



POLICE DEPARTMENT

March 11. 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Kevin Marcial
Tax Registry No. 937879
101 Precinct
Disciplinary Case Nos. 2013-9999 & 2014-11636

The above-named member of the Department appeared before me on December 19, 2014, charged with the following:

Disciplinary Case No. 2013-9999

1. Said Police Officer Kevin Marcial, assigned to the 72 Precinct, on or about May 26, 2012, while on duty and assigned to guard a hospitalized prisoner, failed to keep the prisoner under constant observation; in that said Police Officer had his eyes closed and his hand on his chin for approximately one minute.

P.G. 210-02, Page 3, Paragraph 22 HOSPITALIZED PRISONERS

2. Said Police Officer Kevin Marcial, while assigned to the 72 Precinct, on or about and between September 18, 2012 and January 10, 2013, failed to maintain a current New York State Driver's license, as required.

P.G. 203-03, Page 1, Paragraph 5 – GENERAL REGULATIONS
COMPLIANCE WITH ORDERS

3. Said Police Officer Kevin Marcial, while assigned to the 72 Precinct, on or about January 28, 2013, failed to safeguard a Department Tint Meter that was assigned to him.

Interim Order No. 7, Revision to P.G. 206-03, Page 2, Paragraph 3
VIOLATIONS SUBJECT TO COMMAND DISCIPLINE

Disciplinary Case No. 2014-11636

1. Said Police Officer Kevin Marcial, while off-duty and assigned to the 72 Precinct, on or about January 11, 2013, engaged in conduct prejudicial to the good order,

discipline or efficiency of the Department, to wit: said Police Officer improperly registered his 2008 Acura with a temporary New Jersey license plate.

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

2. Said Police Officer Kevin Marcial, while assigned to the 72 Precinct, on or about and between January 11, 2013 and January 30, 2013, engaged in conduct prejudicial to the good order, discipline or efficiency of the Department, to wit: said Police Officer operated his improperly registered 2008 Acura.

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

3. Said Police Officer Kevin Marcial, while assigned to the 72 Precinct, on or about and between January 31, 2013 and February 12, 2013, engaged in conduct prejudicial to the good order, discipline or efficiency of the Department, to wit: said Police Officer operated his 2008 Acura that had an expired registration.

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

The Department was represented by Jamie Moran, Esq., Department Advocate's Office. Respondent was represented by Michael Martinez, Esq.

Respondent, through his counsel, entered pleas of Guilty to the subject charges and testified in mitigation of the penalty. A stenographic transcript of the mitigation hearing record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2013-9999

Respondent, having pleaded Guilty, is found Guilty as charged.

Disciplinary Case No. 2014-11636

Respondent, having pleaded Guilty, is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTED IN MITIGATION

With regard to his misconduct under Disciplinary Case No. 2013-9999, although Respondent admitted that he had failed to keep a hospitalized prisoner under constant observation in that he closed his eyes and had his hand on his chin for about one minute, he testified that he was not sleeping; that the hospitalized prisoner was handcuffed and leg shackled and did not attempt to escape; and that his executive officer did not direct that he be relieved from his post.

Regarding his misconduct of failing to maintain a current New York State Driver's license between September 18, 2012 and January 10, 2013, Respondent explained that because he was having financial problems ("money hardships"), he failed to pay his auto insurance premium and, as a result, his policy was cancelled and the New York State Department of Motor Vehicles (NYS DMV) suspended his vehicle registration and suspended his New York State Driver's license for three months.

Finally, as to his failure to safeguard a Department Tint Meter that was assigned to him, Respondent explained that when he was unable to find the Tint Meter after searching for it, he immediately reported the loss to a supervisor. The Tint Meter, which was inside a four inch by four inch box and had slipped into and become wedged in a gap between two car seats, was recovered about a month later.

With regard to his misconduct under Disciplinary Case No. 2014-11636, Respondent testified that after the NYS DMV suspended his vehicle registration he went to a DMV office twice but was unable to get the suspension lifted so he went to a used car dealership and paid about \$100.00 to have the used car dealer issue a NYS DMV

registration and plates for his car. The used car dealer placed temporary license plates on the car and Respondent began driving the car to the 72 Precinct.

Respondent asserted that he “honestly” did not realize that the used car dealer had placed temporary New Jersey license plates on the car rather than temporary New York license plates until he was confronted by a member of the service (MOS) who told him that the plates “weren’t good.” Respondent further asserted that because he believed that the temporary license plates would be valid “until I got it registered,” between January 31, 2013 and February 12, 2013, he continued to operate his car with the temporary license plates on the car.

In June, 2014, he was transferred from the 72 Precinct to the 101 Precinct and he asserted that he has been doing “fine” since his transfer.

On cross-examination, Respondent confirmed that while his New York State Driver’s license was under suspension, he obtained a Conditional New York State Driver’s license which allowed him to drive to and from work.

A photocopy of the “New Jersey 20 Day Non-Resident Temporary Plate” containing an expiration date of “January 30, 2013” that the used car dealer put on the Acura was offered in evidence by the Assistant Department Advocate (the Advocate) [Department’s Exhibit 1]

Respondent asserted that even though the used car dealer affixed this temporary license plate on the rear of his car, he never noticed that the plate had “New Jersey,” not New York, on it or that the license plate had an expiration date of “January 30, 2013” on it until an MOS pointed both of these things out to him.

PENALTY

In order to determine an appropriate penalty, Respondents' service records were examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on July 11, 2005. Information from his personnel record that was considered in making this penalty recommendation is contained in attached confidential memorandum.

As the prior disciplinary decisions cited by the Advocate indicate, Respondent's misconduct of failing to keep a hospitalized prisoner under constant observation, in that he closed his eyes and had his hand on his chin for about one minute, and failing to safeguard a Department Tint Meter, would merit no more than a loss of vacation days if these two acts of misconduct stood alone. However, Respondent's misconduct of failing to maintain a current New York State Driver's license for nearly four months constitutes more serious misconduct because police officers are required to have a valid New York State Driver's license as a condition of their employment with the Department.¹

Most significantly, Respondent's misconduct of improperly registering his Acura, operating this improperly registered vehicle, and operating it even past the date of the expired improper registration, constitutes serious misconduct. Since "New Jersey" and "EXP JANUARY 30, 2013" are displayed in large, bold-faced type on the photocopy of the "New Jersey 20 Day Non-Resident Temporary Plate" that was affixed to Respondent's Acura (DX 1), it is difficult to credit Respondent's claims that he never noticed that this was not a temporary New York State license plate and that he never noticed that this temporary license plate would expire in 20 days, until an MOS pointed out both of these things to him. Since UMOS enforce motor vehicle laws, Respondent's

¹ Patrol Guide Procedure No. 203-03(5), Note.

claims of ignorance, even if they are credited, reflect poorly on his ability to insure that he himself is not violating motor vehicle laws.

The Advocate recommended that Respondent receive a penalty consisting of one year on dismissal probation and the forfeiture of 30 vacation days.

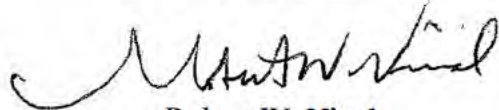
In a very recent decision, *Case No. 2013-10128* (Feb. 4, 2015), a police officer who had responded to the scene where a possible explosive device and threatening note were left, pleaded guilty to having torn up and discarded the note; discarding a bottle that was a part of the possible explosive device; failing to secure the crime scene, failing to advise detectives about information regarding the case; failing to record relevant information in his Activity Log; and failing to prepare a Complaint Report. In that case, the Police Commissioner disapproved the Trial Commissioner's recommended penalty of the forfeiture of 30 vacation days and imposed a penalty consisting of one year on dismissal probation and the forfeiture of 30 vacation days. In imposing this penalty, the Police Commissioner specifically cited the officer's "poor performance history with the Department."

Although Respondent's misconduct here differs from the misconduct in that case, in fashioning a penalty recommendation I have also taken into consideration Respondent's poor performance history with the Department (as detailed in the attached Confidential Memorandum).

Therefore, it is recommended that Respondent be DISMISSED from the New York City Police Department; however, this penalty of dismissal will be held in abeyance pursuant to Section 14-115(d) of the NYC Administrative Code for a period of one year, during which time Respondent will remain on the force at the Police Commissioner's

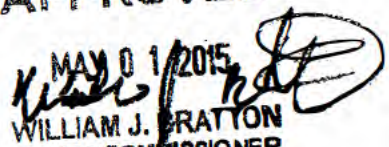
discretion and may be terminated at any time without a further hearing. It is further recommended that Respondent forfeit 30 vacation days.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner Trials

APPROVED

MAY 01 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

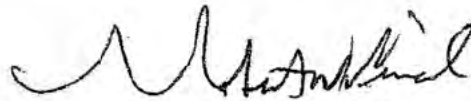
From: Assistant Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER KEVIN MARCIAL
TAX REGISTRY NO. 937879
DISCIPLINARY CASE NOS. 2013-9999 & 2014-11636

Respondent received an overall rating of 3.0 on his 2014 performance evaluation, 3.0 on his 2013 evaluation, and 2.5 on his 2012 evaluation. He has no medals. [REDACTED]
[REDACTED]
He has no formal disciplinary record.

On October 12, 2012, he was placed on Level 2 Performance monitoring since he received two below standards evaluations. This monitoring is continuing.

On June 7, 2014, he was transferred for cause from the 72 Precinct to the 101 Precinct as a result of his "dismissive attitude and his inability to adhere to Department procedures."

For your consideration.



Robert W. Vinal
Assistant Deputy Commissioner – Trials