



POLICE DEPARTMENT CITY OF NEW YORK

February 3, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Matthew Giunta
Tax Registry No. 947033
75 Precinct
Disciplinary Case No. 2014 12027

Charges and Specifications:

1. Said Police Officer, Matthew Giunta, on or about December 14, 2013, at approximately 2150 hours, while assigned to the 75th Precinct and on duty, [REDACTED], engaged in conduct prejudicial to the order, efficiency, or discipline of the New York City Police Department, in that he entered said location without sufficient legal authority.
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT- PROHIBITED CONDUCT
2. Said Police Officer, Matthew Giunta, on or about December 14, 2013, at approximately 2150 hours, while assigned to the 75th Precinct and on duty, [REDACTED], engaged in conduct prejudicial to the order, efficiency, or discipline of the New York City Police Department, in that he threatened to notify the Administration for Children's Services without sufficient legal authority.
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT
3. Said Police Officer, Matthew Giunta, on or about December 14, 2013, at approximately 2150 hours, while assigned to the 75th Precinct and on duty, [REDACTED], engaged in conduct prejudicial to the order, efficiency, or discipline of the New York City Police Department, in that he threatened to arrest Ms. Shalonda Simmons without sufficient legal authority. *(As amended)*
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

POLICE OFFICER MATTHEW GIUNTA**Appearances:**

For CCRB-APU: Heather Cook, Esq.

For Respondent: John Tynan, Esq.

Hearing Date (s):

November 6, 2015 and January 11, 2016

Decision:

Specification 1: Guilty

Specification 2: Not Guilty

Specification 3: Not Guilty

Trial Commissioner:

ADCT Jeff S. Adler

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on November 6, 2015 and January 11, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called Krystal Zachery and Shalonda Simmons as witnesses. Respondent called Sergeant Jose Deschamps as a witness and 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.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of unlawful entry into the apartment, Not Guilty of threatening to notify ACS without legal authority, and Not Guilty of threatening an unauthorized arrest.

FINDINGS AND ANALYSIS

At about 2150 hours on the evening of December 14, 2013, Respondent and his partner arrived [REDACTED]; they were there looking for Krystal Zachery, who resided in Apartment [REDACTED]. Zachery's downstairs neighbor had filed a complaint, alleging that

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Zachery had damaged her car by "keying" it. Shalonda Simmons, Zachery's mother, opened the door and spoke with Respondent while he and his partner remained outside the apartment in the hallway. From the stairwell a few feet from the apartment door, the downstairs neighbor identified Zachery, who was standing inside the apartment. Respondent explained to Simmons that they were going to arrest Zachery and asked that she step out, but Simmons told them that since they did not have a warrant, her daughter would not come out of the apartment to be arrested. There were several people inside the apartment at the time, including Zachery's younger siblings (approximate ages 11, 7, 6, and 15 months) and older brother. After calling Sergeant Jose Deschamps to the location, Respondent entered the apartment and arrested Zachery. The first issue is whether the record has established that Respondent entered the apartment without sufficient legal authority; I find that it has. The second issue is whether it has been proven by a preponderance of the credible evidence that Respondent wrongfully threatened to arrest Simmons and to notify ACS if she and her daughter didn't cooperate; I find that it has not.

Zachery, who was 21 at the time of the incident, testified that Respondent entered the apartment without consent. She acknowledged that the door was open the entire time her mother was speaking with the officers, but insisted that at no point did anyone give Respondent permission to enter the apartment. (Tr. 26) According to Zachery, after her mother's initial conversation with Respondent, additional officers arrived. One officer, who she described as an African-American male, consulted with Respondent in the stairwell. (Tr. 21, 27) That additional officer then departed, and as Simmons continued to speak with Respondent's partner, Respondent walked inside the apartment uninvited. (Tr. 23, 40, 52). Respondent walked back to

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the bedroom where Zachery was getting dressed, placed her under arrest, and escorted her from the apartment. (Tr. 24-25)

Some portions of Zachery's testimony were questionable. For instance, she claimed that she could hear everything that was being said by the front door and that no consent to enter was given; however, she was inside her bedroom, approximately 21 feet away, at the time Respondent entered the apartment, and the officers and her mother were speaking in regular tones. (Tr. 51-52, 54) Similarly, her claim that she actually saw Respondent "slide" past her mother into the apartment was not convincing, considering Zachery was concentrating on getting dressed in her bedroom at that time. (Tr. 23, 41, 54)

Simmons testified to a version of events that was at odds with that provided by her daughter. Simmons testified that when the officers first arrived, the downstairs neighbor identified her daughter; there was no mention of that in Zachery's testimony. (Tr. 73) Also, whereas Zachery stated that Respondent entered only after having consulted with his sergeant, Simmons maintained that Respondent entered before the sergeant had even arrived on the scene. (Tr. 77) More specifically, Simmons testified that because she had young children inside, she didn't want the officers coming into her apartment. (Tr. 73) Also, she stated that she didn't like how Respondent and his partner were handling the situation, and asked that a supervisor be summonsed. (Tr. 75, 106) Meanwhile, Simmons instructed her daughter to go to her bedroom and get dressed. (Tr. 76, 88) Before the sergeant arrived, though, Respondent "eased his way" past Simmons into the apartment; Simmons was momentarily distracted by one of her younger children, and moved her hand away from the door. (Tr. 77, 117) Simmons insisted she never gave Respondent consent to enter, and even said to him, "Who told (you) to come in?" (Tr. 77) When the sergeant arrived about a minute and a half later, Simmons invited him in to talk about

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the situation. Simmons then saw Respondent walk Zachery out from the rear bedroom in handcuffs. (Tr. 118, 120)

Respondent provided a different account of how he entered the apartment. Respondent, who has been with the Department seven years, testified that after Zachery had been identified, she retreated further inside her apartment. (Tr. 162) Simmons specifically told him that "he wasn't coming in." (Tr. 145) Respondent called for his sergeant, the standard procedure in an arrest situation. (Tr. 166) When the sergeant arrived, Respondent met him downstairs, and they returned to the apartment together. Respondent stated that at no point did he receive a direct order from the sergeant instructing him to enter the apartment to arrest Zachery. (Tr. 182) Respondent testified that as the sergeant was speaking with Simmons in the doorway, Simmons dropped her arm from the door (which up until then she had been using to block Respondent's entrance) and "moved aside," at which point Respondent stepped two or three feet inside the apartment and arrested Zachery. (Tr. 150-151, 169-171, 173) Respondent admitted that Simmons did not make any type of gesture or motion with her hand suggesting it was okay to enter, and never specifically told him that he could come into the apartment to arrest Zachery. (Tr. 168-169, 171, 181) Nevertheless, Respondent explained why he believed he had the right to enter the apartment: "I had a complainant, I had a view of the person who committed the crime. It was my understanding I was able to arrest her." (Tr. 175)

Sergeant Deschamps testified that he responded to the scene after receiving a call from Respondent regarding a possible arrest. Outside the building, Respondent updated him on the situation, and together they walked up to the apartment. The sergeant testified that Simmons answered his knock, and he explained to her that they needed to arrest her daughter. At the time of this conversation, the sergeant and Respondent were standing together in the hallway just

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outside the apartment door; the sergeant stated that he did not enter the apartment. (Tr. 127-128, 134) The sergeant could not recall ordering Respondent to enter the apartment, and testified that Respondent went in on his own in order to place Zachery under arrest. (Tr. 135) Specifically, Sergeant Deschamps testified that as he was talking with Simmons by the door, Zachery started walking toward them from the rear of the apartment, as if to exit. Respondent then walked three feet inside the apartment, handcuffed Zachery, and removed her from the apartment. (Tr. 128, 134-136) The sergeant stated that he did not recall hearing Simmons give them permission to enter. (Tr. 134) He suggested, though, that he did not believe there was anything wrong with Respondent's having gone inside to arrest her, even without permission; indeed, when asked what the officers would have done if Zachery had stopped inside the apartment six feet away from the door, the sergeant replied that they would "go inside and cuff her...because she is going – she is going to be arrested." (Tr. 137)¹

Guidance for what constitutes reasonable police conduct in this situation can be found in the Fourth Amendment. It is a basic principle of Fourth Amendment law that entry into a home without a warrant is presumptively unreasonable. This rule against warrantless entry is subject only to a few specifically established exceptions, such as where "exigent circumstances" exist that justify the entry. However, given the non-violent nature of the offense here, the lack of any reason to believe Zachery was armed, and no likelihood that Zachery would escape if not swiftly apprehended, there was no urgent need for a warrantless entry. See *People v. McBride*, 14 NY3d 440 (2010)

¹ One potential item of evidence that could have resolved some of the discrepancies here was never produced at trial. Zachery, Simmons, and Respondent all testified that Simmons' son recorded the incident with his phone. The footage of this recording, which presumably could have shed some light on the circumstances surrounding Respondent's entry into the apartment, and whether any threats were made, was never provided to CCRB or police, and was not introduced into evidence at this trial. (Tr. 36, 80, 153)

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Additionally, it also is well-settled that police need not procure a warrant when they have obtained the voluntary consent of a party possessing the requisite authority over the premises. See *People v. Adams*, 53 NY2d 1 (1981). It is undisputed that during Respondent's initial approach to the apartment, Simmons made clear that there was no consent to enter. What is at issue is whether consent was granted after Respondent returned to the apartment with his sergeant. Both Simmons and Zachery insisted that Respondent stepped into the apartment without permission. Respondent stated that Simmons dropped her arm from the door and stepped aside, suggesting that there was implied consent to enter. See *People v. Davis*, 120 AD2d 606 (2d Dept. 1986). However, Sergeant Deschamps testified that he did not recall any verbal consent being given, and there was no testimony from him that Simmons stepped aside to allow entry. Rather, according to the sergeant, Respondent merely walked inside the apartment on his own initiative when he saw Zachery walking toward the door.

This tribunal finds the sergeant's version of events to be the most plausible and credible. He is a disinterested witness, and came across as sincere on the witness stand. Based on the sergeant's account, Respondent crossed the threshold into the apartment to apprehend the suspect, rather than wait for her to step out of the apartment. No consent was given, express or implied, for the officer to enter. Indeed, having listened to the testimony of Simmons regarding her interaction with Respondent and his partner, this tribunal cannot imagine her giving consent to Respondent to enter her apartment at any point, considering how clearly she "didn't like their performance." (Tr. 75)

Even if Respondent honestly believed he had a basis for entering the apartment without a warrant, that belief was not a reasonable one. Under the totality of circumstances, a reasonable officer in this situation would not have acted the way Respondent did here. When he stepped

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inside the apartment, Respondent acted without due and reasonable care that his actions be proper, and I find him Guilty of Specification 1.

Notwithstanding this finding, this tribunal is not persuaded by the credible evidence that Respondent threatened Simmons as alleged in the remaining two specifications. Simmons testified that Respondent said to her that if Zachery didn't come out and they had to bring the sergeant to the scene, the sergeant would call ACS because of her children, and Simmons would be arrested. (Tr. 75-76) Zachery, too, alluded to a threat from Respondent regarding ACS, claiming he said to her, "Don't make it harder on yourself. You don't want to get a(n) ACS case for your mother. Just walk out and be quiet." (Tr. 25) Zachery conceded that Respondent did not yell at her. (Tr. 56) Respondent, himself, acknowledged that he explained to Simmons that "if things were to escalate or go south", Simmons could be arrested for Obstructing Governmental Administration, and ACS would be notified. Respondent insisted these comments were not designed to threaten Simmons; rather, he merely "explained procedure" to Simmons with the hope of warding off a potentially violent situation should Simmons decide to interfere with the officers' efforts to make a lawful arrest. (Tr. 148, 151-152, 167-168) Having observed Respondent's demeanor on the stand, this tribunal finds it more probable than not that Respondent's comments were made in good faith and for legitimate police purposes, rather than gratuitous threats against mother and daughter. The record has failed to establish otherwise, and I find Respondent Not Guilty of Specifications Two and Three.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent, who was appointed to the Department on July 8, 2008, has no formal disciplinary history. Information

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from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB has recommended that Respondent forfeit eight (8) vacation days, but under the totality of the circumstances that recommendation is excessive. Respondent has been found guilty only of unlawful entry, for which a typical penalty is forfeiture of three (3) vacation days. See, eg., *Disciplinary Case No. 11569-14* (September 10, 2015) (10-year sergeant with no disciplinary history forfeited three (3) vacation days for entering an apartment without sufficient legal authority); *Disciplinary Case No. 12439-14* (October 13, 2015) (17-year detective with no disciplinary history forfeited three (3) vacation days for entering an apartment without sufficient legal authority. That penalty seems appropriate here as well. To be sure, Respondent is responsible for knowing the law connected with the Fourth Amendment rights of citizens. However, Respondent's unlawful entry into the apartment did not appear to stem from a blatant disregard of the occupants' rights. Rather, it seemed more a result of an erroneous belief, shared by his sergeant, that such conduct was proper, as his suspect had been identified and was standing there in plain view. Hopefully this case will be the impetus for his making better, more-informed decisions moving forward. Accordingly, I recommend that Respondent forfeit three (3) vacation days as an appropriate penalty.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED

APR 07 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER MATTHEW GIUNTA
TAX REGISTRY NO. 947033
DISCIPLINARY CASE NO. 2014-12027

On his last three performance evaluations Respondent twice received an overall rating of 4.5 "Extremely Competent/Highly Competent" and once received an overall rating of 4.0 "Highly Competent."

[REDACTED]

He has no prior formal disciplinary history.

For your consideration.

Jeff S. Adler
Assistant Deputy Commissioner Trials