POLICE DEPARTMENT

July 10, 2023

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2022-24833
Police Officer Anthony Fernandez	:	
Tax Registry No. 950401	:	
83 Precinct	:	

At:	Police Headquarters One Police Plaza New York, NY 10038
Before:	Honorable Paul M. Gamble Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department:	Kevin Andrade, Esq. Department Advocate's Office One Police Plaza, Room 402 New York, NY 10038
For the Respondent:	Roger Blank, Esq. 136 Madison Avenue, 6th Floor New York, NY 10016

To:

HONORABLE EDWARD A. CABAN
ACTING POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Said Police Officer Anthony Fernandez, while off-duty and assigned to the Vice Enforcement Division Zone 2, on or about and between October 16, 2020, and February 15, 2022, in Queens County, knowingly associated with an individual known to the Department who he reasonably believed to be engaged in, likely to engage in, or to have engaged in criminal activities.

   A.G. 304-06, Page 2, Para. 8(c) PROHIBITED CONDUCT

2. Said Police Officer Anthony Fernandez, while on duty and assigned to the Vice Enforcement Division Zone 2, on or about October 30, 2021, utilized Department computer systems to make one (1) query unrelated to official Department business.

   P.G. 219-14, Page 1, Para. 2 DEPT. COMPUTER SYSTEMS

3. Said Police Officer Anthony Fernandez, while off-duty and assigned to the Vice Enforcement Division Zone 2, on or about September 30, 2021, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Detective Fernandez patronized an unlicensed premise on one (1) occasion. *(As amended)*

   A.G 304-06, Page 1, Para. 1 PROHIBITED CONDUCT

   A.G. 318-05, Page 2, Para. 3(e) CAUSE FOR SUSPENSION OR MODIFICATION

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 13, 2023. Respondent, through his counsel, entered a plea of Not Guilty to Specification 1 and pleaded guilty to Specifications 2 and 3. The Department called Sergeant Jonathan Diaz-Mojica as a witness. 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 the charged misconduct and recommends a penalty of 30 vacation days.

Motion to Dismiss

This Tribunal is in receipt of Respondent's May 3, 2023, Motion to Dismiss. Respondent seeks dismissal of Charge and Specification 1 of the above-referenced matter on the grounds of the fruit of the poisonous tree doctrine, averring that this charge results from the Department unlawfully accessing and using sealed criminal justice records. For the following reasons, the motion is DENIED.

Untimeliness

The Department Advocate correctly states that the motion is untimely. Under DCT Trial Practices, the parties must file pre-hearing motions at least 14 days before the hearing or by the date ordered at the pre-trial conference. All motions were due by March 7, 2023, as ordered during the January 26, 2023 pre-trial conference. Respondent submitted this motion on May 3, 2023, making it untimely by 59 days.

While this motion was made untimely, in the interest of justice, this Tribunal reviewed the merits of the arguments made by Respondent's counsel.

Standing & Fruit of the Poisonous Tree Doctrine

Respondent's counsel contends that the Department Advocate unlawfully accessed and used sealed criminal justice records from a third-party individual. Respondent lacks standing to make this claim as he is asserting the claims of a third party not before this court, and Respondent was not the subject of the sealed records. Furthermore, the fruit of the poisonous tree is a criminal law doctrine inapplicable in an administrative law forum. As addressed in the Department Advocate's response, the investigation that resulted in Specification 1 did not originate from sealed reports related to the third party; instead, this investigation commenced with a phone call from a confidential informant who provided the information.

Accordingly, Respondent's motion is denied.

The Trial

Respondent has pled Guilty to two specifications of misconduct: making an unauthorized query in a Department database and patronizing an unlicensed establishment. He admitted that on September 30, 2021, at approximately 0335 hours, he visited La Mansion with his cousin and friend while it was still an unlicensed premise.[1] Respondent also admitted that on October 30, 2021, he made an inquiry in a Department database unrelated to official Department business. In accordance with his pleas, I find him Guilty of Specifications 2 and 3. Respondent testified in mitigation of the penalty as to those specifications.

As discussed in the analysis below, I find Respondent Guilty of Specification 1.

I recommend that Respondent forfeit 30 vacation days.

ANALYSIS

Respondent testified that on October 16, 2020, he was part of a Queens Vice Enforcement Division team that conducted an undercover operation at La Mansion. This establishment was suspected of operating without a liquor license and violating COVID restrictions[2] (T. 71, 75-77).

During his Department interview, Respondent admitted that when he entered the premise, Person A the establishment's owner, approached him as he sat at the bar and began "grilling" him, inquiring how Respondent gained entry. Respondent used the ruse that his cousin

[1] There is no dispute that at some time after Respondent visited La Mansion on September 30, 2021, the establishment obtained a liquor license from the New York State Liquor Authority.

[2] On July 16, 2020, Governor Cuomo announced regulations concerning bars and restaurants, requiring social distancing, as well as limiting the dispensing of alcohol to patrons who were ordering and eating food (https://www.governor.ny.gov/news/governor-cuomo-announces-new-regulations-bars-and-restaurants-ensure-compliance-state-social#:~:text=The%20Governor%20also%20announced%20that,or%20separated%20by%20physical%20barriers.).

had been in the establishment the previous week and had recommended it as a "good spot." He then offered to leave if there was an issue, but Person A told him there was not, saying, "Good, now I know who you are; you can come next time." Person A then gave Respondent his mobile telephone number, which he dialed immediately (Dept. Ex. 4A at 15-17).

At the conclusion of that operation, Respondent placed Person A under arrest for operating a club without a liquor license. After Person A appeared in Queens in response to a Desk Appearance Ticket, he disposed of the charge, and the case was sealed.

During his trial testimony, Respondent admitted that he provided Person A with his Department business card, on which his personal mobile telephone number was written, hoping that Person A would agree to become a confidential informant (T. 82-84). During his Department interview, he admitted that Person A was a well-known manager of licensed and unlicensed bars in the Roosevelt Avenue area (Dept. Ex. 4A at 20). Respondent conceded that Person A never did agree to become an informant, and Respondent never discussed his desire to recruit Person A with his supervisor (T. 112-13).

Respondent admitted that he remained in contact with Person A after his arrest. The two exchanged text messages and placed calls to each other. According to Respondent, Person A would call him repeatedly, inquiring whether he knew when the COVID regulations would be lifted[3] (T. 85). The evidence established that Respondent and Person A exchanged telephone calls on 29 occasions (14 incoming calls and 15 outgoing calls) (Dept. Ex. 1; *see* T. 111-13).

Respondent also admitted that he associated with Person A at licensed and unlicensed establishments, where he would often order alcoholic beverages; he acknowledged that he

[3] The allegations of misconduct against Respondent overlap with the World Health Organization's declaration of the COVID-19 public health emergency as a pandemic on March 11, 2020, and the expiration of the Public Health Emergency for COVID-19, authorized under Section 319 of the Public Service Health Act, on May 11, 2023 (https://www.defense.gov/Spotlights/Coronavirus-DOD-Response/Timeline/).

brought a cousin and a friend to La Mansion on September 30, 2021 (T. 91-94; Dept. Ex. 4A at 23-26, 32, 48-50). Person A introduced Respondent to Person B whom he saw on subsequent occasions at La Mansion, which he visited after the enforcement action on October 16, 2020, at Person A's invitation (Dept. Ex. 4A at 29). During his trial testimony, he asserted that while he did not always receive a bill for his drinks, he always left enough money with the establishment to cover the cost of the drinks (T. 96-99).

On cross-examination, he was confronted with a statement he made during his Department interview that he never received a bill but always left money as a gratuity to the wait staff (T. 113-16, 125-26; Dept. Ex. 4A at 33). On re-direct, he claimed he must have misunderstood the question posed during his Department interview (T. 127). Respondent explained in his Department interview that when he visited the unlicensed establishments, it was because it was usually late at night, no other bars were open, and he wanted to "blow off steam" by having a few drinks (Dept. Ex. 4A at 30-31).

Respondent also admitted that he performed auto-detailing services[4] for Person A and two of his family members on four occasions, receiving $200-250 per vehicle (T. 86; Dept. Ex. 4A at 36-40).

Respondent admitted that he used Department databases to search the Playboy bar that Person B, an associate of Person A's, operated in the 103 Precinct. He asserted during his testimony that he ran a search on the location. He knew the 103 Precinct had "issues" because he had worked there and "wanted to make sure that it wasn't problematic" or a "purple location" (Dept. Ex. 4A at 42; T. 87-90, 119). The evidence established that he reviewed two data entries in the database which referenced a 911 call concerning Person A as an intoxicated person at that

[4] Respondent has an authorized, off-duty mobile car detailing business.

bar, as well as an aided card relating to the same incident, listing Person A under an alias, "[ ] (T. 123; Dept. Ex. 4A at 43-44). Respondent also admitted in his Department interview that Person B had contacted him and told him that she was having trouble with Person A presenting himself at her bar intoxicated (Dept. Ex. 4A at 46).

Specification 1: Criminal Association

I find that the Department Advocate has met its burden of proof by a preponderance of the credible, relevant evidence that Respondent knowingly associated with an individual known to the Department who he reasonably believed to be engaged in, likely to engage in or to have engaged in criminal activities.

Respondent admitted that he arrested Person A for operating an unlicensed premise. As he described the enforcement operation which resulted in Person A's arrest, he testified that Person A approached him at the bar, asking who he was and how he gained entry. This scrutiny of a patron of a drinking establishment is more consistent with that of someone operating an unlicensed establishment rather than a legitimate enterprise.

Respondent further admitted that he associated with Person A after his case was disposed of. However, a senior officer in his command made him aware that Person A was known in the Department for operating legal and illegal establishments in the Roosevelt Avenue area. Not only did he visit Person A on several occasions at various unlicensed establishments, but he also brought a friend and a family member with him on one occasion. Respondent did business with Person A detailing his various automobiles and accepting approximately $1,000 in payment. While there is no evidence that those funds were the proceeds of the unlawful operation of unlicensed premises, the probability cannot be excluded.

Respondent's argument that issuing a liquor license to [redacted] *after* Respondent had continued to associate with him should permit the Tribunal to infer that Person A was not a person whose activities Administrative Guide procedure 304-06 was intended to apply to lacks merit. First, as a Member of Service, Respondent must comply with the Administrative Guide; that obligation cannot be obviated by an independent determination by the State Liquor Authority that a license should be issued to Person A. Second, the parameters of eligibility for the issuance of a liquor license are not before this Tribunal, precluding a comparison of Administrative Guide procedure 304-06's definition of persons "reasonably believed to be engaged in, likely to engage in, or to have engaged in criminal activities."

Respondent's other argument that he met, and corresponded with Person A to sign him up as a registered informant, is unpersuasive. Even if this Tribunal were to grant Respondent the benefit of the doubt as to his initial motivation for maintaining the contact, the number of times they communicated without any manifestation of interest on Person A's part to becoming an informant would have informed a reasonable investigator in Respondent's position that no such agreement was in the offing.

Based upon the foregoing, I find Respondent Guilty of Specification 1.

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 6, 2011, has been found Guilty of criminal association, and pled Guilty to misuse of a Department database and patronizing an unlicensed premise. The Department Advocate has recommended the forfeiture of 30 penalty days. I concur with his recommendation.

The presumptive penalty for criminal association is 20 days; the mitigated penalty is 15 days, and the aggravated penalty is 30 days.

The presumptive penalty for misuse of a Department computer is ten days; the mitigated penalty is five days, and the aggravated penalty is 20 days.

The penalty for a good order and discipline offense ranges from training to dismissal.

In the view of this Tribunal, Respondent's misconduct resulted from the exercise of flawed judgment despite the availability of information that would have led a reasonable Member of Service possessing such information to refrain from associating with Person A His professed naiveté concerning the charged misconduct cannot be excused because the reputational harm to this Department is so great.

While there are many conceivable scenarios where Members of Service could associate with individuals with criminal pasts to advance a greater societal benefit, those associations would have to be monitored by the Department with complete transparency. The relationship Respondent forged with Person A was neither transparent nor did it advance any public interest; moreover, despite his assertion that he was attempting to recruit Person A to be an informant, he conceded that he never notified a supervisor that he was undertaking this initiative. A neutral observer, seeing Respondent in the company of Person A consuming alcoholic beverages in an unlicensed premise, then being made aware that Respondent is also a Member of Service, would have reason to question Respondent's integrity.

While Respondent's reversion to police officer status after his promotion to detective was rescinded is a collateral consequence, which this Tribunal need not consider, I do find that Respondent's loss of the privilege of wearing his father's detective shield carries a degree of mortification, which, under the circumstances presented by this record, I find to be mitigating (T. 68-69).

Accordingly, I recommend that Respondent forfeit a penalty of 20 vacation days for the criminal association count and 20 vacation days for patronizing an unlicensed premise, both penalties to run concurrently with each other. I further recommend that Respondent forfeit an additional ten vacation days for misuse of a Department computer, to run consecutively to the aforementioned penalties, for a total of 30 vacation days.

Respectfully submitted,

Paul M. Gamble, Sr.
Assistant Deputy Commissioner Trials

APPROVED

OCT 23 2023

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 ANTHONY FERNANDEZ
TAX REGISTRY NO. 950401
DISCIPLINARY CASE NO. 2022-24833

Respondent was appointed to the Department on July 6, 2011. On his three most recent performance evaluations, he was rated "Exceeds Expectations" for 2022, and received a 4.0 rating of "Highly Competent" in 2020, and a 4.5 rating of "Extremely Competent/ Highly Competent" in 2019. He has been awarded ten medals for Meritorious Police Duty and ten medals for Excellent Police Duty.

In connection with the instant matter, Respondent was placed on Level 2 Discipline Monitoring on September 30, 2022; monitoring remains ongoing.

Respondent has no formal disciplinary history.

For your consideration.

Paul M. Gamble, Sr.
Assistant Deputy Commissioner Trials