



POLICE DEPARTMENT
NEW YORK, N.Y. 10038
DEPUTY COMMISSIONER—TRIALS

September 14, 2011

MEMORANDUM FOR: Police Commissioner

Re: Captain Jonn Marchica
Tax Registry No. 913828
Patrol Borough Staten Island
Disciplinary Case No. 85577/09

The above-named member of the Department appeared before me on May 16, 2011 and May 31, 2011, charged with the following:

1. Said Captain Jonn Marchica, assigned to the 123rd Precinct, on or about March 7, 2008, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Captain failed to fully and properly conduct an investigation into a Department vehicle accident.

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

The Department was represented by Daniel Maurer, Esq. and Joanne Watters, Esq., Department Advocate's Office. Respondent was represented by Louis LaPietra, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

It is recommended that the charge against Respondent be DISMISSED.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Captain Alex Markov and Sergeant Matthew Chapman as witnesses.

Captain Alex Markov

Markov, a 22-year member of the Department currently assigned to Patrol Borough Brooklyn North, was assigned as a lieutenant in the 120 Precinct on March 7, 2008. Markov has been a Captain for approximately a year and a half. He explained that on March 7, 2008, he responded to the intersection of Bradley Avenue and Watchogue Road because of a vehicle accident involving a Member of the Service (MOS). Markov stated he received a call to respond to the accident from a sector car. Upon his arrival he learned that the reason he was called to the scene of the accident was because the MOS that was involved in the accident was Deputy Chief Joseph McKeever. There were only two other officers on the scene.

Markov testified that upon arriving on the scene, the investigation that he conducted into the accident involved ascertaining from the sector car how the accident occurred and who was involved. Markov testified that the detail that was given to him surrounding the accident was that McKeever approached a steep turn and lost control of the vehicle and crashed into a fence. [Department's Exhibits 1 through 9 are photographs of the damage done to the vehicle and the fence.] After speaking with the two officers in the sector car Markov briefly spoke to McKeever. Markov's conversation with McKeever consisted of Markov asking McKeever if it was a Department vehicle and if

McKeever was injured. Markov testified that McKeever stated it was a Department vehicle and he was not injured and did not require an ambulance. After the brief conversation with McKeever, Markov called for the duty captain (Respondent) to respond. Markov explained that he felt it was appropriate to call the duty captain because McKeever was a higher ranking MOS.

When Respondent arrived, Markov informed him that McKeever was involved in an accident. Markov stated that the only other information he might have provided to Respondent was that McKeever was not hurt and that it was a Department vehicle accident. Markov explained that Respondent spoke to McKeever in his presence but Markov did not hear what was going on. Markov estimated that the conversation between Respondent and McKeever lasted approximately fifteen minutes. Markov further explained that he was directed by Respondent to have McKeever taken home. Markov assigned someone to take McKeever home as directed.

After McKeever was removed from the scene, Markov directed the sergeant to respond and prepare a Police Accident Report (PAR). Markov remained on the scene until the sergeant arrived. Markov recalled that he looked at the PAR back at the station house but he stated, "I don't remember how far into it I went to see if it was accurate or not, but I did take a short look at it."

Markov did not notice anything unusual about McKeever's behavior during the initial conversation that he and McKeever had while awaiting the arrival of Respondent. Markov did not notice anything that would indicate that McKeever was under the influence of alcohol. Markov did not question McKeever as to where he had been prior to the accident, his rate of speed at the time of the accident, and if he had ingested any

alcohol. Markov said that his proximity to McKeever during their conversation was a distance of approximately three to four feet. Markov testified that he did not make any other notifications other than to the duty captain and he did not fill out any paperwork other than his Activity Log. Markov acknowledged that as a result of this investigation, he received a Command Discipline (CD) for failing to canvass for witnesses with respect to the investigation at the scene of the vehicle accident.

On cross-examination, Markov testified that although he was issued a CD, he did not feel that he deserved a CD at the time. Markov did not recall the exact time of the accident. Markov agreed that the sector car was at the scene when he responded but he did not know how long the sector car was there. Markov testified that he did not think that it was reasonable at that time to knock on people's doors at 2:00 a.m. Markov explained, "At that time of day at approximately 1:30 or 1:50 or 2:00 in the morning – I don't remember the exact time. I took a look around to see if there were any witnesses and I really did not see anybody so I didn't think it was prudent to wake people up at 2:00 in the morning." Markov did not recall if it rained that night. He agreed that at some point he talked to the officers that were in the sector car and they informed him about what happened. Markov also agreed that the sector told him what McKeever had told them. Markov assumed that the sector took all the necessary information for the PAR, and he agreed that in order for that to happen the sector had to have interviewed McKeever. Markov could not recall if he personally directed Department tow to respond but acknowledged that Department tow was requested because it was a Department automobile. Markov was aware that the platoon commander knew that a Department tow

was notified and he believed that the command from which McKeever's car was assigned was also notified.

Markov testified that upon his arrival he did not see any witnesses and he did not remember seeing anybody on the scene. He also did not remember seeing the Fire Department or EMS on the scene nor did he observe anyone with injuries. Markov requested the response of Respondent because he considered the accident to be an unusual occurrence because a chief was involved. Markov said that he was promoted to the rank of captain about a year and a half ago and acknowledged that he is "somewhat" familiar with the Patrol Guide. Markov stated that a Department vehicle accident with no injuries does not require a Department memorandum, but added that "each incident is different." Markov conceded that there is probably not an exception that would require a Department memorandum to be prepared for an unusual occurrence if there is a chief involved. Markov testified that each occurrence is different and he did not feel that a Department memorandum was necessary for that occurrence. Markov acknowledged that the captain would determine whether or not an incident should be classified as an unusual occurrence. Markov reiterated that he called Respondent because the incident involved McKeever, who was a chief and a higher ranking MOS, which seemed to be an unusual occurrence at the time.

Markov testified that he was at the scene a short amount of time before Respondent arrived. Markov did not think there were any witnesses upon Respondent's arrival other than the responding officers. Markov had observed McKeever and spoke to the responding officers and no one indicated that McKeever may have been intoxicated. Markov also did not believe McKeever to be intoxicated. According to Markov, he

would not ordinarily ask motorists where they were coming from while investigating accidents if there were no indicators of alcohol. Markov further agreed that Respondent had about a 15 minute conversation with McKeever. Markov indicated that Respondent made a judgment call after a fifteen minute conversation with McKeever that there was nothing more that could be done by Respondent at that point. Markov conceded that he did not know what else if anything could have been done by Respondent after the fifteen minute conversation with McKeever.

Markov affirmed that Sergeant Castellano, the patrol supervisor, prepared the PAR. Markov did not remember seeing the PAR on the night of the incident, but conceded that he might have glanced over the report either that night or the next morning. Markov reiterated that it had been three years since the incident and acknowledged that he might have looked over the PAR at that time. After reviewing the PAR in court, Markov acknowledged that it was not his signature on the bottom of the report and that there were deficiencies on the report. Markov noted that the boxes located on the left side of the report were not completed. According to Markov, those boxes were used for recording information such as weather conditions. Markov also pointed out that the accident diagram does not show how the accident occurred. Markov explained that a person looking at the PAR could learn how the accident had happened looking at the accident diagram box on the report. Markov agreed that there was a description of how the accident occurred in the "officer's notes" section located at the bottom of the PAR. Markov agreed that the various boxes of the PAR that depict various types of accidents by means of arrows (i.e. rear end, left turn, etc.), which are located above the accident diagram do not accurately depict what happened in this particular accident. Markov also

agreed that the officer's description and notes at the bottom of the report accurately depicted the accident. He also testified that if you read the story one could determine by looking at the report that it was a one car accident and a fence was involved. Markov did not think that there was anything in the PAR that covered anything up. [Respondent's Exhibit (RX) A is a copy of the PAR.]

Markov reviewed a copy of the Accident Report – Police Department Vehicle (ARPDV) prepared by Sergeant Castellano. Markov agreed that the ARPDV is required by the Department when a Police Department vehicle is involved in an accident whether there is an injury or not. He also agreed that the report was prepared by the Patrol Supervisor, Castellano, whom he had called to the scene that night. Markov verified that there is a caption on the ARPDV to record the Department vehicle operator's statement. He acknowledged that the contents of the caption would provide a narrative of what the operator said had happened. There is another section of the report which is used to record the preliminary statement of the investigating supervisor, which would consist of what the investigating supervisor believes had happened. Markov further agreed that based on his understanding of this particular accident both of these sections had accurate statements. Markov acknowledged that the date and tour worked by McKeever was not listed in the caption of the ARPDV for listing such information. Markov also stated that there was no vehicle number listed on the report. When asked, "There is a vehicle number and it looks like it was crossed out; do you see that?" and he replied, "Yes". Markov was not sure if it was a rental vehicle or not, but he did learn that the vehicle involved was assigned to the Counter Terrorism Division. He also acknowledged that he never learned that vehicles assigned to the Counter Terrorism Division are not part of the

ordinary motor transport pool. He was then asked, "If you would have learned that today, would that explain why there is no vehicle number up there?" and he responded, "Sure". Markov acknowledged that insofar as this particular document, there was no place on the document for the investigating supervisor to ask the question of someone where they were coming from. [RX B is a copy of the ARPDV.]

On redirect examination, Markov reexamined the PAR and he acknowledged that the report did not mention anything about McKeever returning home from a bar. He also acknowledged that the report did not indicate anything about McKeever's alcohol consumption, how fast McKeever was traveling, nor what speed McKeever was traveling at the time he made his turn. Markov also agreed that the report did not specifically mention the intersection of Bradley Avenue and Watchogue Road, but he did note that the report stated, "33 Watchogue Road, 50 feet Northwest of Bradley Avenue".

While referring to the ARPDV, Markov acknowledged that this report did not indicate last tour and date and date worked by McKeever. It also did not indicate the number of hours McKeever had been on patrol prior to the accident, the names of any witnesses, nor the statements of any witnesses. Markov acknowledged that the caption for recording the investigating supervisor's observations did not indicate if there was a traffic control device at the location. He also agreed that this section indicated that the operator's actions did not contribute to the accident. Markov also noted that the ARPDV indicated that McKeever, who was the operator of the Department vehicle, was not at fault.

On recross-examination, Markov stated that he thinks Castellano is retired. Although he was not certain, Markov believed that Castellano may have received a CD as

a result of the reports prepared in this instance. Markov did not think that when he came upon the scene, that there was anything involving this accident that made him suspicious of driving while intoxicated. Markov acknowledged that in his experience, he generally would not ask a civilian motorist who was involved in an accident where he or she was coming from without observing things that would cause him to suspect the motorist of driving while intoxicated. Markov explained that if he likewise was investigating an accident involving a motorist who was a police officer, or in this case a chief, he would ask questions to elicit information such as how many hours they have been on patrol. Markov agreed that he was the initial investigating supervisor who spoke to the officers on the scene as well as McKeever. Markov did not have the opportunity to ask McKeever what tour he had worked. Markov explained that he felt that it was not appropriate for him to ask McKeever what tour he had worked because McKeever was a higher ranking member of the service. Markov agreed that if McKeever was intoxicated he would have taken action notwithstanding his rank. Markov agreed that he was a good police officer and he also agreed that there was no indication that in this case alcohol was involved. Markov affirmed that he would have asked a lot more questions if alcohol was involved.

Markov clarified that the questions asked of a civilian motorist may differ from those asked of a police officer because accidents involving just civilian motorists require the preparation of just a PAR. Markov further explained that an accident involving a police officer [operating a Department vehicle] would also require an ARPDV. Markov elaborated that you have to ascertain information for the ARPDV such as "if there was a crime in progress that they were going to, if they were using emergency equipment, the

date and tour worked, how many hours on patrol, and if they had a meal.” On the ARPDV prepared in this instance, the captions used to record date and tour worked as well as hours on patrol has not been completed. He agreed that those questions should have been asked in order to complete the report. Markov stated that Castellano was assigned to do the report because Castellano was performing duty as the patrol supervisor. Markov acknowledged that now as a captain, if he had the patrol duty, the sergeant would still be assigned to do the report. He believed the only time he would follow up on the investigation or get involved is if it was a serious accident like a fatality where someone was likely to die. Markov testified that it would be the sergeant’s job to investigate an accident by asking questions of the persons involved and to prepare the necessary reports. Markov testified that, as a captain, he would not get involved in the investigation, but would direct the sergeant to do the investigation and the reports and he would move on.

Markov agreed that he was the first supervisor on the scene and that there was nothing in the Patrol Guide that precluded him from doing the ARPDV. He could have done the report but did not and instead chose to delegate that duty to Castellano. Markov was at the scene with McKeever for a period of time before McKeever was sent home. Markov acknowledged that McKeever was gone by the time Castellano arrived at the scene. Markov said he didn’t have the time to question McKeever insofar as the report was concerned. Markov thought that it was more appropriate for Respondent to question McKeever. Markov assumed responsibility for directing Castellano to do the report. Markov affirmed that Castellano could not interview McKeever prior to preparing the required reports because McKeever was gone before Castellano’s arrival at the scene.

Sergeant Matthew Chapman

Chapman, a 15 year member of the Department currently assigned to the Internal Affairs Bureau Group 1, Special Investigations Unit (IAB SIU), testified that he has been assigned to IAB SIU since approximately 2004 or 2005. He explained that he was assigned the investigation of an incident involving Respondent which occurred on March 7, 2008. The case was assigned to him by his team leader and it was generated from an anonymous e-mail that was received alleging that McKeever was intoxicated and there was a cover-up of the incident. He was not able to ascertain who sent the e-mail. Once the e-mail was received the investigative techniques that he utilized involved canvassing the location, observing the Department vehicle, interviewing witnesses and 911 callers, interviewing the subject officer and responding officers, and lastly attempting to locate the sender of the e-mail.

Chapman stated that he did not go out on the call out but that members of IAB Group 9 who work the midnight shift went out. Chapman said there was a call out on this incident and IAB members went to Staten Island within the vicinity of Bradley Avenue and Watchogue Road. Chapman believed that several groups went to different areas in that some went to the hospital and some went to McKeever's house to observe his vehicle. Upon discovering that the vehicle at McKeever's house was a replacement vehicle, another group of IAB investigators went to the tow yard where the car involved in the accident was located.

Chapman stated that they received the call out at 2315 hours on the day of the accident and responded to the scene at 2400 hours. He agreed that was a considerable amount of time after the accident. They did a canvass of knocking on people's doors and

they did not interview the 911 caller at that time. He testified that he received the log that was generated pursuant to that call out. Based on his understanding of the Patrol Guide he testified that the role that the duty captain performs in investigating incidents of this nature after they arrive is to ensure that a proper and complete investigation is conducted by his subordinate members. He further testified that the duty captain may take some of the steps if there are any deficiencies that they note in the investigators and the job that they are doing.

Upon Chapman being asked by the Court, "How do you know what the role is that the captain should be playing in this investigation? With all of the other "investigators" that responded to the scene, how do you know and by what authority are you here telling me that this captain should have done more or less," he responded,

Sir, basically when I conducted my investigation, I obviously reviewed the relevant Patrol Guide procedures which, I believe, involved an unusual occurrences due to the Department vehicle accident. I am a supervisor in the New York City Police Department. I have handled Department vehicle accidents in the past. I am a supervisor, I believe my supervisory responsibilities and that of a captain at the scene of a Department vehicle accident would be very similar in nature. If I come on the scene of an accident, any accident, and my subordinate officers do not conduct a complete thorough investigation, or do not perform the duties that are required of them by the Patrol Guide, I must correct those deficiencies. That is my responsibility.

He acknowledged that he interprets the rules of the Department based on his fifteen years as a New York City police officer, in which six or seven of them he has been a supervisor of the Department, and by his review of the Patrol Guide. That is how he makes decisions. He stated that this case was reviewed up the line, not just by him

and he completed the investigation. He acknowledged that this was his interpretation of how an investigation should be handled by responding officers, including a duty captain. He also agreed that was the case even if the captain arrives on the scene in an accident involving a member of the service.

With respect to this investigation Chapman was able to ascertain that there was a 911 caller. He testified that the following steps were taken to locate the caller. First, they pulled the Sprint report and received the cellular phone number, and then they went to the Staten Island District Attorney's Office and received a subpoena for subscriber information for the number. When they received that information back from the carrier, they made attempts to interview the caller by visiting their house. He was able to ascertain the caller and identified him as Person A. He also had an opportunity to speak to Person A. Person A had informed Chapman that he was driving with another individual when they observed a vehicle accident. They observed the vehicle in the middle of the street and they were concerned for the operator of that vehicle so they approached the vehicle and spoke to the operator. Person A knew it was a Department vehicle because he saw an orange E-Z pass and the operator of the vehicle advised him of that fact. Person A noticed that the operator of the vehicle had alcohol on his breath and in his opinion the operator was intoxicated. Chapman testified that Person A claimed that he had been an Emergency Medical Technician (EMT) in the past and was familiar with the signs of intoxication.

Chapman identified the other individual in the car with Person A as Person B. Chapman had also had the opportunity to speak with Person B. Chapman testified that Person B told him that he was at the scene of the accident but that he

believed the operator of the vehicle was not intoxicated. Person B instead said the operator exhibited signs of being involved in an accident. He attributed the way the operator was acting and talking to the fact that he was involved in a pretty serious accident. Chapman testified that Person A stated the operator had glassy eyes, slurred speech and kept repeating himself and that he found that to be signs of intoxication. Person A also noticed an odor of alcohol on the breath of the operator. Person A advised Chapman that he was on the scene when members of the Department had responded and he remained there for 45 minutes. Person A did not mention to Chapman whether he had any conversations with members of the Department.

Chapman testified that McKeever was interviewed by his Commanding Officer, due to McKeever's rank. Chapman had an opportunity to review the worksheets and listen to the tapes of McKeever's testimony. Chapman testified that McKeever had stated in his official Department interview that he was returning from a retirement party in a place called the Still Bar in Manhattan and that he had consumed a couple of alcoholic beverages. McKeever was driving home from the party and when he was coming around the corner of Watchogue Road, the front tire of his vehicle struck the curb causing him to lose control, causing an accident. Chapman further testified that McKeever had said that he had a Bud (Budweiser Beer) or a Bud Light as well as a scotch and Coke. McKeever had indicated that he worked many hours prior to the accident due to the fact that he had been awoken early in the morning for an incident at the Times Square Substation where there was a small explosion. McKeever had been awake for 24 hours and also indicated that he was very tired while driving home on the night of the accident. McKeever in his interview had stated that he was driving on Bradley Avenue and made a turn onto

Watchogue Road. He indicated the speed at which he made the left turn was approximately 30 to 35 miles an hour. The damage to the Department vehicle was estimated at approximately \$16,000 or 66% of the value of the vehicle and the car was totaled. This estimation did not take into account any property damage that resulted from the accident.

Chapman testified that he had an opportunity to review the accident paperwork prepared by Castellano. He testified that pursuant to his investigation he was able to determine that Castellano had only spoken with McKeever by telephone on the night of the accident. McKeever was not on the scene of the accident when Castellano arrived due to the fact that McKeever had been transported home. Chapman noted that there were some deficiencies in the Department paperwork prepared. For example, exactly which Department vehicle McKeever was driving, McKeever's tour of duty, and where he was coming from were not noted on the report. Upon review of the ARPDV, Chapman agreed that it did not indicate the date and tour that McKeever had worked nor did it indicate the hours McKeever was working prior to the accident. There were no witnesses or witness statements noted. He noted that the report stated that there were no traffic control devices at the location of the accident. He acknowledged that the report indicated that McKeever's actions did not contribute to the accident.

Chapman further testified that his investigation revealed that McKeever was traveling at a high rate of speed, he was very tired, it was a one car accident and that his actions absolutely contributed to the accident. Again he noted that the report had indicated, "No" where it says operator at fault but Chapman knew that McKeever was at fault because he lost control of the vehicle. Nowhere on the report was it indicated that

the accident occurred at the cross streets of Bradley Avenue and Watchogue Road but instead it was reported as happening in front of 33 Watchogue Road, which is where the vehicle came to rest. The report also did not indicate where McKeever was coming from or how fast he was traveling. Chapman testified that to the best of his knowledge McKeever was not asked if anyone was inside the vehicle with him. No Fitness for Duty Report was prepared. Chapman continued that if Respondent had asked McKeever where he had been coming from and had been told he was coming from a bar and had consumed alcoholic beverages, then Chapman acknowledged that a Fitness for Duty Report should have been prepared. Upon being asked, "Even if the Chief did not give any signs of being intoxicated, no watery eyes or anything else, even if he did not give any of that, would a Fitness for Duty Report be required to be filled out," Chapman replied that it was his opinion, "That if he stated that he had been coming from a bar and had consumed alcoholic beverages, that a Fitness for Duty Report should have been filled out". Chapman agreed that even if there was no admission a report should have been completed. Chapman stated that he first spoke to Person A on June 30, 2008 which was over three months after the accident.

On cross-examination, Chapman agreed that he was the investigator in the case of Respondent and he prepared an investigative file which consisted of worksheets. There were 96 worksheets in total which also contained certain attachments. Initially the subject officer was McKeever and then at some point Respondent became part of the investigation. When asked, "Isn't it true that of the 96 worksheets, there are two worksheets that mention [Respondent]," he replied, "I don't know that to be a fact, but if you say so". Chapman agreed that the investigation began by way of an anonymous e-

mail that was sent to the IAB Command Center and that this e-mail generated the case. There was also at some point a Daily News article regarding the incident. Chapman did not speak to McKeever or Respondent regarding this incident. He went on to explain that what he had testified to earlier regarding what a captain was supposed to do was based on his opinion of conducting an investigation. Chapman had reviewed the interview of Respondent which was conducted by Inspector Edward Thompson (IAB). Again he agreed that he had never spoken to Respondent nor had he heard Respondent's side of the story from him personally.

During the investigation Chapman had interviewed six members of the service and all of them had indicated that there were no signs of intoxication by McKeever. In addition three civilian witnesses were interviewed and they were Person A, Person B, and Person C. Person B was the one who was present with Person A and Person B's opinion was that McKeever was not intoxicated. Person C was a resident of the block who looked out the window as the accident happened. Chapman interviewed Person C and he testified that Person C stated that he had heard the accident. Chapman did not recall if Person C mentioned that the police were making a lot of noise or that they were slamming doors. Chapman had the opportunity to ask Person C if McKeever was intoxicated and Person C did not believe him to be intoxicated. Chapman did not remember Person C's exact words regarding McKeever. Chapman was then handed a copy of the transcript of the interview of Person C. Chapman reviewed the transcript and agreed that Person C stated that McKeever was fine. When Chapman asked Person C if McKeever was intoxicated, Person C answered, "Not at all." Chapman did not recall if he asked Person C whether McKeever walked a yellow line. Once

again he reviewed the transcript and testified that he did ask and Person C stated that McKeever walked the yellow line. He clarified the record by testifying that he asked Person C if McKeever was unsteady on his feet and Person C responded that McKeever walked the yellow line. Chapman understood this to mean that McKeever had walked a straight line.

Chapman testified that he spoke to Person A on June 30, 2008 which was three months after the accident. Person A had given Chapman his opinion as to McKeever's intoxication during their conversation and the conversation was not recorded. The interview with Person A was in person and Chapman did not ask him for credentials. Chapman also testified that he did not know for a fact if Person A was actually an EMT or a paramedic, but only knew that Person A represented himself as a former EMT. Chapman acknowledged that Person A did not show him an identification card, shield, or any kind of degree.

Chapman indicated that he interviewed Person B. Chapman agreed that Person B did not see any signs at all of intoxication in regards to McKeever. Rather Person B felt that McKeever's condition was attributed to him being disoriented from the severity of the accident. Chapman acknowledged that during his investigation there was no indication that Respondent had anything to do with the preparation of the ARPDV. Nor was there any indication that Respondent asked Castellano to write a favorable report. The report was attributed to Castellano and he received a verbal instruction in regard to this case. When asked, "Is it fair to say that the reason he got a verbal instruction was because he was about to retire," Chapman replied, "I believe that he was retiring". Chapman had also reviewed Markov's involvement in this case and he

agreed that Markov could have prepared the ARPDV. Markov instead gave that responsibility to the patrol supervisor, Castellano. Chapman did not know if the witnesses were present when Respondent arrived but he did recall that Person A was at the scene for 45 minutes after he called 911. Chapman stated that it was not recorded when Respondent arrived at the scene and he did not know whether or not Person A or Person B were still there when Respondent arrived.

Chapman acknowledged that a Fitness for Duty Report was prepared in this case¹. He agreed that a Fitness for Duty Report at the time of this accident in March 2008 which involved no personal injury, but only property damage, was not required by the Patrol Guide or any Interim Order. When asked, "Is it your understanding that subsequent to that, that rule changed," Chapman replied, "It's my understanding that the circumstances of the condition and questions related to him drinking prior to driving would have precipitated it being prepared." Chapman further testified that he believed since McKeever stated that he had been drinking and driving and was involved in a vehicle accident a Fitness for Duty Report should have been filled out. He clarified for the record that McKeever did not state at the scene that he had been drinking and that question was never asked by anybody at the scene. Chapman stated that if they had asked McKeever where he was coming from, a question that should have been asked because it was a Department vehicle accident, he would have stated that he was coming from a bar. If he then stated he was coming from a bar, the next question should have been, were you drinking? He agreed that based on his training and experience they should have asked McKeever where he was coming from because it was a Department

¹ Although a Fitness for Duty Report was prepared, it was neither requested by opposing counsel, nor offered into evidence.

vehicle accident. He also agreed that this was not based on any Department directive or in the Patrol Guide. Chapman testified that he did not think it would be appropriate for a police officer to be questioning a Deputy Chief involved in a Department vehicle accident. He agreed that a Captain need not respond to a Department vehicle accident without injuries. Chapman affirmed that it was fair to say that an off-duty incident is an unusual police occurrence. When asked, "Does a police occurrence become unusual merely by the rank of the operator of a car in a one car accident," he replied, "No, it would involve all the circumstances." He acknowledged that the time of the accident changes the circumstance because McKeever got off from work at 6:00 p.m. and there were many hours from when he left work to when the accident occurred. He went on to say that the accident occurred at 1:40 or 1:50 a.m.

Chapman further testified that Markov received a CD in this case for failing to ascertain the details of the accident and interview civilian witnesses. He, as an investigator, stated that he would have knocked on doors at 2:00 a.m. to obtain witnesses at a serious Department vehicle accident. Upon being asked, "This would be a judgment call on your part, would it not," Chapman replied, "Correct; I believe, that question was of my opinion." He also agreed that a lot of what he was testifying to today before the Court would be a judgment call that he would make given certain circumstances based on his experience.

In his opinion, Chapman explained that a reason why the two officers who were first on the scene might not have notified the homeowners of the damage to their property was because it was really early in the morning.

On redirect examination, Chapman stated that a field sobriety test was not administered to McKeever. Chapman also said Person C observed McKeever “walking the yellow line” from Person C’s house.

On re-cross examination Chapman agreed that this vehicle accident was an unusual circumstance as defined by Patrol Guide Section 212-09.

Respondent’s Case

Respondent called Assistant Chief Stephen Paragallo and Captain Daniel Sosnowik as witnesses, and he testified in his own behalf.

Assistant Chief Stephen Paragallo

Assistant Chief Stephen Paragallo, assigned as the Commanding Officer of Patrol Borough Staten Island (PBSI) since June 2008, was ultimately who Respondent answered to as the first platoon duty captain. Paragallo knows Respondent because Respondent works for him as the late tour patrol supervisor and he has known him for approximately six or seven years. Prior to PBSI, Paragallo had the occasion to work with Respondent in Patrol Borough Manhattan South. Respondent at that time was a precinct executive officer. Paragallo recalled assigning Respondent to the Times Square detail and he agreed that Respondent did a good job. He believed Respondent did a good job because the assignment was very difficult and he handled it well. He stated that they let Respondent know about any issues that they had in Times Square and he addressed them effectively. He went on to say that Respondent was very good in leading the men and women in the detail on a daily basis. Paragallo agreed that Respondent was dependable

for that assignment and he also agreed that he is dependable now in his assignment at PBSI. When asked, "How would you rate Respondent from the standpoint of integrity," Paragallo replied, "Beyond reproach." He did not think Respondent was the type of captain to cover something up. Paragallo acknowledged that when he was first assigned to PBSI, the person who was the first platoon duty captain was there for approximately a month of two, and then retired. Since then Respondent has been in that assignment and Paragallo is comfortable with him covering the first platoon of PBSI.

On cross-examination, Paragallo acknowledged that part of Respondent's role in the Times Square detail was to lead the subordinates of that detail. Paragallo did not recall if Respondent had any investigative functions during that detail. Paragallo could not give an exact amount of times Respondent was assigned as the duty captain while under his command. Upon being asked if he routinely reviewed the investigations that the duty captain had performed, he acknowledged that he would review any unusual occurrence reports and any major incidents. The executive officer would review the actual daily duty worksheets and the day to day worksheets. Paragallo reviewed the paperwork that was generated with respect to McKeever at the time of the incident. He was familiar with the details of the incident but not the particulars. He was not privy to the investigative techniques that were employed at the scene of the incident on March 7, 2008.

On redirect-examination, Paragallo acknowledged that he was not familiar with and never heard of something called the patrol borough accident log. He agreed that the borough tracks Department vehicle accidents and he believed that the accident involving McKeever was recorded at the borough.

Captain Daniel Sosnowik

Sosnowik was assigned to the Leadership Training Section in the Police Academy. Sosnowik is charged with training newly promoted captains in making executive level decisions. Sosnowik said that in his opinion, an MOS who responds to the scene of a Department vehicle should abide by the Patrol Guide, regardless of the rank of the MOS involved. However, he added that the Patrol Guide does not cover every scenario. Sosnowik said that a duty captain is not required to respond to a Department vehicle accident where there are no injuries. Sosnowik also asserted that captains are usually making judgment calls when at the scene of an incident and that not every judgment call that is not ideal, can be classified as misconduct.

Respondent

Respondent, a member of the Department for almost 20 years, was assigned as the supervisor of patrol for PBSI on the day of the incident. He also performed the duties of the duty captain for the midnight tour. As the duty captain, Respondent was responsible for overseeing the patrol functions of the midnight tour. As a supervisor of patrol Respondent performed duties similar to that of an integrity control officer but at a borough-wide scale.

Respondent testified that on the day of the incident, while assigned as the duty captain, he was called to the scene of a Department vehicle accident. He said he was not sure why he was responding because duty captains do not respond to Department vehicle accidents when there are no injuries involved. When a Department vehicle is involved in an accident where there is damage to the property only, then a patrol supervisor responds,

and an ARPDV is required to be completed. Respondent added that he responded to the scene as a courtesy to McKeever since McKeever was a deputy chief.

Upon his arrival at the scene, Respondent spoke with the two police officers and received the details of the accident. The two officers told Respondent that McKeever's vehicle "fishtailed" on the wet road and hit the curb.

Respondent said he arrived approximately an hour after the accident. After speaking with the two officers and Markov, Respondent spoke with McKeever. McKeever told Respondent that he was not injured and needed a ride home. Respondent said he was standing approximately six inches away from McKeever and that he did not notice anything that would be indicative of intoxication.

Respondent said he did not notify the duty inspector because Respondent did not believe there to be any misconduct by McKeever. To Respondent, this was a typical Department vehicle accident. Respondent stated that notification to IAB and to the Operations Unit were also not required.

On cross-examination, Respondent acknowledged that he responded as a courtesy to McKeever because he was a deputy chief. Respondent also said,

[T]he New York City Police Department is a funny organization, rank has its privileges and [McKeever] is a Chief and we want to give him the courtesy of his rank.

I would hate to think what would have happened if I said that's the Chief, I'm not coming over there. I think the borough would have gotten a call and then I would have gotten a call and they would have said, what's the matter, you can't go over there and see if the Chief needs anything.

Respondent acknowledged that if "something further" had to be done with the investigation, he would have done it. Respondent said he did not ask McKeever how fast

he was going while turning. Respondent said there is a left-turn, approximately 45 degrees, from Bradley Avenue onto Watchogue Road. There were no traffic control devices governing vehicles making the left turn onto Watchogue Road.

Respondent again asserted there was no indication that McKeever was intoxicated. McKeever neither slurred his speech, nor stumbled while walking.

Respondent had learned from McKeever's official Department interview that McKeever had consumed one scotch, one beer, and water six hours prior to the accident, at a retirement party. Respondent said he did not know who called 911 to report the accident, but said it could have been McKeever.

Respondent said he did not notify the homeowners of the property damage since a copy of the PAR is automatically mailed to the owner of the property. Respondent said he may have looked at the PAR about a week after it was completed and received at the Borough because he was curious as to the contents of the PAR.

On redirect examination, Respondent testified that the PBSI keeps a log of all Department vehicle accidents. [RX C is a copy of the Borough Accident Log.] Respondent acknowledged that while the ARPDV was missing certain information, the log contained the information necessary to complete the missing captions on the ARPDV.

On recross-examination, Respondent said there may have been a "yield" sign at the intersection of Bradley Avenue and Watchogue Road. Respondent also said that certain captions on the ARPDV may not be correct. When asked,

- Q. With respect to, did operator's action's contribute to the accident, it is marked [on the ARPDV] as no; that is actually incorrect?
- A. Right now it is incorrect. Why [the officers who filled out the report] did that, I have no idea.

Q. How about where it says, operator at fault, and it is checked off as, no; is that incorrect?

A. Yes.

On re-direct examination Respondent stated that the ARPDV was filled out by Castellano and Castellano was not under Respondent's supervision. Respondent also said that once Castellano reviews and signs the ARPDV, he submits it to the executive officer for review. If there were any inconsistencies with the report, the executive officer should have pointed it out to Castellano.

FINDINGS AND ANALYSIS

The Respondent is charged in one specification with having failed "to fully and properly conduct an investigation into a Department vehicle accident." The facts are simple and undisputed. On March 7, 2008 Deputy Chief Joseph McKeever was on his way home in a Department vehicle when he had an accident. The accident was described by Markov, who testified that McKeever approached a steep turn and lost control of the vehicle and crashed into a fence. McKeever was apparently not injured.

Markov requested that the Respondent, who was the duty captain, respond to the scene. Markov gave his reason as follows, "I did it at the time because he was a high ranking member of the service, the rank of chief. It was an unusual occurrence and I felt that because a chief was involved, that's why I did it."

Markov had directly observed McKeever on the scene and had spoken to the original responding officers. He was clear that there was no evidence that McKeever was intoxicated or under the influence of alcohol at all.

Respondent arrived at the scene. He spoke with the two original responding officers who explained that McKeever's vehicle had "fishtailed." He spoke with Markov. He also spoke directly with McKeever who told him that he was uninjured and needed a ride home. The Respondent stated that he was six inches away from McKeever when he spoke to him and did not detect any evidence of intoxication.

An investigation into the events of that evening was launched by a complaint to the Internal Affairs Bureau that McKeever was intoxicated at the time of the accident. The source of that complaint was Person A who claimed to have been a witness to the accident. Person A did not testify at this proceeding but interviews with him were reported by Chapman. Chapman also interviewed Person B who had been in the car with Person A. Person B did not believe that McKeever was intoxicated. Chapman also interviewed another civilian witness, Person C, who did not believe McKeever was intoxicated. Additionally Chapman interviewed the officers who initially responded to the scene and they did not see any indication that McKeever was intoxicated. Thus, of numerous people on the scene, both uniform and civilian, only one, Person A, believed that McKeever was intoxicated.

To be sure this Department needs to be very concerned and vigilant on the issue of possible cover-up of intoxicated driving by members of the service; however that does not mean that every time an accident occurs involving a member of the service it must be assumed that alcohol is involved. The Respondent responded to the scene and appears to have acted appropriately under the circumstances. The charges arise because of massive second guessing after the fact. Indeed the charge itself fails to mention any specific failure by the Respondent.

In his open statement the assistant department advocate complained that the Respondent failed to ask McKeever where he was coming from or whether he had been drinking that night. These are not questions one would ordinarily ask unless there was some basis for doing so. The advocate complained that there was no Fitness for Duty Report. Certainly that is something that the Respondent should have been completed, if he had a reason to do so. As has been discussed, he did not have a reason to do so.² The advocate complained that the motor vehicle accident report was incomplete but as duty captain the Respondent was not responsible to complete such a report nor, as duty captain was he the supervisor responsible for that report.

The complaint fails to set forth a cause of action and the Department failed to provide evidence which made out a cause of action in this case. This Court recommends that the single specification be dismissed.



Respectfully submitted,

John Grappone
Assistant Deputy Commissioner – Trials

² As noted in an earlier footnote, at some point in time a Fitness for Duty Report was prepared however that document is obviously irrelevant to this case as neither side put that report into evidence.