



POLICE DEPARTMENT

May 20, 2024

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In the Matter of the Charges and Specifications :
 - against - :
 Police Officer James Burns :
 Tax Registry No. 960295 :
 122 Precinct :

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Case No.
2023-27771

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

Before: Honorable Vanessa Facio-Lince
Assistant Deputy Commissioner Trials

APPEARANCES:

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

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

To:
HONORABLE EDWARD A. CABAN
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Police Officer James Burns, on or about August 24, 2021, at approximately 1936 hours, while assigned to the 122 Precinct and on duty, in the vicinity § 87(2)(b) Richmond County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department when Police Officer Burns pointed a gun at § 87(2)(b) without police necessity. *(As amended)*

A.G. 304-06, Page 1, Paragraph 1

PROHIBITED CONDUCT

P.G. 200-02

MISSION, VISION, AND
VALUES OF THE NYPD

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on March 26, 2024. Respondent, through his counsel, entered a plea of Not Guilty to the charged misconduct. The Civilian Complaint Review Board (hereinafter "CCRB") called § 87(2)(b) as a witness, and introduced Respondent and his partner's body-worn camera footage. 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 evaluated all of the evidence in this matter, the Tribunal finds Respondent Not Guilty of the sole specification in this matter.

ANALYSIS

This case arises out of a complaint made by § 87(2)(b) who called 911 when she was not able to make contact with her daughter on the evening of August 24, 2021. Respondent and his partner responded to § 87(2)(b) ex-partner's home, where it is alleged that Respondent pointed his firearm at § 87(2)(b) without police necessity. Respondent does not deny pointing the firearm, but asserted doing so based upon his belief that his partner, as well as himself, were in danger at the time that § 87(2)(b) attempted to drive off while his partner

was leaning into her vehicle trying to prevent her from doing so. The sole issue before this Tribunal is whether Respondent pointing his service weapon at § 87(2)(b) violates the Patrol Guide and constitutes sanctionable misconduct.

§ 87(2)(b) testified that on August 24, 2021, she went to her ex-partner's home in an attempt to see their six-year-old daughter after not being able to make contact with her earlier that day. It was their daughter's birthday. An order of protection against § 87(2)(b) held by her daughter's father, was in place on that date of this incident. § 87(2)(b) had been arrested earlier that day for violating the aforementioned order. According to § 87(2)(b) she was supposed to have had a supervised visit with her daughter on the date of the incident but due to her being in police custody for longer than expected, she was unable to see her daughter for their scheduled visit. As a result, she decided to contact her daughter using FaceTime at 7:00 pm, which according to her, is permitted pursuant to the conditions contained in the order of protection. (Tr. 23, 29-33) § 87(2)(b) confirmed that she generally had supervised visits with her daughter at a Children Family Services center and was not allowed to pick up her daughter unsupervised. (Tr. 35-36)

After several FaceTime calls went unanswered, § 87(2)(b) drove to her daughter's father's home and, from down the street, called 911 for a "wellness check." She contended that the 911 operator told her to follow the police vehicle to her ex-boyfriend's home and speak to the officers there. She further asserted that the operator advised her to ". . . go there and talk to the officers, so they will understand." § 87(2)(b) testified that she was not insisting on seeing her daughter, but that she did want to wish her a happy birthday. (Tr. 21-23)

§ 87(2)(b) recounted that when she arrived at the home, she pulled up behind Respondent and his partner, Officer Masullo, who then approached her vehicle from the driver's

side, and “. . . asked them to please move down the street, so [she could] file a report” for “violation of court orders and child endangerment.” (Tr. 23, 54) She testified that she explained to the officers that she wanted to make sure her daughter’s father had not been drinking and driving while celebrating her birthday at a restaurant. She reiterated that the 911 operator had instructed her to do this, but the officers were “not helpful” and “very disrespectful right from the beginning,” ignoring her request and asking for her car keys. She asked multiple times why she was being asked for her keys, but her questions were ignored. (Tr. 2426, 41, 53-54)

§ 87(2)(b) then testified that she felt “threatened and unsafe like I’m being harassed” and feared the officers would hurt her, so she called 911 again to ask that a supervisor be sent to the scene. She stated that as she was on the phone, Officer Masullo “became even more aggressive,” reaching inside the vehicle to grab and pull her out of the car, and so she started to drive away with the door still open. § 87(2)(b) confirmed that she pushed Officer Masullo away with her hand, as he attempted to keep the door open, and he fell to the ground, which allowed her to close the door and drive away. She avowed that she pushed Officer Masullo and drove away not with the intent to flee, but because she wanted to drive to meet a supervisor and wanted to get away from Respondent and Officer Masullo who she feared might “hurt me and kill me and violate me.” (Tr. 26-29, 47-50)

§ 87(2)(b) confirmed that as she drove forward, Respondent, who had been in the driveway speaking with her daughter’s father and his current girlfriend, stepped out into the street with his gun pointed and ordered her to stop. She stated that she “saw her whole life in front of [her]” and believed that Respondent wanted to kill her. She stopped her car and was taken to the police station. She testified that the matter was “sealed and dismissed.” (Tr. 29, 49-52)

Respondent testified and provided his version of the events that transpired on the date of this incident. It is worth noting at the onset that his version of events is substantially corroborated by the body-worn camera footage submitted in evidence by CCRB. I therefore credit Respondent's testimony. Respondent testified that he was responding to a 911 call and upon arrival at the location, he was met by § 87(2)(b) ex-boyfriend's current girlfriend, § 87(2)(b) who stated that § 87(2)(b) was down the block. Respondent recalled that he had responded to this location on at least two prior occasions to conduct wellness checks on § 87(2)(b)'s daughter, at her behest. While Respondent was speaking with § 87(2)(b) § 87(2)(b) pulled up in her vehicle in front of the home. Respondent immediately inquired why she was present at the location despite having an order of protection forbidding her to do so. Respondent was aware of the order of protection against § 87(2)(b) because of his "knowledge of the house" and from his fellow officers. Respondent was also aware that § 87(2)(b) had been arrested earlier that day for violating the same order of protection as he had seen her at the 122 Precinct picking up her property. Respondent explained that he asked her for her keys, rather than immediately informing her that she was under arrest, because he did not want § 87(2)(b) to drive away to avoid being arrested. Subsequently, he recalled directing her multiple times to get out of her vehicle. She did not comply with these directives. (Tr. 60-66)

Respondent recollected that § 87(2)(b) eventually turned her vehicle off, but did not hand him her keys. He proceeded to confirm with § 87(2)(b) who was standing at a distance of about two to three car lengths away, that the order of protection was still in effect. While he and his partner were separated, Respondent recalled hearing a "scuffle" and seeing § 87(2)(b) begin to drive away while his partner was still standing beside the open passenger door of her vehicle. Respondent believed § 87(2)(b) was potentially dangerous and his concern was

elevated when he heard his partner yell, “don’t start the car,” as § 87(2)(b) proceeded to accelerate. Respondent immediately became concerned that she could physically injure Officer Masullo when she drove off while he was partially inside the open door of her vehicle struggling to prevent her from doing so. He quickly ran into the street and pointed his gun at the fleeing vehicle. He could not estimate how fast the vehicle was going but detailed that she was driving in an “unsafe manner” and remembered hearing the tires screech. (Tr. 65-70, 73)

Both Respondent and his partner, Officer Masullo’s body-worn camera videos were received in evidence as CCRB’s Exhibit 1 and 2 respectively. The following is a relevant portion of Respondent’s body-worn camera footage:

- 00:51 – 01:07: Respondent walks up a driveway before turning around and approaching a red vehicle pulling up in the middle of the street. The driver of the vehicle is § 87(2)(b). Respondent asks, “Are you supposed to be here?” § 87(2)(b) responds, “Yeah, I’m in Staten Island. Respondent then asks, “Are you supposed to be in front of their house?” She answers, “No, that is why I want to talk to you.”
- 01:11 – 01:23: Respondent orders § 87(2)(b) to “turn the car off.” She complies. Respondent then orders § 87(2)(b) to hand over the car keys and she refuses. Respondent demands the car keys and she asks “Why?” Respondent then answers, “I don’t want you to drive away.”
- 01:25 – 01:35: Respondent repeatedly asks for § 87(2)(b) keys and she refuses to hand them over. Respondent then orders her to “step out of the car.” § 87(2)(b) says, “No, I did not do anything.” She then places the keys inside of what appears to be a bag on the front passenger side floor. § 87(2)(b) then states, “The keys are hidden.”
- 01:46 – 02:22: Respondent repeatedly requests that § 87(2)(b) step out of the car. She refuses and Respondent reiterates that he is allowed to tell her to step out of her vehicle. § 87(2)(b) then calls 911 and Respondent’s partner can be heard telling § 87(2)(b) “You are not supposed to be here.”

02:28 – 03:44 Respondent walks away from § 87(2)(b) vehicle to speak with a woman in a red dress. While speaking with her, he turns around and runs toward the street. Visible in his body-worn camera are the headlights from § 87(2)(b) vehicle. § 87(2)(b) is attempting to drive off and Respondent unholsters his firearm and points it at § 87(2)(b) vehicle while yelling, “Stop, right now.” § 87(2)(b) immediately stops her vehicle; Respondent approaches it, reholsters his firearm, and proceeds to take her into custody.

Officer Masullo’s body-worn camera captures Respondent walking up to a woman in a red dress (later identified as § 87(2)(b) who points in the direction of § 87(2)(b) approaching vehicle. The following is a relevant portion of Respondent’s partner’s body-worn camera video:

- 00:50 – 01:07: Respondent can be seen walking up a driveway before turning around and approaching a red vehicle pulling up in the middle of the street. Also present is § 87(2)(b) who is pointing in the direction of § 87(2)(b) approaching vehicle, which is driving up the street in Respondent’s direction. Respondent can be heard asking, “Are you supposed to be here?” § 87(2)(b) responds, “Yeah, I’m in Staten Island. Respondent then asks, “Are you supposed to be in front of their house?” § 87(2)(b) answers, “No, that is why I want to talk to you.”
- 01:11 – 01:23: Respondent orders § 87(2)(b) to “turn the car off.” § 87(2)(b) complies. Respondent then orders § 87(2)(b) to hand over the car keys and she refuses. Respondent demands the car keys and complaint asks “Why?” Respondent then answers, “I don’t want you to drive away.”
- 01:25 – 01:35: Respondent repeatedly asks for § 87(2)(b) keys and she refuses to hand them over. Respondent then orders § 87(2)(b) to “step out of the car.” § 87(2)(b) says, “No, I did not do anything.”
- 01:46 – 02:22: Respondent repeatedly requests that § 87(2)(b) step out of the car. She refuses and Respondent reiterates that he is allowed to tell her to step out of her vehicle. § 87(2)(b) then calls 911 and Respondent’s partner can be heard telling § 87(2)(b) “You are not supposed to be here.”

- 02:46 – 02:22: § 87(2)(b) is seen on the phone speaking with a 911 dispatcher and saying, “they are harassing me.”
- 02:54 – 03:07 § 87(2)(b) is seen holding her keys and Officer Masullo tells her, “Don’t put the keys in the ignition.” § 87(2)(b) car starts up and a struggle ensues between Respondent’s partner and § 87(2)(b). He tries to remove her from the vehicle and she proceeds to drive her vehicle forward nearly dragging Respondent’s partner. Respondent and his partner are seen pointing their firearms at § 87(2)(b) ordering her to “stop the car” and “get the fuck out of the car.”

This Tribunal found CCRB’s Exhibit 2 particularly informative in assessing the precarious nature of the confrontation between Officer Masullo and § 87(2)(b). After Respondent walked away from § 87(2)(b) to speak with § 87(2)(b) Officer Masullo was standing in the open door of § 87(2)(b) vehicle while she was reaching down to the floor of the front passenger seat. (CCRB Ex. 2 at 02:47) She then proceeded to insert her keys in the ignition despite repeated directives by Officer Masullo to *not* do so, and his physical efforts to prevent her from driving away. (*Id.* at 02:55) § 87(2)(b) accelerated the car while Officer Masullo was still standing beside the open car door, despite his efforts to prevent this. Officer Masullo’s body and foot were in close proximity to her vehicle’s back left tire as she is driving away. (*Id.* at 3:00) In her attempt to drive away, § 87(2)(b) could have dragged, struck or even run over Officer Masullo with her vehicle. This video footage depicts the imminent danger posed to Officer Masullo by § 87(2)(b) at the moment when Respondent drew his service weapon.

Specification 1: Improperly Pointing Firearm

Respondent is charged with improperly pointing his firearm at § 87(2)(b) in violation of the Patrol Guide. CCRB argues that Respondent improperly pointed his firearm at § 87(2)(b) because she did not have a weapon and she was driving her vehicle to get away from

Respondent and his partner. Conversely, Respondent's contention is that he drew his firearm and pointed at § 87(2)(b) fleeing vehicle because he believed she was a serious threat to the safety of his partner and himself, and he wanted to compel her to stop her vehicle immediately. This Tribunal credits Respondent's testimony and finds that he acted reasonable under the circumstances.

Patrol Guide section 221-01 states that any application of the use of force must be reasonable under the circumstances. The Patrol Guide cautions that a uniformed member of service should not draw his/her firearm prematurely. "The decision to display or draw a firearm should be based on an articulable belief that the potential for serious physical injury is present." It further provides that when that threat has ended, the officer must re-holster his firearm "as soon as practicable." That is precisely what occurred here. Respondent articulated a belief that there was the potential for serious physical injury to his partner at the time he pointed his firearm at § 87(2)(b) vehicle, which was corroborated by the video evidence submitted by CCRB. Once the threat ceased, Respondent reholstered his service weapon as mandated by the Patrol Guide.¹

On the date of this incident, Respondent encountered § 87(2)(b) who was in violation of a valid order of protection by being in close proximity to her ex-boyfriend's home. This interaction occurred hours after she was released from police custody for a prior violation of the same order of protection. This was a fact that Respondent was aware of because he had seen her at the 122 precinct earlier that same day. Additionally, § 87(2)(b) was not complying

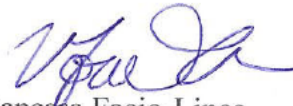
¹ In summation, CCRB cited Patrol Guide section 221-01, prohibition 1(f), which prohibits members of the service from discharging their firearms at a moving vehicle unless deadly physical force is being used against them or another person present, by means other than the moving vehicle. (Tr. 91-92) However, that is not at issue here, as Respondent did not discharge his firearm but rather unholstered and pointed it at § 87(2)(b) as she was in her vehicle. Therefore, CCRB's reliance on this particular prohibition is misplaced and not applicable.

with Respondent's directives to give him her keys or exit her vehicle. It appeared, from the video evidence submitted, that § 87(2)(b) behavior was erratic and her actions were unpredictable.

Respondent briefly left his partner with § 87(2)(b) while he verified the status of the order of protection. That is when the situation rapidly unfolded and escalated from the initial scuffle between § 87(2)(b) and his partner to her attempt to drive off in her vehicle while he was leaning inside. From Respondent's vantage point, it appeared that § 87(2)(b) attempted to drive away with her car door ajar, as Officer Masullo was physically engaging her, posing a grave risk to his partner. § 87(2)(b) actions created a situation where Respondent was required to act immediately to protect his partner from potential serious physical injury. By drawing his service weapon, Respondent was ensuring that he conveyed to § 87(2)(b) that there was no alternative but for her to stop her vehicle instantly. Taking all of these factors into consideration, Respondent pointing his firearm at § 87(2)(b) vehicle as she was attempting to flee did not constitute sanctionable misconduct.

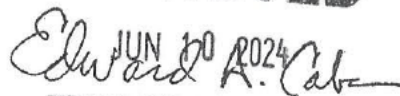
Accordingly, the Tribunal finds the Respondent Not Guilty.

Respectfully submitted,



Vanessa Facio-Lince
Assistant Deputy Commissioner Trials

APPROVED



JUN 10 2024
EDWARD A. CABAN
POLICE COMMISSIONER



ERIC L. ADAMS
MAYOR

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ARVA RICE
INTERIM CHAIR

May 13, 2024

The Honorable Edward A. Caban
Police Commissioner
New York City Police Department
One Police Plaza
New York, New York 10038

Re: Police Officer James Burns (DADS #: 2023-27771)

Dear Commissioner Caban:

The above-referenced case was tried on March 26, 2024, by Administrative Prosecutor Dwayne Bentley for the New York City Civilian Complaint Review Board (hereinafter "CCRB"), pursuant to the Memorandum of Understanding between the CCRB and the New York City Police Department.

CCRB has reviewed the draft decision of Assistant Deputy Commissioner of Trials ("ADCT"), Vanessa Facio-Lince, dated May 8, 2024. We respectfully submit the following comments regarding that draft decision pursuant to *Fogel v. Board of Education*, 48 A.D.2d 925 (2d Dept. 1975).

Respondent, Police Officer James Burns, was charged with the following:

1. Police Officer JAMES BURNS, on or about August 24, 2021, at approximately 1936 hours, while assigned to 122 Precinct and on duty, in the vicinity of § 87(2)(b) Richmond County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department when Police Officer Burns pointed a gun at § 87(2)(b) without police necessity. (*As Amended*).

A.G. 304-06, Page 1, Paragraph 1

PROHIBITED CONDUCT

P.G. 200-02

MISSION, VISION, AND
VALUES OF THE NYPD

The Court found Police Officer Burns not guilty of Specification One. It is respectfully requested that you reject ADCT's not Guilty findings and find PO Burns Guilty of the charges against him. The CCRB requests that you find PO Burns guilty of the Charge and Specification and impose the CCRB recommended penalty of the forfeiture of Ten (10) vacation days.

STATEMENTS OF FACTS

CCRB adopts the statements of facts articulated in ADCT Facio-Lince's Draft Decision.

ARGUMENT

Police Officer James Burns

CCRB disagrees with the Court's finding that PO Burns is not guilty of Specification One (1) in that he engaged in conduct prejudicial to the good order, efficiency or discipline of the Department when Police Officer Burns pointed a gun at § 87(2)(b). Further, CCRB disagrees with the Court's conclusion that "By drawing his service weapon, Respondent was ensuring that he conveyed to § 87(2)(b) there was no alternative but for her vehicle instantly stop. Taking all these factors into consideration, Respondent pointing his firearm at § 87(2)(b) vehicle as she was attempting to flee did not constitute sanctionable misconduct. Accordingly, the Tribunal finds the Respondent Not Guilty." (Draft Decision, page 10.) The evidence submitted by CCRB clearly shows that PO Burns wrongfully engaged in conduct prejudicial to good order when he pointed a gun at § 87(2)(b).

Under Patrol Guide Section 221-01 it states, "Force may be used when it is reasonable to ensure the safety of a member of service or a third person, or otherwise protect life . . ." Also, the note for this paragraph 221-01 states "Drawing a firearm prematurely or unnecessarily limits a uniformed member of the service's option in controlling a situation and may result in an unwarranted or accidental discharge of the firearm." In this case, PO Burns pointing the gun was not reasonable because § 87(2)(b) had driven away from PO Masullo. As can be clearly seen in the BWC, at the time PO Burns drew his weapon and pointed it at § 87(2)(b) car had passed PO Masullo and PO Masullo was no longer in danger. Furthermore, as PO Burns, on his volition, stepped in front of § 87(2)(b) vehicle, any danger to PO Burns from § 87(2)(b) car was created by PO Burns positioning himself in front of the car and, thus, creating a dangerous situation.

In § 87(2)(b) testimony, the question was put to her about pushing PO Masullo away. She said that PO Masullo was, "Few feet away. Its hard to tell for me, but definitely he fell on the ground and he was on the side ..." (Transcript, page 28). Next, PO James Burns was asked, "Okay. And so, you ran around the car to point in front of § 87(2)(b) So, § 87(2)(b) when she was driving the car, she wasn't coming straight towards you, correct, before you ran in front of her?" He said "Correct." (Transcript, page 73). Thus, PO Burns was not reasonable in using the force of pointing his gun at § 87(2)(b) because PO Masullo was far away from her vehicle at the time PO Burns drew his weapon, and PO Burns was not in danger himself until he put himself in front of § 87(2)(b) vehicle.

Therefore, PO Burns should be found guilty of Specification One and CCRB's penalty recommendation of the forfeiture of 10 vacation days should be imposed.

CONCLUSION

For all the aforementioned reasons, CCRB requests that you reject ADCT Facio-Lince's Not Guilty finding and find PO Burns Guilty of the charge against him. CCRB requests that you accept this recommended penalty: 1. Forfeiture of ten (10) vacation days for Specification One (1).

Respectfully submitted by,

Dwayne L. Bentley

Dwayne L. Bentley

Prosecutor

NYC Civilian Complaint Review Board

Administration Prosecution Unit

Cc: Michael Martinez