an immediate fear for P.O. Horun's safety, her own and that of the members of the public present on the subway platform.

Complainant then broke free of their handholds, declared that the police officers would have "to shoot" him, and began a protracted, determined fight with P.O. Horun.

After P.O. Horun struggled with Complainant for a period without being able to subdue him, both men fell onto a wooden bench and continued struggling with each other. Respondent fired her Taser at Complainant in cartridge mode, but that discharge did not appear to have any effect on his resistance. P.O. Horun and Complainant appeared to reach an impasse where P.O. Horun seemed to be growing fatigued, but Complainant still did not make any attempt to surrender his hands to be cuffed; in fact, Complainant held onto P.O. Horun after Horun punched him in the face.

P.O. Horun appeared to be preparing for a final effort to subdue Complainant when he ordered Respondent to use her Taser in drive stun mode. Complainant then declared that he had "hemophilia type-A" and demanded to be taken to a hospital. P.O. Horun directed Complainant again to surrender his hands; when he did not respond, P.O. Horun struck him in the face and used his body weight to force Complainant onto his left side on the bench. It was at this point that Respondent used her Taser for the second time, pressing it against Complainant's right shoulder. The body-worn camera recording shows Complainant moaning, apparently from the effect of the Taser, continuously chanting, "I have hemophilia type-A," then laying limp on the bench before he was brought to the ground by several police officers who arrived on the platform seconds after Respondent's second Taser deployment.

Based upon the totality of the evidence, I find that at the time Respondent deployed her Taser in drive stun mode, she reasonably believed that Complainant had not, and was not about to, cease his resistance and submit to arrest. The evidence shows that he engaged in an intense physical struggle with P.O. Horun for approximately one minute, including being punched

several times, but persisted in his resistance. I further find that Respondent, based on Complainant's spontaneous declaration that the police would have "to shoot" him, could reasonably believe that he had no intention of surrendering peacefully; in fact, there is no evidence in the record from which this Tribunal may infer that he was about to surrender.

CCRB's argument that Complainant's assertion that he had hemophilia was a change in circumstance which should have caused Respondent to hesitate in using force, if not forgoing it altogether, lacks merit. First, there is no evidence in the record to support Complainant's assertion that he suffered from this disease. Based upon the record, it is a fair inference that Complainant's assertion was a last-ditch attempt to avoid arrest rather than acquiescing to it. Second, even if Complainant's assertion were true, he was still engaged in violent resistance and was believed to possess a weapon that Respondent had not yet seen. It would have been reasonable for Respondent to be concerned that if Complainant had broken free from P.O. Horun, he could get to a weapon and further endanger them.

Finally, the evidence demonstrates that Respondent understood P.O. Horun, a tall, physically fit police officer, as she described him, was tiring from his prolonged struggle with Complainant. The evidence supports a finding that it would have been reasonable for her to calculate that the second deployment of her Taser against Complainant, in drive stun mode, would be a last-ditch effort to avoid escalating to the use of deadly physical force, should he break free from her partner.

Accordingly, this Tribunal finds that the preponderance of the evidence proved Respondent's defense and that she is Not Guilty of the misconduct set forth in Specification 1.

b. Objective Test

Even though this Tribunal has credited Respondent's assertion that at the time of her second Taser deployment, she actually believed: (1) P.O. Horun was in imminent danger of physical injury, and (2) that force was necessary to effectuate Complainant's arrest, the law still requires an assessment to determine whether that belief was objectively reasonable. Indeed, this is because an honest belief may still be unreasonable, no matter how genuine. A careful review of the record has led this Tribunal to conclude that, under these specific circumstances, Respondent's stated belief and subsequent actions were objectively reasonable. In short, the preponderance of the evidence proved that a reasonable police officer under similar circumstances would have believed that the force used was necessary to avert imminent danger. (*See People v. Castillo*, 2024 N.Y. Slip Op. 05817 [Nov. 21, 2024], quoting *People v. Collice*, 41 N.Y.2d 906, 907 [1977]; *Goetz*, 68 N.Y.2d at 115).

Analyzing the reasonableness of a police officer's actions "requires careful attention to the facts and circumstances of each particular case." This Tribunal is mindful that it is often "reasonable for police to move quickly if delay 'would gravely endanger their lives or the lives of others'" and that this "is true even when judged with the benefit of hindsight, the officers may have made 'some mistakes'" (*See City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 612 [2015], citing *Heien v. North Carolina,* 574 U.S. 54, 61 [2014]; *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298–99 [1967]; *see also Graham v. Connor*, 490 U.S. 386, 396 [1989]).

As discussed in detail above, Respondent raised the defense that her use of a Taser against Complainant was justified because she believed P.O. Horun was in danger of being assaulted and Complainant had not yet submitted to being handcuffed. The record establishes that this was an objectively reasonable belief when Respondent deployed her Taser for the

second time. CCRB's Exhibit 2, Respondent's body-worn camera recording, provides the most compelling evidence supporting this finding.

CCRB's Exhibit 2 shows that as soon as Complainant exited the subway platform area, he declared himself the victim of an assault and admitted that he "defended himself." This admission, captured on the video and reasserted during Complainant's CCRB interview, combined with the information in the dispatcher's call, and the identification of Complainant by other persons on the subway platform, would lead any police officer hearing it to conclude: (1) the description provided in the dispatcher's call matched the appearance of the person who was before them; (2) the person before them admitted that he was involved in a physical confrontation and used force against another person; and (3) the temporal and physical nexus of the person before them to the incident reported made it more likely than not that the person before them was the same person who had assaulted a fellow train passenger with a weapon reported to be a knife.

Complainant's (a) request to remove his backpack, (b) physically breaking the handhold the police had on his wrists, and (c) his declaration that the police would have to shoot him made it more likely than not that he was still in possession of some incriminating evidence and was so motivated to prevent the discovery of that evidence that he initiated a violent struggle with two armed police officers.

The video shows that Respondent first deployed her Taser in cartridge mode and that the deployment was unsuccessful in defeating Complainant's resistance. It also captures P.O. Horun's numerous orders to Complainant to give him his hands, even including the use of profanity, *i.e.*, "Give me your f-cking hands." Finally, while Complainant and P.O. Horun struggled in an awkward position on the bench, and Complainant had his left hand gripping

something near P.O. Horun's gun belt, P.O. Horun told Respondent to "drive stun him." Upon hearing this, Complainant's response was not to release his grip and declare that he was surrendering, but instead, he stated that he had "hemophilia type-A." A reasonable police officer, even one who was familiar with hemophilia, could infer that Complainant made that declaration in a desperate attempt to avoid being tased again.

I note that at the time of this incident, Respondent was a rookie police officer who had only been out of the police academy for five months and was still under the instruction of her Field Training Officer, P.O. Horun.

In sum, the evidence showed that at the moment Respondent used her Taser for the second time against Complainant: (a) he was involved in a violent struggle he initiated and persisted in; (b) he had refused to follow police commands; (c) he was unrestrained; (d) he had already been Tased once with no apparent effect; and (e) still had a backpack and a jacket on his person, either of which could have contained a weapon. Under the totality of the circumstances, it was objectively reasonable for Respondent to deploy her Taser a second time to overcome his resistance and complete his arrest (*see Scoma v. City of New York*, 2021 U.S. Dist. LEXIS 12727 *31 [E.D.N.Y. 2021] ["[V]iewing the totality of the circumstances, [the officer] confronted an individual suspected of a violent crime who was uncooperative, unrestrained, and not incapacitated by the first deployment of the Taser. Accordingly, [the officer's] second use of the Taser after plaintiff stood up and continued to resist arrest was not objectively unreasonable"]; *see also Fuentes v. Schemmer*, 2023 U.S. Dist. LEXIS 7200 *18 [S.D.N.Y. 2023] ["Although neither the Supreme Court nor the Second Circuit has defined 'active resistance,' the Second Circuit has upheld uses of force involving tasers where the suspect was actively non-compliant with the Officers' directions"]; *People v. Atkinson*, 119 A.D. 3d 1151, 1153 [3d Dept. 2014]

[Defendant, a convicted felon, was arrested on a parole violation. After police stopped the car he was in, he refused to show his hands or get out of the vehicle when ordered. He used his legs to resist during and after his removal from the car. Once placed on the ground, he kept his hands under his body and refused to comply with orders to put his hands behind his back. He also failed to comply with orders to open his mouth or spit out what was in his mouth despite warnings that he would be tased. The police officer's decision to tase defendant, believing that he had narcotics in his mouth and unsure of whether he had a concealed weapon, was reasonable]).

Accordingly, this Tribunal finds that the preponderance of the credible evidence proved that Respondent was justified in using her Taser in drive stun mode against Complainant. As such, she is Not Guilty of the misconduct set forth in Specification 1.

Respectfully submitted,

Paul M. Gamble, Sr.
Assistant Deputy Commissioner Trials

APPROVED
JUL 30 2025
JESSICA SOTISCH
POLICE COMMISSIONER