



POLICE DEPARTMENT

July 01, 2009

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Nicholas Henry
Tax Registry No. 941891
23 Precinct
Disciplinary Case No. 83310/07

The above-named member of the Department appeared before me on March 19, 2009 charged with the following:

1. Said Probationary Police Officer Nicholas Henry, assigned to the 23 Precinct, while off duty, on or about August 29, 2007, in Queens County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Probationary Police Officer was arrested on a [REDACTED] Family Court Arrest Warrant, Docket No. O-08533-07.

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

2. Said Probationary Police Officer Nicholas Henry, assigned to the 23 Precinct, while off duty, on or about August 29, 2007, having been directed by New York City Police Captain Christopher Tamola to respond to the Queens North Investigations Unit forthwith, did fail and neglect to comply with said order.

P.G. 203-03, Page 1, Paragraph 2 – COMPLIANCE WITH ORDERS

3. Said Probationary Police Officer Nicholas Henry, assigned to the 23 Precinct, while off duty, on or about August 29, 2007, in Queens County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Probationary Police Officer engaged in a domestic physical altercation with a person known to the Department in that he grabbed said individual's hand and forcibly bent their fingers back.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT
N.Y.S. Penal Law Section 120.00(1) – ASSAULT IN THE THIRD DEGREE

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4. Said Probationary Police Officer Nicholas Henry, assigned to the 23 Precinct, while off duty, on or about August 28, 2007, in Queens County, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Probationary Police Officer did intentionally place or attempt to place another person in fear of death, imminent serious physical injury or physical injury, to wit: pointed his service weapon at said individual and threatened to kill himself and their children.

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

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

The Department moved to dismiss Specification Nos. 1, 3, and 4. The Respondent, through his counsel, entered a plea of Not Guilty to Specification No. 2. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty of Specification No. 2. Specification Nos. 1, 3, and 4 are dismissed.

MOTION TO DISMISS

The Assistant Department Advocate moved to dismiss Specification Nos. 3 and 4 because the complaining witness, Carla Zapata, conceded to the investigating officer that her allegations were not true. Zapata, the Respondent's former fiancée, falsely claimed that the Respondent had assaulted and threatened her because she wanted the Respondent to leave her alone. Based on Zapata's recantation, these charges were ultimately unsubstantiated by the investigating group.

After making her false allegations, Zapata was issued a [REDACTED] Family Court Order of Protection. With respect to Specification No. 1, the Assistant Department Advocate sought to dismiss the charge because there was no technical "arrest" of the Respondent. The Assistant Department Advocate stated that an ex parte Order of Protection was issued against the Respondent and served upon him. Evidence adduced at trial also established that the [REDACTED] picked up the Respondent at his [REDACTED] on the warrant and detained him overnight to see a judge. By all accounts, the Respondent was not free to leave. Black's Law Dictionary defines an arrest as "A seizure of forcible restraint." It is also defined as "The taking or keeping of a person in custody by legal authority." A lawful arrest is defined as "The taking of a person into legal custody either under a valid warrant or on probable cause that the person has committed a crime." [See Black's Law Dictionary, Deluxe, 7th Edition, 1999 West Group, p. 104]. The Respondent was kept by the [REDACTED] Police based on a warrant.

The problem this Court has is that the Respondent was charged in Specification No. 1 with being arrested on a [REDACTED] Family Court Arrest Warrant. An arrest, in and of itself is not a crime or actionable misconduct and should not form the basis for a Charge and Specification absent some underlying misconduct or crime being alleged. It is for these reasons that Specification No.1 should be dismissed.

Based on the foregoing, I recommend that Specification No. 1 be dismissed and that the motion to dismiss be granted.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Captain Christopher Tamola as its sole witness.

Captain Christopher Tamola

Tamola, an 18-year member of the Department currently assigned as the Commanding Officer of the 112 Precinct, was the Queens North Duty Captain on August 29, 2007. He testified that at one point that day he was notified by the Internal Affairs Bureau (IAB) that the Respondent had allegedly threatened to kill his children and himself and that the [REDACTED] Sheriff's Department [REDACTED] had issued a warrant for the Respondent's arrest. After receiving this information, Tamola called the Respondent on his cell phone to order him in for an interview. When the Respondent told Tamola that he was on his way to work, Tamola instructed him that his tour started at that moment and that he should report directly to the Queens North Investigations Unit (QNIU), which is located in the 114 Precinct, instead of going to his regularly assigned command. According to Tamola, when the Respondent asked what was going on, he told the Respondent that it was about a domestic incident in which he was involved. Tamola never reported to the 114 Precinct. Tamola later learned that the Respondent went to a residence within the confines of the 113 Precinct, where he was taken into custody by [REDACTED] officers. The Respondent was subsequently suspended from duty.

On cross-examination, Tamola testified that he would probably not have been able to conduct an Official Department Interview of the Respondent without getting prior approval from the District Attorney's Office. Due to the nature of the allegations against

the Respondent, Tamola's priority was getting the Respondent secured in a police facility. On that day, Tamola prepared a memorandum on the situation for the First Deputy Commissioner. Tamola did not indicate in the memorandum that he told the Respondent during their telephone conversation that he was being investigated for a domestic incident. Tamola did not tell the Respondent about the arrest warrant. Tamola did not know where the Respondent was located during their telephone conversation. He could not recall if the Respondent asked him how to get to the 114 Precinct. Similarly, he could not recall if he initiated the call to the Respondent or if he left a message for the Respondent to call him back.

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent, a two-and-a-half-year member of the Department, is currently assigned to the 23 Precinct. In August 2007, he had been out of the Police Academy for a period of only six or seven months. About six weeks before the incident, he moved out of the [REDACTED] residence he had been sharing with Carla Zapata, his partner of nine or ten years and the mother of his two children. He explained that he and Zapata had been arguing a lot, and it was time to end the relationship. He broke off his engagement to Zapata and moved to [REDACTED]

On August 29, 2007, he went to visit his children in [REDACTED] but nobody was home. As he was driving from [REDACTED] to his mother's house to get ready for work, he received the telephone call from Tamola. At the time, he was about to get on the

Seaford Oyster Bay road toward the Southern State. He did not have his firearm or shield on him because he did not feel it was necessary to carry his gun when he went to visit his children. On the telephone, Tamola instructed the Respondent to report for duty at the 114 Precinct. According to the Respondent, he did not ask Tamola what was going on, and Tamola did not tell him anything about a domestic incident or an investigation. The Respondent asked Tamola for directions to the 114 Precinct, and the entire conversation lasted two or three minutes. The Respondent testified that he decided to stop at his mother's house on the way to the 114 Precinct to pick up his gun and shield. He believed he needed to pick up his gun and shield because a police officer does not report for duty without them. Two blocks from his mother's house he was stopped by [REDACTED] officers. The officers told the Respondent that although he was not being arrested, he needed to go with them to court. He was held in police custody until he saw a judge the next day. The Respondent stated that [REDACTED] is on the way from [REDACTED] to the 114 Precinct, and stopping at his mother's house would have added five minutes to his trip.

[Respondent's Exhibit A is a map of Long Island, which shows the locations of [REDACTED] [REDACTED] and the area of the 114 Precinct.] He testified that he did not intentionally disobey Tamola's order to report to the 114 Precinct, and he reiterated that he planned to stop at his mother's house just because he assumed he would need his gun and shield at work that day.

On cross-examination, the Respondent testified that Tamola gave him a lawful order to respond to the 114 Precinct. Instead of driving directly to the 114 Precinct, though, he attempted to stop at his mother's house on the way.

FINDINGS AND ANALYSIS

The Respondent stands charged with failing to comply with an order to respond to QNIU forthwith. When the Respondent's former fiancée falsely alleged that the Respondent had threatened to kill his children and himself, Tamola, the Queens North Duty Captain, called the Respondent and instructed him to report to QNIU, which is located in the 114 Precinct. The Respondent, who at the time was driving back to [REDACTED] from [REDACTED] stopped at his mother's house in [REDACTED] to pick up his gun and shield. It was at that point that he was taken into custody by the [REDACTED] officers. He was held in custody until the following day, never making it to QNIU.

Tamola testified that he told the Respondent during the telephone call that he was being summoned to QNIU because of a domestic incident in which he was involved. The Respondent, in contrast, testified that Tamola did not provide that information. For several reasons, the Court believes the Respondent's claim that he did not understand the real reason that Tamola wanted to see him. First, Tamola did not indicate in the memorandum that he prepared for the First Deputy Commissioner on the day of the incident that he told the Respondent anything about a domestic incident investigation. Second, Tamola conceded that he cannot completely recall the telephone conversation with the Respondent. Specifically, Tamola could not recall whether the Respondent asked him how to get to the 114 Precinct or if he even initiated the call in the first place. Third, both the Respondent and Tamola agreed that Tamola did not mention the arrest warrant during their conversation. Lastly, out of safety concerns for the Respondent's fiancée and children, it would not have been prudent for Tamola to give the Respondent too much information on the situation.

Based on the above, it is understandable that the Respondent genuinely believed that when he reported to Tamola at QNIU he was reporting for a regular tour of duty, which would have required him to have his gun and shield. This is why he attempted to stop at his mother's house on his way to the 114 Precinct. He stored his gun and shield at his mother's house, which was on the way from [REDACTED] to the 114 Precinct, and stopping there would have added only five minutes to the trip. Before he could get there, though, he was taken into police custody, making it physically impossible for him to report to QNIU. Thus, his failing to appear at QNIU was beyond his control.

Accordingly, the Respondent is found Not Guilty.

Respectfully submitted,



Claudia Daniels-DePeyster

Assistant Deputy Commissioner – Trials

APPROVED



JUL 22 2008
RAYMOND W. KELLY
POLICE COMMISSIONER