



POLICE DEPARTMENT

May 5, 2022

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In the Matter of the Charges and Specifications : Case Nos.
- against - : 2020-22176
Police Officer Michael Sher : 2021-23461
Tax Registry No. 951244 :
Quartermaster Section :
-----X

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

Before: Honorable Josh Kleiman
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: David Green, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Stuart London, Esq.
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To:

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

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CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2020-22176

1. Said Police Officer Michael Sher, while assigned to the 70th Precinct, while on duty on or about May 30, 2020, within the confines of the 70th Precinct, wrongfully and without just cause used force against one or more people, including pulling down glasses or other eyewear or face masks, and spraying the faces of said people with oleoresin capsicum pepper spray, causing said people to suffer pain and injury.

P.G. 221-01

FORCE GUIDELINES –
TACTICAL OPERATIONS

P.G. 221-02

USE OF FORCE –
TACTICAL OPERATIONS

P.G. 221-07

USE OF OLEORESIN CAPSICUM
PEPPER SPRAY DEVICES –
TACTICAL OPERATIONS

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT
GENERAL REGULATIONS

2. Said Police Officer Michael Sher, while assigned to the 70th Precinct, while on duty on or about May 30, 2020, having used force against one or more people, including pulling down glasses or other eyewear or face masks, and spraying the faces of said people with oleoresin capsicum pepper spray, wrongfully failed to obtain or to attempt to obtain any medical attention for any injured person, notify his immediate supervisor regarding his use of force and oleoresin capsicum pepper spray, document his use of force in his Activity Log, or prepare a “Threat, Resistance or Injury (T.R.I.) Interaction Report,” as required.

P.G. 221-03, Page 4, Paragraphs 3-5

REPORTING AND
INVESTIGATION OF FORCE
INCIDENT OR INJURY
TO PERSONS DURING POLICE
ACTION –
TACTICAL OPERATIONS

P.G. 221-07

USE OF OLEORESIN CAPSICUM
PEPPER SPRAY DEVICES –
TACTICAL OPERATIONS

Disciplinary Case No. 2021-23461

1. Said Police Officer Michael Sher, while assigned to the 70th Precinct, on or about May 30, 2020, while on duty and having recovered “found” property, a cellular telephone, on

or about the roadway near Church and Flatbush Avenues, Kings County, wrongfully failed to process said found property, as required.

P.G. 218-26, Pages 1 & 2

PROCESSING FOUND
PROPERTY – GENERAL

2. Said Police Officer Michael Sher, while assigned to the 70th Precinct, on or about May 30, 2020, while on duty and having recovered “found” property, a cellular telephone, on or about the roadway near Church and Flatbush Avenues, Kings County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer wrongfully kicked said cellular telephone in the street, and then picked it up and threw or dropped it into a nearby sewer.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT
GENERAL REGULATIONS

3. Said Police Officer Michael Sher, while assigned to the 70th Precinct, on or about May 30, 2020, while on duty, at or near Church and Flatbush Avenues, Kings County, wrongfully made discourteous or disrespectful remarks regarding another person.

P.G. 203-10, Page 1, Paragraph 1

PUBLIC CONTACT –
PROHIBITED CONDUCT
GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on March 21 and 22, 2022. Respondent entered a plea of Guilty to the charged misconduct in Case No. 2021-23461. He pled Not Guilty to the subject charges of Case No. 2020-22176. The Department called Sergeant Imran Khan, Sergeant Eric Chow, and Police Officer Artur Sadowski, as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner’s review. Having reviewed all of the evidence in this matter, the Tribunal accepts Respondent’s Guilty plea in Case No. 2021-23461 regarding his kicking a civilian’s phone into a sewer and making discourteous remarks, as captured on video. As to his use of OC spray, in Case No. 2020-22176, the Tribunal finds Respondent Not Guilty of Specification 1 and Guilty, in part, of Specification 2. The Tribunal

further recommends that Respondent forfeit 30 suspension days already served, forfeit an additional 25 vacation days, and be placed on one-year dismissal probation.

ANALYSIS

Disciplinary Case No. 2020-22176

On May 30, 2020, at approximately 5 p.m., Respondent, and several other officers from the 70th Precinct responded to an urgent request for backup (“10-13”) at the scene of a large protest, five days after the murder of George Floyd. At trial, the Department’s attorney described the protest as follows:

[T]he protest situation that the Respondent and his fellow officers faced that day was of an order of magnitude different and larger and more threatening than others the Department members had faced in the past. You will see that they were surrounded by hundreds, if not thousands, of people who were taunting them, who were throwing objects or liquids at them and were recording their every move.

There is absolutely no question, nor can it be argued by any reasonable person, that the police officers did not feel that their safety was compromised that day. . . .

Police officers were being attacked, police vehicles were being damaged, and property around the city was being destroyed.

(Tr. 19-20).¹ Respondent’s direct supervisor, Sergeant Khan, agreed at trial that upon responding to the 10-13, at the corner of Bedford and Tilden avenues in Brooklyn, he encountered “one of the worst scenes of a hostile crowd I ever responded to as a police officer.” He recalled that police vehicles were on fire and the crowd was throwing glass and other objects. It was so loud and hectic that Sergeant Khan claimed that he was not able to communicate with the officers

¹ The Tribunal did not observe any violence on the part of protesters or any thrown objects in the videos entered into evidence. Nevertheless, both Department witnesses and Respondent consistently described a hostile crowd. While video evidence may provide superior evidence to testimony where the video offers a clear depiction of all of the relevant facts necessary to the determination of a charge; here, the video evidence is not so all-encompassing and offers only partial depictions of the events. The Tribunal takes judicial notice that the day before the protest at issue in this case, on May 29, 2020, Molotov cocktails were thrown into NYPD police vehicles in two separate incidents.

under his supervision. A Level 3 Mobilization was called and aviation was directed to the scene.
(Tr. 35-56)

At one point, an individual was caught spray-painting a patrol car. She was believed to be the same person who had spray painted “KKK” on a patrol vehicle earlier that day. Placing her under arrest further angered the crowd. The patrol vehicle she was placed in was surrounded. Respondent positioned himself in front of the patrol vehicle and, as seen on video, attempted to move the hostile crowd away from the vehicle so that the prisoner could be transported to the nearest precinct.² (*Id.*; Dept. Ex. 4)

The Department alleges that, as the officers attempted to create a path for the patrol vehicle’s exit, Respondent improperly utilized his Department issued Oleoresin Capsicum pepper spray (“OC spray”) seven times on six different protesters.³ Respondent’s body worn camera (Dept. Ex. 4)⁴ depicts the following uses of pepper spray:

21:24:59Z⁵ Respondent is positioned in front of a police car moving slowly through a crowd with lights and sirens. A white male wearing a

² Police Officer Becerra was the arresting officer and the operator of the patrol car attempting to move through the crowd. His body-worn camera video was entered into evidence (Resp. Ex. A). At 21:24:13Z, Officer Becerra tells a fellow police officer, “Yo, we need a fucking boss bro.” At 21:27:13Z, Officer Becerra, while behind the wheel of his RMP, announces through the PA system “use the pepper spray, use the pepper spray, pepper spray.” Respondent was not questioned as to whether he heard Officer Becerra’s request. Assuming the time stamps on the various body worn camera videos in evidence are accurate, the statement made by Office Becerra occurred after four of Respondent’s six deployments of his spray. At his official Department interview, also entered into evidence (Resp. Ex. D), Officer Becerra, who did not testify at trial, stated: “So, honestly, in my opinion, every officer that was there, including Sher, um, basically, like protected my life, the prisoner’s life, and all the other officers there. Because if it wasn’t for the officers outside the RMP initially, me [and] everyone in the RMP . . . were in serious danger.”

³ While the charges note that Respondent “pull[ed] down glasses or other eyewear or face masks” prior to deploying pepper spray, the Department admitted, at trial, that Respondent did this to only one of the six protesters.

⁴ Sergeant Eric Chow of IAB testified that during the course of his investigation he obtained Respondent’s body worn camera video (Dept. Ex. 4) depicting the alleged misconduct as well as a video posted on Twitter (Dept. Ex. 5), which depicted Respondent pulling down a protester’s goggles and facemask and deploying OC spray. The protester’s identity is known to the Department and is referred to herein as “RX2.” (Tr. 71-73)

⁵ The Tribunal takes judicial notice that the Department’s body worn cameras utilize a watermark timestamp in Coordinated Universal Time (UTC), also known as *Zulu* time, denoted by a “Z” at the end of all watermark timestamps (*see* Axon Camera Video Watermark Timestamp, *available at* <https://my.axon.com/s/article/Axon-Camera-Video-Watermark-Timestamp> [last visited April 14, 2022]). On May 30, 2022, *Zulu* time was four hours

black shirt and red backpack (RX1), positioned in front of a parked police van, approaches from Respondent's right. Respondent shoves the protester back, telling him to "step back, step back, step back." The protester squares up and moves forward toward Respondent, who deploys his OC spray, striking RX1 in the face. RX1 moves to the side and Respondent proceeds forward.

21:26:26Z
&
Twitter Video

Respondent uses outstretched arms, with his hands in fists, to push protesters back. A black male wearing a black shirt with red lettering, a backpack, a red bandana, sunglasses, and a red face mask covering his mouth and nose (RX2), is positioned to Respondent's right.⁶ Respondent turns towards RX2 and pushes him back stating, "step back, step back, step back." RX2 returns to his position in front of Respondent. Respondent swipes down on RX2's face, pulling off his sunglasses and face mask. He then deploys his OC spray, striking RX2 in the face. RX2 moves back away from Respondent and to the side of the road. Respondent continues forward.

21:26:56Z

Respondent moves forward yelling, "step back, step back, step back." Respondent approaches a black male wearing a white shirt with black lettering and a white face mask (RX3). Next to him is a white female wearing a white shirt, black baseball cap, sunglasses, and a white face mask (RX4). They are standing in place and not moving back. Respondent pushes RX4 back and she moves away. Respondent pushes RX3 twice, but RX3 stands his ground. Respondent deploys his OC spray, striking RX3 in the face. RX3 moves back, crouching down to rub his eyes.

21:27:19Z

A white male wearing a tucked in black shirt with a silver belt buckle, a black sun hat, swimming goggles, and a zebra print face mask (RX5) moves towards Respondent.⁷ Respondent while yelling "step back, step back, step back" pushes RX5 away from him. RX5, while yelling at Respondent, punches his fist forward in the air above Respondent. Respondent deploys his OC Spray, striking the left side of RX5's face. RX5 turns away from Respondent and then turns back to Respondent,

ahead of Eastern Daylight Time. Accordingly, a watermark timestamp of 21:24:59Z equates to a local time of 17:24:59, or approximately 5:25 p.m.

⁶ This is not the first time RX2 is depicted on Respondent's body worn camera. At 21:24:39Z, RX2 is depicted stepping from the front of a parked police van into the street and watching a police officer pushing protesters back. It is not clear that Respondent is aware of RX2 at this time.

⁷ This is not the first time RX5 is depicted on Respondent's body worn camera. At 21:25:17Z, RX5 is depicted walking towards Respondent while Respondent is stating "step back, step back." RX5 positions himself directly in front of Respondent. Respondent pushes RX5, who falls back and is pushed by another officer into the crowd.

bringing his arm up toward Respondent and pointing his finger at Respondent. Respondent again deploys his OC spray, which does not appear to make contact with RX5, but, nevertheless causes RX5 to turn away. RX5 begins stepping back while giving Respondent the middle finger. A protester asks Respondent, "who are you protecting right now?" Respondent replies, "you." The protester responds, "what about her" pointing to the patrol vehicle carrying the female arrestee. Respondent walks away. Respondent asks another officer, "do you have mace?" The officer pulls out his mace. Respondent asks, "did you use it?" The officer responds, "not yet."

21:33:00Z Respondent, while screaming in pain, approaches another officer stating, "I can't see," "I need the water." An officer approaches Respondent with a water bottle and pours the water in Respondent's eyes. Another officer says, "get him out of here." Respondent is escorted by another officer through the protesters and away from the scene. Respondent enters a police van. An officer states, "he's going to the precinct."

Sergeant Khan testified at trial that he did not interact with Respondent during the course of the protests. He was unaware that Respondent deployed OC spray and Respondent did not notify him of the OC spray deployments. Sergeant Khan opined that Respondent should have used his nightstick to move the crowd back rather than OC spray. (Tr. 52)

Later in the evening, Sergeant Khan witnessed Respondent putting water on his eyes. It was his testimony at trial that he believed it was because it was a hot day. During his official Department interview, however, he had stated that Respondent was pouring water on his eyes because Respondent had been pepper sprayed. Sergeant Khan did not endorse his interview statement at trial, stating that he did not know if Respondent was pepper sprayed. (Tr. 57-59)

Respondent testified that he arrived at the protest at Bedford and Tilden avenues at approximately 1700 hours in response to a "10-13." Respondent observed about ten officers and one lieutenant, who he did not recognize, standing before a large crowd. Respondent noticed the crowd began to surround the officers. In an effort to retreat, Respondent and the officers moved back towards his patrol car. By the time they reached the vehicle, hundreds of protesters

surrounded him and the other ten officers. Approximately, one to two minutes after his arrival, the female protester suspected of spray-painting patrol vehicles, was arrested. Approximately two to three minutes after the arrest, Respondent activated his body worn camera in response to the danger posed by the crowd. Respondent testified, "At that particular moment, I honestly thought that this is it; I'm not going to make it out alive." (Tr. 257-61)

Respondent called for additional units to respond, expressing the distress he and those officers around him were experiencing. In the middle of the crowd, the third row of people and beyond, he witnessed people throwing stones and rocks, but he was unable to reach these individuals. He noted that the previous night he had been assigned to a protest where he found several backpacks containing rocks, bottles, and foreign objects, that he believed were intended to be thrown at officers. This made him concerned about individuals with backpacks. (Tr. 262-64)

While trying to move the crowd back to allow the patrol car containing the prisoner to pass, Respondent positioned himself behind three officers to make sure they were not ambushed from behind. He testified that he was forced to make quick decisions concerning individuals that were approaching the officers. He further stated that he was in "survival mode" and wanted to get from point A to point B as fast and safely as possible, while utilizing the least amount of force. (Tr. 265-67; Dept. Ex. 4)

He used OC spray on RX1 after he instructed RX1 to move back several times. Respondent described RX1 to be standing about a foot or two from him. After ordering him several times to "step back" and pushing him away, Respondent stated the protester "interlocked" hands with him, at which point he deployed his OC spray. (Tr. 267-69)

According to Respondent, when he first encountered RX2, he walked by him without incident. RX2 then turned around and walked straight at the officers. Respondent observed RX2

come from his right side, wearing a backpack, and try to approach a small group of cops. Respondent told RX2 to stay back several times. RX2 ignored the commands and tensed towards Respondent. Respondent then decided to administer OC spray. (Tr. 271)

Respondent testified that he learned in training that OC spray was most effective in the eyes. Because RX2 was wearing a hat shielding his forehead, he did not believe he could deploy the spray to RX2's forehead since it was blocked by the hat, and with RX2 also wearing "goggles,"⁸ Respondent did not believe the OC Spray would be effective unless he removed them. Accordingly, Respondent removed RX2's eyewear and deployed OC spray. (Tr. 270-73)

As to RX3, Respondent remembered that this was an individual to Respondent's side who was holding a satchel. The protester stood over six feet and had his arms extended with the bag over Respondent's head. He was pushing into Respondent's side. Respondent attempted to move the man back several times without success, leading to him deploying OC spray. Respondent denied pepper spraying RX4, the female standing next to RX3.⁹ (Tr. 274-77)

As for RX5, Respondent believed he would have been arrested if there were enough officers to control the crowd. He previously observed RX5 throwing an object at the officers. There were several prior altercations with RX5 where an officer other than Respondent pushed him. Respondent attempted to move RX5 back two or three times and recalled the man throwing objects again and yelling as he approached the officers. He further recalled that the sun was in his eyes, creating an obstruction. Once Respondent recognized the individual coming towards him again, he deployed his OC spray. Because the man was wearing goggles,¹⁰ the spray ended up being ineffective. (Tr. 277- 79)

⁸ RX2 is depicted on video wearing aviator-style sunglasses, not goggles. (Dept. Ex. 4 at 21:26:17)

⁹ The Tribunal finds that there is insufficient evidence in the record that RX4 was pepper sprayed.

¹⁰ RX5 is depicted on video wearing swimming goggles.

Respondent said the circumstances at the time did not allow him to stop and seek medical attention for any of the individuals or himself. He was surrounded and outnumbered, and his primary concern was safety. Later in the evening, Respondent was sprayed with OC spray by an unknown individual. (Tr. 269; Dept. Ex. 4 at 21:33:00Z)

Respondent admitted that never informed his supervisor regarding his uses of force, nor did he complete a Threat, Resistance or Injury Interaction Report (“TRI report”). He also did not make Activity Log entries to reflect his uses of OC spray. When asked why he did not mention his use of force the next day, Respondent stated he was just happy to be alive. (Tr. 353-54)

Expert Testimony

Police Officer Artur Sadowski testified as an expert in the proper deployment of OC spray pursuant to the Patrol Guide and Department training. Officer Sadowski is an instructor at the Firearms and Tactics Section, who regularly conducts firearms, OC spray, and conducted electrical weapon training for NYPD recruits and in-service personnel. He is also a master instructor in the Saber brand of OC spray devices utilized by Respondent on the incident date. One of his duties consists of regularly updating lesson plans to ensure they are consistent with Department policies. Police Officer Sadowski stated that while he has never himself deployed OC spray in the field, he has pepper sprayed approximately 75 to 100 members of the service as part of their training. (Tr. 100-02)

Officer Sadowski explained that OC spray works in three ways: (1) it affects the nerve receptors on the skin by causing a heating or burning sensation; (2) it affects the mucus membranes in the respiratory system, causing a burning sensation in the nasal passages and lungs; and (3) it is hydrophobic, causing it to repel water and dry out the eyes, causing an intense burning and itching sensation typically causing the eyes to close. (Tr. 217-19)

The Patrol Guide does not permit the use of OC spray on a person who is passively resisting. Passive resistance is defined in the Patrol Guide as: "Minimal physical action to prevent a member from performing their lawful duty. For example, a subject failing to comply with a lawful command and stands motionless and/or a subject going limp when being taken into custody" (P.G. 221-07 at 1). Officer Sadowski applied this analysis to RX1, finding that Respondent's deployment of OC spray was "objectively reasonable." His analysis was as follows:

So, at this point there are protester behind the first line officers which is a significant safety concern. Without knowing who's behind you, what they can grab at behind you, things along those lines. So, Officer Sher seems to have been trying to clear the protesters from the line which was behind the police officers which has everyone's safety in mind.

Now, in terms of why I think the actual pepper spray is reasonable itself is initially Officer Sher seems to shove the protester back and a protester is just standing with their hands up, not moving, one could make the argument they're passively resisting and not have the need to use pepper spray. However, what seems to be the case here, best as I can tell, is Officer Sher pushed the protester backwards, that protester took a step forward to that officer again.

So, now you're going from what might be passive resistance where a push, shove, a guidance, to what now may be considered active resistance. Now, that person is now bracing, tensing, coming back towards the officer and also at one point you see both Officer Sher's and the protester's hands coming into contact with each other. This person now may be trying to grab at Officer Sher or push back against Officer Sher. So, in that instance, I saw it as objectively reasonable to utilize what Officer Sher already had in his hand which is the pepper spray.

(Tr. 125-27)

As to RX2, Officer Sadowski initially stated that the reasonableness of Respondent's deployment of OC spray was inconclusive, finding that the video depicting the suspect's hands coming up in front of the officer could lead a reasonable officer to believe he was reaching for something. When asked to assume that RX2 was simply raising his arms in response to having

his glasses and face mask pulled down, Officer Sadowski stated that he would then find that the deployment was not objectively reasonable. (Tr. 129-36)

Upon viewing the video evidence associated with Respondent's deployment of OC spray in connection with RX3, Officer Sadowski testified that he did not believe the deployment was objectively reasonable since it did not appear to him that RX3 was advancing toward Respondent. It appeared, instead, that RX3 was standing still with his hands up and empty, posing no physical threat. Upon further questioning on cross-examination, however, Officer Sadowski admitted that it was inconclusive as to whether or not the deployment of OC spray was objectively reasonable since it is unclear whether the reason RX3 did not move when Respondent pushed him was whether RX3 was just "dead weight" or because RX3 was "tensing." Officer Sadowski further claimed that RX4 was sprayed as well because he could see "droplets" in the air,¹¹ but that the propriety of the deployment was inconclusive because it was unclear if RX4 had "body check[ed]" Respondent. (Tr. 137-42, 197-99)

Finally, Officer Sadowski testified that Respondent had no objective reason to deploy OC spray in connection with RX5. While RX5 was angry and pointing at Respondent, his hands were empty. Officer Sadowski suggested that it was possible that Respondent had the sun in his eyes and was unable to discern if RX5 posed a threat. The second deployment of OC spray against RX5 was also not reasonable given the distance between Respondent and RX5 and that RX5 was not advancing on him. (Tr. 145-48, 190)

Officer Sadowski admitted that if information was presented to him beyond what is shown in the video, his calculus could change since objective reasonableness is determined based

¹¹ The Tribunal does not credit that RX4 was sprayed based on the video evidence.

on the totality of the circumstances. He described the fact that the officers were outnumbered and the overall chaotic situation as “absolutely huge factors.” (Tr. 182-84, 200-03).

Findings

Specification 1- Use of OC Spray

The Tribunal credits Respondent’s testimony that he feared for his safety and that the situation in which he was placed was “chaotic.” Respondent’s direct supervisor testified that he was unable to communicate with his team, including Respondent, and it was not apparent from the video evidence that any other supervisor provided Respondent with direction.¹² Indeed, Respondent’s supervisor described being placed in a position that was just as foreign and chaotic to him as it was to Respondent. Accordingly, the Tribunal finds that Respondent was placed in an unfamiliar circumstance with little guidance and inadequate backup.

The Department’s force guidelines, in effect at the time, asked officers when determining whether a use of force is reasonable to “consider” the “[n]umber of subjects in comparison to the number of MOS” and the “[p]resence of hostile crowd or agitators.” Respondent and his fellow officers decided to take decisive action to extricate themselves and a prisoner from what both the Department and Respondent described as a dangerous circumstance. It is not in dispute that the decision to do so was reasonable. The officers made multiple requests that the protesters in front of them “step back.” Some of the protesters complied; others stood their ground. It is also not in dispute that the decision to attempt to push back those who stood their ground was reasonable under the circumstances. At issue, is whether the use of intermediate force, specifically OC spray, was authorized in response to those who resisted efforts to be pushed back.¹³

¹² While the Patrol Guide now has provisions governing the Department’s response to “First Amendment activities” (P.G. 213-20) and “an unusual disorder” (P.G. 213-05), the incident date predated such targeted guidance.

¹³ Each of the protesters sprayed by Respondent is pushed by Respondent first. While the Department attempted to argue that some of the protesters may have moved forward after being pushed because they were rocking forward to regain their balance, the preponderance of the evidence did not establish that this was, in fact, the case.

The Tribunal is not convinced by the Department's efforts to distinguish Respondent's deployments of OC spray based upon an ordinary passive resistance versus active aggression analysis. While the video evidence does not depict any of the individuals whom Respondent sprayed as engaged in "active aggression," as that term is defined in the Patrol Guide,¹⁴ the Tribunal is not convinced that any of them were engaged in "passive resistance" either.

While under ordinary circumstances the Tribunal might agree with Officer Sadowski's assessment that those who refused to move were engaged in "passive resistance," the Tribunal disagrees that the ordinary model of "passive resistance" applies to those acting in support of a large hostile group surrounding a small group of officers. Rather, the passiveness of such resistance ceases when it is actively used to surround and intimidate officers and leave them exposed to the dangers of thrown objects and the lack of reasonable access to an egress.

According to the Department's expert witness, both a nightstick and OC spray are tools of intermediate force (Tr. 152). The Department did not present any evidence that Respondent was trained to use one, rather than the other, in circumstances similar to the one he faced at the protest scene.

The Tribunal further finds that Respondent's deployments of OC spray were not gratuitous or arbitrary. As to each person sprayed, Respondent first warned them multiple times to step back, attempted to push them back, and directed the spray at the individual in a controlled fashion. While, in the Tribunal's view, Respondent should have provided forewarning to RX1-RX5 that if they did not move back they would be sprayed, the lack of a warning under the

¹⁴ P.G. 221-07 defines "active aggression" as "Threat or overt act of an assault, coupled with the present ability to carry out the threat or assault, which reasonably indicates that an assault or injury is imminent."

totality of the circumstances is not grounds for formal disciplinary action, but may be addressed by the issuance of formal instructions or ordered training.¹⁵

Accordingly, the Tribunal finds that under the unique circumstances presented by the parties in the instant disciplinary case, the Department has failed to prove that Respondent's deployments of OC spray were objectively unreasonable. Respondent is, therefore, found Not Guilty of Specification 1.

Specification 2- Failure to Document Use of Force and Obtain Medical Treatment

While Respondent's deployment of his OC spray under the totality of the circumstances was not unreasonable, Respondent's decision not to document his uses of force and not to inform his supervisor of these uses of force was unreasonable. When asked why he did not document his uses of force that day or the next day, Respondent answered with a non-sequitur that he was just glad to be alive. While the Tribunal appreciates that an officer who is emotionally or physically overwhelmed by truly extraordinary events may be unable to address required administrative tasks immediately, once such hardships have subsided the officer is expected to complete their required recordkeeping tasks. Respondent failed to do so. Accordingly, Respondent is found guilty of failing to make required activity log entries, failing to inform his supervisor of his uses of force, and failing to complete a TRI report.

Specification 2 also charges Respondent with wrongfully failing to obtain or attempting to obtain medical attention for those he pepper sprayed. While ordinarily such an obligation is required, the Tribunal credits Respondent's testimony that given the circumstances of being

¹⁵ Patrol Guide Section 221-07 does not require officers to verbalize a pre-deployment warning prior to the deployment of OC spray, rather it suggests that they "should" deliver such a warning "if feasible." The Tribunal further notes that during Respondent's body-worn camera footage, entered into evidence as part of Respondent's second disciplinary matter, occurring approximately 5 hours after the pepper spray deployments relevant here, Respondent, who is no longer surrounded by a hostile group, is heard saying to protesters while holding his pepper spray, "keep walking, keep walking, you will get pepper sprayed, keep walking." The protesters comply, backing up. No deployments of pepper spray are observed on this video. (Dept. Ex. 4 at 02:25:46Z)

surrounded by a hostile crowd and the need to maintain a zone of safety for his fellow officers, he was not in a position to leave the zone of safety to offer medical assistance to those he pepper sprayed. The Tribunal finds that doing so would have likely required Respondent to separate from his fellow officers, which could have put his safety in jeopardy. Accordingly, Respondent is found not guilty of failing to seek medical assistance for those he pepper sprayed under the unique circumstances attendant to this disciplinary matter.

As such, Respondent is found Guilty, in part, of Specification 2.

Disciplinary Case No. 2021-23461

Approximately five hours after the OC spray deployments detailed above, at approximately 10:30 p.m. on May 30, 2020, while on duty, Respondent discovered a cellphone in the middle of an active roadway near the corner of Church and Flatbush Avenues in Brooklyn. As depicted on Respondent's body-worn camera, as another officer approaches the phone to pick it up, Respondent states, "No, I want to kick it to the sewer man, I want to kick it to the sewer." The other officer walks away. Respondent kicks the phone twice towards a nearby sewer. Respondent exclaims, "Ah fuck, it didn't get there." Respondent then picks up the phone and drops it through the sewer grate. He then approached a group of officers, stating, "The phone just fell in the sewer." Respondent explains to one officer, "The fucking fat female with that younger chick, it was their phone." (Dept. Ex.3)

At trial, Respondent pled guilty to all of the specifications associated with this disciplinary case, including: (i) failing to properly process found property; (ii) improperly kicking and dropping the phone in a sewer; and (iii) making disrespectful and discourteous remarks. Respondent testified that while he had no recollection of the events described in these specifications, he does not dispute that they occurred as captured on his body-worn camera.

Respondent acknowledged that he was “stupid” and has “no defense” or “justification” for his actions. (Tr. 280-82)

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department’s Disciplinary System Penalty Guidelines, considered the relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent’s employment history was examined as well (*see* 38 RCNY § 15-07). Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum. The Department has recommended that Respondent be terminated. The Tribunal agrees that a serious penalty is warranted.

Respondent has been found guilty of failing to make proper notifications regarding his use of OC spray (penalty range: 0-5 penalty days [“PD”]), failing to prepare a required report (penalty range: 3-20 PD), failing to properly process found property (penalty range: 5-20 PD), intentionally kicking and discarding private property (penalty range: 5-20 PD), and using disrespectful and discourteous language (penalty range: 1-10 PD).

The Tribunal finds that an aggravated penalty is warranted in connection with Disciplinary Case No. 2021-23461, especially given Respondent’s prior disciplinary history. In 2017, Respondent forfeited 30 vacation days and was placed on Dismissal Probation for: (1) failing to comply with three lawful orders on two separate occasions, (2) failing to be properly attired, (3) failing to safeguard a 2015 Department parking plaque being used by his girlfriend, (4) lying to his Integrity Control Officer about having returned his 2014 Department parking plaque, (5) placing an unauthorized plastic cover over the license plate and placing the

registration sticker in a foil bag for two vehicles registered to him, and (6) operating a motorcycle with a mutilated license plate such that only two numbers were legible.

While Respondent's prior disciplinary history does not involve the same misconduct as here, it is, nevertheless, consistent with the brazen and intentional acts exhibited by Respondent in Case No. 2021-23461. Accordingly, in connection with Case No. 2021-23461, the Tribunal finds that a period of monitoring is warranted in addition to a significant forfeiture of penalty days, and therefore recommends a forfeiture of 45 penalty days and the imposition of one year Dismissal Probation. The Tribunal further determines that a loss of 10 vacation penalty days is sufficient to address Respondent's notification and documentation failures in connection with Case No. 2020-22176.

Respondent already served 30 days on suspension from June 5 to July 5, 2020 in connection with this matter. Accordingly, it is recommended that Respondent forfeit the 30 suspension days already served, forfeit an additional 25 vacation days (for a total forfeiture of 55 penalty days), and that Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one (1) year pursuant to Section 14-115 (d) of the Administrative Code, during which time he may remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings.

Respectfully submitted,



Josh Kleiman
Assistant Deputy Commissioner Trials

APPROVED

JUL 14 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
POLICE OFFICER MICHAEL SHER
TAX REGISTRY NO. 951244
DISCIPLINARY CASE NOS. 2020-22176 & 2021-23461

Respondent was appointed to the Department on July 6, 2011. On his three most recent annual performance evaluations, he received overall ratings of “Exceeds Expectations” for 2019 and 2020 and was rated “Exceptional” for 2021. Respondent has been awarded six medals for Excellent Police Duty.

In 2017, Respondent forfeited 30 vacation days and was placed on one-year dismissal probation after pleading guilty to (i) failing to comply with an order to respond to an accident scene; (ii) failing to be properly attired in uniform; (iii) failing to comply with an order to put on his proper uniform for 45 minutes; (iv) being absent from an assigned security post for 45 minutes; (v) failing to safeguard his Department parking permit and allowing his girlfriend to display it in her vehicle; (vi-vii) obscuring his license plate and registration on his personal vehicles on two dates; (viii) failing to return his parking permit as required & lying about doing so to his ICO and (ix) operating a motorcycle with a mutilated license plate.

In connection with the instant matter, Respondent was suspended from June 5 to July 5, 2020. He was also placed on Level 2 Discipline Monitoring in December 2020; monitoring remains ongoing.

For your consideration.

Josh Kleiman
Assistant Deputy Commissioner Trials