



OFFICE OF THE POLICE COMMISSIONER

ONE POLICE PLAZA • ROOM 1400

March 19, 2010

Memorandum for: Deputy Commissioner, Trials

Re: **Sergeant Kevin J. Finegan**
Tax Registry No. 923434
43rd Precinct
Disciplinary Case No. 84092/08

The above named member of the service appeared before Assistant Deputy Commissioner David S. Weisel on November 25, 2009, and was charged with the following:

DISCIPLINARY CASE NO. 84092/08

1. Said Sergeant Kevin Finegan, assigned to the 43rd Precinct, while off-duty, on or about December 9, 2006, at a location known to this Department, in Greene County, did fail and neglect to properly safeguard a firearm, to wit: a Smith & Wesson .9mm, Model 3953, serial #TDM3767.

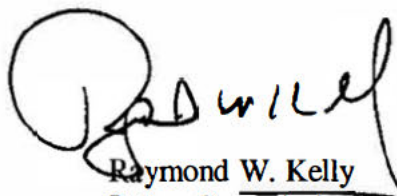
PG 204-08, Page 2, Para. 7

**FIREARMS-GENERAL REGULATIONS
UNIFORMS AND EQUIPMENT**

In a Memorandum dated January 27, 2010, Assistant Deputy Commissioner Weisel found the Respondent GUILTY of the sole Specification. Having read the Memorandum and analyzed the entire facts of this instant matter, I approve the finding, but disapprove the recommended penalty of 15 Vacation days to be forfeited.

The magnitude of the Respondent's failure to properly safeguard his firearm was evident when he himself was struck by a round discharged from the firearm, following careless handling by another member of the service. This incident occurred inside a rental ski premises, while alcohol was being admittedly being consumed by both parties. Further, the Respondent had placed his firearm atop a table between them, as they were playing card games.

It is readily apparent that the proper securing of his firearm was not a priority concern, with an end-result that almost resulted in mortal consequences. As such, a greater penalty is merited, and Respondent Finegan is to forfeit 30 Vacation days.


Raymond W. Kelly
Police Commissioner



POLICE DEPARTMENT

January 27, 2010

MEMORANDUM FOR: Police Commissioner

RE: Sergeant Kevin Finegan
Tax Registry No. 923434
43 Precinct
Disciplinary Case No. 84092/08

The above-named member of the Department appeared before the Court on November 25, 2009, charged with the following:

1. Said Sergeant Kevin Finegan, assigned to the 43rd Precinct, while off-duty, on or about December 9, 2006, at a location known to this Department, in Greene County, did fail and neglect to properly safeguard a firearm, to wit: a Smith & Wesson 9mm, Model 3953, serial #TDM3767.

PG 204-08, Page 2, Para. 7 FIREARMS-GENERAL REGULATIONS
UNIFORMS AND EQUIPMENT

The Department was represented by Pamela Naples, Esq., Department Advocate's Office, and the Respondent was represented by Philip Mellea, 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.

COURTESY • PROFESSIONALISM • RESPECT

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Carmen Nieves as a witness.

Carmen Nieves

Nieves was a former probationary police officer.¹ The Respondent and Nieves had been boyfriend and girlfriend. They met through work. On December 9, 2006, Nieves and the Respondent went up to a rented ski house in New York State. The Respondent picked her up, and after over an hour of travel, they arrived. Nieves did not recall what time they arrived upstate.

After the Respondent showed her around, they changed into pajamas. They sat at the kitchen table and played cards. It was a "pretty decent size kitchen" with a "regular square table." The table was a little less than half the size of the counsel's tables in the trial room.

Nieves stated that she and the Respondent were sitting next to each other at the kitchen table, one of them on each side. They were not far apart from each other. The firearm was in the middle of the table between them. Nieves admitted that both she and the Respondent were drinking alcohol.

Nieves testified that she did not remember how long they were playing before they decided to go to bed. Nieves testified that while the Respondent was shuffling the cards, she picked up his firearm to unload it. She asserted that she did not recall when the Respondent placed the firearm on the table, what type of gun it was, whether it was holstered, or how far she

¹ The Advocate stated that Nieves was terminated while still on probationary status as a result of the instant matter and other incidents.

had to reach for it. Nieves contended that she did not know what “prompted” her to attempt to safeguard the gun.

Nieves stated that her own weapon was a Glock. She did not recall whether she attempted to safeguard the Respondent’s firearm in the same way that she would have with her Glock. The Respondent did not hand his weapon to her or ask her to safeguard it.

Nieves testified that when she picked up the firearm, it went off and struck the Respondent in the arm. They had no cell phone service at the house, so Nieves wrapped the Respondent’s arm in a towel and they drove to find help.

On cross-examination, Nieves stated that when she was a police officer, she safeguarded her weapon while at home. That is what she was doing on the night of the incident at the ski house. She agreed that she received training “on how to disarm the weapons,” possibly only on one occasion. Nieves asserted that she did not recall if the training taught safeguarding one type of weapon or several types. She agreed that she was taught how to safeguard a Glock, but claimed not to remember how to do so. She asserted that she did not know if she learned how to disarm a Smith & Wesson.

Nieves recalled, however, that she stated at an official Department interview that to unload her gun, she had “to pull the trigger and then slides to the back and then slides to the back and then the magazine comes out but I have to pull the trigger I have to pull the trigger first and then lock the slide to the back.” She agreed that this was how she safeguarded her Glock.

Nieves stated that the Respondent was looking down while shuffling the cards. She did not know if he saw her pick up the weapon. She did not tell him that she was doing so.

The Respondent's Case

The Respondent testified on his own behalf.

The Respondent

The Respondent had been a member of the Department for over ten years and became a sergeant on July 31, 2006. He testified that he met Nieves when they were both police officers in Police Service Area 8. They began dating in August 2006.

The Respondent stated that he and his friends had rented a ski house at Hunter Mountain. He and Nieves went to the house on the weekend of December 9, 2006. They "settled in" and changed into pajamas. The Respondent put on a T-shirt and pajama pants. He and Nieves then went downstairs to relax.

The Respondent testified that he and Nieves began playing cards. As soon as he sat down, he placed his 9-millimeter Smith & Wesson firearm in his pants, but the weight of the gun kept pulling off his pants, so he placed the gun on the kitchen table. He set the weapon down within arm's length. He had always used a 9-mm Smith & Wesson since becoming a Department member.

The Respondent stated that he was shuffling the cards in preparation for one last game before bed. He asserted that he did not realize Nieves picked up the weapon. He believed that she picked up the gun to unload it but accidentally discharged it. The Respondent heard a bang, realized he was shot in the arm, and fell to the floor. After he realized what happened, he told Nieves to look for a calling card to contact 911 (as Nieves testified, the ski house had no cell service), and to "get a sheet or something" to wrap up the wound.

The Respondent testified that he put his firearm back into his waistband and held it there with his hand. He and Nieves went to find a neighbor and called 911 from there. The Respondent was then taken to the hospital.

The Respondent stated that personnel from both the New York State Police and the NYPD responded to the incident and conducted an investigation. The State Police concluded that the discharge was accidental.

The Respondent testified that he received training from the Department in the firing, safeguarding, loading and unloading of a firearm. He asserted that this training covered “[d]ifferent types of weapons.”

The Respondent indicated that at home, before bed, he usually placed his firearm on the nightstand. He asserted that Nieves, because she had a child at home, would always unload her weapon before bed. When civilians were at the ski house with the Respondent, the firearm “doesn’t leave [his] sight.” On the night of the incident, the Respondent put the gun on the table for two reasons. First, the gun was pulling on his pants. Second, the Respondent contended, “At work there is always somebody behind the desk for somebody to watch or safeguard it so to me there was no threat or danger leaving my weapon with another MOS that is with me.”

The Respondent admitted that he and Nieves each had two drinks. The Respondent believed his were vodka and cranberry juice. He did not believe they were drunk. He had drunk with Nieves before, knew her tolerance, and was “confident that two drinks was not too much.”

On cross-examination, the Respondent testified that his firearm was loaded and in his holster when he placed it on the kitchen table. He agreed that Nieves would need to remove the gun from the holster in order to safeguard it. When he placed his gun on his nightstand at home, he did not unload it.

On questioning by the Court, the Respondent stated that when, as desk officer, he handed his weapon to another member before going to check the cells, it was the other member's responsibility to safeguard it. He asserted that had he seen Nieves safeguarding the weapon, he would have let her continue.

The Respondent testified that although weapons are different, the safeguarding process basically entailed removing the magazine, locking the slide, removing the chambered round, visually inspecting the weapon to make sure no rounds are left, and releasing the slide. He had never owned a Glock, but was aware of "a little mechanism with the trigger" that he believed was "for firing the weapon." However, "nowhere do they tell you to pull the trigger of the gun to safeguard it first with ammunition in the weapon."

On re-direct examination, the Respondent said that he had fired a Glock at the range while in the process of deciding on an off-duty weapon.

FINDINGS AND ANALYSIS

The Respondent is charged with failing to safeguard his firearm. The Respondent went to a rented ski house upstate with his then-girlfriend, former Police Officer Carmen Nieves. After arriving, they changed into pajamas and played cards in the kitchen before going to bed. The Respondent placed his weapon, a 9-mm Smith & Wesson, on the kitchen table. When they were ready to go to bed, Nieves picked up the Respondent's firearm in order to render it safe. There was an assertion by the Department that Nieves was not familiar with this type of gun. The Respondent did not know that Nieves was handling it. The gun went off, striking the Respondent in the arm.

The relevant Patrol Guide procedure, 204-08 (7), states that members must "[s]afeguard weapons at all times." The meaning of "safeguard" will depend on the circumstances of each individual case. An officer is not relieved of the duty to safeguard his weapon just because he remains present. For example, in *Case No. 82386/06*, signed Nov. 10, 2008, an officer was found Guilty of failing to safeguard where she allowed her boyfriend's father and her [REDACTED] to fire her service pistol on private property upstate. The officer argued that she did not fail to safeguard the gun because, inter alia, she supervised these individuals as they used it.

Nor is an officer relieved of the responsibility to safeguard a weapon where the only other person present is a fellow member of the service. Thus, in *Case No. 78332/02*, signed Sept. 13, 2004, an officer was found Guilty where he unloaded his weapon and placed it at the side of the bed he was sharing with his ex-girlfriend, also a member of service. They had recently broken up but remained friendly, especially after she became hospitalized for dehydration. The girlfriend committed suicide that morning with the officer's weapon. The Court noted that the "likelihood of an emotional response to a suddenly broken relationship should have made the Respondent more circumspect."

In the instant case, the Respondent relinquished control of his weapon by laying it on the table between himself and Nieves, then a fellow member of the service. The Respondent argued at trial that this was the same thing as when an officer hands his gun to a fellow officer upon entering the precinct cells or for inspection at the range. In those scenarios, however, the officer knows whom he is giving the weapon to, and in what context. Here, the Respondent testified that he did not know that Nieves picked up the weapon. He asserted that he was looking down and shuffling the cards. The Respondent cannot claim to have safeguarded his weapon when he puts it down on a table, is playing cards, and does not even realize that another person, even a

member of service, has picked it up, unholstered it, and was trying to unload and secure it. As such, the Court finds the Respondent Guilty.

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, 240 (1974). The Respondent was appointed to the Department on July 6, 1999. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of failing to safeguard his firearm. The incident occurred when his then-girlfriend, also then a police officer, picked up his gun from a card table where both were sitting, attempted to unload it, but instead accidentally shot the Respondent in the arm.

Recent failure-to-safeguard cases involving the leaving of a firearm in an easily accessible place have resulted in penalties of 20 days. See, e.g., Case No. 83763/08, signed Sept. 16, 2009 (in plea, 17-year member with no record forfeited 20 vacation days for storing service firearm in gym bag in his bedroom closet; his teenage son found the gun and accidentally discharged it, causing property damage to neighbor's car).

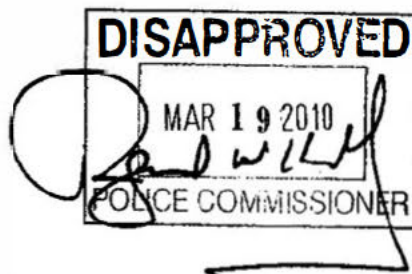
However, *Case No. 78332/02*, supra, is closer to the instant case. There, the ten-year member with no prior disciplinary record forfeited 10 vacation days for failure to safeguard a weapon where his ex-girlfriend, also a member of the service, committed suicide with his firearm, which he had left unsecured next to his bed. Consequently, under the circumstances of the instant case, where the only other person present was also a police officer, but also taking

into consideration the Respondent's prior Departmental history, see Confidential Mem., infra, the Court concurs with the Advocate's recommendation of a penalty of 15 vacation days.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner – Trials



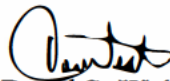
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner -- Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
SERGEANT KEVIN FINEGAN
TAX REGISTRY NO. 923434
DISCIPLINARY CASE NO. 84092/08

In 2008, the Respondent received an overall rating of 4.5 "Extremely Competent/Highly Competent" on his annual performance evaluation. He was rated 5.0 "Extremely Competent" in 2005 and 3.5 "Highly Competent/Competent" in 2004. The Respondent has been awarded six medals for Excellent Police Duty. [REDACTED]

The Respondent has been the subject of one prior disciplinary adjudication. In 2004, he forfeited 20 penalty days (12 days served on suspension plus 8 additional vacation days) for becoming involved in an off-duty physical altercation and failing to notify the Department promptly.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner -- Trials