POLICE DEPARTMENT

February 11, 2022

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2018-19734
Detective Corey Gresko	:	
Tax Registry No. 932745	:	
Warrant Section	:	

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

Before: Honorable Josh Kleiman
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Andre Applewhite, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent: James Moschella, Esq.
Karasyk & Moschella, LLP
233 Broadway, Suite 2340
New York, NY 10279

To:

HONORABLE KEECHANT L. SEWELL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Detective Corey Gresko, on or about July 14, 2015, at approximately 0600, while assigned to WARRSEC and on duty, in the vicinity of [redacted] New York County, did knowingly enter and remain unlawfully in a dwelling at [redacted] without permission and authority.

P.G. 203-10, Page 1, Paragraph 5	PUBLIC CONTACT – PROHIBITED CONDUCT
Penal Law § 140.15(1)	CRIMINAL TRESSPASS IN THE SECOND DEGREE

Before the Tribunal is Respondent's Motion to Dismiss ("Motion") dated December 17, 2021 (Motion Ex. 1), and the response of the Civilian Complaint Review Board ("CCRB") dated January 4, 2022 (Motion Ex. 2). The Tribunal held a conference to discuss the motion on January 18, 2022, a transcript of which has been prepared (Motion Ex. 3). On January 19, 2022, CCRB emailed the Tribunal answers to two questions posed to CCRB at the conference (Motion Ex. 4). Having carefully reviewed these submissions, including the arguments and legal authorities contained therein, the Tribunal, for the reasons set forth below, recommends that Respondent's Motion be granted and the sole specification be Dismissed.

Factual Background

It is undisputed that on July 14, 2015, Respondent went to complainant's home to apprehend complainant's fiancé, who was wanted for a gun-point kidnapping. Respondent went to complainant's home based on a "Probable Cause Investigation Card," which documented probable cause for the arrest, and a background check that revealed complainant's address as an address associated with the fiancé. Prior to traveling to complainant's home, Respondent cross-referenced complainant's address in a Department database, discovering a seven-month-old active bench warrant authorizing the arrest of another individual listing

complainant's address as their residence. (Motion Ex. 1 at 2; Motion Ex. 2 at 1-2; Motion Ex. 3 at 53-55)

According to CCRB, and accepted as true for the purposes of addressing this motion, upon Respondent's arrival at complainant's residence, the complainant refused to grant Respondent consent to enter her home. As she attempted to close the door, Respondent placed his foot in a manner so as to prevent the door from closing and entered complainant's home. Respondent claims that he believed he had the authority to enter the home based, at least in part, on the seven-month old bench warrant;[1] however, as Respondent admitted, this was a mistaken belief because Respondent would not be able to prove that he reasonably believed the subject of the bench warrant to be present in the home, which would have been required to satisfy a Fourth Amendment analysis. Nevertheless, CCRB acknowledges that Respondent's stated belief was that the warrant provided the authority to enter. Respondent entered complainant's home and arrested the fiancé. (Motion Ex. 1 at 2; Motion Ex. 2 at 1-2, 5; Motion Ex. 3 at 26)

On July 19, 2018, 19 months after the expiration of the 18-month statute of limitations established by Civil Service Law § 75, the CCRB investigator assigned to the case, with the endorsement of a supervisor, recommended that the allegation that Respondent entered the apartment improperly be unsubstantiated. On October 11, 2018, 22 months after the expiration of the 18-month statute of limitations, a panel of CCRB's Board rejected the investigator's recommendation, substantiated the improper entry, and recommended charges and specifications for Respondent.[2]

On November 19, 2018, CCRB sent a letter to Respondent's attorney explaining that CCRB had delayed investigating the matter during the period between November 5, 2015 and

[1] Respondent also claims that the complainant consented to his entry.
[2] The Board did not explain its reasoning for rejecting the investigator's recommendation.

November 14, 2017, following a request from an assistant district attorney of the Manhattan District Attorney's office to "hold" this matter until the resolution of the fiancé's criminal case.

On January 7, 2020, four and a half years after the incident date, and three years after the expiration of the 18-month statute of limitations, CCRB served Respondent with a single specification, alleging that Respondent "did knowingly enter and remain unlawfully in a dwelling." CCRB maintains that the charge "if proven" in a New York State criminal court would constitute the crime of Criminal Trespass in the Second Degree (Penal Law § 140.15), thus satisfying the crimes exception to the 18-month statute of limitation established by Civil Service Law § 75(4) (hereinafter the "Criminal Exception"). CCRB's initial penalty recommendation was termination. On November 23, 2021, CCRB reduced its recommended penalty to the forfeiture of thirty (30) vacation days.[3]

Respondent's Motion seeks to dismiss the charged specification, arguing that: (1) CCRB's over-broad application of the Criminal Exception would permit most CCRB cases to benefit from a "limitless" exception; (2) Respondent is unfairly exposed to substantially higher penalties under the Disciplinary Guidelines when the conduct is charged under the Criminal Exception; (3) the wording of CCRB's charge is facially defective for using the words "without permission and authority," instead of the statutory words "not licensed or privileged"; (4) CCRB failed to establish a prima facie case of criminal trespass because CCRB is unable to prove that Respondent "knowingly" entered and remained unlawfully; and (5) there exists no prior precedent for the charging of an on-duty police officer with a criminal trespass.

[3] The presumptive penalty under the Disciplinary Guidelines for an unlawful entry involving a "substantial physical presence and/or remaining on the premises" is ten (10) vacation days.

Standard of Review

The purpose of a pre-trial motion to dismiss is to make the court aware of a defect in the charges or the proceeding that would render the proceeding invalid or moot, including a jurisdictional defect (*see* CPLR § 3211[a]; Civil Service Law § 75[4]; 38 RCNY § 15-03[g]). Where properly asserted, the tribunal must "liberally construe the complaint" and "accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*Dep't of Education v. Oliver,* OATH Index No. 1889/13 at 6 [June 18, 2013]). The motion must be denied if the prosecuting authority "has asserted a set of facts that, if proven, would subject respondent to liability" (*Id.*). In administrative proceedings, pre-trial motions to dismiss are generally disfavored (*see, e.g., Dep't of Correction v. LaSonde,* OATH Index No. 2526/11, mem. dec. [July 8, 2011] ["Pre-trial motions to dismiss are disfavored in practice at OATH and have only been granted in the clearest cases of failure by petitioners to state a viable claim."] [internal citations omitted]).

Analysis

The carve-out for crimes under Civil Service Law § 75(4) is an exception to the jurisdictional 18-month statute of limitations in disciplinary matters, not a substitute for the timely service of Charges and Specifications. While the Tribunal acknowledges that courts in Article 78 proceedings look to the words of the charge to determine whether the Criminal Exception applies, in order to support a finding of guilt at trial this Tribunal requires proof by a preponderance of the evidence as to each element of the crime alleged. Without such a requirement, the exception would swallow the rule, since parties could simply mirror the operative language of a crime to overcome the statute of limitations, yet, at trial, proceed with proof of an ordinary disciplinary matter (*see Dep't of Education v. Oliver,* OATH Index No.

1889/13 at 5 ["This tribunal has eschewed attempts to 'circumvent the application of the statute of limitations simply by drafting . . . pleadings in a way which mirrors the Penal Law elements of crimes, without regard to what [the] evidence would actually show.'"], *quoting Human Resources Admin. v. Man of Jerusalem,* OATH Index No. 936/90 at 16 [Aug. 2, 1990]). It would further contravene basic principles of due process to permit a party to assert the Criminal Exception in a conclusory manner many years after the expiration of the 18-month statute of limitations without reasonable pre-trial notice of its basis for proceeding in such a delayed manner.

Penal Law section 140.15[1] (Criminal Trespass in the Second Degree) reads: "A person is guilty of criminal trespass in the second degree when[] he or she knowingly enters or remains unlawfully in a dwelling." The words contained in CCRB's charge allege that Respondent "did knowingly enter and remain unlawfully in a dwelling." Accordingly, the operative words of the Penal Law are reflected in the charge. Nevertheless, CCRB's charge does not allege, as a criminal complaint would, factual allegations that establish "reasonable cause" for their belief that Respondent committed the offense. While the depth of factual details contained in a criminal complaint are unusual in a disciplinary charge, where, as here, the charge is challenged, and more so in the context of a challenge to a Criminal Exception charge, it is incumbent upon the prosecuting authority to allege facts that, if proven, would subject respondent to liability. This burden may not be met merely with allegations of a conclusory and speculative nature, but only upon allegations having a concrete basis in fact.

Accepting the material facts as alleged by CCRB, the Tribunal finds that CCRB, as a matter of law, has failed to allege a basis upon which the Tribunal could reasonably find that Respondent acted "knowingly," as that term is used and understood in connection with a

criminal trespass. In its response brief, CCRB set forth the following theory of its case as to Respondent's state of mind:

> Simply because Respondent "fully believed" that he had sufficient authority to enter the premises does not absolve him of misconduct in this matter. Respondent's belief (good faith or not) was wrong and based upon his rank and twelve years' experience, he should have known that he did not have the requisite authority to enter and search Ms. [redacted]'s residence. Respondent's "belief" was based solely upon a bench warrant dated some seven months prior to entry, and for another individual not associated with Respondent's current investigation. Respondent cannot bootstrap a stale open warrant for one subject into an excuse to enter a location where he hopes to find a second subject for whom he has no warrant. Furthermore, Respondent took no steps to determine that the information in his possession was even accurate. Accordingly, Respondent did not have a reasonable belief that the person he was searching for was currently residing at the apartment.

(Motion Ex. 2 at 5).[4]

In alleging that Respondent's belief was not "reasonable," CCRB mistakenly inserts an objective reasonableness standard in an area of the law in which the New York courts have consistently rejected such a standard (*see, e.g. People v Hicks,* 155 Misc 2d 209 [Sup Ct, NY County 1991]). In the seminal case, *People v Basch,* 36 NY2d 154 (1975), the New York Court of Appeals explained, in the context of a charge of criminal trespass, "it must be proved that such person 'knowingly' entered the premises without license or privilege and, therefore, a person who enters upon premises accidentally, or who honestly believes that he is licensed or privileged to enter, is not guilty of any degree of criminal trespass." "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists" (Penal Law § 15.05; *see also*

[4] CCRB further argued at the motion conference, "The crime exception doesn't require CCRB or a prosecutor in general to have a good faith belief in setting up these charges" (Motion Ex. 3 at 37). The Tribunal disagrees. Charging instruments must have a reasonable basis in fact (Civil Service Law § 75[4] ["alleged incompetency or misconduct complained of and *described* in the charges"] [emphasis added]; *cf. People v Franklin,* 72 Misc 3d 537, 545 [Crim Ct, Bronx County 2021] ["[T]he accusatory instrument must provide 'reasonable cause to believe that the [accused] committed the offenses charged.'"]

People v Luke (Derek), 37 Misc 3d 73, 78 [1st Dept. 2012] ["Therefore, [Defendant's] belief, even if mistaken, negated the element of 'knowingly and unlawfully remaining.'"]; 6 New York Criminal Practice § 61.03 ["[T]he mental culpability required for trespass, actual knowledge that the entry or remaining is unlawful, is entirely subjective."]).

CCRB equates reasonableness in the context of Fourth Amendment violations with the assessment of *mens reas* in the context of criminal trespasses. The former is an objective reasonableness standard that typically exposes the violator, even for a mistake of law, to the remedy of the suppression of evidence or a civil action (typically brought in a 42 USC § 1983 action); while the latter requires particularized proof as to the violator's state of mind, exposing the violator to a criminal sanction. While this Tribunal acknowledges that the unlawful invasion of a home by government actors is a violation that strikes at the core of the individual liberties enshrined in the Fourth Amendment, the Tribunal, and the parties, are not aware of any precedent for the prosecution of an on-duty police officer for a criminal trespass under circumstances similar to the case at bar. This lack of precedent, although not fatal, supports Respondent's contention that CCRB has employed an unprecedented interpretation of the New York State Penal Law that CCRB has not applied to other improper entry cases.

Nevertheless, in order to ensure that the instant case does not warrant a different approach, the Tribunal inquired of CCRB, at the motion conference, whether this matter involved any facts that made this case markedly different from past disciplinary actions CCRB has brought before this Tribunal involving improper entries. CCRB responded that the only substantial difference was that a district attorney had requested a "hold" in this case (Motion Ex. 4). Such a "hold" request, however, is not a recognized exception to the 18-month statute of

limitations under Civil Service Law Section 75(4) and does not provide a factual basis upon which to sustain a Criminal Exception charge.

Accordingly, as CCRB has failed to allege particularized facts tending to show that Respondent "knowingly" entered complainant's home unlawfully, this Tribunal recommends that Respondent's Motion to Dismiss be granted and the sole specification in Disciplinary Case No. 2018-19734 be Dismissed.[5]

Respectfully submitted,

Josh Kleiman
Assistant Deputy Commissioner Trials

APPROVED
APR 04 2022
KEECHANT L. SEWELL
POLICE COMMISSIONER

[5] Following the issuance of this recommended decision to the parties, and one day prior to the deadline for any responsive comments (*see Fogel v Bd. of Educ. of NY,* 48 AD2d 925 [2d Dept 1975]), CCRB submitted a motion requesting leave to amend its Charges & Specifications. No request to amend was previously made, including within CCRB's response to the Motion to Dismiss or during the conference held to discuss the Motion. Accordingly, the Tribunal denied the motion, finding that the time for such a request had passed.