



POLICE DEPARTMENT

November 24, 2021

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In the Matter of the Charges and Specifications	:	Case Nos.
- against -	:	2019-20285
Detective Victor Falcon	:	2020-22924
Tax Registry No. 936565	:	
Narcotics Borough Brooklyn South	:	

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

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

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

For the Respondent: John Arlia, Esq.
Wenger & Arlia, Esqs., LLP
20 Vesey Street, Suite 210
New York, NY 10007

To:

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

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CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2019-20285

1. Said Detective Victor Falcon, while on-duty and assigned to the 72 Precinct Detective Squad, on or about December 24, 2018, wrongfully and without authorization absented himself from his assigned duties by extending his meal period by fifty-five (55) minutes.
P.G. 203-05, Page 1, Paragraphs 1 & 2 PERFORMANCE ON DUTY – GENERAL
GENERAL REGULATIONS
2. Said Detective Victor Falcon, while on duty and assigned to the 72 Precinct Detective Squad, on or about December 24, 2018, wrongfully and without authorization conducted personal business while assigned to perform official duties.
P.G. 203 05, Page 1, Paragraphs 1 & 2 PERFORMANCE ON DUTY – GENERAL
GENERAL REGULATIONS
3. Said Detective Victor Falcon, while off-duty and assigned to the 72 Precinct Detective Squad, on or about December 26, 2018, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Detective wrongfully and without authorization conducted a purportedly official investigation of his 72 Precinct Detective Squad supervisor's December 24, 2018 whereabouts and activities.
P.G. 203 10, Page 1, Paragraph 5 PUBLIC CONTACT – PROHIBITED
CONDUCT
GENERAL REGULATIONS

Disciplinary Case No. 2020-22924

1. Said Detective Victor Falcon, on or about June 30, 2020, while on-duty and assigned to Narcotics Borough Brooklyn South, wrongfully conducted personal business while on-duty, in that he virtually attended a legal proceeding in his personal and private capacity from about 1002 hours to 1240 hours, and from 1400 hours to 1533 hours, while assigned to perform a scheduled tour from 0700 hours to 1533 hours.
P.G. 203-05, Page 1, Paragraph 1 PERFORMANCE ON DUTY – GENERAL
GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on October 19, 2021.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. Pursuant to an agreement between the parties, the Department called Respondent as a witness. Respondent

called Lieutenant Johnny Wong as a witness. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty of the charged misconduct, and recommend a penalty of 30 vacation days

ANALYSIS

These cases involve allegations that Respondent wrongfully conducted personal business while on duty on two separate dates. Specifically, under *Disciplinary Case No. 2019-20285*, Respondent is charged with extending his meal for 55 minutes without authorization on December 24, 2018. During that time, he engaged in personal shopping, contrary to the rules of the Holiday Integrity Program. It also is alleged that two days later, on December 26, after learning that his supervisor was investigating his actions from December 24, Respondent, without authorization, conducted his own investigation to determine what steps his supervisor had taken. *Disciplinary Case No. 2020-22924* charges Respondent with again conducting personal business while on duty; it is alleged that while at work on June 30, 2020, Respondent spent several hours, on his phone, watching depositions that were taking place in connection with his federal lawsuit against the Department.

Respondent essentially concedes the factual allegations against him, but argues that he was singled out for prosecution in retaliation for an EEO complaint he had filed against members of the Department in October 2018; subsequently, Respondent also filed a lawsuit against the Department, which is pending in federal court. As part of his complaint, Respondent alleged that a supervising sergeant in his command, [REDACTED] had placed her dirty underpants in his mouth. He also alleged that another supervising sergeant at the 72 Precinct,

Sergeant Johnny Wong (who is now a lieutenant), repeatedly threw Respondent's overtime slips in the garbage, and unfairly denied Respondent shift changes. (Tr. 42-45, 76-77, 82-83, 101-02)

Lieutenant Wong testified that he was informed by a colleague at the 72 Precinct that Respondent had taken an extended meal on December 24, 2018. Two days later, Wong conferred with his supervisor, Lieutenant McCartan, about how to proceed; the lieutenant spoke with Respondent, then instructed Wong to investigate Respondent's whereabouts on December 24, including whether Respondent had gone to the barbershop to get a haircut while on duty. (Tr. 127, 144-48, 153-55)

As part of his investigation, Wong reviewed the command log, which indicated that Respondent had signed out at 1000 hours, and signed back in at 1155. Wong used the Automatic Vehicle Locating ("AVL") system to trace the route Respondent had taken while on meal. He also visited locations along the route in an attempt to obtain video footage that might show where Respondent had gone during his extended meal. One such location was DNA Barber Shop, where Wong identified himself as an MOS and asked to review their video footage, though he did not inform them specifically whom he was investigating. Wong denied that he threatened the workers at the barbershop. Afterward, Wong prepared a packet, including photographs and diagrams, illustrating the results of the investigation he performed (Dep't. Ex. 1) (Tr. 113-14, 120-22, 128-30)

Wong acknowledged that at the time he was investigating Respondent's whereabouts, he was aware that Respondent had filed an EEO complaint with the Department, in which Respondent made accusations against Wong. Nevertheless, Wong believed it was appropriate for him to pursue the investigation into Respondent's conduct, since Wong was still Respondent's supervisor, and this was a matter that was appropriately handled in-house. An

EEO investigator had previously informed Wong that he still had the authority to investigate Respondent, but that he needed to consult with EEO before taking any disciplinary action against him. Wong described his investigation into Respondent as “thorough;” he “let the evidence exhaust itself,” and tried to conduct the investigation “to the best of [his] knowledge and the best of [his] ability.” After his investigation, Wong intended to issue a CD to Respondent for shopping while on duty; Wong first called the EEO office as instructed, and they had him refer the matter to IAB. Wong also testified that this was the only time he had ever investigated an MOS for misuse of time, though he explained that was because he had never received any other such accusations to investigate. (Tr. 120, 134-35, 149-51, 156-59, 161-63)

Respondent testified that he did, in fact, take an extended meal on December 24, 2018. He drove an unmarked Department vehicle to a cupcake shop, where he made a purchase, then went to a department store where he did some shopping. At the department store, Respondent, who was dressed in plain clothes, purchased a fanny pack as a gift for [REDACTED], and some cosmetics that he was hoping to use to camouflage a bruise he had on his face. He drove back to the front of his command, where he placed the items he had purchased into his personal vehicle. Respondent then drove the Department vehicle to a sandwich shop, where he purchased something for lunch, before returning to his command at 1155 hours. At no point during this outing did Respondent go to the barbershop. According to Respondent, he did not ask for permission to take the extended meal, since it was common for MOS at the command to do so without authorization. He explained that there were days where squad members did not have time to take meal, and so on other days where they had more free time, “you might take a little extra, but no one’s ever been punished for it.” (Tr. 22-37, 84-86, 94)

Two days later, Respondent went to get a haircut at DNA Barbershop, and learned from people at the barbershop that Wong had been there asking about him. They told Respondent that Wong had demanded to see the store's video footage for December 24, and had even threatened the barbers. Respondent testified that he was unsure why Wong was doing this, since Respondent had not been at the barbershop that day, and wondered whether Wong was "trying to pick a fight" with him. Respondent decided to investigate Wong's actions further, before reporting Wong to IAB. Toward that end, Respondent, on December 26, went back to the department store where he had shopped two days earlier, and told the security manager that an Asian man had been following and harassing him. Respondent, who was off duty, identified himself as a police officer, and may have asked the manager whether the store had video. He also showed the manager video footage of Wong that had been taken at the barbershop. The manager told Respondent that nobody had come looking for him at the store. (Tr. 38-40, 48-59, 87-88, 91-92, 99-100, 102-05)

With respect to the second matter, Respondent admitted that on June 30, 2020, without permission, he used his personal phone while at work to watch depositions that were taking place in connection with his federal lawsuit. Respondent explained that he was assigned to the equipment room at Brooklyn South Narcotics, where he had a lot of down time, and officers who worked there often watched television or played video games. He insisted that if he had received a call for equipment, he would have stopped watching the depositions and attended to his work. Respondent was warned and admonished for this misconduct, and testified that he subsequently followed protocol by taking time off when he needed to deal with his lawsuit. (Tr. 66-71, 96-99)

As indicated above, Respondent has essentially admitted that the factual allegations against him are true. In his defense, Respondent claims that he was being singled out for

discipline, in retaliation for his EEO complaint. Under Section 75-b of the New York Civil Service Law, a public employer shall not take disciplinary action against a public employee where that disciplinary action is “based solely” in retaliation for an EEO complaint filed by the employee. The burden here rests with Respondent to prove that he would not have received these charges but for his prior complaints. See *Disciplinary Case No. 1997-71540* (Nov. 4, 1997).

Counsel for Respondent argues that Wong, who conducted the investigation, was motivated by his hostility toward Respondent, since Respondent had named him in his EEO complaint. Because of that hostility, Wong was extra zealous in investigating Respondent for extending his meal for 55 minutes; Wong’s efforts included traveling to stores, seeking out video footage, and reviewing the AVL of Respondent’s vehicle, all of which was thoroughly captured in a packet he prepared to document Respondent’s precise whereabouts.

Under the specific circumstances presented here, I am not persuaded that the actions taken against Respondent were retaliatory. While it may have been preferable for Wong to have had someone else conduct this investigation, the credible evidence has failed to establish that Respondent would not have been disciplined but for his EEO complaint. Rather, Wong came across as sincere as he described how, as Respondent’s supervisor, he felt a responsibility to handle this matter “in-house” and “let the evidence exhaust itself.” He first checked with his supervisor, Lieutenant McCartan, and then proceeded to look into the circumstances surrounding Respondent’s extended meal. That investigation confirmed that Respondent had, in fact, engaged in a misuse of time, leading to the charges in these matters.

With that in mind, we turn to the specifications for each of the two cases.

Disciplinary Case No. 2019-20285

Specification 1 charges Respondent with extending his meal by 55 minutes without authorization, while Specification 2 alleges that he conducted personal business while on-duty. The investigation done by Wong clearly established that Respondent did extend his meal; specifically, he signed out for meal at 1000 hours, and signed back in to the command at 1155, fifty-five minutes beyond the one hour allotted to him (*see* Dept. Ex. 1). Respondent, himself, admitted as much, conceding that he extended his meal without authorization, and that he was doing some personal shopping at a department store during that time. Accordingly, I find Respondent guilty of Specifications 1 and 2.

Specification 3 charges Respondent with wrongfully conducting a purportedly official investigation into the activities of Wong, his supervisor, on December 26, 2018. With his detailed testimony, and corroborating documents (Dept. Ex. 1), Wong provided credible evidence that Respondent went to the Department store to investigate whether Wong had been there asking about him. Respondent, himself, acknowledged that while off duty, he went to the location, identified himself as a member of the service, and asked the security manager at the store about Wong. Respondent may also have inquired about whether the store had video footage. Since Respondent admitted that he made these official inquiries on his own time, without proper authorization, I find him guilty of Specification 3.

Disciplinary Case No. 2020-22924

Specification 1 charges Respondent with conducting personal business while on-duty on June 30, 2020, in that he virtually attended a legal proceeding in his personal capacity while at work. Specifically, Respondent used his phone to observe depositions that were taking place in connection with his federal lawsuit against the Department. Respondent admitted that he was

watching the depositions on his phone for several hours. He explained, however, that his viewing of the legal proceeding did not interfere with his work in the equipment room, and that he would have stopped watching if there was work to be done.

Even so, it was inappropriate for Respondent to spend several hours at work watching the depositions from his lawsuit. To his credit, after he was warned and admonished that such conduct was improper, he adjusted his behavior and took personal time for all future legal proceedings. Nevertheless, since the credible evidence has established that Respondent wrongfully conducted personal business while on duty, I find him guilty of Specification 1.

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent's employment history also was examined. *See* 38 RCNY § 15-07. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent, who was appointed to the Department on January 10, 2005, has been found guilty of misusing time by extending his meal for 55 minutes, twice conducting personal business while on duty, and wrongfully conducting an investigation into his supervisor. The Department has recommended that Respondent forfeit 30 vacation days. Under the specific circumstances presented here, I agree with that recommendation.

The presumptive penalty for misuse of time is a minimum of 15 penalty days; the disciplinary guidelines do not provide for a mitigated penalty. Here, the extent of Respondent's misuse of time was a single instance of extending his meal by 55 minutes on December 24, 2018,

as opposed to a pattern of time abuse. He did, however, compound that offense by shopping at a department store while on duty. On balance, a forfeiture of *15 vacation days* for the totality of his misconduct that day is reasonable. Two days later, Respondent exacerbated the situation by wrongfully investigating the actions of his supervisor. This misconduct, which is not squarely addressed by the Disciplinary Guidelines, warrants the forfeiture of an additional *10 vacation days*.

Additionally, on June 30, 2020, Respondent, while on duty, wrongfully used his phone to observe depositions involving his lawsuit, which carries a presumptive penalty of 10 penalty days. On the one hand, his actions that day plainly constituted misconduct, and there needs to be appropriate accountability. However, I am not persuaded from the credible evidence that Respondent intended to avoid work while watching the depositions; rather, Respondent credibly testified that the equipment room was quiet that day, and he was prepared immediately to stop watching the depositions if a call for equipment came in. Indeed, there was no indication in the record that any work was neglected that day. Also, to Respondent's credit, after he was warned and admonished for his actions, he adjusted his behavior appropriately, by taking personal time to attend to his lawsuit instead of doing so while on duty. As such, I find that the mitigated penalty of *five vacation days* is appropriate for this misconduct, bringing the aggregate penalty to a forfeiture of 30 vacation days.

Taking into account the totality of the facts and circumstances in these matters, I recommend that Respondent forfeit thirty (30) vacation days.

APPROVED

MAR 10 2022
KEECHANT L. SEWELL
POLICE COMMISSIONER

Respectfully submitted,


Jeff S. Adler
Assistant Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
DETECTIVE VICTOR FALCON
TAX REGISTRY NO. 936565
DISCIPLINARY CASE NOS. 2019-20285 & 2020-22924

Respondent was appointed to the Department on January 10, 2005. On his three most recent annual performance evaluations, he received 4.0 overall ratings of “Highly Competent” in 2017, 2018, and 2019. Respondent has been awarded three medals for Excellent Police Duty and five medals for Meritorious Police Duty.

Respondent has no disciplinary record. He was placed on Level 1 Force Monitoring from April 8, 2009, to April 8, 2010, for receiving three or more CCRB complaints in one year, and subsequently, placed on Level 2 Force Monitoring from April 9, 2010, to April 2, 2012, for receiving three or more CCRB complaints in one year. In connection with the instant matters, Respondent was placed on Level 1 Discipline Monitoring on October 15, 2019; that monitoring remains ongoing.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials