



POLICE DEPARTMENT

August 10, 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Edwin Vargas
Tax Registry No. 937721
61 Precinct
Disciplinary Case No. 83670/08

The above-named member of the Department appeared before me on April 7, 2010,¹ charged with the following:

1. Police Officer Edwin Vargas, assigned to the 61 Precinct, while off-duty, on or about October 29, 2006, at [REDACTED], in [REDACTED] County, failed to remain at the scene of a domestic incident with Ms. [REDACTED] when it was feasible and consistent with his personal safety. *(As amended)*

P.G. 212-32, Page 1, Paragraph 1 – OFF-DUTY INCIDENTS INVOLVING
UNIFORMED MEMBERS OF THE
SERVICE

2. Police Officer Edwin Vargas, assigned as indicted in Specification #1, while off-duty, on or about October 29, 2006, at [REDACTED], in [REDACTED] County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department to wit: Ms. [REDACTED] was engaged in a telephone conversation with an investigator from the Internal Affairs Bureau Command Center and said officer's voice was overheard in the background stating "what the fuck are you doing to me, are you fucking kidding me?" and then said call was immediately disconnected. *(As amended)*

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

¹ The trial record was held open until April 28, 2010, to allow the Department time to prepare a transcript of the recording of a telephone conversation [REDACTED] had with an investigator from the Internal Affairs Bureau's Command Center.

The Department was represented by Beth T. Douglas, Esq., Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty of Specification No. 1. It is recommended that Specification No. 2 be Dismissed.

Introduction

It is not disputed that in October, 2006, the Respondent and his girlfriend [REDACTED] lived together at [REDACTED], [REDACTED], which is located within the confines of the [REDACTED] Precinct.

The Department's Case

The Department called Sergeant Christopher Connolly and Sergeant Gregory Pernicone as witnesses.

Sergeant Christopher Connolly

Sergeant Christopher Connolly, assigned to Brooklyn South Investigations, recalled that on November 21, 2006, he was assigned to investigate a complaint against the Respondent that [REDACTED] had made on October 29, 2006. [REDACTED] had called 911 and when [REDACTED] told the operator that her boyfriend was a police officer, the 911 operator had

referred her call to the Internal Affairs Bureau's (IAB) Command Center. Police Officer Thomas McFarland, who was assigned to the IAB Command Center on October 29, 2006, had called [REDACTED] back at about 4:00 a.m. and he recorded their telephone conversation [Department's Exhibit (DX) 1: [REDACTED] is heard telling McFarland that she and the Respondent had "an argument." A male voice is then heard in the background saying, "What the fuck are you doin'?" and "Hey, fuck you, you fuckin' idiot, didn't you fuckin' hear me?" After a short silent pause, McFarland is heard asking, "Hello?" The male voice is then heard in saying, "This is not a joke."] McFarland wrote in the IAB Log that [REDACTED]' call involved "dispute with boyfriend."

On March 7, 2007, Connolly conducted a telephone interview of [REDACTED] who told him that on October 29, 2006, she and the Respondent had engaged in a verbal argument, that involved no physicality, after she had accused him of cheating on her.

Connolly conducted official Department interviews of the Respondent on October 3, 2007, and on November 2, 2007. At the second interview, Connolly played the recording of the telephone conversation (DX 1, Track 11) between [REDACTED] and McFarland. The Respondent stated that the male voice heard in the background saying, "What the fuck?" was his voice. When Connolly asked why he had said that, the Respondent answered, "Because she had made a threat that she was going to call the job on me."

On cross-examination, Connolly agreed that the first notice the Respondent received that [REDACTED] had complained to IAB was nearly a year after the incident on October 29, 2006. Connolly testified that [REDACTED] told him that the Respondent was unaware that she had called 911 because he had left and was out of their residence when she called. [REDACTED] never alleged that the Respondent had hung up the phone on her.

Sergeant Gregory Pernicone

Sergeant Gregory Pernicone, assigned to the [REDACTED] Precinct, testified that on October 29, 2006, he was the patrol supervisor for the midnight tour and that he was directed to respond to a domestic dispute involving a member of the service at [REDACTED] [REDACTED] at 2:50 a.m. When he arrived, he could not gain access to the residence. He called IAB and was told by McFarland that he had already interviewed [REDACTED]. He was directed by the Duty Captain to prepare a UF 49 [Respondent's Exhibit (RX) A].

On cross-examination, Pernicone testified that he was not directed by the Duty Captain to find the Respondent or to bring him to the [REDACTED] Precinct.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent testified that he has been designated "cop of the month" several times and "cop of the year" once.

He recalled that on October 29, 2006, when he arrived home [REDACTED] was upset and accused him of cheating on her because he had arrived home after 2:00 a.m. [REDACTED] demanded to know, "Why the fuck you coming home so late? What the fuck are you doing?" This was not the first time that she had accused him of cheating on her. They

argued briefly and then he left the residence and walked across the street to a park in order to "let the situation cool off" so that the argument would not "escalate."

When he returned and entered their bedroom, [REDACTED] was in bed holding her cell phone in her hand. He demanded to know, "What the fuck are you doing?" because during previous arguments she had often threatened to call her brother or her mother or "the police" or directly call "my precinct." [REDACTED] put the phone down. He left the house again. He did not know whether she had called anyone or who she had called.

He has been continued on full duty status actively performing patrol duties ever since October 29, 2006. He was never modified or suspended.

On cross-examination, the Respondent acknowledged that at his November 2, 2007, official Department interview, he told Connolly that [REDACTED] had "made a threat that she was going to call the job on me." At this interview he also told Connolly that he recognized his own voice in the background of the recording of the telephone conversation between McFarland and [REDACTED] (DX 1, Track 11). The Respondent told Connolly that he recalled saying to [REDACTED] "What the fuck are you doing? You think it's a fucking joke? We had an argument, why would you call the job on me?"

The Respondent acknowledged that after [REDACTED] had put the phone down and he left the residence for the second time that night, he again walked across the street to the same park he gone to the first time he left the residence. From the park he was not able to see the entrance to [REDACTED].

He did not return to the residence again that night and he never left the park. [REDACTED] never told him that after he had left, police officers had responded to their residence that night.

FINDINGS & ANALYSISSpecification No. 1

It is charged that the Respondent failed to remain "at the scene of a domestic incident" with [REDACTED] when it was feasible and consistent with his personal safety.

Initially, I would note that [REDACTED] told both McFarland (DX 1) and Connolly that this "domestic incident" consisted only of an argument and that the entire argument took place inside the residence. The Assistant Department Advocate's (the Advocate) position (as reflected in her wording of this charge) that the cited Patrol Guide section mandates that an off-duty member who is involved in a verbal argument which occurs inside his own residence must "remain at the scene" appears to be an overbroad interpretation of both the letter and purpose of this section. Moreover, the Advocate's position contradicts the common sense notion that when, as here, domestic partners are having a heated disagreement inside their joint residence, a cooling of the emotions can be accomplished, and an escalation of the argument avoided, if one of them disengages from the verbal battle by leaving the residence.

I credit the Respondent's testimony that he intended to do this when he left their residence the first time because he and [REDACTED] had begun to argue vehemently. If the Respondent had remained away from their residence for the rest of the night and had been unaware that [REDACTED] had picked up her cell phone, a finding of Not Guilty would be the only appropriate disposition of this charge.

However, the recording of the telephone conversation between McFarland and [REDACTED] (DX 1, Track 11) establishes that the Respondent returned to the residence at the exact point in time when [REDACTED] was speaking to IAB. Also, the Respondent admitted that during previous arguments [REDACTED] had often threatened to call "the police" or directly call "my precinct," and the Respondent is heard on the recording telling [REDACTED], "This is not a joke." Also, when Connolly asked the Respondent why he is heard on the recording asking [REDACTED] "What the fuck?" the Respondent answered, "Because she had made a threat that she was going to call the job on me." As a result, I cannot credit the Respondent's claim that when he left the residence after he saw [REDACTED] with her cell phone in her hand, he did not even suspect that she had called his command or 911.

Thus, I can only conclude that the reason that he left the residence for a second time that night, went to a location away from the entrance to [REDACTED], and did not return to the residence again that night was because he knew that [REDACTED] had called the Department. Since the Respondent knew that [REDACTED]' call would be classified as a domestic incident and that, under Department procedures for the handling of such calls, uniformed officers would be responding to the residence, he was required to remain at, if not necessarily inside, the residence.

The Respondent is found Guilty of Specification No. 1.

Specification No. 2

It is charged that the Respondent engaged in conduct prejudicial to the good order, efficiency and discipline of the Department in that while [REDACTED] was engaged in a telephone conversation with IAB's McFarland, the Respondent's voice "was overheard in

the background stating 'what the fuck are you doing to me, are you fucking kidding me?' and then said call was immediately disconnected."

Initially, it must be noted that what the Respondent is heard saying in the background of the recording of the telephone conversation between McFarland and [REDACTED] (DX 1, Track 11) differs from the quoted remarks that are attributed to him in this charge. The Respondent is not heard saying, "What the fuck are you doing to me? Are you fucking kidding me?" Rather, the recording itself, and the transcript of the recording prepared by the Department, reflect that the only remarks he uttered were: "What the fuck are you doin'?" and "Hey, fuck you, you fuckin' idiot, didn't you fuckin' hear me?" and (after a brief, silent pause during which McFarland is heard asking, "Hello?") "This is not a joke."²

I would further note that the phrase at the end of this charge: "then said call was immediately disconnected" implies that the Respondent was responsible for the termination of [REDACTED]'s conversation with McFarland. However, Connolly testified on cross-examination that [REDACTED] never alleged that the Respondent had hung up the phone on her. Thus, the Department did not prove that the reason [REDACTED] terminated her conversation with McFarland was because of the Respondent's exclamations of disbelief that she was reporting him to his employer.

Given the undisputed fact that [REDACTED] was making a domestic incident report against him even though they had merely had a verbal argument inside their residence, it is not surprising that the Respondent would utter expressions of disbelief that she would

² The Respondent's statement, "This is not a joke," is not contained in the transcript the Advocate submitted after she was directed to personally listen to the recording and compare it to the transcript to insure that the transcript accurately reflected what the Respondent is heard saying on the recording.

do this to him even though she had to be aware that her action could negatively affect, and even endanger, his career. As heard on the recording, his expressions of disbelief reflect that he was truly angry, astonished and even astounded that she would report him regarding a mere verbal argument. The fact that his exclamations of disbelief were laced with profanity only supports the proposition that he was expressing genuine feelings of disbelief out loud; the verbal equivalent of shaking his head side to side in amazement at what she was doing to him.

I find that the Respondent's verbalization of his emotional reaction to what [REDACTED] was doing to him does not rise to the level of actionable misconduct.

It is recommended that Specification No. 2 be Dismissed.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y. 2d 222 (1974).

The Respondent was appointed to the Department on January 14, 2005. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found guilty of failing to remain at his residence even though he knew that uniformed officers would be responding to the residence because [REDACTED] had telephoned the Department to make a complaint against him regarding an argument they had.

It is not disputed that although the Respondent's misconduct took place on October 29, 2006, he was first served with these charges on February 7, 2008, well over

one year later, and that he has been continued on full duty status actively performing patrol duties since October 29, 2006. Taking this factor into consideration, as well as his performance evaluations, his excellent sick record, and his lack of any prior disciplinary record, it is recommended that the Respondent receive a reprimand.

Respectfully submitted,



Robert W. Vinal

Assistant Deputy Commissioner – Trials

APPROVED

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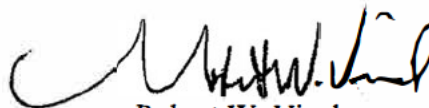
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER EDWIN VARGAS
TAX REGISTRY NO. 937721
DISCIPLINARY CASE NOS. 83670/08

The Respondent received an overall rating of 4.5 on his 2009 performance evaluation, 4.5 on his 2008 evaluation, and 4.0 on his 2007 evaluation. He has no medals. [REDACTED]. He has no prior disciplinary record.

For your consideration.



Robert W. Vinal
Assistant Deputy Commissioner – Trials