The City of New York

POLICE DEPARTMENT

January 20, 2015

MEMORANDUM FOR: Police Commissioner

Re: Lieutenant Charles Francis
Tax Registry No. 915093
122 Precinct
Disciplinary Case No. 2013 10805

The above-named member of the Department appeared before the Court on September 16, 2014, charged with the following:

1. Said Lieutenant Charles Francis, on or about July 3, 2012, at approximately 1900 hours while assigned to the 120th Precinct and on duty, [redacted], engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he participated in the search of Person C's vehicle without sufficient legal authority.

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

The Civilian Complaint Review Board (CCRB) was represented by Raasheja N. Page, Esq. Respondent was represented by Michael Lacondi, Esq., Karasyk & Moschella LLP.

Respondent pleaded Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

RECOMMENDATION

Respondent is found Guilty.

FINDINGS AND ANALYSIS

Respondent was the supervisor of a team assigned to the Staten Island Gang Squad. On July 3, 2012, at approximately 1900 hours, he and his fellow officers testified, they were patrolling in the area [redacted] There had been a gang-related shooting a few days prior at that housing project and it was an area targeted for violence reduction.

There were many people out on this summer evening before Independence Day. According to Respondent's witnesses, the team observed two individuals in a courtyard-type area of the development. One of the individuals later was identified as Person A; the other as Person B. The two men appeared to be smoking a marijuana cigarette by passing it back and forth. When members of the team confronted the two men, one of them dropped the marijuana. One of them also dropped a set of car keys. Both individuals denied that the keys belonged to them.

Respondent's witnesses testified that they were concerned the car to which the keys belonged had been stolen. They surmised that this was the reason for the throwing of the keys and the failure to acknowledge ownership. This set of keys had the type of keychain with remote control to lock and unlock the vehicle. Respondent went over to the nearby parking lot and pressed one of the buttons. Just as he suspected, the lights on one of the parked cars flashed on.

Respondent testified that he instructed one of his officers to radio the central dispatcher to run the license plate of the suspect vehicle. There was, however, a 10-13 occurring at the same time and the radio was busy. Respondent said that central did not get back to them about the car's ownership within a "reasonable time," but also admitted that he "didn't wait" for central to

get back to them. The time he waited was from the time he beeped the car until he arrived at the car (see Resp't Exhibit A, satellite photograph of area showing courtyard between buildings and parking lot; cf. Tr. 57, testimony of Resp't concerning area). Respondent did not quantify the time he waited, but based on the map, it could not have been more than a couple of minutes.

Respondent unlocked the vehicle with the electronic device. He testified that he wanted to find papers in the car indicating ownership. If the car was stolen, as he suspected, he would have to find the registered owner in order to charge the proper crime. Respondent opened the glove compartment and center console. Both of these places had been closed before he opened them. He leafed through things but did not find the papers.

At that point, a third individual, later stated to be Person C, identified himself as the owner of the vehicle. Respondent testified that Person C denied knowing either his brother Person A or the other individual. The vehicle actually was returned to someone who identified himself as a retired member of law enforcement whose daughter was Person C's girlfriend. Person A and the other man were arrested for marijuana possession.

Respondent is charged with participating in a "search" of the vehicle without sufficient legal authority. He argued at trial that his actions did not constitute a search because he simply wanted to check for ownership papers. This was not, in his view, a search for evidence.

The CCRB generally disputed Respondent's claim that he observed Person A and Person B smoking marijuana. They saw this as a ruse to search the vehicle. Whether the men were smoking marijuana is relevant to Respondent's explanation of why the team approached them initially. That, according to Respondent, was how the officers found the keys and eventually the vehicle. Both sides agreed, however, that ultimately the marijuana issue was not relevant to whether Respondent conducted a "search" of the vehicle.

In his statement to CCRB investigators (see CCRB Exhibit 1), Person A denied having smoked marijuana and said that the police found a quantity of marijuana on someone else near him. Person A indicated, however, that he did drop a set of keys to the ground while being frisked. Person A stated that even though his brother appeared and stated that the car in question belonged to him, the police still searched it for evidence. Person A admitted that he actually owned the car but "I just got it under my brother's name." Person A did not want to tell the police that the car belonged to him. When the police found somebody else's name associated with the car, Person A told them that it was his brother. But Person A then stated to the CCRB that the car actually *was* registered under his name. Person A indicated that the police re-arrested him on prior unrelated charges.

Person A did not testify at trial, however. In fact, no one testified for the CCRB. Their case-in-chief consisted of Person A's interview. Although hearsay is admissible in this forum, see Matter of Avala v. Ward, 170 A.D.2d 235 (1st Dept. 1991), there are significant reasons for caution in cases like this that present close questions of credibility. See *Case No. 77005/01*, p. 6 (May 27, 2002).

Moreover, the prosecutor contended that the District Attorney's Office declined to prosecute the marijuana arrests because there was no marijuana to be tested. The arrest report, however, listed a property invoice number, so something must have been recovered. But, the invoice was not provided at trial. The prosecutor pointed to a CCRB interview statement by one of the officers that the marijuana cigarette had fallen into a puddle of water. This suggested that any testable material might have degraded, making a test for the marijuana impossible.

Thus, the Court credits Respondent's version of the facts over the hearsay statement of Person A.

The Court disagrees, however, with Respondent's assertion that he did not conduct a search of the vehicle. Even if Respondent was not searching it for "contraband," under any definition he was searching it for evidence of a crime. Respondent did not, for example, simply see the registration in an open section and remove it from the car. Rather, he leafed through items and other papers that were contained in the closed glove compartment and closed center console. Moreover, Person A and Person B were under investigation for either larceny or unauthorized possession of the vehicle. Respondent did not enter the vehicle simply to return mislaid property. If the papers indicated that the men were not rightfully in possession, they could have been arrested. Thus, Respondent's actions constituted a search.

Respondent argued that he was acting in good faith by trying to determine the owner of the car. He also suggested that he was not really searching the areas because he was just moving his finger back and forth through the items contained therein, and was not really moving things around.

The Court does not dispute Respondent's mindset. It does not, however, change the general rule that probable cause is required to search a vehicle. See People v. Langen, 60 N.Y.2d 170, 180-81 (1983). This was a search notwithstanding Respondent's attempts to parse the actions of his hands. Searching the vehicle was not necessary due to an immediate need to protect life or property which otherwise would have been endangered if not for the search. See People v. Mitchell, 39 N.Y.2d 173, 177 (1976). Thus, Respondent's stated desire to expedite the investigation in light of an unrelated 10-13 did not constitute exigent circumstances.

Because the CCRB proved that Respondent participated in the search of Person C's vehicle without sufficient legal authority, he is found Guilty.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on June 30, 1995. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Although Respondent entered Person C's vehicle without authority, the evidence demonstrated that Respondent acted in good faith during the encounter. He was attempting to verify the true owner of the car. Nevertheless, as a longtime supervisory member of the service, in fact a former investigator for the Internal Affairs Bureau, Respondent should have known that his choice to enter the vehicle was unconstitutional. Therefore, even in light of Respondent's longtime dedicated service to the Department, the Court recommends that he forfeit 3 vacation days as a penalty. This is in accord with the CCRB's original plea offer and other recent pleas as well.

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner – Trials

APPROVED

MAR 06 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
LIEUTENANT CHARLES FRANCIS
TAX REGISTRY NO. 915093
DISCIPLINARY CASE NO. 2013-10805

In 2013, Respondent received an overall rating of 5.0 "Extremely Competent" on his annual performance evaluation. He was rated 4.5 "Extremely/Highly Competent" in 2011 and 2012. He has been awarded one medal for Excellent Police Duty and one for Meritorious Police Duty. [redacted] Respondent has no prior formal disciplinary record.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner – Trials