



POLICE DEPARTMENT

August 4, 2011

MEMORANDUM FOR: Police Commissioner

Re: Lieutenant James Darcy
Tax Registry No. 891427
Transit District 11
Disciplinary Case Nos. 85046/09 & 86007/09

The above-named member of the Department appeared before me on March 14, and March 23, 2011, charged with the following:

Disciplinary Case No. 85046/09

1. Said Lieutenant James Darcy, assigned to Transit District 11, on or about March 5, 2008, while on-duty, in the confines of Bronx County, after having been directed by Deputy Inspector Johnny Cardona, Transit District 11, to issue a summons to an unauthorized non-Department vehicle parked in the parking lot of Transit District 11, failed to comply with said lawful order.

P.G. 203-03, Page 1, Paragraph 2 – COMPLIANCE WITH ORDERS –
GENERAL REGULATIONS

Disciplinary Case No. 86007/09

1. Said Lieutenant James Darcy, assigned to Transit District 11, on or about November 11, 2008, while on duty, in the confines of Bronx County, engaged in conduct prejudicial to the good order and efficiency of the Department, to wit: said Lieutenant improperly transported a prisoner by walking said prisoner approximately fourteen (14) blocks from Lincoln Hospital to Bronx Central Booking. *(As amended)*

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

The Department was represented by Penny Bluford-Garrett, Esq., Department Advocate's Office, and Respondent was represented by Bruce Wenger, Esq.

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Respondent, through his 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

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Deputy Inspector Johnny Cardona, Lieutenant John Andersen, Police Officers Soraya Batista, Jeremiah Daly, Barry Bradley, and Captain William Wynne as its witnesses.

Deputy Inspector Johnny Cardona

Cardona has been a member of the Department for over 20 years and is currently assigned to Patrol Borough Manhattan South. However, on March 5, 2008, Cardona was assigned as the Commanding Officer of Transit District 11 (District 11).

Cardona testified that when he arrived in District 11's parking lot on March 5, 2008, he noticed a civilian member's vehicle parked in his designated parking space. The parking space is marked in yellow paint. He added that there were designated parking areas for members of District 11 based on each member's rank or title. Cardona said he told Respondent (who was assigned as the Desk Officer) that someone was parked in his parking spot and as a result, Respondent was going to be issued a Command Discipline.

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Cardona said the duties of a desk officer include inspecting the command parking area. Further, Cardona said he checks the Command Log to ensure that these inspections are made. Cardona said, according to his inspection of the Command Log, Respondent had conducted a stationhouse security check a little after 8:00 a.m. Cardona arrived just after 9:30 a.m. Cardona added that there are several signs throughout the District that explain the parking regulations. In addition, Cardona held supervisory meetings every payday, in which he reiterated the parking regulations.

As a result of the unauthorized vehicle in Cardona's parking space, Cardona instructed Respondent to issue the vehicle a summons. Respondent neither issued the summons to the vehicle nor was the vehicle moved by the owner. Cardona later learned that the vehicle was owned by Officer Bradley. Bradley was issued a Command Discipline for parking his private vehicle in Cardona's parking area. Cardona said he did not use any curse words while addressing Respondent. Moreover, there were other officers and two supervisors, Sergeants Tracy Colon and John Foder, available to cover the desk in the event Respondent had to leave the desk to address the parking concerns.

During cross-examination, Cardona said he arrived at District 11 at approximately 9:30 a.m. and signed the Command Log at approximately 9:33 a.m. Cardona agreed that on the day of the incident he signed the Command Log but did not put the time he signed it. Cardona further acknowledged that he may have arrived at District 11 at about 10:00 a.m. Cardona could not recall the description of the vehicle that was parked in his area. Cardona did not know what time the vehicle was removed from his parking area.

Cardona acknowledged that according to Patrol Guide 206 service who refuses to follow a lawful order from a ranking member must immediately be

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suspended. He also said that lieutenants do not typically issues summonses and may ask a police officer to issue a summons instead. Cardona also mentioned that Respondent's annual evaluation dropped from 4.5 in 2006 and 2007 to 2.5 in 2008. Cardona agreed that if a police officer did not observe a car parked in Cardona's parking area, the police officer the traffic infraction.

During redirect examination, Cardona said that there were a few instances that affected Respondent's annual evaluations. First, Respondent had ordered a police officer to release a defendant with an open warrant. Second, Respondent had been involved in several confrontations with other supervisors.

During recross-examination, Cardona said he did not recall if Respondent received any Command Disciplines for the above-mentioned infractions.

Upon questioning by the Court, Cardona said that when he gave Respondent the order, Respondent replied, "I'll take care of it."

Lieutenant John Andersen

Andersen has been a member of the Department for 17 years. At the time of the incident, Andersen was working at District 11 as the Integrity Control Officer and assisted Cardona with investigating Respondent.

Andersen reviewed the recording of the official Department interview between the Transit Bureau Investigations Unit and Respondent. According to the interview, Respondent said he did not leave the front desk to conduct an inspection of the parking area because he was the only supervisor available at the time. As part of his investigation, Andersen made copies of the second platoon roll call [Department's Exhibit (DX) 2] and

the Command Log (DX 1) for the day of the incident. These logs indicated that there were two supervisors available, Foder and Colon, to cover the desk. Andersen added that there were four prisoners in the cells at the time of the incident.

During his investigation, Andersen learned that Respondent asked Police Officer Daly to perform the parking area inspection. Andersen said that, according to the roll call, there were two officers, Daly and Batista, assigned as stationhouse security. However, a subsequent inspection of Daly's Activity Log revealed Daly was reassigned but Batista was not. Andersen also stated that Bradley had parked his personal vehicle in Cardona's parking space and was not issued a summons.

During cross-examination, Andersen said that an official Department interview was not conducted with Cardona. He added that the Transit Bureau Investigations Unit may have conducted an informal interview, but he did not know the content of the informal interview. Andersen acknowledged that he did not interview the two sergeants (Foder and Colon) who were said to have been available to cover the front desk while Respondent conducted the parking area inspection. Andersen admitted that although Colon and Foder were listed on the roll call, Andersen did not know if either one of them was physically available to cover the desk.

Andersen said that although Batista was assigned as stationhouse security, she was taken off her post from 9:00 a.m. until 10:25 a.m., and was therefore unavailable to inspect the parking area. He said that Bradley's personal vehicle was not parked directly in Cardona's parking space, but rather it was parked close to Cardona's space. Cardona was able to fit his vehicle in the parking space. Andersen said that Bradley's vehicle was moved at approximately 10:00 a.m. or 11:00 a.m.

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Batista has been a member of the Department for 17 years and was working a 4 00 a m to 12 23 p m tour at District 11 on March 5, 2008. On the day of the incident part of Batista's assignment was the District's parking lot. Batista covered the parking lot from 5 00 a m to 8 40 a m, and then she was post-changed. Batista did not have a conversation with Respondent about inspecting the District's parking lot.

During cross-examination, Batista said she was told to return to the command at approximately 8 10 a m, and by 8 40 a m, she left the District. She arrived at her new assignment at about 9 00 a m and remained there until approximately 10 30 a m. She said she did not hear about this incident until she was called down for interview. She said that she was not in the vicinity of District 11 between 9 00 a m and 10 15 a m.

Police

Daly testified that on March 5, 2008, he was working a 7 05 a m to 3 40 p m tour with two hours of pre-tour overtime. Daly performed his overtime, and remained at the 167 Street No. 4 train station, until 9 00 a m. After 9 00 a m, Daly returned to the District. Daly was then reassigned. Daly's new post did not include inspecting the District's parking lot. Daly stated that at no point during the day did he have any conversation with anyone, including Respondent, about the incident.

During cross-examination, Daly acknowledged that it is possible that Respondent could have asked Daly to inspect the parking lot for illegally parked vehicles as Daly was going to his post.

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Police Officer Barry Bradley

Bradley testified that on March 5, 2008, he was working an 11 15 p.m. to 7 05 a.m. tour and he was on limited duty status. Bradley was in charge of restocking the District's vending machines and was also helping with telephone switchboard operations. He said he drove his personal vehicle to work and parked it in the radio motor patrol vehicle (RMP) parking area. However, he did so because he was unloading goods for the vending machine. Respondent did not ask Bradley to move his vehicle. Bradley said Colon told him that Cardona was angry and that Bradley should move his car. Bradley moved his car but did not recall when. He said it could have been some time after 7 05 a.m. Bradley received a Command Discipline for parking his car in an unauthorized area.

During cross-examination, Bradley said he was not parked in Cardona's parking area. Cardona was able to park his vehicle, and did park his vehicle, in his designated parking area. Bradley also said that Colon told him that Cardona was irate and cursing.

Upon questioning by the Court, Bradley said that Cardona was directing his curses at Respondent.

Wynne

On November 11, 2008, while assigned to District 11, Wynne had a conversation with, now retired-Captain [REDACTED] regarding a Command Discipline that was issued to Respondent for walking an injured prisoner 14 blocks from Lincoln Hospital to Bronx Central Booking (BCB). According to [REDACTED] Captain Lieber told Respondent to have Emergency Medical Service personnel (EMS) drop Respondent and the injured prisoner off at BCB, but Respondent told Lieber that EMS said it was not their practice to

drop off prisoners at BCB, but they can drop off prisoners at the hospital. Lieber then told Respondent to, "do whatever you have to." However, at the time Respondent spoke with Lieber, Respondent had already started walking to BCB. Wynne also confirmed this account of the events with Lieber himself shortly after it happened and, again, right before

Wynne testified that transporting a prisoner 14 blocks from the hospital to BCB is dangerous because the prisoner's injuries may potentially be exacerbated. Also, the escape risk is higher when a prisoner is walking. Wynne asserted that Respondent could have asked the Emergency Service Unit to respond and transport the prisoner, or alternatively, Respondent could have had a precinct RMP to transport the prisoner.

During cross-examination, Wynne testified that Respondent was issued a Command Discipline for violating Patrol Guide 208-03 failing to notify the [Bronx] Court Section of an unusual circumstance regarding the transportation of a prisoner. Wynne stated that notifying Lieber and [REDACTED] was not the same as notifying the Bronx Court Section. However, this Charge was later revised and replaced with improperly transporting a prisoner. Wynne acknowledged that he prepared a Department memorandum regarding the incident. According to the Department memorandum, Respondent was not in violation of improperly transporting the prisoner, but Wynne maintained that this was a typographical error, and Respondent was found to be in violation of improperly transporting a prisoner.

Wynne said that some of the RMPs do not have partitions in them (that separates the front and back seats), and the RMPs with partitions have less leg room than RMPs without partitions. He also acknowledged that the prisoner could have further agitated his injured back if placed in an RMP with a partition. Wynne acknowledged that there were

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two other officers with Respondent. The two officers were walking the prisoner as Respondent was driving alongside of them. He also acknowledged that the prisoner had a back injury and that the injury could have been exacerbated if the prisoner had been transported in an RMP.

Upon questioning by the Court, Wynne stated that there is nothing in the Patrol Guide that prohibits transporting a prisoner on foot. However, if there are unusual circumstances, then the Bronx Court Section has to be notified. Wynne also added that prisoners should be shackled when being transported from the hospital.

During recross-examination, Wynne stated that he did not know if the Bronx Court Section was notified. He reiterated that Respondent received Charges and Specifications for walking the prisoner 14 blocks.

Respondent's Case

The Respondent called Police Officer Drewery Marrow as a witness and testified in his own behalf.

Marrow testified that on March 5, 2008, he was on limited duty status and working an 11:15 p.m. to 7:50 a.m. tour. Marrow was assigned as the telephone switchboard operator. Marrow remembered Cardona arriving at District 11 at approximately between 7:30 a.m. and 8:00 a.m. As Marrow was walking to the desk, he heard a lot of yelling and screaming and saw Cardona leave the desk area in a violent manner. Marrow later learned that Cardona was yelling at Respondent.

During cross-examination, Marrow said he did not perform any overtime on that day. Marrow stated Respondent did not ask him to inspect the parking area, but he remembered Respondent being concerned about the illegally parked vehicle.

During redirect examination, after reviewing a copy of the second platoon roll call (DX2) Marrow acknowledged that he, in fact, did perform post-tour overtime and returned to the District from his overtime post at approximately 9:15 a.m.

During recross-examination, Marrow clarified that he assumed he was on limited duty status on the date of the incident. He could not remember all the details because the incident occurred a long time ago. He added that officers on limited duty status cannot perform overtime.

Upon questioning by the Court, Marrow acknowledged that he may have mixed up the dates he was on limited duty status, but on the day of the incident he was not on limited duty status and did perform overtime.

During recross-examination, Marrow said he was assigned as the telephone switchboard operator until approximately 6:30 a.m.

Respondent

Respondent has been a member of the Department for 24 years. He has been assigned to District 11 as a platoon commander for approximately six years.

With regard to _____ on November 11, 2008, Respondent was working an 11:00 p.m. to 7:50 a.m. tour. At around 3:00 a.m. upon learning that a prisoner was being discharged from Lincoln Hospital, Respondent went to the hospital where he met with Police Officers Pernullo and Santos. Respondent said he observed the

prisoner wearing a back brace. The prisoner was injured and unable to bend over. Respondent tried placing the prisoner in the back of the RMP but the prisoner began moaning in pain. Respondent's RMP was affixed with a partition. Since the prisoner's hands were handcuffed to the rear, it was even more difficult to place him in the RMP. Respondent made a few attempts to place the prisoner in the RMP but the prisoner kept on complaining that his back could not twist the proper way to fit inside the RMP.

Respondent said he called Sergeant [Magaly] Hernandez, the desk officer at District 11 at the time, because Hernandez had worked at BCB before and had a better idea of what to do in unusual situations. In addition, Respondent asked Hernandez to speak with someone she had previously worked with at BCB to help with getting the prisoner there.

Respondent also asked EMS if they could assist with dropping the prisoner off at BCB. However, EMS declined to assist Respondent as they are not allowed to drop off prisoners at BCB.

Respondent said Hernandez spoke with the supervisor at BCB and she was told there were no patrol wagons or patrol wagon operators available to pick up the prisoner and bring him to BCB. Hernandez then told Respondent that Lieber was present at District 11 and available to talk over the phone.

During their conversation, Respondent explained his situation to Lieber. Respondent said the prisoner was able and willing to walk to BCB. Respondent also said that by walking the prisoner to BCB, they would avoid going to the 47 Precinct¹. Lieber then told Respondent to "do what ever you have to to get [the prisoner] to Central Booking." Respondent added that the temperature was around 50 or 55 degrees and clear.

¹ Respondent explained that once a prisoner has been recorded at BCB, the prisoner is then sent to another precinct for lodging.

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Respondent testified that the prisoner was not wearing leg shackles because it would have been difficult for the prisoner to walk. There were two uniformed officers walking the prisoner while Respondent was driving alongside of them.

Respondent testified that if he would have waited for a transport van to arrive, it would have taken 45 minutes to an hour for the van to arrive. Respondent said he is not aware of any complaints filed against him by the prisoner. Once the prisoner was lodged at BCB, Respondent notified [REDACTED] — the Duty Captain at the time. In addition, Respondent notified BCB via Hernandez.

With regard to Disciplinary Case 85046/09, on March 5, 2008, Respondent was working a 6:50 a.m. by 3:25 p.m. tour and assigned as the Desk Officer. Respondent asserted he inspected the stationhouse just before 8:00 a.m. He added that there were two prisoners in the holding cells at the time. Respondent said although he is required to inspect the District's parking lot, he did not because it was a "decent distance" from the District. Additionally, he would have left the prisoners unattended. In order for Respondent to actually inspect the parking lot, he would have to leave the District, exit through the turnstiles and walk up a flight of stairs. Respondent said that usually that are assigned to the stationhouse security posts, "Frank 10" and "Frank 11" are in charge of inspecting the parking lot.

Respondent testified that sometime after 9:00 a.m. Cardona came walking through the front door, screaming, yelling and cursing. Cardona told Respondent that another vehicle was parked in his parking spot and that Respondent should issue that vehicle a summons. Respondent then told Cardona, "I will take care of it." Cardona slammed the door and walked out. Respondent instructed Daly to inspect Cardona's parking space.

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After completing his inspection, Daly called Respondent and told him there was no vehicle parked in Cardona's spot. Respondent said he cannot issue a summons for a parking violation that he did not personally observe.

Respondent did not physically leave the District to inspect the parking lot because three more prisoners had arrived just before Cardona came in. Respondent said he was unable to leave the desk since he was monitoring the prisoners. Respondent, however, directed Daly to issue a summons. A summons was not issued because no one was parked in Cardona's parking spot. He added that Daly inspected Cardona's parking spot less than half an hour after Cardona's tantrum.

During cross-examination with regard to the first incident, Respondent said the prisoner had been previously arrested approximately 50 times for non-violent crimes such as, unlicensed vendor fare evasion and spitting on the ground. Respondent also acknowledged that the prisoner was a transit recidivist.

Upon questioning by the Court, Respondent said that the area where Cardona parked his vehicle is right by a McDonald's restaurant and there is a chance that a McDonald's customer could have parked in Cardona's parking spot. He said Cardona's parking spot was the first spot behind the crosswalk on 161 Street. The parking spot is marked but the paint eventually wears off. Respondent further said that it is difficult to tell where the parking space begins and where it ends.

Moreover, Respondent said Daly told him Cardona's vehicle was parked in his designated spot and no other vehicle was encroaching on Cardona's spot. In order for Cardona to parallel park in his spot, he would have to drive on to the sidewalk and then pull in. He added that the officers issue most of their summonses along this particular

sidewalk and if Daly had seen an unauthorized vehicle, whether it was a member of the service's vehicle or a vehicle belonging to the general public, Daly would have issued the vehicle a summons

Respondent said there is very little leg room in the back seat of an RMP due to the partition. He said a prisoner would have to be guided into the RMP. The prisoner would first have to get one foot in, then his body, and then the other foot.

FINDINGS AND ANALYSIS

Disciplinary Case No. 85046/09

Respondent stands charged herein with failing to comply with a lawful order to summons a car. Respondent is found Not Guilty. Evidence adduced at trial established that Respondent was covering the desk at the command and there were prisoners held at the command at the time. He decided to ask Police Officer Daly to check the parking area and summons any car in the commanding officer's parking space. Based on the commotion that then-Captain, now Deputy Inspector Cardona made about the parked car, Police Officer Bradley, who was encroaching on the spot, was directed to remove his vehicle by another supervisor. He immediately removed his car. By the time Daly went to the spot, the car was already moved.

It must be noted that Daly testified before this Court that he did not recall being asked by Respondent to go to the parking lot to summons the car. The Court also acknowledged that given the course of doing patrol, this would not stand out as a remarkable event. Particularly given the fact that if Daly went to the parking spot and no car was there to issue a summons, there was no event that made this stand out as

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remarkable. Indeed, Daly stated that it was possible he received that directive from Respondent and attempted to issue the summons but the car was removed and the captain's car was in its spot. In addition, Respondent testified that everyone knew that a member of the service's car in the captain's spot could receive a summons just like any other vehicle that belonged to a member of the public.

Without an observation of a vehicle in the captain's spot, a summons could not be issued. Cardona testified credibly that Respondent did not violate the directive by assigning a police officer to the task of checking the parking situation and issuing the summons as per his order to Respondent.

Accordingly, Respondent is found Not Guilty.

Disciplinary Case No. 86007/09

Respondent is charged with engaging in conduct prejudicial to the good order, efficiency, and discipline of the Department in that he walked a prisoner from Lincoln Hospital to Bronx Central Booking. Respondent is found Not Guilty.

Evidence adduced at trial established that Respondent responded to Lincoln Hospital after learning that a prisoner was being released. When he arrived, efforts were made by him and the officers who were with the prisoner to get him in the RMP. The prisoner had a back brace and complained that he could not bend to get into the RMP. Respondent described for the Court that the RMP had a partition which limited the room to get into the back of the vehicle. One would have to put his foot in first, twist the upper body and turn to get the rest of the body into the vehicle and the prisoner was unable to do that.

Respondent testified credibly on how he contacted EMS to transport the prisoner from the hospital to BCB. EMS informed him that they transport people to the hospital not from the hospital. He also contacted a sergeant at his command to contact BCB to see if they had a van available to transport the prisoner. Respondent stated that his sergeant informed him that BCB either did not have a vehicle that could do the transport, or did not have a driver who could operate it. Respondent even spoke to Captain Lieber at his command. He advised him of the circumstances and the captain told him in sum and substance to do whatever he had to do. This was corroborated by Captain Wynne who spoke to Captain Lieber shortly after the incident and prior to testifying at trial. Wynne reiterated that Lieber told him that Respondent advised him of the circumstances and Lieber ended the conversation by telling Respondent to do what he had to do.

Respondent testified credibly that he had to make a judgment call. He could either stay at the hospital to wait for a vehicle that was not available and wait anywhere from 45 minutes to an hour or more, or he could walk the prisoner the 14 blocks to BCB. Respondent stated that he told Lieber about the option of walking and he was told to do what he had to do. Respondent said the two officers walked the handcuffed prisoner as he followed beside them in the RMP. He stated that the prisoner said he could walk, that he made the trip in 20 to 25 minutes and never paused to stop and take a break. Respondent felt this was the best option given the circumstances.

Wynne testified that he felt this action of Respondent was a violation for two reasons. One was the safety issues involved in walking a prisoner in the area of the Grand Concourse where he could escape. The second reason was walking may exacerbate the prisoner's injuries.

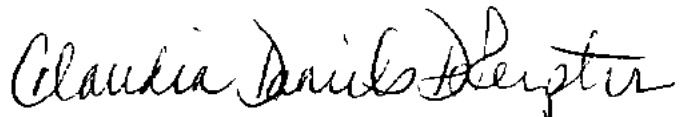
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Respondent testified that safety was not a real issue because the prisoner was handcuffed and escorted by two police officers and him following in an RMP. He also noted that it was 3:00 a.m. as they traveled. The weather was clear and the prisoner had a coat and a scarf. They also walked predominantly down industrial streets where there were limited members of the public present particularly at that time of the day. He further noted that the prisoner felt he could walk rather than contorting his body risking further injury to his back attempting to get in an RMP. Moreover, the prisoner was not a flight risk given his back injury and back brace. He also was a recidivist of non-violent crimes, not a violent felon who might try to flee.

A review of the Patrol Guide does not specifically prohibit transporting a prisoner on foot. Although one would be mindful of doing so alone for several blocks, such was not the case in this instance. Respondent clearly articulated his reasons for taking the action that he did given the circumstances of a prisoner with a back condition that would not allow him to bend into an RMP with a partition.

Accordingly, I find Respondent Not Guilty.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner - Trials

APPROVED
NOV 23 2011

RAYMOND W. KELLY
POLICE COMMISSIONER