



POLICE DEPARTMENT

January 11, 2016

MEMORANDUM FOR: Police Commissioner

Re: Sergeant John Gumpel
Tax Registry No. 934978
114 Detective Squad
Disciplinary Case No. 2014-11514

Police Officer Jacob Giannelli
Tax Registry No. 949023
103 Detective Squad
Disciplinary Case No. 2014-11513

The above-named members of the Department appeared before me on June 9, 2015, charged with the following:

Disciplinary Case No. 2014-11514

1. Said Sergeant John Gumpel, on or about December 17, 2012, at approximately 1900 hours, while assigned to the 103rd Precinct and on duty, in the vicinity of 109th Avenue and Sutphin Boulevard, Queens County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that he searched Richard Balgobin's vehicle without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT
PROHIBITED CONDUCT

Disciplinary Case No. 2014-11513

1. Said Police Officer Jacob Giannelli, on or about December 17, 2012, at approximately 1900 hours, while assigned to the 103rd Precinct and on duty, in the vicinity of 109th Avenue and Sutphin Boulevard, Queens County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that he searched Richard Balgobin's vehicle without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT
PROHIBITED CONDUCT

The Civilian Complaint Review Board (CCRB) was represented by Nicole Junior, Esq. Respondent Gumpel was represented by Matthew Schieffer, Esq. of the Quinn Law Firm. Respondent Giannelli was represented by John Tynan, Esq. of Worth, Longworth & London LLP.

Respondents through their counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2014-11514

Respondent Gumpel is found Guilty.

Disciplinary Case No. 2014-11513

Respondent Giannelli is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The CCRB's Case

CCRB called Richard Balgobin as a witness. CCRB provided the transcript of the CCRB interview of Person A.

The Respondent's Case

Respondents testified on their own behalf.

FINDINGS AND ANALYSIS

It is undisputed that on December 17, 2012 at approximately 7 PM, Richard Balgobin was driving his car on Sutphin Boulevard in Queens. His girlfriend, Person A, was in the front passenger seat of the car. The car had tinted windows. Respondents Giannelli and Gumpel and Police Officer Lalchan were on duty in plainclothes driving behind Balgobin in an unmarked car. Respondents put the flashing lights on in their car and pulled over Balgobin's car. Respondent Giannelli exited the unmarked car and approached Balgobin's vehicle on the driver's side. There are differing accounts as to what happened next.

Balgobin testified that his window was open about three inches and that a male wearing jeans, a hooded sweatshirt and a hat, who he identified at trial as being Respondent Giannelli, approached his window and asked him to roll it down. Balgobin stated that he asked Respondent for identification and that Respondent yelled at him more than once to "roll down the fucking window." (Tr. 21-23). Balgobin reached for his phone to call the Internal Affairs number he had in his contacts list. At this point, he heard Respondent Giannelli yell "103 precinct" and within two seconds he rolled down his window. (Tr. 23-24). Balgobin testified that Respondent Giannelli then "reached into the vehicle, opened the door, and grabbed me by my shirt, my jacket, and pulled me out." (Tr. 24). Balgobin stated that Respondent Giannelli next slammed him up against the car, patted him down, put his hands in his jacket and pants pockets and recovered a pocket knife with approximately a three inch blade, a glass punch and a seatbelt cutter on it. (Tr.

25, 28). According to Balgobin, Respondent Giannelli then put the knife back in his pocket and moved him to the rear of the car. (Tr. 29).

Balgobin stated that he saw Respondent Giannelli in the front driver's seat of his car and then he returned and placed him in handcuffs. (Tr. 32-33). He later saw Respondent Giannelli go into the left rear side of his car. (Tr. 33). Balgobin acknowledged that he had an expandable metal baton in a black leather sheath in the driver's pocket on the door of his car. (Tr. 54-55, 76).

Respondent Giannelli's account differs from that of Balgobin in that he describes the driver's side window as being completely closed with a tinted window he couldn't see through when he approached it. (Tr. 87-88). He testified that he had his shield visible and he identified himself by name and precinct. Respondent Giannelli further describes Balgobin telling him that wasn't sufficient identification, so Giannelli took his police ID out of his pocket and showed him that too; after which Balgobin rolled down the window. (Tr. 89). Respondent Giannelli stated in his direct examination that while he was standing by the driver's side window, prior to the car door being opened, he immediately saw a knife clipped to Balgobin's left front pocket and he noticed there was a large metal baton in the driver's side door pocket. (Tr. 90, 105). He explained that after he noticed these two objects, he opened the door and removed Balgobin from the vehicle. (Tr. 91). Respondent Giannelli stated he handcuffed Balgobin and either he or Lalchan removed the gravity knife from Balgobin's pocket. (Tr. 92-93).

After Balgobin was moved to the back of the car, Respondent Giannelli went back to the door of the car to recover the baton and search the driver's side of the vehicle "to see if there were any more weapons or contraband in the car." (Tr. 93-94). He stated that

Respondent Gumpel assisted in searching the vehicle by searching the passenger side of the car. (Tr. 111-112). Balgobin was placed under arrest and charged with two counts of criminal possession of a weapon. (Tr. 94; Resp. Ex. A).

Respondent Gumpel testified as to his involvement at the scene. He stated that he approached the passenger's side and after Respondent Giannelli took Balgobin out of the car, he had the passenger get out of the car and brought her to the back of the car where Lalchan then took control of Balgobin and the passenger. (Tr. 116). When Respondent Gumpel was at the back of the car, he observed that Respondent Giannelli had "secured weapons from inside of the car." (Tr. 117). This is where he first saw what he described as a gravity knife and a baton. Respondent Gumpel said, at that point, when Balgobin and the passenger were at the back of the car, he assisted Respondent Giannelli in searching the reachable, "lungeable" area of the car. (Tr. 122-23). His stated reasons for doing this were that since two weapons had already been found in the car, "I had reason to believe that there may be more weapons in the car," and he wanted to confirm there were no more weapons in the car for the safety of both the police and the passenger, since they subsequently gave the car to her. (Tr. 117).

Additional testimony about the incident comes from the hearsay statement made by the passenger, Person A to CCRB. While hearsay is admissible in this proceeding, in general it must be given special scrutiny since the witness is not available to be cross-examined. In this case, however, Person A does not add anything of great significance to the crucial issue in this case which concerns the search. Person A was asked if she saw when the officers were searching the vehicle and she said no since they kept her back towards everything. (CCRB Ex. 1B, 28). She again stated that she did not actually

observe the officers in her car. (*Id.* at 34). She added that she knew there had been a search since things had been moved from the passenger and driver's side door areas (*Id.* at 29-32), and because she saw the officers playing with the baton which had been in the driver's side door pocket and with Balgobin's knife. (*Id.* at 32, 34-35).

Each Respondent is charged with searching Balgobin's vehicle without sufficient legal authority. As a preliminary matter, it is clear from their own testimony that Respondents Giannelli and Gumpel each did conduct a search of a portion of the interior of Balgobin's vehicle. According to Respondent Giannelli, he went into the car to recover the baton he had already seen when the door was closed and also to search, "the interior driver's side area of the vehicle to see if there were any more weapons or contraband in the car." (Tr. 93-94). Respondent Gumpel testified that he went into the vehicle when he was assisting Respondent Giannelli in a "lungeable" area search and he looked in the interior of the passenger side of the car. The only question remaining is whether they had sufficient legal authority to conduct their searches. I find that they did not.

In *Arizona v. Gant*, the U.S. Supreme Court held that "police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." 556 U.S. 332, 351 (2009). Respondents cannot prevail under either prong of *Gant*.

With regard to Respondent Giannelli, according to his testimony, at the time he entered the car, Balgobin was already under arrest, in handcuffs, at the rear of the vehicle. Similarly, Respondent Gumpel testified that before he entered the vehicle, Balgobin was in the control of Lalchan at the rear of the vehicle. It was not reasonable for the

Respondents to believe that Balgobin could access the vehicle at the actual time of their searches and, therefore, the searches were not justified on this basis. *See People v. Torres*, 74 NY2d 224 (1989) (explaining that a police officer may search areas within the reach of the suspect when there is a reasonable suspicion of criminal activity and the officer fears for his safety); *see also Case No. 83890/08* (June 9, 2011) (finding that Respondents had the right to inspect any areas where the driver could reasonably access a weapon, that right did not extend to the glove box); *Case No. 81265/05* (April 17, 2006) (determining that searches of the glove compartment and trunk were unjustified as the suspect was arrested outside the car and there was “no nexus” between the offense and the car’s interior). The inside of the vehicle was not a “lungeable” area when Balgobin was standing in handcuffs behind the car. Neither of these searches were therefore justified under the “reaching distance” exception outlined in *Gant*. *See* 556 U.S. at 351.

The Respondents’ actions also do not fall under the “evidence of the offense of arrest” exception set forth in *Gant*. At trial, Respondent Giannelli presented a scenario where he had seen the illegal baton in the pocket of the driver’s side door before Balgobin even opened the door. Under this sequence of events, Respondent Giannelli would then be going into the car after Balgobin was secured at the back of the car, merely to remove evidence of the arrest charge of criminal possession of the illegal baton. This scenario however is called into question by several things. Unfortunately, no evidence was presented by either party concerning the actual positioning of the pocket on the driver’s side door of this particular car which would allow the court to conclude whether it was indeed possible to see the baton from outside the car. *See Case No. 81682/06* (November 19, 2007) (finding that Respondent was unjustified in searching the rear

passenger and container areas of a vehicle even though he testified that he heard a "metallic" sound emanating from inside the vehicle which led him to suspect the driver had dropped a weapon under his seat). However, it seems more likely than not that it would have been at best very difficult, if in fact not impossible, to see a baton in a pocket in a car door, at night, while Respondent Giannelli was not leaning into the car, but merely standing completely outside of it, particularly if the baton was in fact sheathed in a black leather case as described by both Balgobin and Person A.

While the issue of whether the baton could have been seen is troubling, the inconsistencies in Respondent Giannelli's testimony are more dispositive in calling into question whether Respondent Giannelli did actually see the baton before he entered the car to remove it. Respondent Giannelli was impeached at trial on two very important facts concerning his trial version of what happened. First, when Respondent Giannelli was interviewed by CCRB on May 7, 2013, approximately six months after the incident, he was asked to describe what happened. At that time, he told CCRB that when Balgobin rolled down his window, Respondent Giannelli immediately looked to the area where his hands were and he noticed a metal clip on his right front pocket and he then told him to open the door and step out. (Tr. 109). Further, and most importantly, in the CCRB interview, Respondent Giannelli stated that he passed Balgobin off to Lalchan who took him to the rear of the vehicle, "so I can safely search his grabbable" area. Respondent Giannelli continued that, "immediately upon looking in the area, in his grabbable area, I noticed a large chrome handled object in his door panel, his driver's side door panel." (Tr. 110). In that the trial occurred approximately two and a half years after the incident, the more credible testimony appears to be the statements given by Respondent Giannelli

much closer in time to the actual incident. I find that it is more likely than not that the baton was not seen until the driver's side vehicle was being searched by Respondent Giannelli, while Balgobin was secured at the rear of the car. Therefore Respondent Giannelli was not searching to recover evidence of the crime of illegal possession of a baton since he did not have the basis to arrest Balgobin for that crime until after he searched the car. Accordingly, Respondent Giannelli's search of the vehicle does not fall under an exception to the warrant requirement set forth in *Gant*.

It is also important to note in this case that even if I had found Respondent Giannelli's trial sequence of events to be credible, he would be violating the second prong of the test based on his own testimony that after he recovered the baton from Balgobin's car, he "searched the interior driver's side area of the vehicle to see if there were any more weapons or contraband in the car." (Tr. 93-94). Respondent Giannelli, at that point, was not looking for evidence of any crimes Balgobin had been arrested for but was merely looking for anything else he could find to charge Balgobin. This clearly is not an exception within the parameters of *Gant* and is cause to find Respondent Giannelli Guilty without even considering the recovery of the baton.

Since Respondent Giannelli's searches did not meet either prong of the test for an appropriate search of a vehicle, Respondent Giannelli is guilty of searching Balgobin's vehicle without sufficient legal authority.

With regard to Respondent Gumpel, it is clear from his own testimony that both the knife and the baton had been recovered before he searched the passenger side of the vehicle. According to Respondents, Balgobin was arrested and charged with criminal possession of what they described as a gravity knife and a baton. Therefore this search

conducted after the Respondents had possession of the knife and baton clearly cannot constitute a search to obtain evidence of the offense for which the occupant was arrested.

Respondent Gumpel's search of the passenger side of the vehicle at the time he conducted it also does not fall under one of the exceptions outlined in *Gant*. Accordingly, Respondent Gumpel is Guilty of searching Balgobin's vehicle without sufficient legal authority.

PENALTY

In order to determine an appropriate penalty, Respondent's service records were examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent Gumpel was appointed to the Department on July 1, 2004 and Respondent Giannelli was appointed to the Department on July 6, 2010. Information from their personnel records that was considered in making this penalty recommendation is contained in attached confidential memoranda.

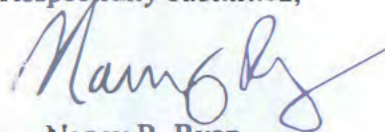
Both Respondent Gumpel and Respondent Giannelli have been found guilty of searching Balgobin's vehicle without sufficient legal authority. CCRB has requested a penalty of forfeiture of five vacation days each. However, in *Disciplinary Case No. 2013-10147* (April 7, 2015), an eleven-year police officer with no prior disciplinary history forfeited three vacation days for participating in the search of complainant's vehicle without sufficient legal authority. Also, in *Disciplinary Case No. 2013-10805* (March 6, 2015), a twenty-year lieutenant with no prior disciplinary history forfeited three vacation days for participating in the search of a complainant's vehicle without

SERGEANT JOHN GUMPEL
POLICE OFFICER JACOB GIANNELLI

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sufficient legal authority. Accordingly, I find the forfeiture of three vacation days each to be a more appropriate penalty in this case.

Respectfully submitted,



Nancy R. Ryan

Assistant Deputy Commissioner - Trials

APPROVED



FEB 17 2016
WILLIAM J. RAYTON
POLICE COMMISSIONER

From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
SERGEANT JOHN GUMPEL
TAX REGISTRY NO. 934978
DISCIPLINARY CASE NO. 2014-11514

Respondent was appointed to the Department on July 1, 2004. His last three annual evaluations were as follows: he received 4.5 ratings of "Highly/Extremely Competent" in 2013 and 2015 and a 4.0 rating of "Highly Competent" in 2014. He has received one medal for Excellent Police Duty and four medals for Meritorious Police Duty.



Respondent has no prior formal disciplinary history.

Nancy R. Ryan
Assistant Deputy Commissioner - Trials

From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JACOB GIANNELLI
TAX REGISTRY NO. 949023
DISCIPLINARY CASE NO. 2014-11513

Respondent was appointed to the Department on July 6, 2010. His last three annual evaluations were as follows: he received a 4.0 "Highly Competent" overall rating in 2015, a 3.0 overall rating of "Competent" in 2014 and a 4.5 rating of "Highly/Extremely Competent" in 2013. He has been awarded two medals for Excellent Police Duty and four medals for Meritorious Police Duty.

From March 25, 2013 to March 25, 2014, he was placed on Level I Force Monitoring for having three or more CCRB complaints in one year. He has no prior formal disciplinary history.

For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner - Trials