



POLICE DEPARTMENT CITY OF NEW YORK

May 6, 2016

MEMORANDUM FOR: Police Commissioner

Re: Captain Isa Abbassi
Tax Registry No. 918669
Chief of Department
Disciplinary Case No. 2014-12263

Captain Thomas Passolo
Tax Registry No. 924312
79 Precinct
Disciplinary Case No. 2014-12262

Sergeant Forrest Hirsch
Tax Registry No. 941905
81 Precinct
Disciplinary Case No. 2014-12260

Police Officer Ross Garner
Tax Registry No. 949007
81 Precinct
Disciplinary Case No. 2014-12259

Police Officer William Sitzman
Tax Registry No. 939474
81 Precinct
Disciplinary Case No. 2014-12261

Charges and Specifications:

Disciplinary Case No. 2014-12263

1. Said Lieutenant Isa Abbassi, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he threatened to arrest Jilvonnia Littles without sufficient legal authority.

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

2. Said Lieutenant Isa Abbassi, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings

County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered said residence without sufficient legal authority.

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

3. Said Lieutenant Isa Abbassi, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched said residence without sufficient legal authority.

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

Disciplinary Case No. 2014-12262

1. Said Lieutenant Thomas Passolo, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he threatened to arrest Jilvonita Littles without sufficient legal authority.

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

2. Said Lieutenant Thomas Passolo, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered said residence without sufficient legal authority.

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3. Said Lieutenant Thomas Passolo, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched said residence without sufficient legal authority.

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

Disciplinary Case No. 2014-12260

1. Said Sergeant Forrest Hirsch, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered said residence without sufficient legal authority.

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

2. Said Sergeant Forrest Hirsch, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings

County, used offensive language regarding Kaheem Littles' race by calling him, in su[m] and substance, a fucking nigger.

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

3. Said Sergeant Forrest Hirsch, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, used offensive language regarding Kaheem Littles' race by calling him, in su[m] and substance, a coon.

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

4. Said Sergeant Forrest Hirsch, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, used offensive language regarding Kaheem Littles' race by calling him, in su[m] and substance, a gorilla.

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

5. Said Sergeant Forrest Hirsch, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, used offensive language regarding Kaheem Littles' race by calling him, in su[m] and substance, a monkey.

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

6. Said Sergeant Forrest Hirsch, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, used offensive language regarding Kaheem Littles' race by, in su[m] and substance, making monkey noises.

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

Disciplinary Case No. 2014-12259

1. Said Police Officer Ross Garner, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered said residence without sufficient legal authority.

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

Disciplinary Case No. 2014-12261

1. Said Police Officer William Sitzman, on or about July 4, 2013 at approximately 1830 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched said residence without sufficient legal authority.

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

CAPTAIN ISA ABBASSI
CAPTAIN THOMAS PASSOLO
SERGEANT FORREST HIRSCH
POLICE OFFICER ROSS GARNER
POLICE OFFICER WILLIAM SITZMAN

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Appearances:

For the CCRB: Nicole S. Junior, Esq.
Civilian Complaint Review Board
Administrative Prosecution Unit
100 Church Street, 10th Floor
New York, NY 10007

For Respondents Abbassi and Passolo:

Louis La Pietra, Esq.
La Pietra & Krieger PC
30 Glenn Street, Suite 105
White Plains, NY 10603

For Respondent Hirsch:

John D'Alessandro, Esq.
The Quinn Law Firm PLLC
399 Knollwood Road, Suite 220
White Plains, NY 10603

For Respondents Garner and Sitzman:

Craig R. Hayes, Esq.
Worth, Longworth & London LLP
111 John Street, Suite 640
New York, NY 10038

Hearing Dates:

October 29, 2015; January 5-7, 11 and 13, 2016

Decision:

Respondents Abbassi and Passolo are found Not Guilty.

Respondents Garner and Sitzman are found Guilty.

Respondent Hirsch is found Guilty of Specification No. 1, and Not Guilty of Specification Nos. 2-6.

Trial Commissioner:

ADCT David S. Weisel

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before the Court on October 29, 2015, and January 5-7, 11 and January 13, 2016. Respondents, through their counsel, entered a

plea of Not Guilty to the subject charges. The CCRB called Kaheem Littles, Derrick Mack, James Littles, Jilvonnia Littles and Andre Littles as witnesses. Respondents testified on their own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, the Court finds Respondents Abbassi and Passolo Not Guilty, Respondents Garner and Sitzman Guilty, and Respondent Hirsch Guilty of Specification No. 1 and Not Guilty of Specification Nos. 2-6.

FINDINGS AND ANALYSIS

The charges and specifications in this case arise from the following, largely undisputed, sequence of events. On July 4, 2013, Kaheem Littles, an African American male in his mid- to late 20s, was hosting a backyard barbeque for approximately 18 to 20 friends and family members at his home located at [REDACTED] in Brooklyn. At the time of trial, Kaheem was on parole after serving a one-year sentence for third-degree robbery. He pleaded guilty to this in January 2015 (Tr. 13, 20, 170).

[REDACTED] was the second house from the corner of [REDACTED] and [REDACTED]. It was owned by Kaheem's parents, James and Person A. James and Person A also owned [REDACTED], the corner house. The houses had a shared backyard enclosed by a nine-foot fence, with a gated entrance on [REDACTED]. The fence was lined with hard plastic sheeting, preventing outsiders from seeing into the backyard from the street when the gate was closed. There also was barbed wire at the top (Tr. 20, 23, 28; CCRB Ex. 2, photos of [REDACTED] entrance to backyard; Exs. 3-5, photos of backyard; Ex. 8, map).

On the day in question, Respondents Hirsch, Garner and Sitzman, and Police Officer Malerie Treuman were assigned to the 81 Precinct's Street Narcotics Enforcement Unit (SNEU) team. They were performing patrol duties in uniform in an unmarked vehicle looking for street-level narcotics offenders (Tr. 346, 402, 441-42).

Respondent Garner testified that at approximately 1830 hours, while travelling northbound on [REDACTED], he saw a man standing on the sidewalk about ten feet away who appeared to be rolling a marijuana cigar. Respondent Garner alerted the other members of his team, and both Respondents Hirsch and Sitzman testified to seeing the man holding what looked like a marijuana cigar. They exited the vehicle, Respondent Garner identified himself as a police officer, and instructed the individual to stop. Respondent Garner testified that the man immediately turned his back and quickly walked south on [REDACTED] before turning left into the gated entrance of [REDACTED]. Upon crossing the threshold into the backyard, the man went over to a garbage can located just inside the fence on the right, opened the lid, and placed the marijuana cigar inside. Respondent Garner testified that the man then walked through the backyard and entered the house through an open door in the rear of the yard and the rear of the house (Tr. 347, 349-50, 352, 404-06, 442; Respts. Ex. A, complaint report for criminal possession of marihuana in the fifth degree with unknown subject).

Respondents Hirsch, Garner and Sitzman, plus Police Officer Treuman, pursued the individual into the backyard of [REDACTED] through the gate on [REDACTED]. Respondent Garner testified that he walked approximately five feet into the backyard and was stopped by two men, whom he said were Kaheem and an individual later identified as Person B. They put their hands on Respondent Garner and prevented him from moving further into the backyard. Respondent Hirsch testified that he saw two men push Respondent Garner when he

first entered the backyard, which caused Respondent Garner to stumble backward. On direct examination, Respondent Sitzman also testified that Respondent Garner was pushed by two men upon entering the backyard. Upon cross examination, however, Respondent Sitzman was confronted with his CCRB interview, in which he stated that he did not see two men push Respondent Garner. Kaheem denied putting his hands on any of the officers at any point (Tr. 43, 351, 377, 407, 432, 442-43).

Video footage of the incident taken by one of Kaheem's guests, Person C was introduced as CCRB Exhibit 7. The video begins shortly after Respondents Garner, Hirsch and Sitzman entered the backyard. The officers attempted to move further into the backyard in order to get to the back door of [REDACTED]. A group of individuals in the backyard, including Kaheem, Kaheem's friend Derrick Mack, and Kaheem's sister Jilvonnia Littles, all stood in front of the back door blocking the officers' entrance to the house. Respondent Hirsch testified that he radioed for backup and shortly thereafter, additional members of service arrived. Respondent Sitzman walked over to the garbage can, opened the lid, and removed a marijuana cigar from inside. Respondent Sitzman alerted Respondent Hirsch, placed the cigar in a plastic bag, and secured it in his pocket. After the incident, the cigar was brought back to the 81 Precinct, where it was tested and confirmed as marijuana (Tr. 42-43, 111, 174, 353, 408, 444; CCRB Ex. 6, still image from video, showing Jilvonnia, Kaheem and Mack standing in front of Respondents Hirsch and Garner; Respts. Ex. B, voucher for marijuana cigar).

Kaheem, Jilvonnia, and Mack testified at trial that when the officers initially entered the backyard, they told everyone they were responding to a noise complaint. They testified that after a few minutes, the officers told them that someone rolling marijuana had run into their home. Kaheem and Jilvonnia insisted that they repeatedly asked for a description of the individual the

officers had seen run into the backyard, but their questions were ignored (Tr. 16, 42, 54-56, 108, 172, 176).

Jilvonia testified that shortly after the officers entered the backyard, she called her parents, James and Person A, who were out of state at the time. James testified at trial that he was on the phone with Jilvonia for approximately 10 to 15 minutes as she was trying to ascertain why the police were in the backyard. At some point Jilvonia told him that the police wanted to search the house for an individual they had seen with marijuana. He responded by telling Jilvonia that the police had no reason for invading his privacy, but if allowing them inside would mean that they would then leave, he would allow them to enter his house. James wanted to make sure, however, that his son and eldest sibling Andre escorted the officers inside the house (Tr. 151, 153-54, 157-58).

Among the additional members of service from the 81 Precinct that arrived were Respondents Abbassi and Passolo (both of whom were Lieutenants at the time and since have been promoted to Captain). That day, Respondent Abbassi was working in uniform as platoon commander and Respondent Passolo was working in plainclothes as the special operations lieutenant. Andre Littles also arrived around the same time and spoke to Respondents Abbassi and Passolo. They told Andre they were looking for someone that had been seen with marijuana and had run into the house. After some discussion, Andre agreed to let the officers into the house to allow them to search for the individual. Approximately 20 minutes after the officers first arrived, Respondents Abbassi, Passolo and Garner entered [REDACTED] and searched areas in the house where a person could have been hiding. The search yielded negative results and they returned to the backyard. Thereafter, Kaheem and Person B were arrested for

obstructing governmental administration for pushing Respondent Garner when he first entered the backyard (Tr. 307, 319, 332, 358, 360-61, 471, 475-77, 483, 509, 514-15).

Entry Into Backyard and House

Respondents Abbassi, Passolo, Hirsch and Garner are charged with entering [REDACTED] [REDACTED] without sufficient legal authority. The determination of whether their entry was unlawful rests on whether Respondent Garner had probable cause to arrest the individual seen on the sidewalk. The Court finds that Respondent Garner did not have probable cause.

Respondent Garner testified that his initial observation of the individual on the sidewalk was that he was holding "brown paper, and he seemed to be, you know, twisting it between his fingers while looking down at it." Respondent Sitzman similarly testified that he saw the individual holding "loosely rolled brown wrapping paper" and that he was "absolutely sure" it was marijuana when he saw it, based on his training and experience. He admitted, however, that the contents could have been something other than marijuana. Respondent Sitzman further testified that the individual had the brown paper in "both his hands and he was twisting it." On cross examination, Respondent Sitzman testified that he did not see the individual twisting the cigar, and instead saw it "pinched with his two hands." Respondent Hirsch testified that as they were driving on [REDACTED] Respondent Garner directed his attention to a black male standing on the sidewalk holding a marijuana cigar. He testified that he "observed the male holding it." Respondents Garner, Sitzman, and Hirsch all conceded that they were unable to see the contents of the cigar, it was unlit, and there was no odor of marijuana (Tr. 348, 377, 403-04, 423-24, 438, 442, 452).

First, it is well settled law that a home's curtilage, the land closely surrounding and associated with the home, warrants the protection of the Fourth Amendment's privacy rights.

Curtilage is defined "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." See Oliver v. U.S., 466 U.S. 170, 180 (1984). It is undisputed that the Littles family maintained an expectation of privacy in their backyard, which was enclosed by a nine-foot fence. It is further undisputed that the members of service who entered the backyard were aware they were entering private property. Therefore, entry into the backyard constituted an entry into the "residence" of [REDACTED], as charged in the specifications.

It is also well settled that warrantless arrests, searches and seizures are "presumptively unreasonable." Payton v. New York, 445 U.S. 573, 586 (1980). There are certain exceptions, however. Respondents contend that their entry into [REDACTED] was justified by the hot pursuit exception, which prescribes that an officer may pursue a subject as he flees into a private location if the officer has probable cause to believe the suspect has committed a crime. People v. McBride, 14 N.Y.3d 440, 446 (2010). This is because "retreat into one's home cannot thwart an otherwise proper arrest set in motion in a public place." People v. Nunez, 111 A.D.3d 854, 856 (2d Dept. 2013). Probable cause to arrest exists where the facts and circumstances within the officer's own knowledge, which the officer has received through reasonably trustworthy information, sufficiently warrant a person of "reasonable caution" to believe that an offense has been or is being committed. Dunaway v. New York, 442 U.S. 200, 208 n.9 (1979); United States v. Granderson, 182 F. Supp. 2d 315, 324 (W.D.N.Y. 2001). Further, probable cause must be "evaluated in light of the circumstances as they would have appeared to a prudent, cautious, trained law enforcement official." Granderson, 182 F. Supp. 2d at 324.

The testimony established that the officers attempted to stop the individual based on their observation that the object he was holding and twisting, or pinching, looked like a marijuana

cigar. There were no factors, other than this initial observation from between 10 to 15 feet away, that it was marijuana. There was no testimony that the officers smelled marijuana, no testimony indicating that the individual was in a location known for sales of marijuana, nor any other factors that would have contributed to an objective belief that the individual was in possession of marijuana.

As the CCRB prosecutor commendably conceded (Tr. 578, 582), the officers had the right to approach the individual and question him regarding their observations, as under the framework of People v. De Bour, 40 N.Y.2d 210 (1976), there was founded suspicion that criminal activity could be afoot. But, at that point, the individual also had the right to walk away, which he did. The mere observation of what appeared to be a marijuana cigar and no other accompanying factors to suggest it was marijuana failed to meet the burden of establishing probable cause. See People v. Sanchez, 8 A.D.3d 504, 505 (2d Dept. 2004) (detective had common-law right of inquiry to question defendant based on defendant rolling and licking three-to four-inch brown cigar wrapper; this escalated to probable cause when detective saw defendant in possession of a knife, and defendant began struggling with detective who attempted to secure it); cf. People v. Anderson, 293 A.D.2d 483 (2d Dept. 2002) (officer had probable cause to arrest defendant for smoking marijuana cigarette based on the way defendant was holding the cigarette, how it was rolled, smell of burning marijuana, and smell of it on defendant's breath after he tossed the cigarette away).

As such, Respondents Garner and Hirsch did not have probable cause to arrest the individual observed on the sidewalk and therefore their entry into [REDACTED] was unlawful. They reasonably should have been expected to know and understand that. They each are found Guilty of the misconduct set forth in Specification No. 1.

Respondents Abbassi and Passolo arrived at [REDACTED] after a call for backup was made. After arrival, they were informed by Respondent Hirsch that the SNEU team had observed an individual with marijuana, attempted to effect an arrest, and the individual fled into the backyard (Tr. 473, 510). Based on this information, Respondents Abbassi and Passolo, along with Respondent Garner, entered the house itself to search for the fleeing individual. The CCRB contends that both their entry into the backyard and the subsequent entry into the house were separate unlawful entries.

Respondents Abbassi and Passolo's initial entry into the backyard was the result of Respondent Hirsch's call for backup. Their entrance into the backyard as supervising members of service in response to a call for backup does not constitute misconduct, as they could not be expected to remain outside on the sidewalk while their subordinate officers dealt with a hostile situation within the backyard. *See Case Nos. 2014-11568-69*, p. 11 (Sept. 10, 2015) (police officer following a fellow police officer into a residence, even where the following officer had reason to believe that his partner's entry was improper, may be justified, because if the following officer had remained outside, she would have been unable to come to her partner's assistance).

With regard to the entry into the home, under the fellow officer rule, information received by one officer from a fellow officer with probable cause is presumptively reliable, for purposes of determining whether the receiving officer has probable cause. *See People v. Ketcham*, 93 N.Y.2d 416, 419-20 (1999). Respondents Abbassi and Passolo acted on the information they received from both Respondents Hirsch and Garner at the scene, which was that they had observed an individual with marijuana flee into the backyard and then into the house. Though it is true that supervising officers are held to a higher standard when it comes to making decisions on patrol, they also are permitted to rely on the information communicated to them regarding the

situation if they arrive after the fact. Based on the information they received from Respondents Hirsch and Garner, it was reasonable for them to conclude that they had probable cause to enter the house. See Case No. 82894/07, pp. 48-51 (Mar. 15, 2010) (SNEU sergeant not guilty of unlawful stop where he made the stop in reliance on observing officer's radio transmission of description of suspect). Accordingly, Abbassi and Passolo are found Not Guilty of unlawful entry, Specification No. 2 against each of them.

Search of the Garbage Can

Respondent Sitzman is charged with unlawfully opening and searching the garbage can located in the backyard of [REDACTED]. As previously discussed, Respondent Sitzman testified that as soon as the individual from the sidewalk entered the backyard, he opened the lid of a garbage can located just inside the fence and placed the marijuana cigar inside. Respondent Sitzman admitted that once he and his team were inside the backyard, he opened the garbage can and removed the marijuana cigar before securing it in his pocket.

As discussed above, the initial entry into the backyard by Respondents Hirsch, Garner and Sitzman was unlawful. It follows that the subsequent search of the garbage can, located inside the backyard, was likewise unlawful. Respondent Sitzman's attorney contended that because the marijuana cigar had been thrown in the garbage, it constituted abandoned property. Furthermore, counsel contended that the individual who threw the cigar into the garbage did not live at [REDACTED] and could not have had an expectation of privacy (Tr. 539-40). This argument is flawed. The garbage can at issue in this case was located within the curtilage, where an expectation of privacy still existed, regardless of whether something was thrown in the trash. Had the garbage can been located outside the backyard's fence on the sidewalk, Respondent Sitzman's search would have been reasonable under the Fourth Amendment. See

California v. Greenwood, 486 U.S. 35, 39-41 (1988). Additionally, while the fleeing individual may not have had an expectation of privacy in the garbage can within the backyard, the Littles, as owners of the home, maintained an expectation of privacy within their own backyard. The alleged violation of that right, not any claim to suppression of evidence by the fleeing suspect, is the subject of the CCRB complaint. Accordingly, Respondent Sitzman is found Guilty of unlawfully searching the garbage can.

Alleged Racial Slurs

Respondent Hirsch is charged in Specification Nos. 2 through 6 with five separate uses of offensive language regarding Kaheem Littles' race. Jilvonja and Kaheem both testified at trial that during the initial back and forth with the responding officers in front of the back door, Respondent Hirsch taunted Kaheem in several ways. According to Kaheem, Respondent Hirsch, who is white, called him a coon, a nigger, a gorilla, and a monkey, and made monkey noises at him while tapping his rib cage with his hands in simian mimicry. Kaheem indicated that Respondent Hirsch's tone of voice was "very normal" yet sarcastic, and that he called him each name one time (Tr. 44-47, 175).

Jilvonja testified that Hirsch said to Kaheem, "You're nothing but a nigger, a coon, a monkey, a gorilla." According to Jilvonja, Respondent Hirsch called Kaheem a coon, monkey and gorilla once each, but called him a nigger several times. In response to hearing Respondent Hirsch use such language, Jilvonja testified that she said to Respondent Hirsch, "I cannot believe you. I cannot believe you just said that." She told Kaheem to not respond (Tr. 178).

Mack testified that a uniformed Caucasian officer standing in front of the back door and next to the kitchen window, facing Kaheem, called Kaheem a coon and a nigger in a tone that was aggressive but not yelling. On cross examination, Mack was questioned regarding his

CCRB interview, in which he stated that the officer who made the comments was in plainclothes. Mack testified at trial that he was confused because there were a lot of officers (Tr. 114-15, 127-28).

Respondent Hirsch testified that at no point during the incident did he use any of the charged words. He explained that as he was talking to Kaheem and Jilvonía, he was trying to keep the situation under control because the crowd was being combative (Tr. 443, 446-47).

The video footage depicts an exchange between Respondent Hirsch, Jilvonía, and Kaheem in front of the back door. In the video, Respondent Hirsch was standing next to a window and speaking to Jilvonía, who was wearing a red shirt; Kaheem, who was wearing a white tank top; and Mack, who was wearing a gray T-shirt (Tr. 194). Around 1:45 into the video, words were exchanged between Respondent Hirsch, Jilvonía, Kaheem, Mack, and a second friend, Steven. It was here that Jilvonía testified Respondent Hirsch first made the racial remarks. Jilvonía can be heard saying on the video, "Why are you saying that?" to Respondent Hirsch, and then turning to Steven and saying, "Don't say nothing" (Tr. 239-41, 267-68).

Respondent Hirsch's attorney argued that the racial epithet allegations were "tailored to fit a narrative." He pointed to the fact that Kaheem has a pending lawsuit against the City and the Department as a result of this incident and argued that these allegations are an effort to bolster that lawsuit. He argued that if Respondent Hirsch had, in fact, made the alleged remarks, Kaheem, Jilvonía, and Mack would have reacted much more strongly than they did. Additionally, he noted that once Respondents Abbassi and Passolo arrived, no one told them about the alleged remarks made earlier. Jilvonía asserted that when she was speaking to Respondents Abbassi and Passolo, she mentioned that the responding officers had been

disrespectful and had used disrespectful language, but she did not repeat the words that were used (Tr. 15, 93, 246, 273, 571).

Respondent Hirsch's attorney also argued that certain witnesses to the incident who gave statements to the CCRB, but did not testify at trial, were not consistent with the trial testimony on this point. Specifically, Respondent Hirsch's attorney pointed to the fact that Person C, the woman that actually recorded the incident, told the CCRB she did not recall hearing any officer use offensive language toward anyone in the backyard (Tr. 566-67; Respts. Ex. C, portion of CCRB closing report).

There is no question that the video footage depicts a hostile situation at the back door of the house. In fact, in addition to the first alleged racial remarks, at around 2:46 of the video, Respondent Hirsch says "okay" in a dismissive manner, turns away from Jilvonina and takes a sip of his iced coffee, and then turns back and says something to the three men behind Jilvonina, possibly Mack in particular. It is not completely audible and Treuman is blocking Respondent Hirsch's face, but Respondent Hirsch apparently said something along the lines of, "say some shit." It was in response to this that Jilvonina indicated they should not respond, and that Respondent Hirsch was goading them into a fight. Respondent Hirsch makes some additional remarks toward the men, but at no time is Respondent Hirsch heard making any of the vicious racial slurs he is accused of making. In fact, the person making the video, standing mere feet away, heard nothing.

It is all the more so with regard to the alleged monkey noises and beating of Respondent Hirsch's chest. The video does not even come close to depicting this. The reasonable conclusion is that this was an exaggeration to bolster the claims that Respondent Hirsch used the offensive specific words. If the complainants exaggerated on this, however, the tribunal cannot

credit their claims that Respondent Hirsch made the other remarks. In light of the video's failure to demonstrate that Respondent Hirsch made any of those remarks, the CCRB failed to prove by a preponderance of the credible evidence that Respondent Hirsch used the alleged offensive language regarding Kaheem's race. Accordingly, Respondent Hirsch is found Not Guilty of Specification Nos. 2 through 6.

Threat of Arrest

Respondents Abbassi and Passolo are charged with threatening to arrest Jilvonía without sufficient legal authority, Specification No. 1 against each of them. Jilvonía testified that when the additional officers arrived she had a conversation with an officer in a white uniform (Respondent Abbassi) who said to her, "There's a lot of officers here, there's a lot of video cameras; I need to justify why we're here." When she asked what he meant, she was told that they "needed a body," and if she did not give them someone to arrest, she would be the arrestee (Tr. 181-82, 187).

Andre testified that at one point during his conversations with Respondents Abbassi and Passolo, they told him that Kaheem and Jilvonía would be arrested if the people still inside the house did not come out. Andre then asked everyone who was inside to come outside. Once everyone came out of the house, Andre testified, he was told that Kaheem and Jilvonía still were going to be arrested. In response, Andre asked them, "What would it take for my brother and sister not to get arrested?" He was told that if he allowed the officers to search the house, the arrests would not occur (Tr. 305-06).

Respondent Abbassi testified that he spoke to both Jilvonía and Andre and told them that they needed "to cease their unlawful activity," i.e. obstructing governmental administration. Respondent Abbassi described Jilvonía as "completely uncooperative" but Andre as

“substantially more reasonable.” He testified that he told them that if they did not cease their conduct, they would be subject to arrest, essentially giving them a warning. Respondent Passolo also testified that during the course of one of the conversations with Jilvonja and Andre, he told Jilvonja that if she continued to physically obstruct the officers from entering the house and arresting the pursued individual, she would be arrested for obstructing governmental administration (Tr. 475-76, 498, 513).

As previously discussed, Respondents Abbassi and Passolo relied on the information provided to them by Respondents Garner and Hirsch. Based upon that information, they believed that they had the right to enter the house. Therefore, they reasonably believed that Jilvonja was, in fact, obstructing governmental administration, by blocking their entry into the home. The so-called threats that Jilvonja would be arrested if she did not cease blocking their entry were not without sufficient legal authority because they were based on a legitimate belief, through the fellow officer rule, that they had a right to enter the house. As such, Respondents Abbassi and Passolo are found Not Guilty of threatening to arrest Jilvonja without sufficient legal authority.

Search of the House

Respondents Abbassi and Passolo also are charged with searching [REDACTED] without sufficient legal authority. Though Respondent Garner also entered the house and searched, he is not charged with an unlawful search. In any event, approximately 22 minutes into the video footage, Respondents Abbassi, Passolo and Garner entered the house. Respondent Abbassi testified that the decision to enter the house was made based on the information received from Respondent Hirsch regarding the observation of the individual on the sidewalk and the principle of hot pursuit (Tr. 480).

Respondents Abbassi and Passolo based their decision to enter and search the house on the information provided to them by Respondents Hirsch and Garner. Specifically, that an individual they observed in possession of marijuana fled into the house through the back door. Both Respondents Abbassi and Passolo were justified in relying on this information due to the fellow officer rule. Accordingly, Respondents Abbassi and Passolo are Not Guilty of searching [REDACTED] without sufficient legal authority, Specification No. 3 against each of them.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondents' service records were examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent Hirsch was appointed to the Department on July 10, 2006, Respondent Garner was appointed on July 6, 2010, and Respondent Sitzman was appointed on July 11, 2005. Information from their personnel records that was considered in making these penalty recommendations is contained in attached confidential memoranda.

Respondents Hirsch and Garner have been found Guilty of entering [REDACTED] [REDACTED] without sufficient legal authority. The CCRB recommended a penalty of 10 vacation days for Respondent Garner and termination for Respondent Hirsch, although that latter recommendation was of course based on the extremely offensive racial language allegations, of which the Court has found Respondent Hirsch Not Guilty.

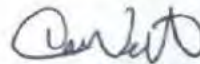
The recommendation of 10 days is excessive. Respondent Garner was operating under a mistaken understanding of the law but with the intention of interdicting a crime. In the face of immense hostility, he maintained his composure at all times. The tribunal recommends that Respondent Garner forfeit 3 vacation days as a penalty. See Case Nos. 2014-12437-39 (Oct. 13,

2015) (17-year detective with no prior disciplinary history forfeited three vacation days for entering an apartment without sufficient legal authority).

The analysis for Respondent Hirsch is different. As the first supervisor on the scene, he should be held to a higher standard when it comes to guiding his subordinate officers in their performance of their duties. This includes a correct understanding of the law of hot pursuit onto private property. It is thus recommended that Respondent Hirsch forfeit five vacation days as a penalty.

Respondent Sitzman has been found guilty of searching the garbage can in the backyard of [REDACTED] without sufficient legal authority. The CCRB recommended a penalty of five vacation days. This too is excessive and unsupported by Department precedent. Respondent Sitzman's search was brief and limited to the garbage can. A forfeiture of three vacation days is appropriate. See Case Nos. 2014-12349-50 (Sept. 22, 2015) (13-year detective, with prior history, forfeited three days for unlawful apartment search that was "brief in its intrusiveness").

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED

MAY 24 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
SERGEANT FORREST HIRSCH
TAX REGISTRY NO. 941905
DISCIPLINARY CASE NO. 2014-12260

On his last three performance evaluations, Respondent Hirsch once received an overall rating of 4.5 "Extremely Competent/Highly Competent" and twice received an overall rating of 4.0 "Highly Competent." He has been awarded 22 medals for Excellent Police Duty and nine medals for Meritorious Police Duty. [REDACTED]

From October 19, 2009, to October 19, 2010, Respondent Hirsch was on Level 1 Force Monitoring for having three or more CCRB complaints in one year.

He has no prior formal disciplinary history.

David S. Weisel
Assistant Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ROSS GARNER
TAX REGISTRY NO. 949007
DISCIPLINARY CASE NO. 2014-12259

On his last three annual performance evaluations, Respondent Garner twice received an overall rating of 4.5 "Extremely Competent/Highly Competent" and once received an overall rating of 4.0 "Highly Competent." He has been awarded 18 medals for Excellent Police Duty and two medals for Meritorious Police Duty. [REDACTED]
[REDACTED]

Beginning March 14, 2014, Respondent Garner was placed on Level 1 Force Monitoring for having three or more CCRB complaints in one year, which remains ongoing.

He has no prior formal disciplinary history.

David S. Weisel
Assistant Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER WILLIAM SITZMAN
TAX REGISTRY NO. 939474
DISCIPLINARY CASE NO. 2014-12261

On his last three annual performance evaluations, Respondent Sitzman once received an overall rating of 5.0 "Extremely Competent" and twice received an overall rating of 4.0 "Highly Competent." He has been awarded 20 medals for Excellent Police Duty and five medals for Meritorious Police Duty. [REDACTED]

He has no prior formal disciplinary history.

David S. Weisel
Assistant Deputy Commissioner Trials