



POLICE DEPARTMENT

March 13, 2014

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Timothy Geary
Tax Registry No. 945680
112 Precinct
Disciplinary Case No. 2012-8216

Police Officer Robert Cohen
Tax Registry No. 934660
103 Precinct
Disciplinary Case No. 2012-8217

The above-named members of the Department appeared before me on August 19, 2013, October 29, 2013 and January 8, 2014, charged with the following:

Disciplinary Case No. 2012-8216

1. Said Police Officer Timothy Geary, while on-duty and assigned to the 72nd Precinct, on or about May 23, 2012, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer failed to properly perform his duties, to wit: said Police Officer failed to conduct a complete and thorough investigation into an assault complaint.

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

2. Said Police Officer Timothy Geary, while on-duty and assigned to the 72nd Precinct, on or about May 23, 2012, wrongfully released an individual before completing a thorough investigation.

P.G. 212-11 - STOP AND FRISK

Disciplinary Case No. 2012-8217

1. Said Police Officer Robert Cohen, while on-duty and assigned to the 72nd Precinct, on or about May 23, 2012, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer failed to properly perform his duties, to wit: said Police Officer failed to conduct a complete and thorough investigation into an assault complaint.

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

2. Said Police Officer Robert Cohen, while on-duty and assigned to the 72nd Precinct, on or about May 23, 2012, wrongfully released an individual before completing a thorough investigation.

P.G. 212-11 - STOP AND FRISK

The Department was represented by Christine Maloney, Esq., Department Advocate's Office. Respondents Geary and Cohen were represented by Craig Hayes, Esq.

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 Nos. 2012-8216 and 2012-8217

Respondent Geary and Respondent Cohen are found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

Department called Lieutenant James Colella, Justin Marr and Police Officer Christopher Furda as witnesses.

Lieutenant James Colella

Colella is a 19-year member of the Department. He testified that on May 23, 2012, while assigned to the 72 Precinct, at about 5:15 a.m., he responded to a 10-34 "assault in progress," along with six officers: Respondents Geary and Cohen (Respondents), and Police Officers Furda, Ciardiello, Noel and Gelber. Although the job was finalized with the disposition of "no assault," Colella still went to the scene because "[i]t's a sensitive area in the command. At that time, we had a specific pattern number 9 going on, which indicates - - it was a rape pattern."

No one was at the scene of the alleged assault when Colella arrived, so he requested that the radio dispatcher ask the victim to approach him, but instead, the radio dispatcher informed Colella of another job, a 10-24 "past assault" (referring to the same incident). Colella noticed two white males (witnesses) and one Hispanic female (the victim) on the corner of 16 Street, walking southbound on Fourth Avenue. Colella said that he interviewed one of the two males, James Marr, the individual who called 911. According to Colella, Marr told him that he was coming from work and heard the victim scream, "Help." Marr walked towards the screams and observed another man (the suspect) standing next to the victim. The suspect ran away as Marr approached the victim. Marr asked the victim if this was the person and she responded, "Yes, yes, yes."

Marr gave chase, and subsequently managed to bring the person into custody and telephone the police.

Colella also interviewed the victim. The victim told Colella that she was going home and believed that she was followed from the train station. Additionally, the victim said the suspect placed his hands near her vaginal area. Colella documented the information of the two witnesses in his Activity Log.

Colella then requested all the members who had responded to the job to return to the scene. Colella asked Respondents to conduct a canvass with the victim and prepare a Stop, Question and Frisk Report (UF-250) for the individual they had stopped. The canvass was conducted for about less than an hour. Colella also conducted a canvass with Marr. Colella said that during the canvass, Marr was "aggravated and animated," because he had not previously experienced this type of investigative activity. He said Marr was cooperative during the canvass. The canvass concluded with negative results.

Colella said Pattern 9 involves a series of sexual assaults (rape and attempted rape) against females in the vicinity of where this incident occurred. The most common description of the suspect was a male Hispanic between 120 and 180 pounds.

Back at the precinct, Colella interviewed Respondents. He said Respondents told him that "they responded to the scene, they had no victim, so they felt it was necessary to let the person that they stopped go."

Colella testified that he had disseminated information about Pattern 9 to his subordinates during several roll calls.

After the canvass, Respondents and Colella returned to the precinct where Colella instructed Respondents. Colella told Respondents that they should have spent more time

at the scene while the witness went to look for the victim. Additionally, he told Respondents that "maybe they could have brought back the person that they stopped, question and frisked because the ID they obtained wasn't clear at all. There was a language barrier, and there was no documentation." He also said they could have brought the suspect to the precinct to be identified by detectives and other officers.

On cross-examination, Colella agreed that upon meeting the reasonable suspicion standard, Respondents could have asked the suspect to return to the precinct with them. However, if the suspect refused to go with Respondents, they could have requested a supervisor to respond to the scene. Colella agreed that Respondents did not have probable cause to bring the suspect to the precinct. He also agreed that his instruction to Respondents to bring the suspect to the precinct would have been against the law as Respondents did not have probable cause. However, Colella agreed that Respondents could have asked the suspect to voluntarily come with them to the precinct.

Colella agreed that it is not illegal for someone to not have proper identification. Colella also agreed that a person cannot be detained or brought to the precinct because the person does not have identification. Colella acknowledged that he did not instruct members of his precinct regarding Pattern 9 every day. He also acknowledged that he is constantly given different crime patterns that occur within the confines of his precinct.

Colella agreed that the last incident that fit Pattern 9 occurred eight months before this incident.

Colella said that a Quest for Excellence Sheet records conditions of the precinct. These conditions range from Grand Larceny-Auto, burglary, accident-prone locations and crime patterns. Conditions change on a weekly basis. Respondent's Exhibit (RX) A is a

copy of the Quest for Excellence Command Conditions Report for the week of May 14, 2012 to May 20, 2012, for the first platoon tour (Respondents' assigned tour at the time of the incident) for Sector A and Sector B. According to RX A, Respondents' conditions for their tours from May 14, 2012 to May 20, 2012, Sector A included Grand Larceny-Auto, petit larceny, graffiti, and Grand Larceny-Motorcycles. Additionally, conditions for Sector B included accident-prone location Third Avenue and 20 Street, graffiti, Grand Larceny-Auto, larceny from construction sites, and Grand Larceny-Motorcycles.

Colella agreed that officers who have detained a person based on reasonable suspicion have to be mindful that they do not violate the detainee's rights during the detention. Colella agreed that two other officers, Noel and Gelber, also assisted Respondents. Noel and Gelber told Colella that they were instructed to canvass the area for a Hispanic female (the victim) but they did not exit their radio motor patrol car (RMP). Colella agreed that Noel and Gelber were not disciplined for their conduct that day. He acknowledged that a good canvass is conducted by car and on foot.

Colella agreed that a crime pattern, along with other factors, can be used to establish reasonable suspicion. Colella agreed that he has prepared a Department evaluation for Respondent Cohen in the past but did not recall the content of the evaluation. During his official Department interview, Colella stated that Respondent Cohen does not meet the standards as a police officer with respect to "[g]oing to jobs, handling jobs, as far as broadcasting transmissions, as far as morale when other police officers bring in arrests and things of that nature saying I don't do this, I don't do that, I don't believe in 250's, I don't believe in a certain arrest." Colella stated that he did not issue a Command Discipline to Respondent Cohen, but if he wanted to, he would have.

On re-direct examination, Colella agreed that an ongoing crime pattern does not need to be highlighted for a certain week. Colella did not know whether Gelber or Noel looked for Marr during their canvass. Colella agreed that he takes crime patterns into consideration when investigating a case.

Justin Marr

Marr testified that on May 23, 2012, at about 5:00 am, he was heading home from work in the vicinity of 16 Street and Fourth Avenue. As Marr walked home, he first observed the victim, who was wearing a short black dress, cross the street and then heard her scream "Help me help me." He ran towards the direction of the screams and saw a "short Hispanic man" walking towards him. Marr asked the suspect, "Did you do something to her?" but the suspect replied that he did not, and Marr let him walk away. Marr asked the victim, "Was that him," and the victim "nodded her head yes," but by this time, the suspect had run away and was at the end of the street. Marr dropped his book bag "in the middle of the road" and chased after the suspect. Marr chased the suspect to the corner of Prospect Avenue and Fourth Avenue where the suspect put his hands up and said it was not him (Department's Exhibit [DX] 1 is a video showing Marr running after the suspect.) The suspect told Marr not to touch him and walked away and tried to hail a taxi. Marr then called 911. (DX 2 is a CD of the 911 call.)¹

When the police arrived, Marr told them that he observed "this Hispanic man accosting a woman up the block. I think I left my bag in the middle of the street. I can go get the girl and grab my bag if you guys want to meet me up there." Marr went back to the scene of the incident and found the victim in her apartment and asked her if she

¹ The CD contains an audio recording of this 911 call and a subsequent 911 call made by Marr.

wanted to identify the suspect because the police were on their way. Marr then observed an "unmarked" vehicle drive by, and tried to wave it down, but the vehicle drove away.

Marr then called 911 again (DX 2).

Marr explained that before he went to recover his bag and to look for the victim, "I just said, you know, meet me up the block, and I'm going to look for the girl. I mean, that was it. There was no formal plan, I guess." Marr was not accompanied by the officers. After placing the second 911 call, Marr walked to the corner of Prospect Avenue and Fourth Avenue with the victim. Marr flagged down an RMP driving north on Fourth Avenue and asked what had happened. The officers told Marr that other officers had stopped the suspect but then released him. Marr then canvassed the area with [Colella] for 15 minutes and "[w]e got a call that they had caught someone, but it wasn't the guy. I identified him."

On cross-examination, Marr said that before the victim crossed the street, she was less than 10 feet from him. Marr continued to walk toward his apartment when he heard the victim scream. Marr ran toward the screams and he and the suspect walked past each other between two parked cars.

Marr said that he told the 911 operator that someone had groped the victim based on what he had witnessed and based on what he had experienced. Marr admitted that he did not observe the suspect touch the victim.

Marr said that he told the 911 operator that he observed three police vehicles. He told the first officers that the victim had been accosted by the suspect and that the victim was able to identify the suspect. Marr testified that he told the officers to meet him on 16 Street because he would bring the victim there and he also had to retrieve his bag. Marr

said the officers did not ask him to stay. When Marr returned to the scene of the incident, the victim was no longer there. Marr also saw another unidentified individual standing there. Marr and this individual, who knew where the victim lived, walked up the block, past a couple of houses, where they found the victim's house. Marr called the victim down and asked her what had happened. The victim told Marr that she was accosted and groped. Marr told the victim that the police were on their way and that she should identify the suspect. Marr then saw an unmarked police vehicle driving slowly down the street and tried to wave it down but the vehicle did not stop. By this time, Marr said, it was already daylight.

Marr stated that he called 911 the second time after about 10 or 15 minutes. He said he waited another 15 minutes for the police to arrive. He acknowledged that about 25 to 30 minutes had passed since his first encounter with the police. Marr said he told the first police officers that "this man accosted a woman."

Police Officer Christopher Furda

Furda testified that on May 23, 2012, he was working a midnight tour, assigned to sector G with his partner, Police Officer Ciardiello. At about 5:07 a.m., Furda and his partner arrived in the vicinity of Fourth Avenue and Prospect Avenue for an "assault in progress job." When Furda arrived, he observed Respondents standing on the corner with a Hispanic male. Furda asked Respondents what they had and Respondents told him that "there was an assault, but they had no complainant." Although Furda was not fluent in Spanish, he tried to elicit the suspect's pedigree information (for about less than two minutes), but the suspect was unresponsive. At that point, Respondents asked an

unidentified male to help with Spanish interpretation. Furda was not part of this conversation and returned to his vehicle. As he returned to his vehicle, Noel and Gelber pulled up “and they said that they didn’t have anything.” Furda testified that if he had to communicate with a Spanish-speaking person, he would request a Spanish-speaking officer or an interpreter.

On cross-examination, Furda said he responded to the scene as a back-up officer. Furda communicated with the suspect without having been requested by Respondents. He described the suspect’s demeanor as calm. Furda agreed that he understood Noel and Gelber’s statement to mean that they had conducted an unsuccessful canvass for the complainant/victim.

DX 3 is a copy of the Stop, Question and Frisk Report. DX 4 is a copy of the Sprint Report for the 911 calls.

Respondents’ Case

Respondents testified in their own behalf.

Respondent Geary

Respondent Geary, a seven-year member of the Department with a total of 90 arrests, testified that on May 23, 2012, he was working a midnight tour with his partner, Respondent Cohen. Respondent Geary was the recorder. He responded to Prospect Avenue and Fourth Avenue for a 10-34, possible assault. At the scene, he observed individuals: the 911 caller (Marr) and an Hispanic male (the suspect). Respondent Geary said he spoke with the suspect, while his partner spoke with Marr. Respondent Geary

heard Respondent Cohen ask the suspect what happened and was someone assaulted. Respondent Geary also heard Marr state that he had chased the male down the block because he heard a female scream.

Respondent Geary testified that Marr was very uncooperative because he wanted to retrieve his personal belongings that he had dropped. Respondent Geary observed Respondent Cohen physically hold Marr and tell him, "You can't leave at this point." Respondent Geary said he spoke to the suspect while Marr was there, and continued to speak to the suspect after Marr left. He noticed that, although it was a humid day, the suspect was not sweating. Additionally, the suspect did not seem nervous and was respectful. Respondent Geary prepared a UF-250 after his interaction with the suspect.

Noel and Gelber also arrived at the scene. Respondent Geary asked them to canvass the area with Marr but then remembered that Marr had run off to recover his belongings. About seven or eight minutes later, Noel and Gelber, who were in a black unmarked Department vehicle, returned to the scene and told Respondent Geary that the results of the canvass were negative.

Furda and Ciardiello also arrived to the scene, and Furda assisted Respondent Geary in obtaining pedigree information from the suspect. Respondent Geary also asked a random, unidentified bicyclist to assist in translating. Respondent Geary detained the suspect for about another 90 seconds and explained why he had stopped him before letting him go. Respondents released the suspect because they did not have any more facts to reasonably detain the suspect longer, and then they resumed patrol. About five or six minutes later, a second call came in as a "10-24," sexual assault, and Respondents responded to the scene again. At the scene, they observed Colella, the victim, and Marr.

Respondent Geary told Colella that they stopped the suspect for about eight minutes, did not have a victim, the witness had left the scene, and the canvass yielded negative results. Colella then instructed Respondents to canvass for the suspect again, which Respondents did, but were unsuccessful in finding him. Respondents' patrol sergeant also responded and instructed Respondents to prepare a complaint report for the victim.

Respondent Geary testified that the most important Quest for Excellence conditions are announced during roll call. He said no announcement concerning a sexual assault was announced during his roll call for that tour. He recalled "many months" prior to May 23, 2012, being informed about an individual who was groping women in the area.

On cross-examination, Respondent Geary agreed that he has obtained pedigree information from people using the Spanish language. However, he was not able to obtain the suspect's address because, "due to my expertise working in the Hispanic community, most of who are immigrants to the country, a lot of these individuals...basically they're nomads." Respondent Geary said that the suspect mumbled and that the only thing he was able to understand was that he was from the Bronx.

Respondent Geary explained that Marr was uncooperative because when he first observed Marr, Marr was "screaming into his cell phone at the 911 operator. He eventually hung up. He was pacing back and forth, he was sweating. He wasn't really answering the questions being asked of him." Respondent Geary said he did not ask Marr for any of his identifying information. Respondent Geary said that he asked Noel and Gelber to conduct a canvass with Marr. Respondent Geary did not tell Marr that he

was going to be a part of the canvass, but instead, told Noel and Gelber to meet Marr on 16 Street.

Respondent Geary said he found Marr's request to retrieve his personal belongings unreasonable because "he called 911, he couldn't articulate the reason why he stopped this individual, and now he wanted to leave the scene and leave us basically high and dry. If he had cooperated, we would have accommodated him in getting his personal belongings." Respondent Geary did not ask Noel or Gelber for Marr's whereabouts. Respondent Geary believed that once Marr retrieved his property, he would assist Noel and Gelber with the canvass. Respondent Geary agreed that he did not ask the radio dispatcher for a call back on the 911 caller. He also did not request a supervisor on the first 911 call.

On re-direct examination, Respondent Geary agreed that he has prepared a UF-250 on a person who was either homeless or was not able to provide a specific street address.

Respondent Cohen

Respondent Cohen was Respondent Geary's partner on the date of the incident. His testimony was more or less identical to Respondent Geary's testimony.

Respondent Cohen is a nine-year member of the Department. When Respondent Cohen arrived at the scene, he decided to speak with Marr, instead of the suspect, because Respondent Geary spoke Spanish and would be able to communicate with the suspect. Respondent Cohen asked Marr what had happened and Marr responded, "I don't know...I heard a woman scream and I saw this guy running, so I chased him." Marr also

told him that he heard the screams somewhere around 16 Street and that the woman was wearing a black dress, but he did not know where she lived. Marr then told him that he had to get his bag. Respondent Cohen told him, "You have to stay here," but Marr maintained that he had to leave and retrieve his bags. Respondent Cohen then told Marr that "I don't want you to go but I can't stop you." Marr then ran diagonally across Fourth Avenue toward 16 Street. When Noel and Gelber arrived, Respondent Cohen told them to follow Marr.

Respondent Cohen did not consider Marr to be dangerous. Noel and Gelber returned about five or 10 minutes later but did not find the victim or Marr. Respondent Geary prepared a UF-250 and Respondent Cohen finalized the job over the radio. Respondent Cohen testified that, based on his experience and knowledge of the law, he could not have detained the suspect any longer than he already did because he did not have reasonable suspicion or probable cause.

Respondent Cohen testified that he canvassed the area again after having been instructed to do so by Colella. He said he went to a few show-ups to identify the individual for whom they had prepared the UF-250, but he was unsuccessful. Respondent Cohen recalled that the last time he was informed about the sexual assault pattern was sometime in 2011.

On cross-examination, Respondent Cohen said he did not document Marr's pedigree information.

FINDINGS AND ANALYSIS

Respondents are charged, under Specification No. 1, with failing “to conduct a complete and thorough investigation into an assault complaint.” Under Specification No. 2, they are charged with “wrongfully releas[ing] an individual before completing a through investigation.”²

The two charges relate to an incident that occurred on May 23, 2012. The facts and circumstances of this incident are, for the most part, not in dispute. At about 5:00 a.m., Marr was walking home from work along 16 Street in the vicinity of Fourth Avenue in Brooklyn. He heard a woman scream, “Help me, help me.” Marr ran in the direction of the screams, and saw a man walking towards him. Marr testified that he asked the man if he had done anything to the woman and the man replied that he had not. Marr said that he let the man walk away and then approached the woman and asked if that was him. Marr testified that she nodded her head, indicating “yes.”

Marr further testified that he saw the man running so he dropped his book bag “in the middle of the road” and chased the man to the northwest end of Prospect and Fourth Avenues.³

Marr said the man stopped at that corner and put his hands up. The man then tried to hail a cab and casually walked away. Marr called 911. There is an audio recording of this call (DX 2). Marr can be heard yelling at the man and telling him to stay put.

² Respondents are charged in separate dockets; however, the specifications are identical. To simplify matters, I refer herein to each specification in the singular, but it should be noted that I am addressing the duplicate specifications as they exist as to each Respondent.

³ Prospect Avenue and 16 Street run parallel to each other. Sixteenth Street crosses Fourth Avenue one block north of Prospect Avenue.

The call, which lasted 3 minutes and 45 seconds, came to an end as Respondents arrived on the scene. Marr testified that he told Respondents,

I saw this Hispanic man accosting a woman up the block. I think I left my bag in the middle of the street. I can go get the girl and grab my bag if you guys want to meet me up there.

Respondents both testified about coming on the scene and seeing a white man on a telephone and a Hispanic man. Respondent Geary approached the Hispanic man, while Respondent Cohen approached the white man, who was Marr.

Respondent Cohen testified that his conversation with Marr began as Marr was ending his call with the 911 operator. Respondent Cohen said that he asked Marr what happened, and Marr stated that he did not know. When Respondent Cohen made further inquiry, Marr stated that he had heard a woman scream and saw "this guy" running, so he gave chase. Both Respondents said that the issue that was of most concern to Marr was the retrieval of his book bag. Marr, they testified, ran off across Fourth Avenue. Respondent Cohen said that he then turned to Gelber and Noel, who had arrived at the scene, and told them to follow Marr and see if they could find the victim.

At this point, Respondents were alone with the suspect, whom they described as being calm. They indicated that he did not try to leave. They tried to interview him, but he seemed not to understand. Respondent Geary said he spoke some Spanish but was still unable to communicate with the suspect, who produced no identification. Furda, another officer who responded to the scene, also spoke some Spanish but was equally unable to communicate with the suspect. An attempt was made to get an unidentified bicyclist to speak with the suspect, but that was also unsuccessful.

Gelber and Noel returned to the scene about 5 to 10 minutes after they left, according to Respondent Cohen, who testified that they told him they did not find the victim or Marr. Respondent Geary completed a Stop, Question and Frisk Report, UF-250, and Respondent Cohen closed out the job accordingly. Believing they had no further basis to detain the suspect, Respondents let him go.

While this was going on, Marr said he retrieved his bag and then started looking for the victim. He found the victim, who told Marr that she had been accosted and groped. Marr said that he then saw what he believed to be an unmarked police vehicle drive slowly by, which he tried to wave down, but the vehicle did not stop. After that car drove by, Marr called 911 again. After waiting a few more minutes, he walked with the victim to the corner where he had left Respondents and the suspect, but no one was there. Thereafter, Colella arrived and an investigation was launched, which resulted in these charges.

At trial, the Advocate argued that Respondents should have done more before releasing the suspect. Respondents argued that when Gelber and Noel returned, they had no alternative but to release him.

Respondents further argued that the suspect had been detained for between 8 and 10 minutes. The Advocate argued that it was 6 minutes. The Sprint report (DX 4) showed that Marr made the first 911 call at 5:06 a.m. At 5:09 a.m., Marr saw the police. At 5:15 a.m., Respondents called in "No 34," meaning no assault, which would indicate that, at most, Respondents detained the suspect for 6 minutes.

Counsel for Respondents cited several court decisions in support of his argument that Respondents acted appropriately in releasing the suspect, but the cases cited are

distinguishable from the instant case. In People v. Lee, 96 A.D.3d 1522 (3rd Dept. 2012), the first case cited by Respondents, the appellate court held that a detention of 24 minutes, without reasonable suspicion that defendant had committed a crime, was impermissible. However, as will be seen, the Lee case is different not only for the much greater period of time involved but for the basis for holding the individual.

In Lee, *supra*, a local town justice called the police to report a man possibly stealing bicycles in the neighborhood. The justice based his call on his conversation with a newspaper delivery woman, who told him that she saw a man riding one bicycle while simultaneously pulling a second bicycle. The justice had also found a bicycle in his driveway. The police responding to the call drove one block from the justice's residence where they encountered the defendant, who matched the description of the suspect given by the delivery woman to the justice. One officer stopped the defendant for 24 minutes while another officer went to residences in the neighborhood searching for evidence of a crime. The delivery woman showed up at the scene 24 minutes after the initial encounter with the police, and identified the defendant as the person she had observed, earlier in the morning, with two bicycles. An additional 15 minutes passed before a civilian arrived and identified the bicycle that defendant was riding as his. The appellate court agreed with the trial court's ruling that reasonable suspicion did not exist until the delivery woman arrived, 24 minutes after the defendant's initial encounter with the police, and thus, defendant was detained for 24 minutes without reasonable suspicion, which violated his constitutional rights.

The circumstances here are obviously different. Unlike the officers in Lee, who were not even certain a crime had been committed when they stopped the suspect, the

police officers here, Respondents Geary and Cohen, had reason to believe that a crime had occurred and that the man, whom Marr had stopped and turned over to them, had committed that crime. Respondents had the level of proof necessary for an investigatory detention, something that did not exist in Lee.

Another case cited by counsel for Respondents is People v. Ryan, 12 N.Y.3d 28 (2009). Although counsel correctly pointed out that the Court of Appeals in Ryan held that the 13-minute detention of the defendant was inappropriate, what was critical to the ruling was the reason the detention did not pass muster.

Officers picked up Ryan, a person known to them from many prior encounters, in relation to a carjacking. Before Ryan was picked up, the victim had viewed a photo array and had identified someone else. The officers held Ryan for 13 minutes, while another witness was shown a photo array and positively identified him. Obviously, there was no basis to hold Ryan for any period of time as “[p]roper administration of the photo array did not require the defendant’s presence,” and no other exigencies existed to allow “holding defendant while the photo array was conducted.” Ryan, *supra* at 31. While in Ryan, the officers did not have a basis to hold defendant for any period of time, in the instant case, Respondents had a reasonable basis upon which to detain the suspect for a proper investigation.

The seminal case in this area is People v. Hicks, 68 N.Y.2d 234 (1986), in which the Court of Appeals ruled that a brief detention which included transportation of a suspect, which lasted less than 10 minutes, was a permissible incident of a lawful investigatory stop. The court held that a “special law enforcement interest” was served by the detention, in that it provided the opportunity for the police to diligently pursue “a

means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.” Hicks, *supra* at 241.

Clearly, Respondents had the right to hold the man Marr had turned over to them so that they could conduct an investigation. There is nothing in the law itself that required them to release the suspect after six minutes.

Counsel for Respondents also argued that Respondents are not legal scholars, they acted in good faith, and they should not be disciplined for their actions. To that end, he cited NYPD v. Tirado, a case decided at the Office of Administrative Trials and Hearings (OATH) in 2000.⁴

In Tirado, the officer was charged with conducting an unlawful stop and frisk, and the hearing officer held,

Moreover even if a determination was made that respondent had less than the required reasonable suspicion to stop and frisk Mr. Green, that finding alone would not render the officer’s conduct sanctionable. We have held that improper police action is punishable only if an officer acted “with knowledge that he was [acting] improperly, acted without concern for the propriety of his actions, or acted without due and reasonable care that his actions be proper.”

The Tirado case, to the extent that it might be considered precedent in this forum, stands for a different proposition than the one espoused by Respondents’ counsel. Tirado held that an officer should not be subject to discipline for doing his job, so long as he is acting reasonably and in good faith. Here, Respondents are charged with failing to carry out their duty as officers.

⁴ For a period of time, Civilian Complaint Review Board (CCRB) cases against police officers were handled at OATH. In Lynch v. Giuliani, 301 A.D.2d 351 (1st Dept. 2003), that practice was found to violate the Administrative Code, and OATH was enjoined from further handling cases involving police officers.

Looking at the circumstances here, Respondents had a real law enforcement interest in holding the man turned over to them by Marr. Further, while they had an obligation not to hold this man for an inordinate period of time, they were required to make sure they conducted a thorough and proper investigation before releasing him. This is consistent with the controlling case law and with the Patrol Guide.

The real question in this case is whether Respondents acted reasonably and professionally in releasing the man they were holding when Gelber and Noel returned with no information.

Respondents had a very brief interaction with Gelber and Noel upon their return. The Advocate asserted that Respondents should have had a detailed discussion with Gelber and Noel about what occurred during their canvass. Counsel for Respondents argued that Respondents had a right to rely on the simple statement by Gelber and Noel that they found nothing.

As the officers holding the suspect, Respondents had an obligation to make sure they completed their investigation before releasing him. If they believed that Gelber and Noel had nothing to add, or if they asked specifically and got no additional information, then they had an obligation to consider what other steps to take. The obvious thing would be to have "Central" call the original 911 caller [Marr] back.

There are a number of reasons for this. The first would be to see if Marr had located the victim. The second would be to let him know that if the victim could not be located they had an obligation to release the man he had caught. Lastly, Respondents apparently did not have any information about Marr and they should have obtained that information for their Activity Logs and for any report they may have done on the matter.

Calling back a complainant who had called 911 is an integral part of work on patrol. Obviously, at some level they accepted that Marr was an engaged and concerned citizen because if they had not, they should not have let Marr leave the area unescorted to recover his bag. Before closing the case out as unfounded, Respondents had an obligation to do more to find Marr and potentially the victim. They should have conducted a call back to determine where Marr was, something they apparently did not know and apparently did not care about.

There were also disturbing aspects in the testimony of Respondents about Marr, in which they characterized him as only being interested in retrieving his property. There is no doubt that once police arrived on the scene, Marr wanted to retrieve his bag, but to suggest that he was not interested in the man he had just caught, does not correlate with the situation Respondents encountered upon arriving at the scene, and is further belied by Marr's behavior during his first 911 phone call. Respondent Geary's testimony about Marr's lack of cooperation and his behavior when Respondents first arrived at the scene is directly contradicted by the recording of the 911 call (DX 2). Respondent Geary testified that when he first saw Marr, Marr was "screaming into his cell phone at the 911 operator. He eventually hung up." However, the 911 call (DX 2) shows not only that Marr was cooperative and answered the operator's questions, while yelling at the suspect to stay put, but that he did not hang up on the operator as alleged and instead politely ended the conversation with a "thank you, alright, bye."

This mischaracterization of Marr's behavior is disturbing and indicates that certainly Respondent Geary and apparently both Respondents did not take Marr's actions and statements seriously.

Marr was, in fact, a concerned and engaged citizen. As a concerned citizen, Marr also needed to be informed that the man he had caught was to be released, unless the victim was available or there was some other basis for detaining him. Again, this could have been accomplished by a call back.

Concern for the rights of the person they were detaining is certainly important, but it is not an excuse for failing to do basic police work. In the end, this is not a matter of knowing the law; it is a matter of knowing and being engaged in police work.

Counsel for Respondents also cited a “note” in Patrol Guide Section 212-11, which instructs officers not to wait for the arrival of a patrol supervisor before releasing a suspect “if investigation is *completed* and no probable cause [exists] to arrest suspect” (emphasis added). The finding, herein, is that the investigation had not been completed without the call back.

Another claim made about Respondents’ failure to investigate merits discussion, and it involves the alleged failure of Respondents to obtain any information from the suspect while he was detained. Respondents attempted to speak to the suspect in Spanish by using officers who spoke some limited Spanish and attempted to get a delivery man who spoke Spanish. In her opening statement, the Advocate asserted that Respondents could have called for a translator, or brought the suspect back to their command, to verify his identity. Colella testified that Respondents could have brought the suspect back to the stationhouse because the identification he had was not clear and because of the language barrier.

However, when asked about this issue near the end of the trial, the Advocate agreed that Respondents could not have brought the suspect back to the stationhouse

based on the information they had but still asserted that they could have gotten a proper translator to the scene. Reviewing the “note” in Patrol Guide Section 212-11, it states that “[i]f person stopped refuses to identify him/herself (and there is no reason to take summary action) check off ‘REFUSED’ in the appropriate space of ***STOP, QUESTION AND FRISK REPORT WORKSHEET***.” This would indicate that the suspect, who had been stopped and handed over to them by Marr, was free to refuse to answer questions.

The arguments made by a capable, experienced attorney and the opinion put forward by a supervisor in this Department, each with ample time to consider the issue, demonstrates how difficult these matters can be for patrol officers who have to deal with the issue in real time. In the end, the Advocate did not establish all of the aspects of Respondents’ alleged failure that had been claimed at the outset of this trial.

Specification No. 1 charges Respondents with having failed to conduct a thorough and complete investigation while Specification No. 2 charges them with releasing the male suspect before having completed that investigation. The two specifications are therefore intertwined.

As discussed above, the circumstances surrounding the detention of the suspect here required Respondents to have done more before closing the case out and releasing him. The Respondents, therefore, are found Guilty of Specification Nos. 1 and 2.

PENALTY

In order to determine an appropriate penalty, Respondents’ service records were examined. *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent Geary was appointed to the Department on January 17, 2008. Respondent Cohen was

appointed to the Department on July 1, 2004. Information from their personnel records that was considered in making this penalty recommendation is contained in attached confidential memoranda.

The Advocate has recommended a penalty involving the loss of 20 vacation days for each Respondent. In assessing an appropriate penalty, it must be noted that Respondents were not found guilty of the full range of misconduct claimed by the Advocate. Indeed, as has been noted, some of the alleged failures, such as the failure to get any useful information from the suspect who was detained, did not constitute misconduct.

There is also an apparent belief on the part of the Advocate that had Respondents done a better job, the suspect would not have been released and would have been arrested for a crime against the victim. While that is certainly possible, it is not necessarily so. Marr ran up 16 Street and was not heard from again until his second call to 911. In that call, Marr explained that the victim, the young woman, had been inside her apartment but was now outside and willing to talk to the police. According to the Sprint report (DX 4), that call came in at 5:19 a.m., about 4 minutes after Respondents let the suspect go.

Had they called Marr back at 5:15 a.m., before they let the suspect go, they might well have reached Marr at a point in time before he had found the victim. If that call provided a negative result, they may well have had to release the suspect anyhow. Of course we do not know and should not speculate, but there is certainly the possibility that the result would have been the same.

Finally, the Advocate argued that Respondents should have been aware of the precinct condition involving a suspect who groped women in the neighborhood.

Respondents denied knowledge of that condition and no proof was offered to establish that they knew.

All of these matters have been considered in making the penalty recommendation. It is therefore recommended that each Respondent forfeit five (5) vacation days.

Respectfully submitted,



Martin G. Karopkin
Deputy Commissioner – Trials

APPROVED

APR 18 2014

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

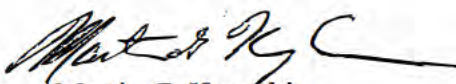
From: Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER TIMOTHY GEARY
TAX REGISTRY NO. 945680
DISCIPLINARY CASE NO. 2012-8216

In 2013, Respondent Geary received an overall rating of 4.5 "Extremely Competent/Highly Competent" on his annual performance evaluation. He was rated 3.5 "Highly Competent/Competent" in 2011 and 3.0 "Competent" in 2012. [REDACTED]

[REDACTED]
[REDACTED]

He has no prior formal disciplinary record.

For your consideration.


Martin G. Karopkin
Deputy Commissioner – Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ROBERT COHEN
TAX REGISTRY NO. 934660
DISCIPLINARY CASE NO. 2012-8217

In 2012 and 2013, Respondent Cohen received an overall rating of 3.0 "Competent" on his annual performance evaluation. He was rated 3.5 "Highly Competent/Competent" in 2011. [REDACTED]

[REDACTED] He has no prior formal disciplinary record.

For your consideration.


Martin G. Karopkin
Deputy Commissioner – Trials