



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

September 15, 2023

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Edgar Guerrero**
Tax Registry No. 956706
45 Precinct
Disciplinary Case No. 2022-24788

The above named member of the service appeared before Assistant Deputy Commissioner Paul M. Gamble on March 22, 2023, and was charged with the following:

DISCIPLINARY CASE NO. 2022-24788

1. Said Probationary Detective Edgar Guerrero, while off-duty and assigned to the 43rd Precinct, on or about February 21, 2022, in New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Probationary Detective Guerrero operated a motor vehicle while said Probationary Detective was under the influence of an intoxicant (*Dismissed*).

2. Said Probationary Detective Officer Edgar Guerrero, while off-duty and assigned to the 43rd Precinct, on or about February 21, 2022, in New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Probationary Detective Guerrero operated a motor vehicle while said Probationary Detective's ability to operate a motor vehicle was impaired by the consumption of alcohol (*Dismissed*).

3. Said Probationary Detective Officer Edgar Guerrero, while off-duty and assigned to the 43rd Precinct, on or about February 21, 2022, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Probationary Detective Guerrero refused to submit to a chemical breath test.

A.G. 304-06, Page 1, Paragraph 1
V.T.L. 1194 (1)(B)

PROHIBITED CONDUCT
REFUSAL TO TAKE A BREATH
TEST

4. Said Probationary Detective Officer Edgar Guerrero, while off-duty and assigned to the 43rd Precinct, on or about February 21, 2022, in New York County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Probationary Detective Guerrero was unfit for duty (*Dismissed*).

5. Said Probationary Detective Officer Edgar Guerrero, while off-duty and assigned to the 43rd Precinct, on or about February 21, 2022, in New York County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Probationary Detective Guerrero was unfit for duty while armed (*Dismissed*).

6. Said Probationary Detective Edgar Guerrero, while off-duty and assigned to the 43rd Precinct, on or about February 21, 2022, in New York County, wrongfully failed to safeguard his firearm, as required.

A.G. 305-07, Page 1, Paragraph 1

**UNIFORMS AND EQUIPMENT
FIREARMS – GENERAL
REGULATIONS**

7. Said Probationary Detective Officer Edgar Guerrero, while off-duty and assigned to the 43rd Precinct, on or about February 21, 2022, in New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Probationary Detective Guerrero wrongfully failed to safeguard Department property, that being a Department issued cellular phone.

A.G. 304-04, Page 1, Paragraph 1

**GENERAL REGULATIONS
PROHIBITED CONDUCT**

8. Said Probationary Detective Edgar Guerrero, while off-duty and assigned to the 43rd Precinct, on or about February 21, 2022, in New York County, wrongfully failed to immediately notify the Desk Officer of the loss of a firearm.

P.G. 219-21, Page 1, Paragraph 1

**DEPARTMENT PROPERTY
LOST/STOLEN FIREARM,
SHIELD, IDENTIFICATION
CARD**

In a Memorandum dated May 2, 2023, Assistant Deputy Commissioner Paul M. Gamble found Police Officer Edgar Guerrero guilty of Specification Nos. 3, 6, 7 and 8, after Police Officer Guerrero entered a plea of guilty to Specification Nos. 6 and 7, in Disciplinary Case No. 2022-26587. Specification Nos. 1, 2, 4 and 5 in said Disciplinary Case were dismissed prior to trial. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

After reviewing the facts and circumstances of this matter, in light of Police Officer Guerrero's previous suspension days served in connection with said misconduct, I direct that a penalty including the forfeiture of thirty (30) suspension days already served and the forfeiture of ten (10) vacation days, be imposed as the disciplinary penalty.



Edward A. Caban
Police Commissioner



POLICE DEPARTMENT

May 2, 2023

-----X

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2022-24788
Police Officer Edgar Guerrero	:	
Tax Registry No. 956706	:	
45 th Precinct	:	

-----X

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

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Michael Riccottone, Esq.
Department Advocate's Office
One Police Plaza, Room 402
New York, NY 10038

For the Respondent: Stuart London, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

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

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CHARGES AND SPECIFICATIONS¹

3. Probationary Detective Edgar Guerrero, while off-duty and assigned to the 43rd Precinct, on or about February 21, 2022, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Probationary Detective Guerrero refused to submit to a chemical breath test. (*As amended*).

A.G. 304-06, Page 1, Paragraph 1
V.T.L. 1194(1)(B)

PROHIBITED CONDUCT
REFUSAL TO TAKE A
BREATH TEST

6. Probationary Detective Edgar Guerrero, while off-duty and assigned to the 43rd Precinct, on or about February 21, 2022, in New York County, wrongfully failed to safeguard his firearm, as required.

A.G. 305-07, Page 1, Paragraph 1

UNIFORMS AND
EQUIPMENT
FIREARMS – GENERAL
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A.G. 304-04, Page 1, Paragraph 1

GENERAL REGULATIONS
PROHIBITED CONDUCT

8. Probationary Detective Edgar Guerrero, while off-duty and assigned to the 43rd Precinct, on or about February 21, 2022, in New York County, wrongfully failed to immediately notify the Desk Officer of the loss of a firearm.

P.G. 219-21, Page 1, Paragraph 1

DEPARTMENT
PROPERTY LOST/STOLEN
FIREARM, SHIELD,
IDENTIFICATION CARD

¹ The Department dismissed Specifications 1, 2, 4, and 5 before trial.

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on March 22, 2023. Respondent, through his counsel, entered pleas of Guilty to Specifications 6 and 7 and pleas of Not Guilty to Specifications 3 and 8. The Department called Sergeant Stephan Williams. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all of the evidence in this matter, the Tribunal finds Respondent Guilty of Specifications 3, 6, 7, and 8. I recommend a penalty of 40 vacation days.

ANALYSIS

The following is a summary of the facts which are not in dispute. On February 21, 2022, at approximately 0200 hours, Respondent parked his Honda Accord on Dyckman Avenue, in the 34th Precinct, and entered a restaurant to purchase some food. When he exited the restaurant, he discovered his vehicle had been stolen and called 911. When police officers responded, he informed them that his Department mobile phone was in the car and participated in a canvass of the area. Approximately 15 minutes into the canvass, Respondent told the officers that his off-duty firearm was also in the vehicle. Respondent and the officers continued the canvass for a time before going to the 34th Precinct (T. 19-20).

At the Precinct, Sergeant Delacruz observed that Respondent had bloodshot, watery eyes and smelled a faint odor of alcohol on his breath (T. 19-20). [REDACTED]

[REDACTED]

Officer Rodriguez of the IDTU conducted the coordination test. According to the examination form completed by the officer, Respondent had a faint odor of alcohol on his breath,

watery eyes, and his speech was clear (Court Ex. 1). Rodriguez attempted to administer a chemical breath test to Respondent; he refused the test twice (T. 15-17; Dept. Ex. 1 at 11:47:56-11:48:20). He then performed two coordination tests, which Respondent took (T. 20). After the exam, Rodriguez indicated Respondent was not under the influence of an intoxicant (Court Ex. 1).

Respondent's vehicle, firearm, and Department cellphone were recovered two days later in the 50th Precinct (T. 23).

At issue, in this case, is whether Respondent's actions at the Intoxicated Driver Testing Unit amount to refusing a chemical breath test in violation of Administrative Guide 304-06. Also at issue is whether Respondent's disclosure to Sergeant Delacruz that his firearm was in his stolen car is sufficient to constitute a report of a lost firearm to the Desk Officer, as required by Patrol Guide procedure 219-21.

The following is a summary of the relevant evidence presented at the trial.

Sergeant Stephen Williams of the Chief of Detectives Investigation Unit testified that he investigated the present matter (T. 13). At the time of the incident on February 21, 2022, Respondent was a probationary Detective (T. 12-13). During his investigation, Sergeant Williams reviewed [REDACTED] Body Worn Camera Video of Sergeant Delacruz (Dept. Ex. 1), watched the surveillance video of Respondent's car being stolen, and conducted an interview with Respondent, as well as reviewed interviews with Sergeant Delacruz and Police Officer Rodriguez (T. 14, 17-21, 33).

Sergeant Williams testified that, based upon his review of the surveillance video, there was no forced entry into Respondent's vehicle when it was stolen; he also observed that the video showed the rear lights of the car were on, indicating the possibility that the vehicle's engine was running at the time it was stolen (T. 38). Sergeant Williams testified further that during the investigation, he learned Respondent did not disclose that his firearm was in the stolen vehicle until about 15 minutes into his interaction with the responding officers (T. 19, 28).

Respondent testified that on February 21, 2022, at approximately 0200 hours, he left a friend's house and decided to stop for a sandwich (T. 46). He testified further that before leaving that friend's home, he had visited another friend who lived in the area of 207th Street, in Washington Heights (T. 47). Respondent had worked the previous day from approximately 0800 to 1800 hours (T. 46-47). Respondent denied having consumed alcohol from the time he ended his tour on February 20th until 0200 hours on February 21st (T. 47).

Respondent testified that he drove his white Honda Accord to a restaurant on Dyckman Street and waited for a parking spot (T. 47-48). He then pulled over, parked, and shut his car off (T. 48). Respondent stated that he went inside to order a sandwich, then came back out to his car; at the time he entered the restaurant, he had his off-duty firearm, his police identification card and his shield (*Id.*). He claimed that as he was ordering his food, he felt his holster was loose but decided not to address the issue at that time (T. 48-49).

Once Respondent received his sandwich, he returned to his car, and then decided to order another sandwich; before he returned to the restaurant, however, he removed his firearm and his Department phone and placed them under his driver's seat in a "sealed compartment" which was not locked² (T. 50-51).

² Respondent alternatively described this compartment as hidden and concealed.

Respondent testified that he returned to the restaurant to order the second sandwich; he asserted that he shut and locked the car the second time he exited it. He stated that he sometimes leaves his lights on but remembered the engine being off (T. 49-50). When he left the restaurant for the second time, Respondent noticed his car had been stolen and immediately called 911 (T. 54).

Respondent testified that while he was on the phone with 911, he did not tell the operator that his firearm was in the stolen vehicle. At first, he claimed he did not have time to tell the operator; then, he claimed that the situation was overwhelming and he was nervous. He then explained that the responding officers appeared in front of him before he could finish his call with the 911 operator (T. 51-52). Respondent continued to explain how he did not want to possibly alert the perpetrators in the vehicle that there was a firearm on the off-chance they had a radio and were listening to the transmission (T. 53).

Respondent testified on direct examination that he told the responding officers that his firearm was in the car and was hidden under the driver's seat; on cross-examination, he admitted that while he did tell the officers right away that his Department mobile phone was in the car, he did not tell them that his off-duty firearm was in the car and hidden until 15 minutes into their canvass of the immediate area (T. 56, 70-72). After the failed canvass, Respondent returned to the 34th Precinct to complete a stolen vehicle report (T. 56-57, 72-73).

At the Precinct, Respondent met Sergeant Delacruz in front of the desk (T. 57). According to Respondent, Sergeant Delacruz asked him what happened, then informed him that he would take a report, make some notifications, then call the duty captain (*Id.*). Respondent then told Sergeant Delacruz, "Hey, sergeant, I'm not too sure if you are aware, but my off-duty firearm was underneath my driver's seat" (T. 57-58). He testified that Sergeant Delacruz

responded, “Are you kidding me?” and his demeanor changed (T. 58). Respondent claimed that it was when he was brought to the 45th Precinct that he realized he was being arrested for Driving While Intoxicated (T. 59).

Respondent admitted that he refused the chemical breath test but claimed that he did so because he believed that he was the victim of a crime and was nervous (T. 59-60). He explained that other people in the testing facility told him that he did not have to take the test; that he did not know any better because he had never been in that situation before; and that he did not trust the software (*Id.*). Respondent testified that he did not like that he did not have control of the breathalyzer and was concerned that an error in the software could cause the breathalyzer to issue a false positive result (T. 60). He testified that he did submit to the coordination test because it was under his control (*Id.*).

Respondent testified that when his vehicle was recovered, his firearm and Department mobile phone were still where he had placed them under the driver’s seat; however, he admitted that he failed to safeguard them (T. 63).

Credibility

I credit Sergeant Williams’ testimony as clear, concise, and logical. He is a disinterested witness in this proceeding whose testimony was consistent with his role as an investigator without personal knowledge of the relevant events.

Respondent’s testimony, while credible for the most part, was in some respects self-serving, illogical, and speculative.

Specification 3: Refusal of Chemical Breath Test

I find that the Department Advocate has met his burden of proof by a preponderance of the credible, relevant evidence that on February 21, 2022, Respondent refused to submit to a chemical breath test.

The Administrative Guide section 304-04 Fitness for Duty states:

“A uniformed member of the service who refuses to submit to chemical testing in connection with an alleged violation of section 1192 of the New York State Vehicle and Traffic Law (Driving While Intoxicated) will be charged with violating Administrative Guide procedure 304-06, ‘Prohibited Conduct,’ Engaging in conduct prejudicial to the good order, efficiency, or discipline of the Department.”

(A.G. 304-04).

I have reviewed the video evidence in Department Exhibit 1, which establishes conclusively that Respondent, while present at the Intoxicated Driver Testing Unit, located inside the 45th Precinct in Bronx County, refused a chemical breath test. He was then warned by Police Officer Rodriguez, who conducted the examination, that refusal to submit to the test would result in the suspension of his license; Respondent again refused the test.

Every person who operates a motor vehicle on the roadways of New York is subject to chemical breath testing if they are suspected of driving while intoxicated or impaired, upon pain of having their driving privileges suspended if they refuse the test (*See* VTL § 1194[1][B]). While such persons have the option of challenging the admissibility of evidence of their refusal in a later prosecution for drunk or impaired driving, a similar refusal by Members of Service subjects them to Departmental discipline for violating the Patrol Guide, whether or not they are eventually prosecuted (P.G. 304-06, para. 1).

Respondent’s testimony that he refused the test because he did not trust the software used in the Intoxilyzer machine is without merit, as his comfort level with the process used in the

IDTU is not part of the Department's burden of proof. Similarly, it is not relevant that he submitted to part of the testing regime or that he never had his driver's license suspended by the New York State Department of Motor Vehicles.

The evidence also establishes that Respondent's unequivocal refusal of the chemical breath test, in violation of Patrol Guide procedure 304-04, was prejudicial to this Department's good order, efficiency, and discipline. I reject the argument that the accusatory tone Sergeant Delacruz reportedly took with him, and the purported shock of being arrested for drunk driving overwhelmed him and led him to make an ill-informed choice to refuse the test. Respondent is a seasoned police officer who is charged with the supervision of other police officers. His refusal was also illogical, given his denial that he had been drinking. New York law permits evidence of a refusal to submit to chemical breath testing in a subsequent trial for drunk driving (VTL § 1194[2][f]).

The New York Vehicle and Traffic Law applies to all motorists, including Respondent, regardless of their subjective beliefs concerning the efficacy of its enforcement tools. Similarly, Members of Service lose the moral authority to enforce the law if they attempt to avoid the law's application to themselves.

Based upon the foregoing, I find Respondent Guilty of Specification 3.

Specification 6: Failure to Safeguard Firearm

Based upon Respondent's admission at trial that he failed to safeguard his firearm, I find him Guilty of Specification 6.

Specification 7: Failure to Safeguard Department Phone

Based upon Respondent's admission at trial that he failed to safeguard his Department mobile phone, I find him Guilty of Specification 7.

Specification 8: Failure to Notify Desk Officer

I find that the Department Advocate has met his burden of proof by a preponderance of the credible, relevant evidence that on February 21, 2022, Respondent failed to notify the Desk Officer of the loss of his firearm.

Patrol Guide procedure 219-21 directs a Member of the Service who “discovers the loss /theft of a firearm, shield or **IDENTIFICATION CARD**” to “Notify Desk Officer, precinct of occurrence, immediately” (emphasis in original)(P.G. 219-21[1]).

Respondent admitted in his trial testimony that he canvassed the neighborhood where his car had been stolen with responding police officers from the 34th Precinct for approximately 15 minutes before he informed them that his firearm was in the car. He offered two inconsistent rationales for failing to inform them of the weapon’s loss immediately: (1) he was so rattled by the experience of having his car stolen that he forgot to do so; and (2) that he deliberately withheld the information so it would not be broadcast over police radios, enabling unknown malefactors from monitoring the police frequencies and learning that the weapon was in his car before it could be recovered. Respondent also testified that the Desk Officer was sitting close by when he told Sergeant Delacruz that his weapon was in the stolen vehicle after the unsuccessful canvass and back at the 34th Precinct. Therefore, that notice to Sergeant Delacruz was the functional equivalent of informing the Desk Officer directly.

The aforementioned belated rationalizations strain credulity. It would require this Tribunal to believe that a Member of Service who professes to be skilled at making street-level gun arrests could be so discombobulated by the theft of his vehicle that he would simply forget to make a notification regarding an unsecured firearm. It is more likely that Respondent

recognized his perilous situation and sought to delay the disclosure of the lost firearm as long as he could.

Even if the Tribunal were to entertain, for the sake of argument, his concerns about broadcasting information over an insecure radio frequency, his explanation ignores the fact that every Member of Service has an issued Department mobile telephone, which he could have borrowed from either of the responding police officers to contact the Desk Officer in a more secure manner. Moreover, Respondent admitted that he called 911 from his mobile phone, from which he could have made another call to the 34th Precinct Desk Officer.

Finally, this Tribunal will not abandon common sense and ignore the clear language of the Patrol Guide procedure requiring Respondent to notify the Desk Officer of the loss of a firearm *immediately* (emphasis added) and adopt a standard that would permit informing any supervisor in close physical proximity to the Desk Officer.

Based upon the foregoing, I find Respondent Guilty of Specification 8.

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent's employment history also was examined (*See* 38 RCNY § 15-07). Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent, who was appointed to the Department on July 9, 2014, has been found Guilty of the charged misconduct.

The Department Advocate has recommended the forfeiture of 35 penalty days. The recommended penalty includes (1) 15 days for the refusal to submit to the chemical breath test; and (2) 20 days for the failure to safeguard Respondent's off-duty firearm and Department cellphone, as well as the failure to notify the desk officer of the loss of his firearm, all to run concurrently with each other.

The presumptive penalty for failure to safeguard a firearm, not resulting in a loss, is 15 vacation days; there is no mitigated penalty.

The presumptive penalty for failure to report a lost firearm is ten penalty days; the aggravated penalty is 20 penalty days.

The loss of Department property is sanctioned as a Class "B" Command Discipline, authorizing a penalty of up to ten penalty days.

The presumptive penalty for failure to submit to chemical breath testing is 30 suspension days and dismissal probation. The mitigated penalty is 15 days, and the aggravated penalty is termination.

I disagree with the Department's position regarding the applicability of the mitigated penalties for Respondent's refusal to submit to chemical breath testing and for the failure to safeguard his firearm.

While it is true that Respondent was the victim of a crime, his negligence in leaving the firearm and Department phone unsecured in his vehicle was complete before the car was stolen. Accordingly, I recommend that Respondent forfeit 15 vacation days for failing to safeguard his firearm and five days for losing his Department mobile phone.

The facts of this case demonstrate that Respondent had the duty and the ability to notify the Desk Officer of the loss of his firearm almost immediately after he discovered his car had

been stolen with the firearm inside. His delay in reporting the existence of the firearm in the car while he was canvassing with his brother officers was inexcusable. It was likely motivated by the hope that the vehicle could be located before he would be forced to admit that he had left his firearm inside. Respondent's immediate disclosure of the loss of his Department phone makes it more likely that his belated disclosure that his firearm had also been lost was deliberate.

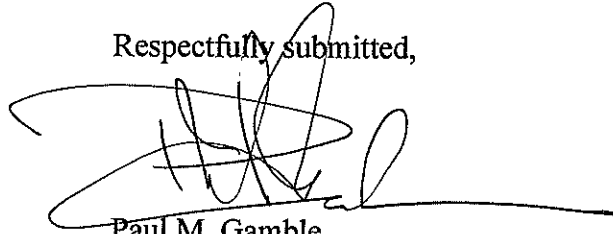
While it is understandable that Respondent may have loathed the idea of placing himself on report, he had a more significant duty to the public, if not his fellow police officers, to mitigate the risk of someone acquiring possession of his unsecured weapon. I therefore recommend a further penalty of 10 days for failure to immediately report the loss of his firearm to the Desk Officer.

Respondent's refusal to submit to chemical breath testing is not in dispute. The reasons he offered for his refusal are feeble and lacking in merit. Thus, no evidence of mitigation warrants the imposition of the mitigated penalty of 15 days. On the other hand, the presumptive penalty of 30 suspension days and dismissal probation appears more applicable to a Member of Service who refuses to test and is later found to have been driving while intoxicated. The penalty recommended by the Department Advocate is sufficient to sanction Respondent's unlawful refusal and act as a general deterrent. Based on the facts of this case, I recommend that he forfeit 15 vacation days.

In sum, I recommend that Respondent forfeit 40 vacation days. The penalties for each offense described above shall run consecutively to each other, except that the ten-day penalty for

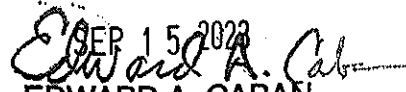
failure to safeguard Respondent's Department mobile phone shall run concurrently with the 15-day penalty for Respondent's failure to safeguard his firearm.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Paul M. Gamble', written over a horizontal line.

Paul M. Gamble
Assistant Deputy Commissioner Trials

DISAPPROVED

SEP 15 2022

EDWARD A. CABAN
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER EDGAR GUERRERO
TAX REGISTRY NO. 956706
DISCIPLINARY CASE NO. 2022-24788

Respondent was appointed to the Department on July 9, 2014. On his three most recent performance evaluations, he was rated “Exceptional” in 2019 and “Exceeds Expectations” in 2021 and 2022. He has been awarded one medal for Commendation, three medals for Meritorious Police Duty, and thirteen medals for Excellent Police Duty.

Respondent has no formal disciplinary history.

For your consideration.

Paul M. Gamble
Assistant Deputy Commissioner Trials