



POLICE DEPARTMENT

August 13, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Christopher White
Tax Registry No. 942696
50 Precinct Detective Squad
Disciplinary Case No. 2014-11787

Police Officer Stephen Frappier
Tax Registry No. 943253
Patrol Services Bureau
Disciplinary Case No. 2014-11788

The above-named members of the Department appeared before me on June 11, 2015, charged with the following:

Disciplinary Case No. 2014-11787

1. Said Police Officer Christopher White, on or about June 11, 2013, at 1420 hours, while assigned to the 7th Precinct and on duty in the vicinity of Essex Street and Delancey Street, New York County, abused his authority as a member of the New York City Police Department, in that he stopped Edward Alston-Mcduffie without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 - STOP AND FRISK

Disciplinary Case No. 2014-11788

1. Said Police Officer Stephen Frappier, on or about June 11, 2013, at 1420 hours, while assigned to the 7th Precinct and on duty in the vicinity of Essex Street and Delancey Street, New York County, abused his authority as a member of the New York City Police Department, in that he stopped Edward Alston-Mcduffie without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 - STOP AND FRISK

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The Civilian Complaint Review Board (CCRB) was represented by Simone Manigo, Esq. Respondents White and Frappier were represented by John Tynan, Esq. Respondents, through their counsel, entered a plea of Not Guilty to the subject charges. Edward Alston-McDuffie testified for CCRB. Respondents White and Frappier each 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

Disciplinary Case No. 2014-11787

Respondent White is found Guilty.

Disciplinary Case No. 2014-11788

Respondent Frappier is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

On June 11, 2013, at about 2:20pm, Edward Alston-McDuffie was standing near the corner of Essex and Delancey Streets in Manhattan, when he was approached by Respondents, Police Officers Christopher White and Stephen Frappier. The officers were in the Anti-Crime Unit and were in plainclothes.

Alston-McDuffie testified that he had just come off the train and was trying to call his employer regarding a messenger job he was supposed to do. (Tr. 11) He explained that he had four phones with him at the time, and two were in his hand: one was a work phone that he had out to search for his employer's phone number, and the other was a personal phone he was going to use to call his boss once he located the correct number.

There were four nylon clips attached to his right waist-area that held the four phones. (Tr. 15, 63-65) Alston-McDuffie, who was wearing cargo shorts and a t-shirt, also described a pen with a plastic clip that he had in the front right pants pocket of his shorts: according to Alston-McDuffie, the plastic pen was about five-to-six inches and was entirely inside his pocket, including the clip (Tr. 13-14, 64)

As he was preparing to call his employer, without warning, two men approached Alston-McDuffie; though the witness failed to make an in-court identification (Tr. 16), it is undisputed that Respondents are the two men to whom Alston-McDuffie is referring in his narrative. Neither man, according to Alston-McDuffie, identified himself as a police officer or displayed a police shield. (Tr. 17, 48) One of the Respondents, who the witness described as shorter and stubby, asked to speak with him. When Alston-McDuffie asked what it was they wanted to discuss, they did not respond, and the same Respondent reached for and grabbed his arm; he did not feel that he was free to leave. (Tr. 17, 19) Alston-McDuffie pulled away, and as the shorter Respondent reached for him again, Alston-McDuffie pushed his hand away and stepped back. (Tr. 53). Both Respondents then grabbed a hold of Alston-McDuffie and moved him toward their car, where, after a struggle, he was handcuffed. (Tr. 17-19)

For the most part, Alston-McDuffie appeared forthright in his testimony, except regarding one of his prior convictions. When asked on cross-examination about a weapons conviction from 2007, Alston-McDuffie initially refused to specify the weapon he possessed; ultimately, he claimed that he really did not possess any weapon, and only entered that guilty plea to cover a more serious drug charge. (Tr. 45-47) He also admitted

to a Resisting Arrest conviction from 2008, and a felony drug possession conviction from back in 2000.

Alston-McDuffie also acknowledged that he had a pending lawsuit against the City in relation to this incident. Originally, Alston-McDuffie didn't know the names of the officers who approached him, so he called CCRB to obtain the names for his lawsuit. (Tr. 35)

Respondents both testified that they were in their moving automobile when they first noticed Alston-McDuffie about ten feet away. Alston-McDuffie was not acting in a suspicious manner, nor was there any radio call leading the officers to him. (Tr. 88) What drew their attention to him was a metal clip they observed attached to his right front pants pocket. From their experience, Respondents each believed the clip to be part of a gravity knife. (Tr. 72-73, 101) Respondent White stated, "It appeared that it was a clip that could be part of a gravity knife." (Tr. 73) He could not recall the size of the clip he observed, (Tr. 82), and claimed he saw "a small portion of something sticking up from the metal clip." (Tr. 89) Respondent Frappier testified only to seeing the metal clip, which he "believed to be a gravity knife." (Tr. 101) He noted that the clip he observed was "consistent with other gravity knives." (Tr. 113) Neither officer offered any further description of the object they believed to be a gravity knife.

Based on their observations, the officers exited their vehicle, with their police shields displayed, and approached Alston-McDuffie. Respondent White testified that he asked Alston-McDuffie if the officers could speak with him, but Alston-McDuffie gave no verbal response; instead, he took one step back with his right foot and turned his body to the right, which Respondent White described as "blading". (Tr. 76) Respondents both

interpreted that maneuver to mean that Alston-McDuffie was trying to hide a gravity knife from the officers' view. (Tr. 77, 104)

Respondents differ slightly on what happened next. Respondent White testified that after again asking him if they could speak with him, Alston-McDuffie started yelling obscenities; Respondent White believed Alston-McDuffie was being disorderly, and grabbed his right wrist to lead him to the police vehicle. (Tr. 79) Respondent Frappier, though, testified that it was in response to Alston-McDuffie's turning to the side that the officers grabbed him, trying to turn him forward in order to determine whether he had a weapon. (Tr. 105, 111, 114) Respondent Frappier stated clearly that Alston-McDuffie was not free to leave because the officers wanted to continue to investigate whether he had a weapon. (Tr. 110) Both Respondents then gave similar accounts of how Alston-McDuffie continued to struggle with them as they led him to their police vehicle and eventually handcuffed him.

Respondent Frappier testified that after the officers handcuffed Alston-McDuffie, Respondent Frappier did a pat down of the prisoner to make sure he didn't have any weapons. At that time, Respondent Frappier determined that the object which the officers had believed was a gravity knife was, in fact, a dark-colored pen with a metal clip; the clip was outside the pocket, and a portion of the pen was protruding from the pocket, while the remainder of the pen was inside the pocket (Tr. 107, 112) Respondent White, though, did not recall when it was that the officers discovered that the object was a pen and not a gravity knife; he was unsure whether they checked to see if there was a weapon at the scene or back at the precinct. (Tr. 90)

Further testimony was elicited from Respondents as to their experience in recognizing gravity knives. Respondent White made reference to his "experiences making prior arrests for gravity knives clipped to front pants pockets." (Tr. 73) He also testified that he had made arrests for gravity knives where a portion of the knife protrudes from the clip. (Tr. 89) Respondent White provided no further details as to the precise facts in those cases or the approximate number of such arrests. Respondent Frappier also made reference to having made prior arrests for weapons possession, including cases involving gravity knives (Tr. 99, 101). But he, too, did not provide further details as to the number and precise nature of such arrests, and acknowledged he had not received any special training in the identification of gravity knives. (Tr. 101)

FINDINGS AND ANALYSIS

The CCRB alleges that each Respondent abused his authority as a member of the NYPD by stopping Alston-McDuffie without sufficient legal authority, in violation of Patrol Guide section 212-11. The Patrol Guide places officers on notice as to their responsibilities during a street encounter with an individual. Section 212-11 provides that an officer may stop and detain a person when the officer "reasonably suspects a person has committed, is committing, or is about to commit a felony or a Penal Law misdemeanor." The section also lists several factors that might contribute to "reasonable suspicion:

- a. The demeanor of the suspect;
- b. The gait and manner of the suspect;
- c. Any knowledge the officer may have of the suspect's background and character;
- d. Whether the suspect is carrying anything and what he is carrying;
- e. Manner of dress of suspect including bulges in clothing;

- f. Time of day or night;
- g. Any overheard conversation of the suspect;
- h. The particular streets and areas involved;
- i. Any information received from third parties;
- j. Proximity to scene of crime.

The standards of conduct in this area also have been set forth in NYPD form PD 344-153, entitled "Street Encounters – Legal Issues", which is distributed to all officers, and in the NYPD Legal Bulletin, Vol. 22, No. 2 (August 1992). These legal summaries give officers notice of the four levels of permissible interference with an individual's liberty, as set forth by the New York Court of Appeals in *People v. DeBour*, 40 NY2d 210 (1976). The first level permits an officer to approach an individual to request information, so long as there is some objective, credible reason for the request, not necessarily indicative of criminality. The second level allows a common-law right of inquiry where there is a founded suspicion that criminal activity is afoot. Under level three, an officer can forcibly stop and detain a person where the officer has reasonable suspicion that the individual has committed, is committing, or is about to commit a crime. The fourth level allows an officer to arrest and take into custody an individual whom he has probable cause to believe has committed a crime.

The term "reasonable suspicion" has been defined by the Court of Appeals as "the quantum of knowledge sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand." *People v. Cantor*, 36 NY2d 106 (1975). Such suspicion may not rest on "equivocal or innocuous behavior" that is susceptible of an innocent as well as a culpable interpretation. *People v. Corrasquillo*, 54 NY2d 248 (1981).

Ultimately, the touchstone in any evaluation of a street encounter between police and an individual is "objective reasonableness." The question to be answered here is whether a reasonable officer would have acted as these officers did, in light of the established standards of conduct, and the circumstances actually confronted by the officers in this case. I find that Respondents did not act reasonably in this case.

At the point the officers first approached Alston-McDuffie, they at most were justified in making a level-two inquiry, to speak with Alston-McDuffie about their concern that he might be carrying an illegal gravity knife. The Court credits both Respondents when they claim to have seen a clip that they believed could indicate the presence of a gravity knife; each Respondent seemed straightforward and forthcoming in testifying about their preliminary observations and their reason for approaching Alston-McDuffie. The Court also credits Respondents' claim that they had their shields out and identified themselves as officers, despite Alston-McDuffie's protestations to the contrary; there would have been no logical reason for them to approach Alston-McDuffie in this context without identifying themselves.

However, Alston-McDuffie also was free to walk away from Respondents, and did not need to answer their questions; the PD 344-153 Legal Summary mentioned above specifically articulates these standards. The observations of the officers until that point did not justify elevating this encounter to a level-three stop.

Yet when Alston-McDuffie turned away, Respondents physically grabbed him in order to investigate further their suspicion that he was carrying an illegal gravity knife. At that point, Alston-McDuffie was not free to leave, and so Respondents elevated the encounter to a level-three stop. The question then becomes whether under the totality of

circumstances they faced here, did Respondents have a reasonable suspicion that the detainee was committing a crime – i.e., did they have a reasonable basis for believing that Alston-McDuffie possessed a gravity knife at the moment they detained him. For the reasons explained below, the Court finds that Respondents did not, and that the stop was, therefore, unjustified.

Here, since there was no outside information (e.g., radio call, eyewitness account) suggesting Alston-McDuffie possessed an illegal gravity knife, Respondents must rely exclusively on their own observations to establish reasonable suspicion for the stop. The Court finds that neither Respondent provided enough detail to establish a reasonable suspicion that Alston-McDuffie possessed a gravity knife. The officers merely described seeing a clip, from a distance of about ten feet away, as they were in their moving vehicle. Respondent White also observed “a small portion of something sticking up from the metal clip,” but provided no other descriptive details of that unidentified object, or any other identifiable characteristics consistent with a gravity knife or any other illegal weapon. Even after exiting their car and approaching on foot, neither officer provided any additional details regarding the clip or the object protruding from it. There was no testimony that either officer observed an outline of a weapon. Whatever they observed was equally likely to be an innocuous object.

Similarly, Respondents provided very little testimony as to their experience or training in the recognition of gravity knives. Respondents instead relied on general references to previous arrests, without any specifics as to the number or nature of their arrests for gravity knives. See *People v. Cruz*, 39 Misc 3d 52 (2013) (gravity knife

suppressed where officer provided only vague description of clip, and minimal evidence of officer's experience in identifying gravity knives).

The one additional factor that Respondents offer to justify their stop of Alston-McDuffie is that he turned away from them as they approached. Both Respondents maintained that they believed Alston-McDuffie was turning because he possessed an illegal object in his right-waist area that he was trying to shield from the officers' view. However, the mere fact of Alston-McDuffie's turning his body away in the manner described by Respondents was not necessarily culpable behavior; his act of turning away was also fully consistent with his not wanting to speak with the officers, who approached him here without warning. Indeed, Respondent Frappier, himself, testified that Alston-McDuffie was making it "clear that he did not want to come over and speak" with the officers. When then asked what Alston-McDuffie did to physically demonstrate his desire not to talk with them, Respondent Frappier answered, "He turned his body away from us." (Tr. 103) As such, Alston-McDuffie's equivocal act of turning away from the officers was not sufficient to elevate this encounter to a level-three stop.

Under the totality of the circumstances, including the officers' minimal observations regarding the clip, there was no reasonable suspicion that Alston-McDuffie was involved in criminal activity. Absent such reasonable suspicion, there was no basis to physically stop him. Accordingly, CCRB has met its burden of proving misconduct on the part of each officer, and I find each Respondent guilty as charged.

PENALTY

In order to determine an appropriate penalty, the service records of Respondents White and Frappier were examined. See *Matter of Pell v. Board of Education*, 34 NY2d 222 (1974). Respondent White was appointed to the Department on July 10, 2006, Respondent Frappier on January 10, 2007. Information from their personnel records that was considered in making this penalty recommendation is contained in attached confidential memoranda.

The CCRB has asked that each Respondent forfeit five days of vacation as the appropriate penalty. The Court is mindful of the importance of protecting the fundamental rights of citizens to be free from unlawful police intrusion. To be sure, police work is hazardous by nature, and some deference must be given to the often-dangerous circumstances confronted by an officer in a particular case. But that concern still does not justify conduct that violates the standards articulated in the Patrol Guide.

Although the Court did find Respondents White and Frappier guilty of the specification, that finding was predicated upon misconduct that was more negligent than intentional. While there certainly is a need for some accountability based on Respondents' actions, the hope is that this case serves as a productive learning experience as well. As such, the Court feels that a penalty of five vacation days is excessive here. Recent cases involving similar street encounters, and respondents with comparable service records, have resulted in lower penalties being imposed. See *Disciplinary Case No. 2013-10809* (Jun. 22, 2015) (nine-year police officer with no prior disciplinary record forfeits two vacation days for pat down of complainant without sufficient legal authority); *Disciplinary Case Nos. 2013-9653 & 2013-9654* (Feb. 19, 2015) (two eight-

year members with no prior disciplinary record forfeit three vacation days each for stopping, frisking and searching complainant without sufficient legal authority);

Disciplinary Case Nos. 2013-9621 & 2013-9622 (Mar. 11, 2015) (nine-year police officer forfeits two vacation days for frisking complainant's waistband without sufficient legal authority; Respondent did not articulate specific reason to suspect complainant was carrying a weapon).

Given that each Respondent has no prior disciplinary history, I recommend that Respondents White and Frappier each forfeit two days of vacation as an appropriate penalty.

Respectfully submitted,



Jeff S. Adler

Assistant Deputy Commissioner – Trials

APPROVED

OCT 13 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner -- Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER CHRISTOPHER WHITE
TAX REGISTRY NO. 942696
DISCIPLINARY CASE NO. 2014-11787

Respondent White received an overall rating of 4.5 "Extremely Competent/Highly Competent" on his last three annual evaluations. He has been awarded 17 medals for Excellent Police Duty and one for Meritorious Police Duty. [REDACTED]

[REDACTED] He has been on Level II Force Monitoring since December 2013 for receiving three or more CCRB complaints within a year. He has no prior formal disciplinary record.

For your consideration.



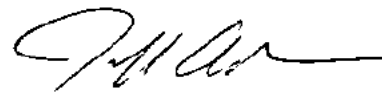
Jeff S. Adler
Assistant Deputy Commissioner -- Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER STEPHEN FRAPPIER
TAX REGISTRY NO. 943253
DISCIPLINARY CASE NO. 2014-11788

On his last three annual evaluations, Respondent Frappier received an overall rating of 4.5 "Extremely Competent/Highly Competent" twice and 4.0 "Highly Competent" once. He has been awarded one medal for Meritorious Police Duty. [REDACTED]
[REDACTED] He has no prior formal disciplinary record.

For your consideration.



Jeff S. Adler
Assistant Deputy Commissioner – Trials