

201503214
David Zabransky
Henry Spengenberg
Sean Phillips

On April 18th, 2015, numerous officers responded to a domestic dispute. Video footage from the body camera on Officer Phillip shows: Phillips entering the apartment after his Sgt, SGT Zabransky, forcibly opened the apartment door. Officer Phillips then walked towards the man in the apartment and grabbed him by the left side of his throat for four seconds. Then the man fell backwards to the ground sufficiently forcefully that he broke a rib. After the incident, the body camera footage shows Officer Phillips ask Sgt Zabransky a “Assault or choke.” Zabransky responded, “Medical condition...I’m sure he’ll tell you something else. Discon violent behavior, OGA.” Zabransky also stated to Phillips, “We gotta do some paperwork to cover up for the bleeding. We caused an injury.”

In his CCRB interview, Officer Phillips recounted the event and said that while he was speaking to Sgt Zabransky, the man was flailing his arms and aggressively walking towards Zabransky. It was in response to this action, Phillips claimed, that grabbed the man by his left collarbone and right bicep to attempt to move him out of the way. Phillips testified that the man charged at him, and that while charging the man tripped and fell backward, causing his rib injury. After being shown the video, which showed him , Phillips stated that the video spoke for itself and he wasn’t going to change his statement.

Officer Spengenberg testified in his CCRB interview that Officer Phillip’s takedown of the man was consistent with Phillip’s statement (that he grabbed the man's collarbone and arm). Spengenberg denied that Phillips made any contact with the man’s neck, even after being shown the body camera footage.

The CCRB substantiated allegations that Officer Phillips was discourteous and used a prohibited chokehold. It substantiated an allegation that Sergeant Zabransky was discourteous.

It found that all three officers made false official statements in their interviews with the CCRB.

The NYPD did not discipline Officer Spengenberg. It issued instructions to Sergeant Zebransky.

Officer Phillips was tried in the NYPD trial room before an NYPD administrative judge. The administrative judge ruled that PO Phillips did not use a “chokehold” because, while his hand was on the man’s neck, the move did not apply “pressure to the throat or windpipe, which may have prevented or hindered {the victim’s} breathing or reduced his intake of air.” The judge acknowledged that the video was “not consistent with Respondent’s memory,” it ruled that the move was not a chokehold and found PO Phillips not guilty. He was not disciplined for the incident.

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Christopher Conway	Team: Squad #15	CCRB Case #: 201503214	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input checked="" type="checkbox"/> Injury
Incident Date(s) Saturday, 04/18/2015 3:40 AM	Location of Incident: [REDACTED]	Precinct: 103	18 Mo. SOL 10/18/2016	EO SOL 10/18/2016	
Date/Time CV Reported Sat, 04/18/2015 9:45 AM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Fri, 04/24/2015 12:54 PM		

Complainant/Victim	Type	Home Address
[REDACTED]	[REDACTED]	[REDACTED]

Witness(es)	Home Address
[REDACTED]	[REDACTED]

Subject Officer(s)	Shield	TaxID	Command
1. POM Henry Spengenberg	19477	§ 87(2)(b)	103 PCT
2. POM Sean Phillips	11911	§ 87(2)(b)	103 PCT
3. SGT David Zabransky	04657	§ 87(2)(b)	103 PCT
4. POM Christophe Dimarzo	11963	§ 87(2)(b)	103 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. POM Stephen Loschiavo	06880	§ 87(2)(b)	103 PCT
2. POM Christophe Casey	12691	§ 87(2)(b)	103 PCT

Officer(s)	Allegation	Investigator Recommendation
A . SGT David Zabransky	Abuse of Authority: Sgt. David Zabransky authorized the entry of § 87(2)(b) in Queens.	A . § 87(2)(g)
B . SGT David Zabransky	Discourtesy: Sgt. David Zabransky spoke rudely to § 87(2)(b).	B . § 87(2)(g)
C . POM Sean Phillips	Force: PO Sean Phillips used a chokehold against § 87(2)(b).	C . § 87(2)(g)
D . POM Sean Phillips	Discourtesy: PO Sean Phillips spoke rudely to § 87(2)(b).	D . § 87(2)(g)
E . POM Christophe Dimarzo	Discourtesy: PO Christopher Dimarzo spoke rudely to § 87(2)(b).	E . § 87(2)(g)
F . SGT David Zabransky	Other: Sgt. David Zabransky provided a false official statement in violation of Patrol Guide procedure 203-08	F . § 87(2)(g)
G . POM Sean Phillips	Other: PO Sean Phillips provided a false official statement in violation of Patrol Guide procedure 203-08.	G . § 87(2)(g)
H . POM Henry Spengenberg	Other: PO Henry Spengenberg provided a false official statement in violation of Patrol Guide procedure 203-08	H . § 87(2)(g)
§ 87(4-b), § 87(2)(g)	[REDACTED]	[REDACTED]

Case Summary

On April 18, 2015, Sgt. Thomas O'Brien of the 103rd Precinct filed this complaint with IAB by phone on behalf of § 87(2)(b) generating original log #15-10228. This case was received by the CCRB on April 24, 2015 under log #15-10559.

At 3:40 a.m. on April 18, 2015, numerous officers responded to § 87(2)(b)'s home at § 87(2)(b) in Queens for a radio run that § 87(2)(b) was choking his girlfriend, § 87(2)(b). Sgt. David Zabransky authorized a forcible entry into § 87(2)(b)'s home (**Allegation A**). § 87(2)(b) refused to allow officers further into his house, and Sgt. Zabransky told him to "stop being so fucking dramatic" (**Allegation B**). PO Phillips then seized § 87(2)(b) by the throat with his right hand for approximately four seconds (**Allegation C**). § 87(2)(b) subsequently fell to the ground sustaining a fracture to his tenth left rib. While § 87(2)(b) was on the ground and as the officers handcuffed him, PO Phillips told him to "Shut the fuck up" and called § 87(2)(b) a "fucking idiot" (**Allegation D**). § 87(2)(b) complained that the officers had broken his ribs, and PO Dimarzo said in response, "Good" (**Allegation E**). § 87(2)(b) was ultimately arrested and charged with obstruction of governmental administration and resisting arrest.

Potential Issues

- § 87(2)(b) refused to sign a verification form as well as a HIPAA release form, even when the field team was dispatched to his home. Regardless, as this misconduct was captured on video, the case was fully investigated.

Mediation, Civil and Criminal Histories

- This case was ineligible for mediation due to § 87(2)(b)'s arrest.
- A FOIL request was sent to the Office of the Comptroller on June 2, 2015, inquiring if § 87(2)(b) has filed a notice of claim in regards to this case. The response will be included in the case file upon receipt.
- An eCourts search indicates that the case resulting from § 87(2)(b)'s arrest during this incident is still open. § 87(2)(b)

Civilian and Officer CCRB Histories

- § 87(2)(b)
- This is the first allegation filed against PO Phillips in his two-year tenure.
- This is the first allegation filed against PO Spengenberg in his three-year tenure.
- Sgt. Zabransky has no substantiated allegations filed against him in his twenty-one year tenure. § 87(2)(g)

Evidence

Body Camera Footage

Lt. Steve Alfano of IAB Group 54 provided a CD containing video footage from PO Phillip' body camera from this incident. The footage depicts two scenes, the first being the entry and § 87(2)(b)'s apprehension, and the second being a conversation between PO Phillips and Sgt. Zabransky some minutes later. The investigation received an identical copy of this footage from NYPD Legal Department on a later date.

The body camera was mounted on PO Phillips' right shoulder at the time of the incident.

Scene #1 (03 Board Review):

There is no sound for the first thirteen seconds. PO Phillips stands outside the door to a home while Sgt. Zabransky shines a flashlight at the door knob. At 00:07, Sgt. Zabransky kicks the door and gains entry. As the door opens, § 87(2)(b) can be seen shirtless holding an item in the background. Sgt. Zabransky and PO Phillips enter, and the sound comes on. § 87(2)(b) is shouting, saying "You gonna put me in cuffs again."

At 00:18 Sgt. Zabransky gestures to something in § 87(2)(b)'s left hand out of sight behind a door, and says "Put that down." § 87(2)(b) replies, "Put that down, my ass," And then throws the item off screen [In his statement, Sgt. Zabransky believed this to be a cigarette].

There is the sound of indistinct shouting, and Sgt. Zabransky says, "Because I told you so...Go over there." § 87(2)(b) begins screaming at 00:36. At 00:37 Sgt. Zabransky says, "Go over there. **Stop being so fucking dramatic.** Move over."

In response, § 87(2)(b) says "Fuck man, I'll stomp you for that." Sgt. Zabransky walks to § 87(2)(b)'s left, giving PO Phillips a clear path. PO Phillips advances and **grabs § 87(2)(b) by left side of his throat** for four seconds (00:42 to 00:46). At 00:46 § 87(2)(b) trips and falls to the ground on his back. PO Phillips grabs § 87(2)(b)'s left arm and § 87(2)(b) says repeatedly, "You broke my ribs, oh God." There are several seconds of screaming and shouting while PO Phillips handcuffs § 87(2)(b)

§ 87(2)(b) says, "Go ahead, go ahead." At 1:01 PO Phillips tells § 87(2)(b) to "**Shut the fuck up.**" Moments later, the camera depicts other officers gathering around § 87(2)(b) on the ground. At 1:20 PO Phillips says, "**We're here to help, you fucking idiot.**" § 87(2)(b) then says the officers cracked his ribs, and PO Dimarzo replies, "**Good.**"

At 1:45 a female is heard screaming. The officers pull § 87(2)(b) to his feet and he says, "I'm fuck with you. You wanna work at the gym, nigga. I'm forty fucking years, forty years old. Get my shoes on. Stop the bullshit." The scene ends.

Scene #2 (03 Board Review):

Sgt. Zabransky is speaking with PO Phillips, with PO Dimarzo standing off to the left side of the frame. PO Phillips says, "Assault or choke." Sgt. Zabransky responds, "Medical condition...I'm sure he'll tell you something else. Discon violent behavior, OGA." A beeping sound is heard around 2:23. At 2:25 Sgt. Zabransky states to PO Phillips, "**We gotta do some paperwork to cover up for the bleeding. We caused an injury.**" PO Casey walks from a back room and gives Sgt. Zabransky some shoelaces; Sgt. Zabransky then walks away. PO Phillips briefly enters the bedroom where § 87(2)(b) is sitting up being treated by two EMTs. The scene ends.

SPRINT

SPRINT event § 87(2)(b) (10 Board Review) indicates that at 3:40 a.m., § 87(2)(b) called 911 to complain that a male was choking her and she could not

breathe. § 87(2)(b) yelled that she needed an ambulance, and told an unknown individual to “get off.” At 3:59 a.m., Sgt. Zabransky arrived on scene.

Medical Treatment of Prisoner Form

PO Spengenberg prepared the medical treatment of prisoner form (11 Board Review), indicating that at the time of the incident, § 87(2)(b) fell and complained of pain to his ribs and wrist.

Finding and Recommendations

Allegations Not Pleaded

- § 87(4-b), § 87(2)(g)
[REDACTED]

Officer Identification

Sgt. Zabransky admitted he authorized the forcible entry to § 87(2)(b)'s residence as the supervisor on scene. **Allegation A** is thus pleaded against Sgt. Zabransky.

The body camera footage depicts a male unanimously identified as Sgt. Zabransky engaged in an argument with § 87(2)(b). At 00:37 seconds, a voice that sounds consistent with Sgt. Zabransky's states to § 87(2)(b) “Stop being so fucking dramatic.” PO Dimarzo identified this voice positively as Sgt. Zabransky, and Sgt. Zabransky said it was “possible” that this was his voice. **Allegation B** is pleaded against Sgt. Zabransky.

The body camera depicts PO Phillips seizing § 87(2)(b) by the neck. § 87(2)(b) stated that the officer wearing the “webcam” was the same officer who grabbed him by the neck. **Allegation C** is thus pleaded against PO Phillips.

The body camera footage depicts PO Phillips placing § 87(2)(b) in handcuffs. Numerous voices are heard, but a voice that is louder than the others states, “Shut the fuck up,” and “We're here to help you, you fucking idiot,” at 01:01 and 01:20 respectively. No officer could identify the male voice, but as the voice was louder and thus closer to the body camera, and as the voice was consistent with PO Phillips' voice in his interviews, this strongly suggests it was PO Phillips making these statements. **Allegation D** is thus pleaded against PO Phillips.

The body camera footage depicts § 87(2)(b) stating to officers, “You cracked my fucking ribs,” at about 01:24. In response, a male officer says, “Good.” PO Dimarzo identified himself as this male officer. **Allegation E** is thus pleaded against PO Dimarzo.

Allegation A—Abuse of Authority: Sgt. David Zabransky authorized the entry of § 87(2)(b) in Queens.

At 3:40 a.m. on April 18, 2015, § 87(2)(b) called 911 and stated she was being choked by a male at § 87(2)(b) and needed help. Upon arrival of police to the scene, it is undisputed that § 87(2)(b) refused to open the door. Officers testified that they identified themselves and requested in vain numerous times for § 87(2)(b) to open the door, and § 87(2)(b) confirmed that officers announced who they were. Officers consistently testified that they could hear § 87(2)(b) crying, moaning, breathing heavily, and in apparent distress (Board Review 05 through 09). Upon Sgt. Zabransky's arrival to the scene, he authorized the entry into § 87(2)(b) in the interest of § 87(2)(b)'s safety.

Case law has long held that a warrantless entry is justified given the presence of exigent circumstances, such as imminent threat to life. According to the emergency doctrine established in *People v. Mitchell*, 39 N.Y.2d 173 (1976) (12 Board Review), the three criteria justifying a warrantless entry are 1) reasonable grounds to believe an emergency is at hand and an immediate need to protect life, 2) the search must not be primarily motivated by intent to arrest or to seize evidence, and 3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

In this incident, officers had received a radio run of a woman being choked and assaulted by a male inside § 87(2)(b) and upon arrival numerous officers stated they could hear a woman moaning, crying, and in distress. The only male on scene, § 87(2)(b) was aggressive and refused to let officers and EMS enter to tend to § 87(2)(b) § 87(2)(g)

§ 87(2)(b)
§ 87(2)(b)
§ 87(2)(b)
§ 87(2)(b)
§ 87(2)(b)
§ 87(2)(b)

Allegation B—Discourtesy: Sgt. David Zabransky spoke rudely to § 87(2)(b)

After officers entered § 87(2)(b) stood in a doorway further inside the apartment and refused officers further entry. Sgt. Zabransky engaged in a verbal argument with § 87(2)(b) ordering him to remove himself so that officers could speak to § 87(2)(b). The body camera depicts that Sgt. Zabransky said to § 87(2)(b) “Stop being so fucking dramatic.”

Patrol Guide procedure 203-10 prohibits members of service from making discourteous statements in the line of duty (13 Board Review).

§ 87(2)(g)
§ 87(2)(b)
§ 87(2)(b)
§ 87(2)(b)
§ 87(2)(b)

Allegation C—Force: PO Sean Phillips used a chokehold against § 87(2)(b)

§ 87(2)(b) alleged that as he stood in his doorway denying officers entry, PO Phillips stepped forward, grabbed him firmly by the throat, and “slammed” him down to the ground. The body camera footage appears to generally confirm this sequence of events. Body camera footage depicts PO Phillips seizing § 87(2)(b) by the left side of his throat with his right hand, his right thumb at the front of § 87(2)(b)'s windpipe. § 87(2)(b) then trips and falls backwards onto the ground.

§ 87(2)(b) is shouting and cursing immediately prior to this grab to the throat. When PO Phillips grabs § 87(2)(b) by the throat, § 87(2)(b) instantly goes silent, only resuming speech upon landing on the ground. This strongly suggests that PO Phillips' hold on § 87(2)(b)'s neck hindered his ability to speak and breathe.

PO Phillips denied that he grabbed § 87(2)(b) by the neck. PO Phillips described what he did as grabbing § 87(2)(b) by his left collarbone and right bicep; when he did so, PO Phillips alleged that § 87(2)(b) lunged forward towards him, lost his footing, and fell backwards. PO Phillips was shown the video footage and did not change his statement.

PO Spengenberg similarly stated that PO Phillips grabbed § 87(2)(b) by the left collarbone. PO Spengenberg was also shown the video footage and did not change his statement.

Sgt. Zabransky denied that he saw this portion of the incident, as he went to tend to § 87(2)(b) PO Dimarzo and PO Casey both stated that they were not inside the apartment yet. Officer testimony indicated that PO Phillips and PO Spengenberg were the only officers around when this action took place.

§ 87(2)(b) was in another room and out of the line of sight of this use of force.

Patrol Guide procedure 203-11 prohibits any member of service from using a chokehold (14 Board Review). This P.G. procedure defines a chokehold as any pressure to the throat or windpipe which may prevent or hinder breathing or reduce intake of air.

§ 87(2)(g)

Allegation D— Discourtesy: PO Sean Phillips spoke rudely to § 87(2)(b)

Allegation E— Discourtesy: PO Christopher Dimarzo spoke rudely to § 87(2)(b)

While handcuffing § 87(2)(b) PO Phillips made the statements, “Shut the fuck up,” and “We’re here to help you, you fucking idiot,” as depicted in body camera footage.

While being handcuffed, the video footage depicts § 87(2)(b) complaining that officers broke his “fucking ribs.” In response to this complaint of injury, PO Dimarzo replies, “Good.”

Patrol Guide procedure 203-10 prohibits members of service from making discourteous statements in the line of duty.

§ 87(2)(g)

Allegation F—Other: Sgt. David Zabransky provided a false official statement in violation of Patrol Guide procedure 203-08.

PO Phillips’ body camera footage depicts Sgt. Zabransky engaged in a conversation with PO Phillips about the incident, the potential charges, and the documentation. At 2:25 Sgt. Zabransky states to PO Phillips, “We gotta do some paperwork to cover up for the bleeding. We caused an injury.”

Sgt. Zabransky confirmed that it was himself in the video making this statement. He explained that he was “reassuring” the officers that § 87(2)(b) was not going to get away with the assault just because § 87(2)(b) did not allege that he choked her as she stated in her 911 call. Sgt. Zabransky stated that he was telling the officers they had to “cover our butts,” not “cover up,” and do the paperwork and documentation perfectly as it was an “unorthodox arrest.”

Despite making the above statement on the video footage regarding the paperwork and bleeding, Sgt. Zabransky denied in his CCRB statement that he ever saw injuries on § 87(2)(b) that § 87(2)(b) complained of injuries to him, and that he was aware § 87(2)(b) was bleeding.

Patrol Guide procedure 203-08 prohibits members of service from making a false official statement to the CCRB (15 Board Review).

§ 87(2)(g)

Allegation G—Other: PO Sean Phillips provided a false official statement in violation of Patrol Guide procedure 203-08.

On June 3, 2015, PO Phillips was interviewed at the CCRB in regards to this incident. He provided the following account of events:

While speaking to Sgt. Zabransky, § 87(2)(b) flared his arms and aggressively stepped towards Sgt. Zabransky. PO Phillips, in response, grabbed § 87(2)(b) by his left collarbone with his right hand, and his right bicep with his left hand, and attempted to move him out of the way. At this point, § 87(2)(b) “charged” at PO Phillips, through PO Phillips could not recall if § 87(2)(b) made contact with him. While charging, § 87(2)(b) tripped over an object on the floor and fell backwards, causing the injury to his ribcage.

PO Phillips’ own body camera footage conclusively contradicts this tale. Upon being shown this video footage, PO Phillips stated that the video spoke for itself and he would change nothing in his statement, even upon the video being paused at the portion where PO Phillips’ right hand is squeezing § 87(2)(b) s throat.

Patrol Guide procedure 203-08 prohibits members of service from making a false official statement to the CCRB.

§ 87(2)(g)

Allegation H—Other: PO Henry Spengenberg provided a false official statement in violation of Patrol Guide procedure 203-08.

On May 28, 2015, PO Spengenberg was interviewed at the CCRB. PO Spengenberg described PO Phillips’ takedown of § 87(2)(b) in a way that was generally consistent with PO Phillips’ statement – that PO Phillips grabbed § 87(2)(b) by the arm and collarbone and pushed him to the ground. PO Spengenberg denied that PO Phillips had any contact with § 87(2)(b) s neck. PO Spengenberg physically demonstrated that PO Phillips grabbed § 87(2)(b) by his left collarbone. PO Spengenberg was shown the video from PO Phillips’ body camera, which he stated he had seen previously, and maintained this version of events.

§ 87(2)(g)

Patrol Guide procedure 203-08 prohibits members of service from making a false official statement to the CCRB.

§ 87(2)(g)

[Redacted text block]

§ 87(4-b), § 87(2)(g)

[Redacted text block]

[Redacted text block]

Team: _____

Investigator: _____
Signature Print Date

Supervisor: _____
Title/Signature Print Date

Reviewer: _____
Title/Signature Print Date

Reviewer: _____
Title/Signature Print Date



POLICE DEPARTMENT CITY OF NEW YORK

August 31, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Sean Phillips
Tax Registry No. 953250
103 Precinct
Disciplinary Case No. 2015-14317

Charges and Specifications:

1. Said Police Officer Sean Phillips, on or about April 18, 2015, at approximately 0340 hours, while assigned to the 103rd Precinct and on duty, in the vicinity of [REDACTED] [REDACTED] Queens County, did wrongfully use force against Person A in that Police Officer Sean Phillips used a chokehold against Person A.
P.G. 203-11 - USE OF FORCE
2. Said Police Officer Sean Phillips, on or about April 18, 2015, at approximately 0340 hours, while assigned to the 103rd Precinct and on duty, in the vicinity of [REDACTED] [REDACTED], Queens County, was discourteous to Person A in that Police Officer Sean Phillips stated in sum and substance SHUT THE FUCK UP. WE ARE HERE TO HELP YOU, YOU FUCKING IDIOT.
P.G. 203-09, Page 1, Paragraph 2 PUBLIC CONTACT GENERAL
3. Said Police Officer Sean Phillips, on or about April 18, 2015, at approximately 0340 hours, while assigned to the 103rd Precinct and on duty, in the vicinity of [REDACTED] [REDACTED], Queens County, did wrongfully use force against Person A in that Police Officer Sean Phillips restricted or hindered the breathing of Person A without police necessity. *(As Amended)*
P.G. 203-11 - USE OF FORCE

Appearances:

For CCRB-APU: Nicole Junior, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

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

Hearing Dates:
June 9 and 27, 2016

Decision:
Not Guilty

Trial Commissioner:
ADCT Nancy R. Ryan

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 9 and 27, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called Edwin Pena as a witness and presented the transcript and audio recording of a CCRB telephone interview of Person A. Respondent called Police Officer Henry Spengenberg, and Sergeant David Zabransky. 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.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

It is undisputed that on April 18, 2015, at approximately 0340 hours, Respondent and his partner that evening, Police Officer Henry Spengenberg, who were assigned to the 103 Precinct, were on duty, in uniform, patrolling in a marked RMP. They responded to an assault in progress

at [REDACTED] in Queens, NY. A female had called 911 from that address yelling that a male was choking her and that she couldn't breathe and needed an ambulance. (Resp. Ex. A) A male, Person A, and a female were in the basement apartment at that location when the police arrived. Sergeant David Zabransky arrived at the location shortly after Respondent and Officer Spengenberg.

Sergeant Zabransky kicked open the apartment door and he entered the apartment, followed by Respondent and Officer Spengenberg. Respondent was wearing a body camera and he activated it when Sergeant Zabransky kicked the door. When Respondent entered the apartment, the female was in a room to the side of the entranceway. Person A was in the vicinity of the doorway to that room. Respondent took Person A to the ground. Person A yelled that his ribs were broken. Someone said, "Shut the fuck up. We are here to help her, you fucking idiot."

The only questions in this case are whether Respondent, 1) used a chokehold against Person A; 2) restricted or hindered the breathing of Person A without police necessity; or 3) was the person who made the comment noted above.

With regard to the charges pertaining to a chokehold, there was testimony concerning the manner in which Respondent took down Person A, from Officer Spengenberg, Sergeant Zabransky, Respondent, and a hearsay statement from Person A. Officer Spengenberg, who testified he did not see every single step of the takedown, stated that he saw Respondent grab Person A in the upper shoulder collar bone area and push him down while he was resisting. (Tr. 74- 75)

Sergeant Zabransky testified that he could not see exactly how Respondent took Person A down. He stated that he had asked Person A several times to step out of the way so that

he could enter the room where he saw the female lying on the floor hyperventilating and hysterical. He further testified that Respondent then came around his side, stepped in front of him, and started pushing Person A away from the doorway area. (Tr. 83) At the time Respondent made physical contact with Person A, Respondent's body was between Sergeant Zabransky and Person A and was blocking the Sergeant's view. (Tr. 92-93) As soon as Respondent moved Person A, Sergeant Zabransky entered the room and focused on the medical condition of the woman. (Tr.83) The next time he saw Person A, he was already in handcuffs. (Tr. 84)

Respondent described Person A as blocking the pathway inside the apartment that led to where the female was. He testified that Person A was not responding to verbal instructions to move and that he became more hostile and was flexing and flailing his arms. He saw him lower his shoulder and thought Person A was going to take a swing at the Sergeant. At that point he stepped, "in front of the sergeant and made contact with Person A to move him out of the situation." (Tr. 104) He testified that he placed his left arm on Person A's right forearm and placed his right hand in his shoulder area. (Tr. 105) Respondent perceived that Person A became more hostile and aggressive. Respondent testified that when Person A moved, his hand moved from his shoulder area further towards Person A's neck. At this point Respondent had control of Person A's right arm and as he was escorting Person A away from the door, Person A fell down. Respondent testified that there was debris and multiple objects scattered all over the floor of the apartment. Once he was on the ground, Respondent rear cuffed Person A. (Tr. 106-07, 136-37) Respondent testified that he never had his hand by Person A's throat. He described the throat as the windpipe in front of the neck. ((Tr. 140-41)

On cross-examination, Respondent was shown clips from his body camera. At the 42 -44 second marks on the video, Respondent acknowledged that the band on his right wrist can be seen in the area where Person A's shoulder meets his neck. (Tr. 121-22) He also testified that parts of his hand were visible in the clip at the 44 second mark. In the parts of the clip that were not in shadows, he saw the knuckle to his thumb and part of his wrist. (Tr. 124) He agreed that his five fingers were around the area of the back of Person A's neck. He denied that his thumb was ever across Person A's neck. He agreed that Person A's ear was visible in the web between his index finger and thumb on his right hand. (Tr. 125) In subsequent questioning about the positioning of his hand and where the "web" of his hand was, Respondent demonstrated that his thumb and fingers on his right hand were all next to each other as he initially placed it on Person A's shoulder and that the four fingers and the thumb remained together throughout the incident. (Tr. 143-44).

When Respondent was shown the video, he agreed that Person A was talking at the 25 and 33 second marks and was still talking up until the 41 second mark and that from the 41 to 46 second mark, Person A could not be heard yelling at the Sergeant. Person A is again heard talking from the 46 second mark to the one minute 22 second mark. (Tr. 130-31).

Person A's hearsay telephonic interview essentially begins with the CCRB investigator telling Person A that he is calling about a complaint they received, "about what happened to you in April in your home involving a possible chokehold." (CCRB Ex. 1B, 2) Person A immediately responds, "A what? You mean it's broken ribs." When asked to describe what happened in an open ended question, Person A stated that the cops broke his window, kicked his door in, and slammed him to the ground, breaking his ribs by jumping on his back. (CCRB Ex. 1B, 3) Upon further questioning of what part of his body the officer grabbed, Person A says he

thinks it was like his neck or "something like that. Body and neck, you know what I mean? Like just my shoulders." The investigator then asks, "He didn't grab your neck and push you down to the ground?" Person A responds by saying, "Yeah, something like that." The investigator continues by asking, "Do you know if he cut off your breathing at all?" Person A says, "What choking me? No. He didn't choke me." The investigator continues by saying, "But his hand was on your neck?" Person A then stated, "Yeah. Yeah. Yeah. His um foot, like, was on my neck." When the investigator goes back to the period of time Person A was being taken down to the ground as opposed to when he was already on the ground, Person A again stated, "No, I wasn't being choked though." (CCRB Ex. 1B, 6) The investigator then proceeded with other questions but goes back later in the interview to ask, "Do, do you know if, like, his hands were in the front of your throat or on, like the side of your throat?" Person A responds to this question by saying, "No. He just grabbed me. And not --not even choking half way, nah nah I can't tell a lie, you know what I mean?" (CCRB Ex. 1B, 8)

Under Patrol Guide 203-11, as it was in effect at the time of this incident, members of the Department were barred from using a chokehold. Under 203-11, "A chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air." In this case, CCRB has not met their burden of proving by a preponderance of the evidence that Respondent either used a chokehold (Specification 1) or restricted or hindered the breathing of Person A without police necessity (Specification 3).

In this case CCRB has brought two separate charges concerning the physical actions of Respondent towards Person A. Specification 3, which is more narrowly worded than PG 203 11, charges that Respondent actually restricted or hindered the breathing of Person A. Perhaps the most convincing evidence in this case comes from the hearsay statement of the purported victim

of the chokehold. Despite what can only be seen as a series of leading questions posed by the CCRB investigator, Person A consistently denied that any chokehold took place. In fact, he seems surprised when the investigator starts the conversation by stating he is calling about an incident involving a possible chokehold. Person A never makes any mention of his airway being restricted or his breathing being hindered in any way. In fact in his initial recitation of the incident he doesn't even mention being touched any place near his neck and instead focused on the injuries he claimed occurred to his ribs. Even when the CCRB investigator directly asks Person A if the officer's hands were in the front or side of his throat, Person A clearly responds, "No." It is clear from the statement of Person A that he did not perceive any restriction or hindering of his breathing. CCRB has not proven by a preponderance of the credible evidence that Respondent actually restricted or hindered the breathing of Person A and I therefore find him Not Guilty of Specification 3.

Specification 1 involves the full definition of a chokehold as cited above in the quote from PG 203-11. To determine whether Respondent is guilty of this specification involves an analysis of whether his actions included any pressure to the throat or windpipe, which may have prevented or hindered Person A's breathing or reduced his intake of air. While Respondent has acknowledged his hand was in the shoulder and neck area of Person A, he denied that his thumb was ever across the front of Person A's neck. Nothing in Person A's statement contradicts this testimony from Respondent. The video in this case does not provide dispositive evidence of what occurred during the entire incident. When the video is viewed at a slow speed it appears that Respondent does approach Person A's shoulder area with his thumb separated from his other fingers. While this is not consistent with Respondent's memory of his five fingers being together during the entire approach to the neck area, it also is not proof by a preponderance of

the evidence that this approach to the shoulder area, or a very brief slip of the hand up towards Person A's ear, as testified to by Respondent, created the degree of pressure on the throat or windpipe which may have hindered Person A's breathing. First of all, the video is not completely clear as to where Respondent's thumb is at all times when part of his hand is seemingly on the side portion of Person A's neck. The thumb is only partially visible at the 44 second mark and it can't be determined where the top portion of the thumb is. Secondly, if Respondent's thumb did cross a portion of Person A's neck as it moved from the shoulder to neck area it could only have been for a very brief time. Based on Person A's statement and his lack of perception of any hindrance of his breathing, it is more likely than not that Respondent either exerted no pressure to the throat or windpipe from his thumb or that it was of such a minimal degree that it did not create the degree of pressure on the throat or windpipe which may have prevented or hindered breathing or reduced his intake of air.

I also reject the suggestion that the fact that Person A ceased yelling during the period of time Respondent had his hand in his neck area is proof that Respondent was using a chokehold. Person A could have ceased his yelling simply because he was being taken to the ground, or for a number of other reasons. The cessation of his yelling does not prove by a preponderance of the evidence that his airway was in any way obstructed.

Based on the credible evidence in this case, I find that CCRB has not proven by a preponderance of the evidence that Respondent used a chokehold therefore I find him Not Guilty of Specification 1.

With regard to Specification 2, the words as charged can be heard in the video. However, the CCRB did not prove by a preponderance of the evidence that it was Respondent who uttered those words. Respondent denied that he said the words. (Tr. 110) Person A's statement

supports this testimony from Respondent. When specifically asked if Respondent used any kind of profanity towards him or made threats to him, Person A responded, "No. Just ignoring me out." (CCRB Ex. 1B, 11) I therefore find Respondent Not Guilty of Specification 2.

Respectfully submitted,

Nancy Ryan ^{RM}

Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

OCT 20 2016
James P. O'Neill
JAMES P. O'NEILL
POLICE COMMISSIONER