

**REPORT OF FINDINGS AND RECOMMENDATIONS PURSUANT TO EXECUTIVE  
LAW § 75(3) REGARDING INVESTIGATION OF BINGHAMTON POLICE  
DEPARTMENT INCIDENT ON JANUARY 1, 2023**

**MAY 10, 2024**

**I. EXECUTIVE SUMMARY**

In January 2023, the Office of the New York State Attorney General (“OAG”) received numerous intakes relating to an incident in which an officer of the Binghamton Police Department (“BPD”) allegedly used excessive force during the arrest of a young Black-Asian man (“the Complainant”) in the early morning hours of January 1, 2023.<sup>1</sup> Video taken by bystanders showed an officer, subsequently identified as Officer Brad Kaczynski, placing his knee on what appeared to be the neck or area adjacent to the neck of an individual who was lying face down on the sidewalk with his hands cuffed behind his back. This incident received significant news coverage and sparked protests and calls from elected officials for an independent investigation.

The OAG opened an investigation pursuant to Executive Law § 75, which empowers the Law Enforcement Misconduct Investigative Office (“LEMIO”) at the OAG to “receive and investigate complaints from any source, or upon [its] own initiative, concerning allegations of corruption, fraud, use of excessive force, criminal activity, conflicts of interest or abuse in any covered agency.” N.Y. Exec. Law § 75(3)(a). At the conclusion of such an investigation, the OAG may determine “whether disciplinary action, civil or criminal prosecution . . . is warranted” and prepare and release a public report detailing its findings and recommended remedial actions. *Id.* § 75(3)(c), (d), (f).

This report sets forth the OAG’s findings and recommendations. We conclude that Officer Kaczynski used excessive force during the arrest of the Complainant and that his actions were in violation of the Federal and New York State Constitutions and BPD’s Use of Force policy. Section II of this report provides an overview of the OAG’s investigation. Section III provides a factual narrative of the January 1, 2023 incident. Section IV of this report provides the OAG’s conclusions and recommendations.

**II. OVERVIEW OF THE INVESTIGATION**

In the course of the investigation, OAG personnel reviewed BPD documentation of the events of January 1, 2023, including arrest records, use of force reports, and body-worn camera (“BWC”) footage, documentation from BPD’s Internal Affairs Unit’s investigation of the incident, BPD policies, procedures, and training materials, and documentation of Officer Kaczynski’s prior use of force incidents. We also interviewed Officer Kaczynski, Officer Nicholas Delanoy, Officer Matthew Zorovic, and Sergeant Daniel Keller. OAG personnel also

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<sup>1</sup> We refer to this individual as the “Complainant” to protect his privacy. While he did not submit a complaint to the OAG directly, members of his family did so.

spoke with the Complainant and other civilian witnesses, reviewed the Complainant's medical records, and reviewed videos of the incident taken by civilian witnesses.

### III. FACTUAL NARRATIVE

As bars near State and Hawley Streets closed at 3:00 a.m. on January 1, 2023, patrons spilled out onto the surrounding blocks. Witnesses and officers estimated there were approximately 150-200 people on the street. Officer Kaczynski was off duty, working as a security guard at Dillinger's Bar and wearing his BPD uniform, service firearm, and BWC.<sup>2</sup> Officers Delanoy and Zorovic were on duty and assigned to patrol the areas near the bars. Sergeant Keller was the acting supervisor for the night shift. [Keller Tr. 27:3–9].

Shortly after 3:00 a.m., a series of skirmishes broke out, primarily involving two young men who appeared to be fighting with groups of other young men, including the Complainant. Seeing the fights breaking out, Officer Kaczynski called for police assistance. He recalled to OAG personnel that other officers arrived within a minute of his call. [Kaczynski Tr. 84:24–85:22]. Sergeant Keller was among the responding officers.

Officers Kaczynski, Delanoy, and Zorovic attempted to break up the fights and separate the individuals. As they did so, their BWCs were knocked off their chests. Officer Delanoy lost his BWC at approximately 3:17:55. It was then picked up by Officer Zorovic at 3:18:34, who placed it on his own chest, apparently believing it was his camera. This camera recorded both video and audio footage of the ensuing events. Officer Zorovic's BWC was lost at approximately 3:17:57 and was picked up shortly thereafter by Officer Kaczynski, who placed it into his cargo pants pocket. [Kaczynski Tr. 129:17–19]. While the video is obscured, this camera continued to record audio. Officer Kaczynski's BWC was lost at approximately 3:17:07, stopped recording after 9 seconds, and was retrieved later. It does not depict the Complainant's arrest.

At approximately 3:19:20, Officer Kaczynski initiated an arrest of the Complainant, who was one of the individuals involved in the fights. Officer Delanoy came over to assist. They took the Complainant to the ground. Once they were on the ground, it took the officers seconds to handcuff the Complainant, according to Officer Kaczynski. [Kaczynski Tr. 82:20-24].

At 3:20:21, the Complainant was lying on the sidewalk on his stomach with his hands cuffed behind his back. Officer Kaczynski, who is approximately six feet nine inches tall and two hundred sixty-five pounds [Kaczynski Tr. 77:18–78:2; Garrity Statement at BING0243], placed his right knee and shin on the Complainant's neck or upper back adjacent to his neck, as depicted in BWC and video footage taken by bystanders. Officer Kaczynski remained in this position, with his knee and shin pressing on the Complainant's neck or upper back area, for the next minute and ten seconds. Officer Smith's BWC at 3:20:21 depicts when Officer Kaczynski first places his knee on the Complainant's neck or upper back area and both Officer Smith's and

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<sup>2</sup> BPD General Order § 308(D)(3) states: "A Police Officer, while engaged in off duty employment, shall be under the indirect supervision of the Officer in Charge and shall at all times be in compliance with Departmental policy and procedures."

Sergeant Keller’s BWCs at 3:21:31 depict Officer Kaczynski lifting his leg and then rolling him onto his back and sitting him up.<sup>3</sup>

Officer Kaczynski testified that he placed his right knee on his back by the “shoulder blade area.” [Kaczynski Tr. 83:6-9; 95:2–10; 131:15–17]. During the internal investigation, he stated that he kept his knee on the Complainant because he needed to control the crowd that he perceived as a threat. [Kaczynski Garrity video 00017 at 00:20–00:48; 00020, 00:24–1:13]. He made a similar statement during his interview with OAG personnel.

The screenshots below show the position of Officer Kaczynski’s knee.



*Screenshot 1: Sergeant Keller’s body-worn camera footage timestamp January 1, 2023, at 03:21:28 PM.*

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<sup>3</sup> At his interview with the OAG, Officer Zorovic stated that he believed Officer Kaczynski and the complainant were on the ground for about 5 to 10 minutes, [Zorovic Tr. 75:19–23], but this timeline is contradicted by video footage.



*Screenshots 2& 3: Video posted on Facebook showing Officer Kaczynski kneeling on the Complainant's neck or upper back.*

The BWC depicts that around the time of the arrest, there were at least five officers nearby in addition to Officer Kaczynski, including Officers Zorovic, Delanoy, Smith, Difulvio and Sergeant Keller.

As Officer Kaczynski knelt on the Complainant, the Complainant shouted “record it” several times, speaking to nearby bystanders, which can be heard at 3:20:25 of Officer Zorovic’s BWC. At approximately 3:20:55–3:20:58 of Officer Zorovic’s BWC, the Complainant said, “I can’t breathe,” and then screamed, “my jaw!” Around this time, a social media video depicted the Complainant lifting his head once and turning it to the other side. That video also depicts the Complainant lifting his legs a few inches from the ground and placing them back to the ground. The movement of the Complainant’s legs was also captured on Officer Delanoy’s BWC at 3:20:52.<sup>4</sup>

BWC footage from various officers depicts approximately a dozen members of the public in the general vicinity of Officer Kaczynski and the Complainant, with an additional crowd on Hawley Street. Several people can be seen speaking with officers who were present at the scene.

Nearby individuals expressed concern about the Complainant and criticized the officers’ lack of action regarding other men involved in the fights. At 3:21:06 of Officer Zorovic’s BWC, a male bystander can be heard asking the officers to “look at [Complainant’s] face,” which was visibly injured. Beginning at 3:21:12 of Officer Zorovic’s BWC, another male bystander pleads with officers, “why y’all doing that? He’s already in handcuffs. What are you doing?” At around

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<sup>4</sup> “Facebook video 01022023 2” at 00:10 depicts the Complainant’s head and legs moving. Social media video “2023-01-19\_10-58-30” at 00:07 also depicts the Complainant’s legs moving.

that time a female bystander is heard telling Officer Delanoy, “the knee is on the neck.” [Sergeant Keller BWC at 3:21:13]. Meanwhile, the first male bystander continues to plead, “he’s already in handcuffs, he’s not doing nothing.”

Sergeant Keller testified that the Complainant looked up at him when he arrived, he saw injuries to the Complainant’s face, and he called for the medics. [Keller Tr. 33:21–23]. Sergeant Keller also testified that he heard a woman say: “he’s on his neck,” but when he turned to look, he said he saw Officer Kaczynski’s knee “across his back.” [Keller Tr. 38:2–4, 39:5]. But because the “optics of this was not good,” he instructed Officer Kaczynski to stand the Complainant up. [Keller Tr. 38:7–8; 41:23–25]. As described above, Sergeant Keller’s BWC at 3:21:31 shows Officer Kaczynski rolling the Complainant over to his back and sitting him up, one minute and ten seconds after he first knelt on the Complainant’s neck or upper back area.

After sitting up, the Complainant cursed at Officer Kaczynski and said his rights were violated. He was then walked over to a nearby transport van where, as Officer Kaczynski and Sergeant Keller testified and BWC reflects, the Complainant straightened his leg, making it difficult to place him into the van. After several seconds, Sergeant Keller and Officer Kaczynski eventually put him into the van. As the ranking officer on scene, Sergeant Keller made the decision not to search the Complainant prior to his being placed into the van or to secure him once in the van. [Keller Tr. 43:2–7].

Once at the station, the Complainant was assessed by an EMT, placed in an ambulance, and taken to Binghamton General Hospital. Officer Zorovic and Officer Delanoy went to Binghamton General Hospital with the Complainant. At the hospital, photos were taken of the Complainant’s injuries, and he was examined by a doctor. Officer Delanoy issued the Complainant an appearance ticket. He was charged with Resisting Arrest and Disorderly Conduct.

After the Complainant was taken to the BPD station, Officer Kaczynski directed other officers to arrest the two other men who had been fighting with the Complainant and others. They each were charged with Disorderly Conduct and their cases eventually were Adjourned in Contemplation of Dismissal. Other than the Complainant and these two men, no one else was arrested.

In his interview with OAG personnel, Officer Kaczynski was asked about his use of force training. He recalled being trained on a tactic called “knee on top.” [Kaczynski Tr. 172:5–177:16]. He agreed that it was BPD policy at the time to use the least amount of force necessary to effect an arrest. [Kaczynski Tr. 30:5–10]. Officer Kaczynski also acknowledged that chokeholds are permitted only in instances that involve the threat of deadly physical force. [Kaczynski Tr. 39:13–23].

The Complainant filed a complaint against Officer Kaczynski with the BPD on January 2, 2023. Internal Affairs investigators looked into the matter, interviewing the Complainant and involved officers, reviewing the officers’ BWCs, and collecting various social media videos. The Captain who supervised the internal investigation issued a report finding that the force used by Officer Kaczynski was within guidelines, noting that Officer Kaczynski placed his knee “across

the back of [the Complainant] to control his body,” [Sutliff Report pg. 14, Bing 0069] and speculating that the Complainant would not have been able to move his head if Officer Kaczynski had been kneeling on his neck, [Sutliff Report pg. 14–15, Bing 0069–0070]. As of April 10, 2024, the investigation remained open, pending final approval by the Chief of BPD.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

##### A. Conclusions

##### 1. Use of Force

We find that the force used by Officer Kaczynski on the Complainant while he was handcuffed and lying face down on the pavement was in violation of BPD’s General Order 620 on the Use of Force and the New York State Model Use of Force Policy and was excessive under the New York State and Federal Constitutions.<sup>5</sup>

BPD General Order 620-A(d) states that “[f]orce shall not be used against persons in handcuffs, except as objectively reasonable to prevent imminent bodily harm to the officer or another person, or as objectively reasonable, where physical removal is necessary to overcome passive resistance.” This policy is similar to that set forth in New York State’s Use of Force Model Policy, which provides that “[f]orce shall not be used by an officer. . . [a]gainst persons who are handcuffed or restrained unless it is used to prevent injury, escape, or otherwise overcome active or passive resistance posed by the subject.” N.Y. Use of Force Model Policy § VIII(A)(4).<sup>6</sup>

BPD policy also provides that “[a]ny application of pressure to the throat, windpipe, neck, or blocking the mouth or nose of a person in a manner that may hinder breathing or reduce intake of air or obstructs blood circulation is prohibited unless deadly physical force is authorized.” BPD Policy § 300.3.6.<sup>7</sup> This provision is identical to the corresponding provision in New York’s Use of Force Model Policy. *See* N.Y. Use of Force Model Policy § VII(C)(1). Deadly physical force is justified only “to protect [the officer] or others from what he/she reasonably believes is an imminent threat of death or serious bodily injury;” or “to stop a fleeing subject when the officer has probable cause to believe that the individual has committed, or

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<sup>5</sup> References to BPD policy are to the 2022 version operative at the time of the incident.

<sup>6</sup> Executive Law § 840(d) requires agencies that employ police or peace officers to adopt a use of force policy that is “consistent with” the Use of Force Model Policy and permits those agencies to “impose further and additional restrictions on the use of force.”

<sup>7</sup> BPD’s General Orders also prohibit “[a]ny chokeholds or neck restraints, with or without a device, that restricts a person’s airway or blood flow to the brain” unless deadly force is authorized. BPD G.O. 620-A(a). A similar prohibition is found in BPD’s Administrative Orders. *See* BPD A.O. 60-14 (“Officers will not use restraint or submission tactics commonly known as ‘choke holds’. Any tactic intended to cut off either the subject’s airway or blood circulation to the head is prohibited. The only situation where such tactics would be authorized is when an officer is justified in using deadly physical force on the subject.”)

intends to commit, a felony involving the infliction or threatened infliction of serious bodily injury or death, and the officer reasonably believes that there is an imminent risk of serious bodily injury or death to any other person if the individual is not immediately apprehended.” BPD Policy § 300.4.

Furthermore, BPD policy states that officers must de-escalate the use of physical force at the “earliest possible moment” and “immediately as resistance decreases.” BPD Policy § 300.3.

Officer Kaczynski’s use of force against the Complainant while he was prone and handcuffed violated BPD policy. While officers may use force on handcuffed individuals if that force is “objectively reasonable, where physical removal is necessary to overcome passive resistance,” in this case, kneeling on the Complainant’s neck or upper back near the base of his neck for more than a minute while he was lying on his stomach with his hands cuffed behind his back was not necessary to overcome the Complainant’s limited movements while on the ground. Contrary to officers’ assertions that the Complainant was resisting because he was moving his head and legs and shouting for bystanders to record his arrest, the available video evidence shows that his movements post-cuffing while on the ground were minimal, did not have the potential or actual effect of interfering with his arrest, and may have been a physical response to the pressure of Officer Kaczynski’s weight.<sup>8</sup> While Officer Kaczynski stated that he put his knee on the Complainant so that he could observe the surrounding crowd, both video and testimonial evidence confirm that at least five other officers were standing in the immediate vicinity. There is no objective reason for Officer Kaczynski putting his knee on the Complainant’s neck or upper back or anything that would have prevented him from immediately shifting the Complainant off his stomach after handcuffing, as he eventually did at Sergeant Keller’s direction. The failure to do so also violated BPD’s requirement that officers seek to deescalate the use of physical force at the earliest possible moment. As a practical matter, kneeling on the Complainant likely further escalated the situation, motivating bystanders to continue expressing concerns about the Complainant’s treatment.

In addition, given that deadly force clearly was not authorized under these circumstances, kneeling on the Complainant’s neck or the upper back area adjacent to his neck violated BPD’s prohibition on “[a]ny application of pressure to the throat, windpipe, neck, or blocking the mouth or nose of a person in a manner that may hinder breathing or reduce intake of air.” Putting weight on a prone and handcuffed person’s neck or upper back has long been recognized as

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<sup>8</sup> Officer Kaczynski testified before OAG personnel that the Complainant raised his head and yelled out to the bystanders to record his arrest and had been non-compliant. [Kaczynski Tr. 96:3-17, 135:20]. Officer Zorovic testified before OAG personnel that the Complainant was “actively resisting” by trying to lift his body and moving his torso. [Zorovic Tr. 32:21-33:5]. Officer Delanoy stated during his internal interview that even though he was not looking at the Complainant, [Delanoy Tr. 54:24-55:2], he could hear the complainant kicking his feet. [Delanoy Garrity Statement, p. 2]. However, the only movement captured by video included when the handcuffed Complainant looked up and turned his head once, as he is complaining of his inability to breathe, and slowly moved his legs a few inches up and down—without making contact with anyone—for fewer than 10 seconds. *See* Delanoy BWC at 3:20:52. He otherwise appears to be compliant while in a prone position on the ground.

presenting the risk of asphyxiation. As early as 1995, the U.S. Department of Justice’s National Institute of Justice advised police departments that “[a] person lying on his stomach has trouble breathing when pressure is applied to his back” and that officers be trained that “as soon as the suspect is handcuffed, get him off his stomach.”<sup>9</sup> More recently, the death of George Floyd is an example of the significant dangers of this technique, as are the circumstances described in the federal court decisions described below.

Officer Kaczynski’s actions also violated the Fourth Amendment of the U.S. Constitution and Article 1, Section 12 of the New York State Constitution, which prohibit the use of objectively unreasonable and therefore excessive force by police officers. *Graham v. Connor*, 490 U.S. 386, 395 (1989).<sup>10</sup> The Supreme Court in *Graham* identified three factors to consider when determining whether force is excessive: (1) the nature and severity of the crime leading to the arrest; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect was actively resisting arrest or attempting to flee. *Id.*

With respect to people who are handcuffed, the Second Circuit has held that it is “clearly established that it is impermissible to use significant force against a restrained arrestee who is not actively resisting.” *Lennox v. Miller*, 968 F.3d 150, 157 (2d Cir. 2020). Similarly, federal circuit courts repeatedly have found that force applied to the neck or back of a prone, handcuffed person is excessive. *See Timpa v. Dillard*, 20 F.4th 1020, 1034 (5th Cir. 2021) (holding “that the state of the law in August 2016 clearly established that an officer engages in an objectively unreasonable application of force by continuing to kneel on the back of an individual who has been subdued”); *McCue v. City of Bangor, Maine*, 838 F.3d 55, 64 (1st Cir. 2016) (holding that “exerting significant, continued force on a person’s back while that [person] is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force”) (internal quotations and citations omitted); *Weigel v. Broad*, 544 F.3d 1143, 1155 (10th Cir. 2008) (holding that it is clearly established that applying pressure to subject’s “upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions”); *Abdullahi v. City of Madison*, 423 F.3d 763, 768 (7th Cir. 2005) (holding that a jury could conclude that an officer used excessive force when he “kneel[ed] on [the plaintiff’s] back/shoulder area after he was already lying prone with his hands behind him”); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) (holding that it is “clearly established that putting substantial or significant pressure on a suspect’s back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force”); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1054, 1059 (9th Cir. 2003) (holding that a jury could find excessive force where two officers knelt on the plaintiff’s neck and upper torso while he was lying on his stomach with his hands cuffed behind his back).

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<sup>9</sup> “National Law Enforcement Technology Center Bulletin,” U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, June 1995, <https://www.ojp.gov/pdffiles/posasph.pdf>.

<sup>10</sup> Force claims under the New York State Constitution are evaluated under the federal Fourth Amendment objective reasonableness standard. *Passino v. State*, 260 A.D.2d 915, 916, 689 N.Y.S.2d 258, 259 (3d Dep’t 1999).



Applying the *Graham* analysis here, we conclude that Officer Kaczynski used excessive force when he used his knee to place pressure on the Complainant's neck or upper back after the Complainant was handcuffed. Officer Kaczynski weighs approximately 265 pounds and is significantly larger than the Complainant<sup>11</sup>, and as he knelt on top of the Complainant, the Complainant stated that he couldn't breathe. The significant risks from this type of force are made clear by the cases cited above. In addition, the *Graham* factors all indicate that such significant and potentially deadly force was not appropriate under the circumstances. First, the Complainant was charged only with the relatively low-level offenses of disorderly conduct (a non-criminal violation) and resisting arrest (a misdemeanor). Second, there was no threat to officer safety or the safety of others because the Complainant had been handcuffed with his hands behind his back within seconds of being taken to the ground. And third, the video makes clear that, while rear-handcuffed and on his stomach on the sidewalk, the Complainant was not actively resisting or attempting to flee.

Officer Kaczynski's contention that he put his knee on the Complainant because of the need to watch the crowd of onlookers is not persuasive. He did not need to kneel on the Complainant to watch the crowd. In addition, by the time the Complainant was handcuffed on the sidewalk, at least five other officers had arrived on the scene and were in the vicinity, several of whom were speaking with members of the public. Although there were dozens of people within a block of the arrest, video footage from bystanders and BWCs shows a limited number of people in the immediate vicinity of the arrest and, to the extent they were engaging with the officers, they were pleading with them on the Complainant's behalf to have Officer Kaczynski remove his knee from the Complainant's neck or upper back area.

Finally, Officer Kaczynski contended at his OAG interview that he was employing a tactic that he had been trained on called "knee on top." [Kaczynski Tr. 175:12-13]. He described the goal of the tactic as "establish[ing] control" over the subject. [Kaczynski Tr. 175:23-25]. He described the benefits of the tactic: "it allows you to like post up, so you can observe your surroundings. You can communicate more effectively with people around you while still getting control of the person on the ground, controlling them to some degree." [Kaczynski Tr. 176:9-13]. However, the way that Officer Kaczynski employed the "knee on top" technique does not appear to be in line with BPD training. According to the 2023 Binghamton Police/Johnson City Police Winter In-Service Defensive Tactics Lesson Plan, when employing knee on top the officer's knee is to be placed "just above belt line/midsection." [BING011727]. That technique is used to apply handcuffs. *Id.* Officer Kaczynski instead applied his knee closer to the neck with the purpose of pinning down an already-restrained individual. Accordingly, Officer Kaczynski's use of force was not in accordance with the law, BPD policy or BPD training.

## 2. Failure to Intervene

Several officers present during the Complainant's arrest did not intervene as Officer Kaczynski knelt on the Complainant's neck or upper back.

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<sup>11</sup> The Complainant is 5'7" and weighs approximately 160 lbs.

BPD policy requires officers to intercede when unreasonable force is used: “[a]ny officer present and observing another law enforcement officer or a member using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force.” BPD Policy § 300.2.1. This provision is repeated in the section regarding officer standards of conduct. *See* BPD Policy § 319.5.8(t)(a). BPD policy largely echoes the New York Use of Force Model Policy on the subject: “[a]ny officer present and observing another officer using force that he/she reasonably believes to be clearly beyond that which is objectively reasonable under the circumstances shall intercede to prevent the use of unreasonable force, if and when the officer has a realistic opportunity to prevent harm.” N.Y. Use of Force Model Policy § VI(A).

The Fourth Amendment to the United States Constitution also imposes on police officers a duty to intercede and prevent fellow officers from subjecting citizens to excessive force, “if he observes the use of force and has sufficient time to act to prevent it.” *Figueroa v. Mazza*, 825 F.3d 89, 106 (2d Cir. 2016). Whether an officer “had a realistic chance to intercede will turn on such factors as the number of officers present, their relative placement, the environment in which they acted, the nature of the assault, and a dozen other considerations.” *Figueroa*, 825 F.3d at 107. Another important consideration is “the assault’s duration.” *Id.* In a recent ruling involving the use of a chokehold, the Second Circuit affirmed a district court denial of a motion for judgment as a matter of law on plaintiff’s failure to intervene claim where the subject officer was in close proximity to the officer who imposed the illegal chokehold for less than fifty seconds, and identified no obstacle that might have hindered his ability to intercede. *Ekukpe v. Santiago*, 823 F. App’x 25, 32 (2d Cir. 2020).

Officers Delanoy, Zorovic, Difulvio, and Smith likely had the opportunity to, and should have, intervened. Although these officers were interacting with members of the public during the incident, each of them testified to the OAG or during BPD’s internal investigation that they observed Officer Kaczynski kneeling on the Complainant and BWC footage shows each of them in close proximity to Officer Kaczynski in the time (over one minute) he knelt on the Complainant. If these officers had intervened, they could have ended the use of force earlier than the time when Sergeant Keller ultimately intervened and directed Officer Kaczynski to lift the Complainant up.

As described in the section below, we recommend BPD officers receive training on the duty to intervene and on techniques for effective intervention.

### 3. Failure to follow arrest procedures

During the arrest of the Complainant, there were two BPD arrest procedures that officers did not follow.

According to BPD General Order No. 604, “Every prisoner will be searched for weapons and contraband prior to being transported.” BPD G.O. 604(II)(A). This search will consist of a pat down of the body and clothing surfaces as well as a search of all pockets, shoes, containers, or any place where a weapon or contraband could be concealed and be readily accessible. BPD G.O. 604(II)(B)(1)-(2). BPD General Order No. 604 also states that both the arresting officer

and the officer assigned to transport the individual are responsible to conduct a thorough pat down search prior to transporting any arrested person. BPD G.O. 604(V)(A). The General Order further states that arrestees are to be transported from the scene of the arrest to Headquarters or the Crisis Center via a marked police vehicle or the police van. BPD G.O. 604(V)(B). Lastly, the General Order states that “[s]eatbelts should be utilized whenever possible.” BPD G.O. 604(V)(F).

Here, the Complainant was neither searched prior to him being placed into the police van by Officer Kaczynski and Sergeant Keller nor was the Complainant properly secured once placed into the police van. Sgt. Keller testified that he assisted in getting the Complainant into the transport van. [Keller Tr. 42:21-25]. He also testified that, as the ranking officer on scene, he decided not to search the Complainant prior to his being placed into the van or to secure him once in the van. [Keller Tr. 43:2-7]. Even though the Complainant straightened his leg in an attempt to avoid being placed in the van, the failure to search the Complainant implicates concerns for officer safety and for the Complainant himself. Furthermore, the failure to secure the Complainant once he was placed in the police van put the Complainant at risk of potential injury during the ride, albeit short, to the police station. These decisions are contrary to BPD policy.

#### 4. IA Investigation

Our office reviewed BPD Internal Affairs (“IA”) policy and procedures as well as the internal investigation into this incident. We found the internal investigative process problematic in three areas.

First, the investigator who interviewed Officer Kaczynski improperly used leading questions. Specifically, he asked Officer Kaczynski, given his weight and height, if he had had his knee on the Complainant’s neck, whether the Complainant would have been able to move his head, to which Officer Kaczynski answered no. [Garrity Int. 00017 at 1:38]. Officer Kaczynski had not previously offered such a statement, which appeared to be a justification offered by the interviewer. This explanation was then incorporated into the Internal Affairs report, in which the Captain who drafted the report stated, “I believe these actions [of moving/raising his head] would not be physically possible if he was being held down by his neck.” [Sutliff Report pg. 14, Bing0069].

Second, it is not clear that the interviewing investigators reviewed any BWC or social media videos prior to interviewing officers. [Sutliff Report pg. 13, Bing0068]. The Internal Affairs report indicates that BWC was first reviewed by the Captain who drafted that report weeks after the subject and witness officers were interviewed (including some who were interviewed by that Captain). Better practice would have been to review the video prior to the interview “to be able to do appropriate follow-up during the interview” and “yield the most valuable information from the investigation.”<sup>12</sup> As noted in this Report, there were several

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<sup>12</sup> The City of New York, Commission to Combat Police Corruption, *Performance Study: A Review of Internal Affairs Bureau Interrogations of Member Services* 20-21 (Mar. 2000),

inconsistencies between officer statements and what was reflected in the BWC, including that the people who had gathered around him while arresting the Complainant were not interfering with the arrest.

Third, the Summary/Findings section of the Internal Affairs report treated the Complainant's account with undue skepticism while adopting officers' accounts, even where belied by video evidence. For example, the Captain who drafted the report wrote that she "saw no obvious distress or concern from [the Complainant's] friends, which I would expect if [the Complainant] was in serious danger or couldn't breathe." [Sutliff Report at 14, Bing0069]. However, the BWC and social media videos show various bystanders asking why the Complainant was being held on the ground when he was already handcuffed and stating that Officer Kaczynski's knee was on the Complainant's neck. The report also describes the Complainant as resistant while on the ground and that he continued to "squirm, yell and scream at officers as well as the public, the entirety of time he is in custody." [Sutliff Report pg. 14, Bing0069]. However, the BWC and the social media videos show the Complainant shouting that he cannot breathe and asking bystanders to record the situation, neither of which could provide justification for continued force. Nor does he appear to be squirming or moving his body in the BWC or bystander videos, other than moving his head once from one side to the other, and at one point, lifting his legs a few inches from the ground. Video also contradicts the report's characterization that officers "had no idea" that the two other individuals who were later arrested "were involved in fights until [Officer Kaczynski] had secured [the Complainant] in the van." [Sutliff Report at 14, Bing0069]. BWC from before the Complainant's arrest showed various officers ordering these men to leave the area and attempting to break up their fights. Finally, the report surmises that Officer Kaczynski's left knee, which was placed on the sidewalk, supported the "balance" of his weight and not his right leg, though video shows Officer Kaczynski's torso was directly above his right leg and the Complainant's neck and upper back, suggesting more weight was distributed there. [Sutliff Report pg. 14, Bing0069].

## **B. Recommendations**

We recommend that BPD implement the following remedial actions under Executive Law § 75(3)(c) and (f):

1. Impose discipline on Officer Kaczynski, including potential termination, for the unreasonable use of force that was not in accordance with law, policy, or training, as described above.
2. Update the Internal Affairs Policy and Procedures (General Order 627) to provide that all available evidence should be reviewed to gain familiarity with the allegations and facts

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available at <https://www.nyc.gov/assets/ccpc/downloads/pdf/Performance-Study-A-Review-of-IABs-Interrogations-of-Members-of-Service-March-2000.pdf>; *see also* Standards and Guidelines for Internal Affairs: Recommendations from a Community of Practice, U.S Department of Justice, Office of Community Oriented Policing Services, <https://portal.cops.usdoj.gov/resourcecenter/RIC/Publications/cops-p164-pub.pdf>.

prior to any interviews of the subject officer, or, if not feasible due to timing considerations, the officer should be recalled after reviewing available evidence.

3. Train all staff about appropriate use of force principles and tactics involving restrained persons, and in particular, that officers should not apply pressure to the neck or back of a prone handcuffed individual; and
4. Train all staff on the duty to intervene and methods for effective intervention, such as those included in the Active Bystandership for Law Enforcement (ABLE) or Integrating Communications, Assessment, and Tactics (ICAT) programs.<sup>13</sup>

Pursuant to Executive Law § 75(5)(c), BPD shall respond within 90 days as to the steps that BPD has taken with respect to these recommendations.<sup>14</sup> The response should include a summary of BPD's findings and any discipline imposed.

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<sup>13</sup> See [https://cops.usdoj.gov/html/dispatch/09-2021/ABLE\\_Intervention.html](https://cops.usdoj.gov/html/dispatch/09-2021/ABLE_Intervention.html); <https://www.policeforum.org/icat-training-guide>.

<sup>14</sup> Executive Law § 75(5)(c) provides that “[t]he head of any covered agency shall advise the governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly within ninety days of the issuance of a report by the law enforcement misconduct investigative office as to the remedial action that the agency has taken in response to any recommendation for such action contained in such report.”