



OFFICE OF POLICE OVERSIGHT

P.O. BOX 1088, AUSTIN, TEXAS 78767
WWW.ATXPOLICEOVERSIGHT.ORG
POLICEOVERSIGHT@AUSTINTEXAS.GOV
PHONE: 512.974.9090 | TTY: 711 | FAX: 512.974.6306
COMPLAINT HOTLINE: 512-972-20PO

May 20, 2024

TO: Robin Henderson, Interim Chief, Austin Police Department
FROM: Gail McCant, Director, Office of Police Oversight
SUBJECT: OPO Recommendation, Case # 2023-1097, APD #23-3360258
Officer Andrew Kabbah #9239

Dear Chief Henderson,

On December 2, 2023, Officers Andrew Kabbah and Jonathan DiGulielmo were dispatched to a Disturbance HOTSHOT at 12215 Hunters Chase Drive in response to a physical disturbance between a male and two females. Upon arrival the officers located and detained a male subject, who was later identified as Frank Gutierrez. Officer Kabbah handcuffed Mr. Gutierrez and escorted him to the back of his patrol vehicle where he attempted to place Mr. Gutierrez in the backseat without the assistance of Officer DiGulielmo. Mr. Gutierrez displayed what Officer Kabbah stated were increasing levels of resistance to the detention. Mr. Gutierrez continually questioned Officer Kabbah as to why he was being detained and refusing to place his left leg and foot into the backseat of the patrol vehicle. As Mr. Gutierrez continued to be noncompliant and grew louder in his speech, Officer Kabbah struck Mr. Gutierrez once in the face with a closed hand. Officer DiGuglielmo arrived at the vehicle shortly afterwards and assisted Officer Kabbah in securing Mr. Gutierrez in the back seat of the patrol vehicle.

During Officer Kabbah's initial interview with Corporal Paul Basulto #5205, he (Kabbah) stated Mr. Gutierrez was at a level of "defensive resistive," when he struck him with a closed hand (X60AA351H – 05:05:34). Officer Kabbah added he believed one strike to the face would be necessary to gain compliance (X60AA351H – 05:06:55) and keep Gutierrez from lounging or spitting on him.

During Officer DiGulielmo's initial interview with Corporal Basulto he stated Mr. Gutierrez was at a level of "defensive resistive," during the incident with Officer Kabbah. He stated he assisted Officer Kabbah in securing Mr. Gutierrez into the backseat of the patrol vehicle, by pulling Gutierrez's shirt causing him to slide into the vehicle. Officer DiGulielmo stated he saw Officer Kabbah push Mr. Gutierrez into the vehicle as Mr. Gutierrez was pushing to exit; he did not see the open hand punch to the face.



At the conclusion of Officer Kabbah's interview with IAD he noted, *"I think I just - there is one thing I - I want to make a note of. And it's - it's a situation that occurred before Mr. Gutierrez, my interaction with Mr. Gutierrez, which I believe helps frame my viewpoint and - and my - my viewpoint of the night. And that - that - that is being that just shy of three weeks prior to Mr. Gutierrez and I interaction, I was involved in a officer involved shooting (unintelligible) incident, that I personally believe that I came back to work too early than what I should have come back to work. And I think that may have caused me to not utilize all my resources that I could have utilized that night. Especially me and my partner. So I think going - looking back I would take the time to take care of myself and make sure that I'm ready to come back to work."*

OPO recognizes the trauma associated with his experience and has a great deal of sympathy for the officer and respect for his drive to return to duty and protect the citizens of Austin. That said, we must also balance the officers needs with that of the community.

OPO's review of Kabbah's BWC demonstrates he did not use objectively reasonable force in controlling Mr. Gutierrez during his detention. Mr. Gutierrez was verbally argumentative and refused to place both feet into the backseat of the patrol vehicle. Kabbah's BWC shows no indication Mr. Gutierrez was attempting to headbutt, spit on, or actively assault him.

OPO recommends a classification B and C based on the following policies.

APD's General Orders, Chapter 2, Section 200.4, Response to Resistance, 200.4.1, Determining the Objective Reasonableness of Force reads:

Any interpretation of objective reasonableness about the amount of force that reasonably appears to be necessary in a particular situation must allow for the fact that police officers are often forced to make split-second decisions in circumstances that are tense, uncertain and rapidly evolving, and the amount of time available to evaluate and respond to changing circumstances may influence their decisions. The question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them.

(a) When determining whether to apply any level of force and evaluating whether an officer has used objectively reasonable force, a number of factors should be taken into consideration. These factors include, but are not limited to:

- 1. Reasonable opportunity for the officer to engage in de-escalation;*
- 2. The conduct of the individual being confronted as reasonably perceived by the officer at the time;*
- 3. Officer and subject factors such as age, size, relative strength, skill level, injury/level of exhaustion and number of officers versus subjects;*
- 4. Influence of drugs and alcohol or mental capacity.*



OFFICE OF POLICE OVERSIGHT

P.O. BOX 1088, AUSTIN, TEXAS 78767
WWW.ATXPOLICEOVERSIGHT.ORG
POLICEOVERSIGHT@AUSTINTEXAS.GOV
PHONE: 512.974.9090 | TTY: 711 | FAX: 512.974.6306
COMPLAINT HOTLINE: 512-972-20PO

APD's General Orders, Chapter 900, Section 900.3.2, Acts Bring Discredit Upon the Department reads:

Since the conduct of personnel both on-duty or off-duty may reflect directly upon the Department, employees must conduct themselves at all times in a manner which does not bring reproach, discredit, or embarrassment to the Department or to the City.

(a) Employees will not commit any act which tends to destroy public confidence in, and respect for, the Department.

Regards,

Gail McCant
Director
Office of Police Oversight

