



POLICE DEPARTMENT

March 27, 2015

MEMORANDUM FOR: Police Commissioner

Re: Lieutenant Phillip Howard  
Tax Registry No. 933547  
Transit Bureau District 4  
Disciplinary Case No. 2012-7861

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The above-named member of the Department appeared before me on November 10, 2014, charged with the following:

1. Said Lieutenant Phillip Howard, assigned to Transit District 4, while on-duty, assigned as the Desk Officer, on or about April 25, 2012, did wrongfully and without just cause fail to properly supervise the arrest processing of six (6) arrested individuals known to the Department, resulting in five (5) Members of Service known to this Department accumulating excessive overtime.

P.G. 202-14, Page 1, Paragraph 6 – DESK OFFICER

2. Said Lieutenant Phillip Howard, assigned to Transit District 4, while on-duty, assigned as the Patrol Supervisor, on or about April 29, 2012, did wrongfully and without just cause fail to respond to a radio assignment involving a serious crime with a severely injured victim.

P.G. 202-17 Page 1, Paragraph 2 – PATROL SUPERVISOR – DUTIES

3. Said Lieutenant Phillip Howard, assigned to Transit District 4, while on-duty, on or about July 11, 2012, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Lieutenant failed to properly conduct container inspections in the subway to wit, said Lieutenant failed to direct the inspection of passenger bags according to the predetermined frequency which was set at every 12th person entering the subway system with a bag.

P.G. 203-10 Page 1, Paragraph 5 – GENERAL REGULATIONS

The Department was represented by Javier Seymore, Esq., Department Advocate's Office, and Respondent was represented by Michael Lacondi, Esq.

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

Respondent is found Guilty.

### INTRODUCTION

Respondent is a 31-year lieutenant assigned to Transit District No. 4. Respondent is currently the subject of Charges and Specifications because he was issued three command disciplines within a six-month period and refused to accept them.

The first command discipline was issued in regard to an incident occurring on the April 25 & 26, 2012, midnight tour. Respondent was assigned as the desk officer. At some point during the day, the Department's new electronic property and electronic tracking system (PETS) had become unavailable. Respondent made several command log entries and contacted the Management Information Systems Division (MISD). However, he failed to dismiss several arrest processing officers waiting to voucher property. As a result, five officers accumulated 28.5 hours of overtime.

Respondent was issued a second command discipline in regard to an incident that occurred on April 29, 2012. Respondent, working as the patrol supervisor, failed to respond to a 10-85 radio transmission from an officer working under his supervision.

Respondent stated that at the time the transmission was broadcasted he was in a transit "dead spot." He heard parts of the transmission but assumed it was a disposition for an aided case when in fact the transmission was related to a robbery and assault.

The third command discipline was issued in regard to a Transit Container check point that Respondent was allegedly improperly supervising on July 11, 2012, at 59 Street and Columbus Circle. Respondent had indicated in his records that he and the officers were systematically checking one in every 12 bags that passed through the turnstile. However, a supervisor from the Quality Assurance Division (QAD) observed Respondent for a period of approximately 20 minutes and reported that 40 bags passed by Respondent unchecked.

### SUMMARY OF EVIDENCE PRESENTED

#### The Department's Case

The Department called Sergeant Conrad DePinto and Lieutenant Carl Cespedes as witnesses.

#### Sergeant Conrad DePinto

DePinto is a sergeant with QAD. Part of his duties and responsibilities are to perform inspections of Transit Container check points. Meaning, he supervises other members of the service who are temporarily assigned to posts within the transit system designated to randomly check the bags of individuals using the subways. He then generates a report at the completion of his inspections.

On July 11, 2012, DePinto conducted an inspection of Respondent's transit check point location. He testified that he remained at the location from 6:40 a.m. to 7:00 a.m.

and observed "approximately" 40 people with bags pass by Respondent unchecked. [See Department's Exhibit (DX) 1, *DePinto's inspection report from July 11, 2012*]. He did not remember specific details about that incident. However, he agreed that the bags varied in size and some could have been small bags.

Lieutenant Carl Cespedes

Cespedes is the integrity control lieutenant assigned to Transit District 4. As integrity control lieutenant, Cespedes is tasked with maintaining order and discipline in the command. There came a time that Respondent received three command disciplines and declined to adjudicate and accept the penalty prescribed. At that point, Cespedes began an investigation of the three incidents.

The first command discipline was issued because of Respondent's failure, as the command's desk officer, to supervise several officers on April 25, 2012. Part of his duties as desk officer was to manage the arrest processing of subordinate officers and any respective overtime incurred. On that day, six prisoners were arrested by five officers from Transit District 4. Cespedes stated that he regarded the arrests as routine and referred to them as "ground ball" type of arrests.

He testified that generally officers are permitted three hours to process an arrest. Occasionally, mitigating circumstances, such as PETS going down, prisoner transports, or hospitalization issues, may extend the arrest processing time frame.

The issue here arose when at 7:00 p.m. on April 25, 2012, the PET System became unavailable due to human error. [See Respondent's Exhibit (RX) A, *the PETS manager's log*]. Because of this, the five officers were unable to voucher property and,

thus, were ordered by Respondent to remain on standby. Ultimately the five officers accumulated 28.5 hours of overtime amongst themselves. *[See RX B, a photocopy of Police Officer Katherine Cordes' activity log from the day of the incident].*

Cespedes attributed the excessive overtime earned by the officers to Respondent's poor judgment. He agreed that the property could have been vouchered at a later time or the vouchering could have been assigned to another officer. The notifications Respondent made to MISD and the command log entries in regard to this matter were not enough and the situation should have been handled differently.

At the time of the incident PETS was relatively new and no official procedures had been issued on what to do when PETS became unavailable. The officers only stopped accumulating overtime when the day tour desk officer, Lieutenant Angela Morris, sent them home. Since this incident, the Department has issued an operations order detailing what to do when there is a network failure with the PETS. *[See RX D, a photocopy of Department Operations Order 25, procedures for invoicing property when PETS is unavailable].*

The second command discipline was issued because Respondent, as the patrol supervisor, failed to respond to a serious incident that occurred at Grand Central Station on April 29, 2012. At approximately 1:50 a.m. Police Officer Carlos Ramos transmitted a 10-85 code; requesting assistance. Ramos transmitted the code because he had come upon a male who had been robbed and assaulted by a group of unknown individuals. The male was bleeding from his head and was slipping in and out of consciousness. Respondent failed to acknowledge the transmission or respond to the location. Further,

Respondent failed to acknowledge Ramos' later attempts to directly contact him over the radio.

Then there came a point when the Transit Wheel, described as an information hub for transit, attempted to raise Respondent. When the Transit Wheel could not get a response, they contacted Transit District No. 4's commanding officer, Inspector Connolly, at home. Subsequently, Connolly contacted the duty captain, Captain Wilfredo Carmargo, and asked that he conduct an investigation of the incident. Carmargo began his investigation and soon thereafter interviewed Respondent. Respondent informed Carmargo that he thought the incident was merely an aided, a person requesting medical assistance. *[See RX C, a photocopy of the draft copy of the command discipline written by Carmargo].*

Cespedes testified that there are certain areas within the transit system that are referred to as "dead spots," where radio transmissions cannot be sent or received. However, he agreed that it is incumbent on a supervisor when receiving a partial transmission in a dead spot to get a clear indication of the type of transmission once out of the dead spot.

The third command discipline was issued because Respondent failed to adequately conduct a proper Transit Container inspection check point on July 11, 2012. Respondent had indicated in his activity log that one in every 12<sup>th</sup> person with a bag would be inspected. However, at some point Cespedes learned from DePinto that he observed approximately 40 bags pass by Respondent unchecked.

Respondent's Case

Respondent testified on his own behalf.

Respondent

Respondent is a 31-year lieutenant with Transit District No. 4. In addition to his extensive time with the Department's Transit Bureau, Respondent has received an Associate's degree in Transportation Management, an Associate's degree in Police Management, and a Bachelor's degree in Security Management.

On April 25, 2012, Respondent was designated as the command's desk officer on the midnight platoon. Upon taking his post, he conferred with the previous tour's desk officer and learned that PETS was unavailable.

Respondent notified MISD and the duty captain, Captain Gonack, of the unavailability of PETS. Command log entries were made. Respondent had come to learn that PETS network failure was a citywide issue and there was no indication when the system would be available. Respondent stated that he was concerned with the property being lost, misplaced, or there being a potential chain of custody issue. Therefore, he made the decision to have the arresting officers complete their own arrest processing steps; this included vouchering their respective property. There came a point where Respondent received a command discipline in regard to the amount of overtime accumulated by the five arrest processing officers.

Subsequent to this incident Operational Order 25 was issued. [See RX D]. In sum and substance that order directs the desk officer to do the following when PETS becomes inoperable:

The desk officer will ascertain if the failure is limited exclusively to the command and the anticipated time period the system will be inoperable. If the PET System network failure is citywide and will be inoperable for more than six hours the desk officer shall contact the Property Clerk Division during business hours and the Springfield Gardens Auto Pound during non-business hours and be guided by their instructions.

The proposed penalty for the command discipline was "warn and admonish." Respondent declined adjudication. He referenced previous supervisors meetings when Connolly relayed to him that arrest overtime was "not a problem because if the cops are working then I [Connolly] can always explain it." Further, the unscheduled overtime sheet has a section to explain unusual delays or circumstances necessitating overtime. [See RX E, a blank unscheduled overtime sheet]. Respondent expressed that this particular incident fell into that category. Respondent based his decision on these circumstances and believes he made the correct decision to keep the officers on overtime.

On April 29, 2012, Respondent was functioning as the midnight patrol supervisor with Police Officer Photo as his driver. [See RX F, a photocopy of Respondent's activity log]. Respondent was at the Second Avenue F train stop, a known "dead spot," when Ramos's 10-85 transmission came over. Respondent was able to ascertain from the "sporadic staticky transmission" that somebody was being transported to the hospital. He concluded that Ramos was radioing central dispatch about an aided case. Respondent further testified that ordinary supervisory procedure would not dictate that he follow up with Ramos about the aided.



Approximately an hour later, Connolly contacted Respondent. Connolly relayed his dissatisfaction with Respondent in regard to the incident and ended the call. Respondent stated that he then resumed his patrol duties. Soon thereafter, Respondent was requested to report to the command. There, he met with Carmargo. Carmargo interviewed Respondent about the incident and then informed him that he would be receiving a command discipline. The proposed penalty was one day. Respondent again declined to adjudicate it.

On July 11, 2012, Respondent was supervising two officers at a Transit Container check point at 59 Street and Columbus Circle. The check point was there so that they could inspect "large bags" and "large containers" of individuals about to enter the subway turnstile. Respondent did not think lunch bags, small bags, and small purses applied to the inspection parameters.

Respondent did not contest DePinto's testimony and agreed with the Department Advocate that it was possible that approximately 40 people with bags passed by the check point uninspected. However, he did question DePinto's qualification for what bags should be inspected. Based on his experiences Respondent was only looking to inspect large bags and large containers.

Upon questioning from the Court, Respondent stated that he is unaware of any Department procedures or orders requiring all bags are subject to search. The sign they put up at the check point states, "Knapsacks/containers" are subject to search. Respondent reasoned this to mean large bags and containers the size of a knapsack. Further, Respondent recalled that public service announcements in the transit system say

in sum and substance, "Ladies and gentlemen, large backpacks and other large containers are subject to search by the police."

### FINDINGS AND ANALYSIS

#### Specification No. 1: Excessive Overtime

At the time of the incident, no official order was in place directing supervisors what guidelines to follow when PETS became inoperable. This Court is left to assume that it is up to the desk officer's discretion what measures to take when faced with inoperable PETS. Here, utilizing this discretion, Respondent made a judgment call to keep the officers on standby in hopes the system would be functioning soon.

Respondent proffered several factors supporting his decision. First, was the likelihood of the property being lost, mishandled, or possible chain of custody issues. This Court understands that setting aside unvouchered property to be vouchered at an indeterminable later time would be irresponsible of Respondent. However, this was not Respondent's only option. An entirely plausible and reasonable option would have been to assign one of the arresting officers the responsibility of eventually vouchering all of the arrest property once PETS was available and sending the remaining four officers home. This surely would have mitigated the amount of overtime incurred that night.

This Court is inclined to agree with the Department Advocate's position that a majority of the property was connected to rather mundane arrests. Further, it does not escape this Court nor should it surprise Respondent that there is a strong likelihood most of these arrests were too trivial to ever go to trial. It would have been more persuasive if

Respondent was arguing property integrity issues for a sexual assault kit or a murder weapon, not for a student metro-card and gravity knife, which was the case here.

Second, Respondent argued that he made good faith efforts to actively address the situation. He contacted MISD, informed them of the issue, and made a record in the command log. He then contacted Gonack, the duty captain, and apprised him of the situation. Furthermore, his actions appear to comport with the subsequent Operations Order issued.

However, the scope of the charge addresses Respondent's overall failure to supervise the officers accumulating overtime. While the measures he took were correct, they were not enough. Respondent was unable to proffer evidence that the officers were being utilized for the needs of the Department; rather, it appeared they were just awaiting further instructions on standby.

Third, Respondent testified that he believed that the system could have become functional at any moment and that he was justified in retaining the officers. This Court finds that Respondent's wait-and-see approach was initially reasonable but became unreasonable when applied to the entire tour. There should have come a point in the evening when Respondent reassessed the situation and should have taken a more proactive approach.

Again, this Court finds that Respondent acted properly in the measures he took to address the failure of PETS. However, the issue here was whether Respondent acted wrongly, in that, he failed to supervise the arresting officers resulting in the accumulation of excessive overtime. Here, the 28.5 hours of overtime incurred by the arresting officers was a derivative result of Respondent's failure to properly supervise.

Accordingly, Respondent is found Guilty.

**Specification No. 2: Failure to Respond to Radio**

As a patrol supervisor, Respondent was tasked with many duties and responsibilities that may stretch his ability to properly supervise certain situations rather thin. Notwithstanding, as patrol supervisor, Respondent has no excuse for not diligently monitoring radio transmissions. While this Court does not dispute that Respondent was probably in a transit "dead spot" during Ramos's call, it finds his dismissive reaction to a static-laced transmission rather disconcerting.

It does not escape this Court that a radio transmission for 10-85 could in no way be mistaken for a transmission regarding a routine aided. The record shows multiple units had responded to the location and it is reasonable to assume there were subsequent transmissions documenting their response and arrival. Furthermore, the transmissions were significant enough to elicit the involvement of the Transit Wheel. All told, there were a considerable amount of players involved and a flurry of transmissions that were broadcasted involving a serious crime with a severely injured victim.

When Respondent heard Ramos' "staticky transmission" transmit over the radio he had the responsibility to seek a location with a stronger signal and gain clarification from Ramos.

Accordingly, Respondent is found Guilty.

Specification No. 3: Failure to Conduct Proper Container Inspections

DePinto testified as to the contents of his report but was unable to provide any further details or circumstances from that day. However, he was certain that approximately 40 bags passed by the check point unchecked in a 20 minute period; even though Respondent had set a predetermined frequency of every 12<sup>th</sup> person being stopped.

In his testimony, Respondent did not collaterally attack DePinto's testimony or report. Rather, he agreed that it was possible 40 bags had passed by the check point uninspected. On the other hand, he challenged the subjective designation DePinto applied when he counted the bags. Respondent would have this Court believe that pragmatically we can not accept that every bag passing by the check point should be treated and scrutinized equally.

It is apparent to this Court that the purpose of these check points is to increase public safety and to deter potential terroristic attacks in our subway system. Respondent argued that he should only be inspecting larger bags capable of holding incendiary devices rather than inspecting small pocketbooks and lunch bags. This Court is not inclined to accept that assumption. Considering Respondent's extensive educational background in Police and Security Management he should be aware that incendiary devices can fit into containers as small as a shoe<sup>1</sup> or a pair of underwear.<sup>2</sup>

Moreover, the protocol with these check points is to inspect bags based on a predetermined frequency. Respondent was given the opportunity to designate whatever

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<sup>1</sup> *U.S. v. Reid*, British man, later designated the "Shoe Bomber," attempted to detonate explosive devices stored in his shoes while a passenger on a trans-Atlantic American Airlines flight.

<sup>2</sup> *U.S. v. Umar Farouk Abdulmutallab*, Nigerian man, later designated the "Underwear Bomber," attempted to detonate explosive devices stored in his underwear while a passenger on a Northwest Airlines flight.

frequency he saw fit. He chose 1-in-12. However, Respondent was not given the latitude to subjectively designate what parameters designate which bag is worthy of being inspected. The undisputed evidence proffered shows that approximately 40 bags passed by Respondent uninspected. It appears clear Respondent failed to properly conduct a transit bag check point, in that, more than 12 bags passed by Respondent uninspected during a 20 minute period.

Accordingly, Respondent is found Guilty.

#### PENALTY

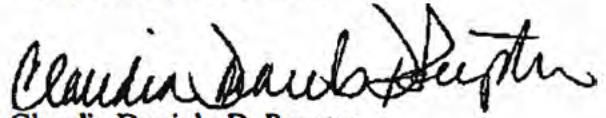
In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on January 5, 1983. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found Guilty of all three specifications. The Advocate recommended the Respondent forfeit 20 vacation days. I find this penalty recommendation exceedingly punitive for the charges put forth.

In determining a penalty recommendation, I have taken into consideration the penalties proposed by Respondent's supervisors in each of the three command disciplines. I have also taken into consideration Respondent's performance evaluations, his Department Recognition Summary, and the fact he has no prior disciplinary record or sick events in over 30 years of service.

Therefore, it is recommended that Respondent forfeit 5 vacation days.

Respectfully submitted,



Claudia Daniels-DePeyster  
Assistant Deputy Commissioner – Trials

**APPROVED**

JUL 24 2015  
  
WILLIAM J. GRATTAN  
POLICE COMMISSIONER

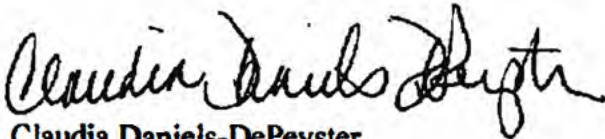
**POLICE DEPARTMENT  
CITY OF NEW YORK**

**From:** Assistant Deputy Commissioner – Trials  
**To:** Police Commissioner  
**Subject:** CONFIDENTIAL MEMORANDUM  
LIEUTENANT PHILLIP HOWARD  
TAX REGISTRY NO. 933547  
DISCIPLINARY CASE NO. 2012-7861

In 2012, 2013, and 2014, Respondent received an overall rating of 3.5 "Highly Competent/Competent" on his annual performance evaluations. [REDACTED]  
[REDACTED]

Respondent has no prior disciplinary history and has received no medals or commendations in his career to date.

For your consideration.

  
Claudia Daniels-DePeyster  
Assistant Deputy Commissioner – Trials