



POLICE DEPARTMENT

November 12, 2020

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In the Matter of the Charges and Specifications

- against -

Police Officer Rafael Tatis
Tax Registry No. 947951
26th Precinct

Case No.
2018-19437

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Kachina Brock, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Roger Blank, Esq.
Roger S. Blank, P.C.
387 Park Avenue South, Fifth Floor
New York, NY 10016

To:
HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Said Police Officer Rafael Tatis, while a Probationary Detective, while off-duty and assigned to the 1st Precinct, on or about August 23, 2018, while in Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Detective Tatis operated a motor vehicle while under the influence of alcohol. *(Dismissed)*
P.G. 203-10, Page 1, Paragraph 5
NYS VTL Section 1192(3)
PROHIBITED CONDUCT –
PUBLIC CONTACT
OPERATING A VEHICLE WHILE
UNDER THE INFLUENCE OF
ALCOHOL OR DRUGS
2. Said Police Officer Rafael Tatis, while a Probationary Detective, while off-duty and assigned to the 1st Precinct, on or about August 23, 2018, while in Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Detective Tatis operated a motor vehicle while his ability to do so was impaired by alcohol. *(Dismissed)*
P.G. 203-10, Page 1, Paragraph 5
NYS VTL Section 1192(1)
PROHIBITED CONDUCT –
PUBLIC CONTACT
OPERATING A VEHICLE WHILE
UNDER THE INFLUENCE OF
ALCOHOL OR DRUGS
3. Said Police Officer Rafael Tatis, while a Probationary Detective, while off-duty and assigned to the 1st Precinct, on or about August 23, 2018, while in Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Detective Tatis was unfit for duty due to his consumption of alcohol.
P.G. 203-10, Page 1, Paragraph 5
P.G. 203-04
PROHIBITED CONDUCT –
PUBLIC CONTACT
FITNESS FOR DUTY
4. Said Police Officer Rafael Tatis, while a Probationary Detective, while off-duty and assigned to the 1st Precinct, on or about August 23, 2018, while in Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Detective Tatis refused to submit to a breathalyzer test.
P.G. 203-10, Page 1, Paragraph 5
PUBLIC CONTACT –
PROHIBITED CONDUCT

5. Said Police Officer Rafael Tatis, while a Probationary Detective, while off-duty and assigned to the 1st Precinct, on or about August 23, 2018, while in Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Detective Tatis was involved in a motor vehicle collision and left the scene.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT

6. Said Police Officer Rafael Tatis, while a Probationary Detective, while off-duty and assigned to the 1st Precinct, on or about August 23, 2018, while in Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit said Detective Tatis failed to safeguard his off-duty Sig Sauer 226 firearm in that it was recovered from a gym bag on the floor of a closet in his apartment. (*Dismissed*)

P.G. 204-08, Page 2, Paragraphs 7 & 8

FIREARMS – GENERAL
REGULATIONS
PUBLIC CONTACT –
PROHIBITED CONDUCT

P.G. 203-10, Page 1, Paragraph 5

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on September 17, September 18, and October 8, 2020. Respondent, through his counsel, entered pleas of Not Guilty to the subject charges. The Department called Sergeant Anthony Bocola, Sergeant Kevin Lynch, Captain James Hynes, Captain Raffaele Petti, retired Deputy Inspector Andrew Benjamin, and Police Officer Pivatchai Jetjomlong as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Specifications 1, 2, and 6 were dismissed on the application of the Department Advocate, without opposition. Having reviewed all of the evidence in this matter, I find Respondent Guilty of Specifications 3, 4 and 5. I recommend that Respondent forfeit 32 suspension days, previously served, and an additional 23 vacation days. I further recommend that Respondent serve a one-year period of dismissal probation.

ANALYSIS

The following facts are not in dispute. Respondent reported for duty on August 22, 2018, and worked from 0800-1630 hours (T. 431). After going off-duty, Respondent attended a soccer match at Yankee Stadium; over a three to four hour period, he had something to eat and consumed no more than three cans of Coors Lite beer (T. 431-432, 455). After the match, Respondent spent approximately two hours at Billy's, a bar across the street from Yankee Stadium, at which he consumed an additional two to three Coors Lite beers, chicken strips and French fries (T. 432-433, 455-456). After leaving the bar, Respondent and several companions drove to Banc Cafe, near 29th Street and Third Avenue in Manhattan, arriving between 0030-0100 hours (T. 434, 435). At the restaurant, they had dinner and Respondent consumed another two Coors Lite beers (T. 435-436).

Respondent left the restaurant at approximately 0400 hours on August 23, 2018, and drove crosstown to drop off a friend at 52nd Street and 11th Avenue; from there, he drove up the West Side Highway to the Bronx (T. 437-439). Respondent recalled that he got onto the West Side Highway at approximately 0430 hours and arrived at his destination 35-45 minutes later (T. 438).

At approximately 0515 hours, Respondent's vehicle collided with a parked vehicle at a location in Bronx County (T. 56). Person A (hereinafter referred to as "the Complainant"), the vehicle's owner, heard a loud noise and looked out his/her window to observe Respondent's car driving slowly away before coming to a stop 10-15 car lengths away, in front of a fire hydrant (T. 64, 98, 293). Complainant looked out his window and saw a person, later identified as Respondent, emerge from the car, lock it with a key fob and walk away (T. 64-65, 191, 293).

The Complainant called 911 and reported that his car had been struck by another vehicle, whose driver had left the scene (Dept. Ex. 1B). The Complainant observed that Respondent's car had a police placard on the dashboard (T. 67, 95, 190, 191).

It is undisputed that there was no broken glass, airbag deployment or blood evidence, either inside or outside the two vehicles involved, nor at the scene of the accident (T. 98-100, 112, 213-215, 311-312, 419-420).

Police Officers Jetjomlong and Manzueta¹ responded to the location and ran a check on the license to determine the registered owner of the vehicle (T. 409). When the inquiry revealed Respondent's name and address, Police Officer Jetjomlong recognized Respondent as a Member of Service (T. 294). He and Manzueta went to Respondent's apartment and knocked on the door; after knocking for several minutes with no response, they returned to the scene of the accident and began preparing paperwork (T. 410-411, 412-413).

Police Officer Jetjomlong contacted Captain James Hynes, who was then a lieutenant and the First Platoon commander (T. 411). Captain Hynes responded to the scene and spoke with Police Officers Jetjomlong and Manzueta, as well as the Complainant (T. 228, 413). He observed that Respondent's car was parked at a fire hydrant, three to four feet from the curb and angled about 15 degrees into the oncoming traffic lane (T. 191-192, 207, 242). Captain Hynes then notified Captain Raffaele Petti, who was, at that time, the Patrol Borough Bronx Duty Captain (T. 192, 291-292). Captain Hynes went to Respondent's apartment door and knocked for about five minutes without any response before returning to the lobby of the building (T. 192, 199, 295, 413-414). Upon encountering the doorman, Captain Hynes asked him if he had seen

¹ Police Officers Jetjomlong and Manzueta are assigned to a Bronx Precinct known to the Tribunal.

Respondent; the doorman indicated that he had seen Respondent walk into the building (T. 193). He also showed Hynes video recordings of Respondent entering the building and riding in an elevator (T. 193; Resp. Ex. B). Captain Hynes then returned to the accident scene to await the Duty Captain's arrival (T. 193).

When Captain Petti responded to the scene, he observed Respondent's car parked on the street, as well as the Complainant's car and the damage done to it by Respondent's car. He conferred with Captain Hynes, as well as Police Officers Jetjomlong and Manzueta (T. 304). Captain Petti contacted Sergeant Kevin Lynch of the Investigations Unit, Patrol Borough Bronx, for assistance (T. 63, 305). Sergeant Lynch responded to the scene and was briefed by the responding police officers, Captain Hynes and Captain Petti (T. 63). Captain Petti then made the decision to go to Respondent's residence and conduct a wellness check/fitness for duty examination (T. 313).

Upon entering the lobby of Respondent's building, the police officers encountered the building doorman, who indicated that he had seen Respondent enter the building that morning (T. 68, 104). Captain Petti was shown the video of Respondent entering the lobby of the building (T. 306-307, 311-312; Resp. Ex. B). The police officers then went up to Respondent's apartment and began knocking loudly on the door (T. 68-69, 193-194, 296, 313, 415). After 10-15 minutes of knocking without any response, Captain Petti asked one of the police officers to contact the building superintendent to obtain a key (T. 69, 194, 297, 316, 415).

After receiving a key shortly thereafter, Captain Petti used it to enter Respondent's apartment at approximately 0830 hours (T. 120, 262, 316-317, 416, 423; Dept. Exs. 5, 6). The

observations the police officers made inside Respondent's apartment, as well as the specifics of their interactions with him, are in dispute.

Pursuant to Captain Petti's order, [REDACTED]
[REDACTED] by Captain Hynes and Police Officer
Jetjomlong (T. 195). Respondent refused to submit to breathalyzer testing² (T. 34, 195-196, 197;
Dept. Ex. 7). [REDACTED]
[REDACTED]

The following is a summary of the relevant trial evidence.

Sergeant Kevin Lynch testified that he is assigned to the Investigations Unit at Patrol Borough Bronx (T. 61). Sergeant Lynch, along with Captain Petti, Captain Hynes and Police Officer Jetjomlong, entered Respondent's apartment and walked into the foyer area; the Duty Captain began calling out, "Captain Petti, Duty Captain, NYPD," in a loud voice (T. 69, 130, 194). Sergeant Lynch then saw Respondent emerge from another room; he did not have any visible injuries but appeared unsteady on his feet and dazed (T. 69-70, 131, 132, 138, 416, 423). He also noticed that Respondent bore a strong scent of alcohol, detected from approximately four feet away (T. 70, 160).

Captain Petti then began asking Respondent questions, starting with whether he was "okay" (T. 70). According to Sergeant Lynch, Respondent stated that he either denied being in an accident or that he had no recollection of being involved in an accident (T. 70, 137-138). Sergeant Lynch testified that he and Captain Petti were asking Respondent questions but, "[h]e

² Respondent challenged the suspension of his driver's license at a hearing before a Department of Motor Vehicle hearing officer and the suspension was lifted.

wasn't making any statements. He had just left [the scene of the accident], but he wasn't making any statements about it. And he made some mention of the night before being at Yankee Stadium for some kind of event" (T. 70, 133-134). Sergeant Lynch conferred with the Captain Petti and they agreed that Respondent [REDACTED]. According to Sergeant Lynch, Respondent was unfit for duty, based upon being unsteady on his feet, the strong smell of alcohol and his evasive answers (T. 71).

Sergeant Lynch then notified his commanding officer³, before questioning Respondent about the presence of any firearms in the apartment. Respondent indicated that he had a firearm in a closet, from which it was recovered (T. 72-73, 155-156, 157). Sergeant Lynch did not accompany Respondent to the 45th Precinct for breathalyzer testing; he conducted formal interviews of the responding police officers and Captain Hynes, before drafting a UF-49 (T. 73, 161). The UF-49 was eventually signed by Captain Petti (T. 74, 148-150).

On cross-examination, Sergeant Lynch testified that although he observed body damage on each of the vehicles, he saw no broken glass; airbag deployment; or blood, inside or outside, either of them (T. 98). He admitted that Captain Hynes told him that he had seen a video of Respondent entering the building lobby before they entered Respondent's apartment but that he did not view the video before he entered (T. 100-101). Sergeant Lynch testified that he recommended that the police officers obtain a key from the building superintendent when Respondent did not respond to their loud knocking for approximately 30 seconds; his reasoning was:

³ Deputy Inspector Andrew Benjamin was the Commanding Officer of the Patrol Borough Bronx Inspections Unit (T. 386).

“I do know that my recommendation was that we needed to put eyes on the driver of the vehicle to ensure that he hadn’t had some kind of medical injury where he, perhaps, slammed his head, or whatnot, and we needed to gain entry to the apartment somehow.”

(T. 106, 110-111, 115-116, 117-118).

Sergeant Lynch conceded that the level of property damage he observed did not have a bearing on whether he suspected that Respondent had hit his head (T. 117). Lynch was then asked whether the deployment of an air bag would have given him greater cause to believe that Respondent may have been injured; he responded:

“Whether it could or couldn’t is immaterial. We believed that we needed to medically – since we were concerned medically, to be honest with you, we weren’t – there is also a time constraint. The longer we wait – we did not have any idea of his medical condition. So if you are talking about weighing all these factors to see if we could make entry, no, there was discussion that the air bag didn’t deploy, do you think that, therefore, he is not injured.

The fact that someone walked away from the vehicle in the middle of the road and then didn’t answer a banging door that caused other people to open their doors struck us as not a normal reaction. And, therefore, there was a sense of urgency to make sure that he was okay medically.”

(T. 118-119).

Sergeant Lynch further conceded that he was unaware of the layout of Respondent’s apartment prior to his entry and did not know whether an air conditioner may have been running at the time he knocked on Respondent’s door (T. 126).

In response to questioning by the Tribunal, Sergeant Lynch testified that it would have been inconsistent with his duties to have left Respondent’s apartment door before gaining entry, explaining:

“At these situations, especially when it involves an off-duty Member of Service, who possibly may have committed misconduct of some kind, we normally want to make contact with that member of Service, in order to get . . . I guess, while his recollection is fresh, you could say. However, the overriding concern in this incident, was again, a medical check to make sure that a Member of the Service was safe, that’s always the

overriding concern. And that, in my mind, superseded any investigatory duties and responsibilities as opposed to just being a supervisor and wanting to make sure a Member of the Service was medically okay.”

(T. 183-184).

Captain James Hynes testified that when he first encountered Respondent inside his apartment, he detected a moderate odor of alcohol on Respondent’s breath and observed that Respondent’s eyes were watery and glassy (T. 195, 273). Respondent answered Captain Petti’s announcement of his presence with, “What the hell are you doing in here? (T. 270). Once Captain Petti began asking Respondent questions, there were some which he answered and others which he did not (T. 267). Respondent did admit, however, that he had been to a soccer game at Yankee Stadium and had gone to a bar afterward (T. 195). Respondent claimed to remember driving home, but was unable to remember arriving home or being involved in a vehicular accident (T. 195).

After Captain Hynes [REDACTED]

[REDACTED] Hynes completed and signed a Supervisor’s Fitness for Duty report in which he asserted that Respondent was unfit for duty (T. 196-197, 275; Dept. Ex. 5).

On cross-examination, Captain Hynes conceded that he did not attempt to contact Respondent by telephone and did not know whether Captain Petti or Sergeant Lynch attempted to do so (T. 217-218). Captain Hynes was also asked what provision of the Patrol Guide controlled wellness checks; he answered:

“I think every officer – that reminds me of the scene from ‘A Few Good Men,’ where they give him the book and say ‘Can you tell us when it’s time to eat chow?’ I forget the specific line, but it’s every officer is trained in the academy that we have a responsibility and a duty to look after each other. You know, we protect each other out in the street and, you know, I would give up my life to protect someone, and, you know, one of my fellow officers. And, you know, in this circumstance, there is no way we would have left that building without making sure that Rafael was safe.”

(T. 260-261).

Captain Raffaele Petti testified that on August 23, 2018, he was the Second Platoon Duty Captain (T. 291-292). Shortly after reporting for duty, he received a telephone call from Captain Hynes, requesting his presence at the scene of the vehicular accident described above (T. 292).

When Captain Petti entered Respondent's apartment, he began calling out, "NYPD; this is Captain Petti. Officer Tatis, where are you?" (T. 298, 317, 320). After numerous attempts to locate Respondent within the apartment, he emerged from a bedroom looking "dazed and confused" (T. 298, 324). When Captain Petti asked him if he was Officer Tatis, he gave him "a thousand yard stare" (T. 298, 320, 321, 330). Captain Petti asked Respondent numerous times whether he was Officer Tatis, what he had been doing, and whether he had heard him knocking (T. 299). When he asked Respondent several times whether he needed an ambulance, Respondent asked, "Why are you in my apartment; why are you here?" (T. 299). Captain Petti asked Respondent whether he had been in an accident; Respondent's initial answer was "very evasive" (T. 299-300, 324). He continued to press Respondent about the accident, and eventually received an answer, but he was unable to recall the specifics of the answer Respondent gave (T. 300).

Captain Petti noticed an empty holster on a table in the hallway; he asked Respondent about his firearm and Respondent was slow to respond, stating, "I don't know why you're here and asking me these questions" (T. 301, 324-325). When Captain Petti continued asking about Respondent's firearm, Respondent said that he did not have to tell him where it was (T. 301). Captain Petti then spoke with Captain Hynes and directed him to contact Respondent's command

to obtain access to his locker (T. 301). Eventually, Respondent pointed to a duffel bag on the floor of a closet, from which Respondent's firearm was recovered (T. 301, 328-329, 331).

Captain Petti acknowledged completing a Supervisor's Fitness for Duty report (T. 302; Dept. Ex. 6). He asserted that he found Respondent unfit for duty based upon his demeanor, his evasive answers and the faint to moderate smell of alcohol on his breath (T. 303, 325, 329). Captain Petti informed Respondent that he would be transported by the other officers to the 45th Precinct IDTU for alcohol testing; that his firearm and apartment would be secured; and that a union delegate would meet him at the 45th Precinct (T. 303-304).

On cross-examination, Captain Petti was confronted with a memorandum signed by Deputy Inspector Andrew Benjamin in which D.I. Benjamin asserted that Captain Petti told him, on June 5, 2019, that "[Respondent] open[ed] the door and [let] them in, he was, apparently, intoxicated" (T. 335, 337-338, 387-390, 392, 393-394). Captain Petti denied recalling making such a statement to D.I. Benjamin (T. 335, 338, 339).

Under questioning by the Tribunal, Captain Petti acknowledged that in his role as the Duty Captain on August 23, 2018, he had an affirmative duty to report his findings at the scene, including signing the UF-49 which was drafted for his signature and submitting it for review in accordance with Patrol Guide procedure (T. 342).

In response to a question from the Tribunal, Captain Petti asserted that he would not have departed the scene without having made personal contact with Respondent, based upon "the circumstances of what I saw at the scene, the totality of all the facts I gathered from the witness and the officers on scene, and what I visibly saw at the scene with the vehicles and the video." Captain Petti explained:

“Because we don’t know if he had hit his head, whether his air bags deployed or not. I have been on numerous scenes, both overseas and in the continental U.S., where people’s injuries can come back later, hours later or days later, and come back, concussions can affect people days later, internal bleeding. So given the totality and not being able to get his attention at the door when I was able to get everyone on that floor to open up their door, it did heighten my concern for his well-being.”

(T. 343).

Respondent testified that once he arrived at his street the morning of August 23, 2018, he parked his car and walked into his building, where he greeted the doorman; he then went upstairs to his apartment and went to bed (T. 439-440, 456). As of the time of his return home, Respondent estimated that he had been awake for 24 hours (T. 439).

Respondent testified that once he went to bed, he did not hear any knocking on his door; according to Respondent, the air conditioning in his bedroom was on (T. 441-442, 462). He did, however, recall hearing police radios, voices and the shuffling of feet inside his apartment, which woke him up (*Id.*). When he stepped from his bedroom, he observed three uniformed officers, and one person in civilian clothes, whom he surmised was a Member of Service (T. 442-443).

According to Respondent, Captain Petti asked him several questions, which he answered; Captain Petti specifically asked whether Respondent had been in a vehicular collision, which he denied (T. 443-444, 457). He recalled Captain Petti telling him that they were trying to “do this like gentlemen” before turning to Captain Hynes and stating, “We are taking him” (T. 444).

According to Respondent, his interaction with Captain Petti occurred at approximately 0830 hours; he denied consuming any alcoholic beverages once he returned home, between 0515-0530 hours (T. 446). During his discussion with Captain Petti and the other officers, he was approximately four to six feet away from them (*Id.*). Respondent asserted that at the time of his interaction with Captain Petti, he did not believe he was under the influence of alcohol (T.

450-451). As of the date of his testimony before the Tribunal, Respondent had no recollection of being involved in a vehicular collision on August 23, 2018 (T. 461).

I credit the August 23, 2018, statement of the Complainant, as being forthright, logical and unembellished. Although their statement is indeed hearsay, and was not subjected to the crucible of cross-examination, I find the statement bears sufficient indicia of reliability to constitute credible evidence in this proceeding. The Complainant made the 911 call at or near the time of the accident; his/her assertion that Respondent's car had been abandoned in a precarious position was corroborated by the observations of all the responding police officers; and his claim that there was damage to his/her vehicle, as well as to Respondent's vehicle, was also corroborated by the responding police officers.

I further credit the respective testimonies of Captains Petti and Hynes; Sergeants Lynch and Bocola; and Police Officer Jetjomlong as forthright, logical and consistent with other evidence in the case. I had the opportunity to observe the demeanor of each witness as he testified before the Tribunal and find the material factual assertions in their respective testimonies to be reliable, notwithstanding Respondent's challenges to their veracity. I further find that their testimonies regarding the material issues at trial were generally consistent with each other, and corroborated by admissions Respondent made during his own testimony.

I note that Captain Petti's assertion at trial that he gained entry to Respondent's apartment through the use of a key provided by a member of the building staff appeared to be in conflict with a June 5, 2019, statement memorialized by his commanding officer, now-retired Deputy Inspector Andrew Benjamin. According to that memorandum, Captain Petti described entering the apartment as a result of Respondent opening the door (T. 387-390, 392-394; Resp. Ex. G).

The same memorandum later summarizes the mode of entry as Respondent “open[ing] it as the super of his building was opening the locks⁴” (T. 396; Resp. Ex. G).

I note that every other member of the entry team testified credibly that they entered through the use of a key and made no mention of Respondent coming to the door at the same time. While Captain Petti was unable to explain the discrepancy, I find that any arguable effect upon his veracity was minimal.

Respondent also argued that Sergeant Lynch’s testimony that Respondent’s car and the complainant’s car were “stuck together” was false and rendered his entire testimony unreliable. An examination of the Complainant’s statement, however, contains an assertion that after Respondent’s car struck his car, it rolled away and then “kind of got stuck” as Respondent apparently attempted to put the car in reverse (Dept. Ex. 3-A, p. 3, ln. 10-11). Since it is undisputed that Sergeant Lynch did not witness the collision, and he conducted the interview of the Complainant in evidence as Department Exhibit 3-A, it is more likely that his reference to the cars being stuck together may have been attributable to confusion or faulty recall than a deliberate attempt to mislead the Tribunal. In either event, I do not find that positioning of the two vehicles was material to the issues in controversy at trial.

At the outset, I will address Respondent’s argument that because the police officers who entered his apartment on August 23, 2018, did so without either a search warrant or his consent to enter, the observations they made therein of his demeanor should be disregarded by this

⁴ While Respondent offered Exhibit G in an attempt to attack Captain Petti’s veracity with respect to his assertion that he entered Respondent’s apartment through the use of a key provided by someone on the building staff, fundamental fairness required me to also consider the summary statement included in Exhibit G to determine whether the discrepancies between the statements recorded therein and Captain Petti’s in-trial testimony resulted from a deliberate attempt to mislead the Tribunal or merely inaccuracy.

Tribunal. While it is beyond dispute that the Fourth Amendment protections against unreasonable searches and seizures apply to the home, those protections do not, and cannot, override the duty to protect life. The credible testimonies of Captains Petti and Hynes, as well as that of Sergeant Lynch, constitute persuasive evidence that their purpose in gaining entry to Respondent's apartment that morning was to ascertain the well-being of a fellow Member of Service, to whom they owed a moral and institutional duty of care.

The circumstances of the motor vehicle collision which led up to the complainant's 911 call (*i.e.*, a collision with a stationary vehicle at an early hour of the morning; the driver exiting the vehicle and locking it with a key fob, while leaving the car parked unlawfully at a fire hydrant with the rear end angled into the lane of oncoming traffic; and leaving the scene without making any effort to notify the owner of the damaged vehicle that he was acknowledging fault) strongly raises concerns about the health and mental state of the driver.

The Duty Captain is explicitly charged by the Patrol Guide with ascertaining whether a Member of Service is unfit for duty as a result of intoxication and must report his findings to, among others, the Chief of Personnel, Chief of Department and First Deputy Commissioner (P.G. 206-12 [4], [5], [12]). Moreover, the concern over the unconstitutional acquisition of evidence to be used against Respondent in a criminal proceeding can be addressed with a criminal court's remedy of the Exclusionary Rule. That rule, however, does not apply to administrative hearings.

Whether Captain Petti, Captain Hynes, and Sergeant Lynch had dual responsibilities in assessing Respondent's fitness for duty, the possibility that he was intoxicated did not negate their obligation to care for his well-being; in fact, it made their assessment more critical. It is

certainly logical that if Respondent were intoxicated, he would be less able to self-assess injuries he may have sustained in the collision. While there was no testimony from any of the aforementioned witnesses that they saw forensic evidence of physical injury at the scene of the accident, it would have been dereliction of duty for them to have assumed that Respondent was fine without making an in-person assessment, given his odd behavior.

I have considered the case law Respondent has submitted in support of his argument that none of the observations made inside his apartment should be considered by the Tribunal and find them unpersuasive.

Specification 3: Fitness for Duty

I find that the Department Advocate has met her burden of proof by a preponderance of the credible, relevant evidence that Respondent was unfit for duty on August 23, 2018 as a result of intoxication.

Members of Service are required to be fit for duty at all times and to refrain from the consumption of intoxicants to the point where the MOS becomes unfit for duty (PG 203-04[1], [2]).

Captain Hynes and Captain Petti each completed a Supervisor's Fitness for Duty Report reporting the observations each of them made of Respondent inside his apartment (P.G. 206-12[2], [4]). The collective testimonial observations of Captain Petti, Captain Hynes and Sergeant Lynch, that Respondent exhibited watery, glassy eyes; unsteadiness on his feet; and had a smell of alcohol on his breath are consistent with common-law indicia of intoxication⁵ (*see People v.*

⁵ This sentence was edited after the submission of the parties' *Fogel* responses.

POLICE OFFICER RAFAEL TATIS

Peasley, 184 A.D.3d 911, 912 [3d Dept. 2020][belligerence, bloodshot eyes, odor of alcohol]; *People v. Neil*, 30 A.D.3d 901 [3d Dept. 2006][odor of alcohol; slurred speech; glassy, bloodshot eyes]; *People v. McClean*, 2 A.D.3d 903 [3d Dept. 2003][slurred speech, bloodshot eyes, strong odor of alcohol, poor motor skills]).

In addition, Respondent's: (1) admission that he had consumed 7-8 beers from the time he went off-duty the previous day to the time of the accident, without any sleep; (2) his evasive answers to questioning; (3) walking away from a collision without attempting to notify the other motorist; (4) parking illegally at a fire hydrant, with the back end extending into the oncoming traffic lane; and (5) claim that he did not remember having been involved in a vehicular accident are further circumstantial evidence that, when considered with the indicia of intoxication set forth above, further support a finding that Respondent was unfit at the time Captains Petti and Hynes interacted with him.

Finally, it has long been held that refusal to submit to breathalyzer testing, after being warned of the consequences of a refusal, constitutes evidence of consciousness of guilt (*People v. Thomas*, 46 N.Y.2d 100, 106-107 [1978]). This evidence permits the Tribunal to draw the inference, which I do, that the reason Respondent opted not to take a breathalyzer test is because of "whatever the test might have revealed as to the alcoholic content of his blood" (*People v. Thomas*, 46 N.Y.2d 100, 108).

Based upon the foregoing, I find Respondent Guilty of Specification 3.

Specification 4: Refusal to Submit to Breathalyzer Testing

I find that the Department Advocate has met her burden of proof by a preponderance of the credible, relevant evidence that Respondent refused to submit to Breathalyzer testing on

August 23, 2018, and such refusal was prejudicial to good order, efficiency or discipline of the Department.

It is undisputed that Respondent refused to take a Breathalyzer test at the 45th Precinct Intoxicated Driver Testing Unit on August 23, 2018 (Dept. Ex. 7). I further incorporate all the factual findings and analysis previously set forth with respect to Specification 3.

Respondent has argued that his refusal should not be considered misconduct; I disagree.

The Patrol Guide explicitly states the following:

“... a uniformed member of the service who refuses to submit to chemical testing in connection with an alleged violation of section 1192 of the New York State Vehicle and Traffic Law (Driving While Intoxicated) will be charged with violating Patrol Guide procedure 203-10, page 1, step 5, “Engaging in conduct prejudicial to the good order, efficiency, or discipline of the Department.”

(P.G. 203-04).

In a similar case, this Tribunal found “[w]hile Respondent was able to avoid his license being suspended as a result of his success at the refusal hearing, that success does not excuse his refusal to comply with an unambiguous Department directive” (*Disciplinary Case No. 2016-16813* [July 19, 2019]).

Accordingly, I find Respondent Guilty of Specification 4.

Specification 5: Leaving the Scene of a Motor Vehicle Accident

I find that the Department Advocate has met her burden of proof by a preponderance of the relevant, credible evidence that Respondent left the scene of a motor vehicle accident on August 23, 2018.

The New York Vehicle and Traffic Law requires:

Any person operating a motor vehicle who, knowing or having cause to know that damage has been caused to the real property or to the personal property, not including animals, of another, due to an incident involving the motor vehicle operated by such person shall, before leaving the place where the damage occurred, stop, exhibit his or her license and insurance identification card for such vehicle, when such card is required pursuant to articles six and eight of this chapter, and give his or her name, residence, including street and number, insurance carrier and insurance identification information including but not limited to the number and effective dates of said individual's insurance policy, and license number to the party sustaining the damage, or in case that the person sustaining the damage is not present at the place where the damage occurred then he or she shall report the same as soon as physically able to the nearest police station , or judicial officer.

(VTL § 600[1][a]).

There is no serious dispute that Respondent's car struck the Complainant's car and caused physical damage (Dept. Ex. 3-A, 4-A, 4-B, 4-C, 4-D, 4-E, 4-F, 4-G). There is also no dispute that Respondent left the place where the damage occurred without taking any action to report the collision to the Complainant, a police officer or a judicial officer: (1) the Complainant stated that Respondent left his vehicle, started walking away from it, turned to lock the car, then continued walking away; (2) Respondent entered his apartment building shortly after the accident; and (3) Respondent was found inside his apartment (Dept. Ex. 3-A; Resp. Ex. B; T. 69, 194, 298, 416).

I find Respondent's assertion that he bore no recollection of having been involved in an accident on August 23, 2018 to be a tacit admission that he did not report the accident to anyone.

Based upon the foregoing, I find Respondent Guilty of Specification 5.

PENALTY

In order to determine an appropriate penalty for Respondent, his service record was examined (*see Matter of Pell v Board of Educ.*, 34 N.Y.2d 222, 240 [1974]). Respondent was appointed to the Department on January 14, 2009. Information from his personnel record that

was considered in making these penalty recommendations are contained in an attached confidential memorandum.

The Department Advocate requested that the tribunal recommend a penalty of 32 suspension days, previously served; forfeiture of 13 vacation days; and a one-year period of dismissal probation. I find this penalty recommendation underrepresents the seriousness of Respondent's misconduct.

The appropriate penalty, in this Tribunal's view, for being unfit for duty is 30 penalty days; dismissal probation; ordered breath testing; and cooperation with counseling. I am informed that Respondent has previously served a 32-day period of suspension in connection with this case. When considered as aggravating factors to a finding of driving while intoxicated, refusing a breathalyzer and leaving the scene of an accident with another vehicle each carry a presumptive penalty of five days. In this case, based upon Respondent's admissions alone, he drove his vehicle from Manhattan to the Bronx after consuming 7-8 beers, all while forgoing sleep for a 24-hour period. The presumptive penalty for driving while impaired is 30 suspension days; 20 penalty days; dismissal probation; ordered breath testing; cooperation with counseling; and demotion, if probationary in rank.

I find no other aggravating or mitigating evidence in the record. While Respondent's counsel has urged the Tribunal to consider the loss of Respondent's status as a probationary detective to be a mitigating factor, I find that the loss of such designation was a collateral consequence of his misconduct, and within the authority of the official who appointed him to that status to revoke.

Accordingly, I recommend that Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Administrative Code § 14-1 15 (d), during which time he is to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. I further recommend that Respondent forfeit 32 suspension days, previously served, in addition to 23 vacation days. While it is beyond my authority to recommend ordered breath testing or cooperation with counseling, I find such additional conditions, if imposed by competent authority, to be warranted in this case.

Respectfully submitted,


Paul M. Gamble

Assistant Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER RAFAEL TATIS
TAX REGISTRY NO. 947951
DISCIPLINARY CASE NO. 2018-19437

Respondent was appointed to the Department on January 14, 2009. On his last three annual performance evaluations, he received a 4.5 overall rating of “Extremely Competent/Highly Competent” in 2018, and twice received 3.5 ratings of “Highly Competent/Competent” in 2015 and 2016. Respondent has been awarded one medal for Excellent Police Duty. [REDACTED]

Respondent has no disciplinary record. In connection with the instant matter, he was placed on Level II Discipline Monitoring; monitoring remains ongoing.

For your consideration.

Paul M. Gamble
Assistant Deputy Commissioner Trials