



POLICE DEPARTMENT

October 20, 2011

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Francisco Aviles
Tax Registry No. 945484
5 Precinct
Disciplinary Case No. 84074/08

The above-named member of the Department appeared before me on August 16, 2011 and on September 23, 2011, charged with the following:

1. Said Probationary Police Officer Francisco Aviles, assigned to Police Academy Recruit Training Section, while off-duty, on or about May 9, 2008, at a location known to this Department, [REDACTED] engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Probationary Officer failed to cooperate with and impeded an investigation when interviewed at his residence by members of Detective Borough [REDACTED].

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

The Department was represented by Rita Bieniewicz, Esq., Department Advocate's Office, and the Respondent was represented by Stuart London, Esq.

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

DECISION

The Respondent is found Not Guilty.

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SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Detective Pedro Ramos and Sergeant Stacey Miller.

Detective Pedro Ramos

Ramos, a 19-year member of the Department, is currently assigned to the 43 Precinct Detective Squad. On May 9, 2008, he responded to an incident in the [REDACTED] Precinct, in which a police officer had been shot. While conducting a canvass of a building [REDACTED] he had occasion to speak with Respondent. Ramos, along with members of the Emergency Service Unit (ESU) entered Respondent's apartment and asked if he had seen or heard anything with regard to the shooting. Respondent told the investigators that he had been sleeping when he heard numerous shots. He did not say anything about looking out the window or seeing any part of the incident. When Ramos showed Respondent a photograph of a piece of clothing that had been worn by the shooter, Respondent said he had never seen it before.

At no point did Respondent indicate that he wanted to provide information nor did he indicate that he was too nervous to do so. He did not ask the investigators for a telephone number or if he could contact them at a later date. He did not appear confused or indicate that he did not understand what was being asked. Ramos saw a woman inside Respondent's apartment, but he did not interview her. Ramos informed Respondent that the victim of the shooting was an off-duty member of the service.

Ramos later learned from a supervisor that Respondent had, in fact, observed the incident. Ramos explained that had Respondent provided him with information regarding his observations during the initial canvass, he (Ramos) would have done things

differently. For example, Ramos would have transmitted over the radio and notified other team members of any information that might have assisted in the apprehension of the shooter. A clothing description could have been material to the investigation, even if the Respondent had not seen the shooter's face. Ramos confirmed that, in his training and experience, information regarding the description of a shooter is something that is urgently required.

On cross-examination, Ramos testified that Respondent identified himself as a Police Academy recruit. Respondent also identified himself to the ESU sergeant who preceded Ramos into the apartment. ESU personnel, who made the initial entry into the apartment, entered and exited quickly. They secured the premises but did not question Respondent about the shooting. Ramos entered the apartment afterwards to interview Respondent for information. The interview was not tape recorded. During the course of the investigation, Ramos learned that the building was both a gang and drug-prone location. To his understanding, gang members hang out in and around the building, and drugs are bought and sold in front of the building. Ramos took this into account during his interview of Respondent, and he advised Respondent that he could call later. Ramos described the interview as a "brief discussion," which might have lasted less than four or five minutes. Ramos never specifically asked the Respondent if he looked outside the window or if he saw the weapons that were used. Ramos did specifically ask if he saw the clothing that was worn, and Respondent replied that he did not. During the interview, Respondent stated he was worried about his family, but he did not seem fearful or traumatized. Ramos did not attempt to take Respondent into a private room. When he showed Respondent the piece of clothing, Respondent did not lead Ramos aside. Ramos did not remember what Respondent was wearing. He did not see Respondent's uniform

laid out on a bed. When he left the apartment, he did not offer Respondent any protection.

Other than doing the initial canvass, Ramos did not have anything to do with the investigation. Ramos was unaware that Respondent subsequently told a sergeant that he had more information to contribute, that he went to the [REDACTED] Precinct to view a photo array, that he identified the perpetrator as a gang member, or that he ultimately gave a full detailed statement with respect to clothing that was worn. Ramos based his Complaint-Follow Up Informational Report-Canvass ("DD-5") [Department's Exhibit (DX 1)] on notes he took during the canvass and that was how he recalled Respondent stating, "I just heard a few shots, and it woke me up, so I woke up the family."

On redirect examination, Ramos testified that Sergeant Duke called him at home later that day to ask if he had had any interaction with Respondent. Ramos informed Duke that he did speak with Respondent and that Respondent claimed to have not seen anything.

Sergeant Stacey Miller

Miller is a sergeant in the Deputy Commissioner Training Investigations Unit, where she has been for six years. In her current position, she investigates allegations of misconduct regarding personnel in the Training Bureau and of entry level personnel such as probationary police officers. She investigated a matter involving Respondent in which it was alleged that he saw a shooting in the confines of the 47 Precinct and did not come forward with information immediately. As part of her investigation, she learned that Respondent had been subject to an official Department interview (DX 2a and 2b, tape and transcript of the May 9, 2008 interview).

The allegation against Respondent was that he had witnessed a shooting that transpired between two individuals, one of whom was an off-duty member of the service. He did not report this information until approximately five hours after the incident. She learned that the person who fired the shots was apprehended on May 9, 2008 at about 0400 hours.

Respondent had been appointed to the Department on January 7, 2008. Miller testified that she is familiar with the Recruit Officer Handbook (DX 3) and that all recruits are given a copy of it at the beginning of their training. She noted that there is a section regarding the duty to report an incident. She said that recruits are taught to report immediately if they are witnesses to, or personally involved in, an incident. They are also directed to call 911 immediately, give all pertinent facts and remain at the scene if possible. She indicated that this duty included witnessing a crime.

On cross-examination, Miller indicated that Respondent had been in the Police Academy about four months when this incident occurred. She noted that the full training is six months. She stated that there is a class regarding how to handle off-duty incidents. She did not know when he received this instruction or who gave it. She did not know if he had this training before the incident. She agreed that she had no evidence to show that Respondent had received this training before the incident.

She was not present when Respondent was subject to an official Department interview nor was she part of the original investigation. She was assigned to the case sometime later. She stated that according to the SPRINT¹ report, 911 calls were made at about 0039 hours on May 9, 2008. She agreed that the location where this occurred was "problematic." She said the vicinity is a known gang location. She was made aware of

¹ Special Police Radio Inquiry Network

the fact that threats were made against Respondent and that he was allowed to dress in semi-civilian attire. She agreed that normally a recruit was required to report to work in uniform but that an exception had been made for Respondent and that he was allowed to wear plainclothes when traveling to the academy. She said the concern was that if he were in uniform, he would be recognized by people in the neighborhood as being affiliated with this Department. She did not know the date that this occurred but the Threat Assessment Unit was notified. Furthermore, the Threat Assessment Unit authorized the issuance of a Department radio to Respondent (RX A, Miller's Investigating Officer's Report, dated June 10, 2008).

Miller agreed that Respondent was very instrumental in assisting in the expeditious arrest of the perpetrator involved in the shooting and that she had received this information from Lieutenant Rafferty, the Squad Commander of the [REDACTED] Precinct Detective Squad. In an Investigating Officer's Report dated June 11, 2008 (RX B), Miller noted that Rafferty called Miller's commanding officer and:

wanted to explain that [Respondent] was instrumental in assisting with the expeditious arrest of the perpetrator involved with the police shooting...the perpetrator was apprehended within (4) hours of the incident... [Respondent] identified gang members that were persons of interest to the investigation. Lieutenant Rafferty further expressed that due to personally being familiar with the area in which [Respondent] resides at he believed that [Respondent's] action not to immediately reveal what he witnessed was appropriate. Lieutenant Rafferty described the apartment building as being a location where several individuals that are affiliated with gangs reside or loiter at.

Miller also spoke with the investigator in the case, Detective Flood.² She agreed that Flood had indicated that Respondent had fully cooperated with the criminal investigation in the case. According to her Investigating Officer's Report dated May 27, 2008, (RX C), Miller noted that Flood informed her:

that to his knowledge [Respondent] cooperated fully with the criminal investigation into the shooting of off-duty PO Reeves of the 48th Precinct. PO Flood stated that [Respondent] was most likely hesitant initially to talk with investigating officers because the individual identified as the shooter is a known gang member of the [B]loods and does hang out in front of [Respondent's] apartment building. PO Flood further stated that the apartment building where [Respondent] resides at with his family is known as [a] problematic location (narcotics).

Respondent's Case

Respondent testified on his own behalf.

Respondent

Respondent entered the Police Academy on January 7, 2008 and graduated approximately eight or nine months later. His graduation was delayed because of this case. He was suspended for 30 days, after which he served on modified duty for a period of time. Respondent is currently full duty in the 5 Precinct where he has been since January 2011.

On May 9, 2008, he was living in an apartment [REDACTED] with his mother, two brothers and a sister. At about 12:30 a.m., he was sleeping and heard about three or four gunshots. His first instinct was to check his brothers to make

² As in the transcript, however Miller's report indicates that Flood was a police officer at the time of the incident.

sure they were okay. His mother started yelling and coming towards him to make sure he was okay.

Respondent testified that everything happened quickly. He observed two men running down the block from what he can remember. He saw this because his bed was near the window. He said he checked his family first before trying to peek out the window. He did not open the window but peeked out. He did not know where the shots were coming from. Asked if he saw the clothing of the men, Respondent stated, "At that time, no. It took me further, later on as I reflected, to remember all that stuff because everything happened so quickly. And my adrenaline was pumping." He agreed that at that time he was in fear for his own safety and that of his family. He said that he remembered the details later at the precinct.

After the shooting, Respondent had a phone in his hand and he was about to dial 911 when his mother started yelling at him. Then he saw patrol cars coming. At that point, he decided to hold off on the phone call and calm his mother. He indicated that his mother, who did not want him to become a police officer, was yelling, "[S]ee, this is why I didn't want you to become involved in stuff like this." He stated that his mother was worried about his safety.

After the patrol cars arrived, the Emergency Service Unit (ESU) arrived and began a canvass. He said ESU knocked "firmly" on the door and as he opened it they rushed in with automatic firearms "to make sure the apartment was safe." They noticed his recruit uniform and told him a detective [Ramos] would be coming up soon. A few minutes later, Ramos came in. Respondent said he identified himself and told him he was a recruit. Ramos gave him a photograph and asked if he recognized the photograph.

Respondent testified that he really did not recognize anything and “couldn’t remember, at that point.” Further describing the interaction Respondent testified:

He asked me what did I see. And at that moment, honestly, I can say for that second I did panic because there were people all over the building that were outside in the hallway, and people that know me since I was very little were watching me. And at that point, I thought about my family’s safety. So I took the detective, and there is an entrance to the kitchen, and I pulled him to the side into the kitchen and I told him at that moment everything happened so quickly. I didn’t know. At this moment, I don’t know if I saw the shooting or anything. He said, Did you see faces? I said, I definitely did not see faces. He said you didn’t see anything, and left it alone. After that, his partner was at the doorway, and then that was it, they left.

Respondent said there were “[a]bsolutely” gangs in his building and people that he grew up with are the same people that he saw all the time in front of his building.

Before he became a police officer, he knew they were involved in “that stuff.” He said, “There definitely was a lot of narcotics in there.”

Respondent testified that the detectives left at about 1:30 a.m. At that point, he and his mother had a “big discussion.” She disapproved of his decision to become a police officer and did not want him to speak [to investigators]. He responded that this was what he wanted to do, that he felt this was what he was meant to do. He testified, “[E]veryone was scared knowing that these guys, you know, knew me since I was very little, and they just separated, did their own thing. These guys know my mom, they know my brothers.”

After that, he realized that he had to do something more. He had relaxed and reflected and started to remember things. He explained that he had panicked and that, at that time, he was in the process of transitioning from being a civilian to being an officer.

He stated that the academy did not really prepare him for this type of situation. He stated, "Anybody can say, if you see something say something. It's easier said than done when you are facing a situation like this when your family is at risk."

He went downstairs and ran into a sergeant. He asked if they had caught the shooter and the sergeant told him they had not. He said at this point he had started to remember things and he asked if there was someplace they could talk privately. He was brought to the [REDACTED] Precinct where he spoke with two detectives. He wrote down what he had seen and he picked three of the four people involved from a photo array. He explained that he knew these people hung around outside his building and were involved in illegal activities. The detectives did not tell him who the shooter was.

He was then subject to an official Department interview, after which he was suspended.

Subsequently, he was confronted by guys hanging out on his stoop who made a gun gesture to him, which indicated that he had to watch his back. He spoke with Flood, who told him that he had to leave his home. He relocated his family to his aunt's house elsewhere [REDACTED] "for protection before they were able to apprehend the guy or speak to the guy in regards to what happened, the threat that was made." The Threat Assessment Unit contacted him and they were very concerned. He was issued a Department radio. Afterwards, he moved [REDACTED].

On cross-examination, Respondent stated that when Ramos came into his apartment he (Respondent) identified himself. Ramos showed him a photograph and asked him if he had seen anything. Respondent stated that he brought Ramos to the side in the kitchen near the sink. Ramos asked him if he had seen a shooting. He said he replied, "Not that I remember at this moment. Everything happened so quickly." Ramos

asked if he had seen faces and Respondent told him that he had not seen faces as he was too high up. He stated that Ramos said, "[A]ll right you didn't see anything."

Respondent stated that later, at the precinct, "everything came clear." He said he was calm and that they gave him coffee. He stated that it was a nerve-racking experience at the beginning. He agreed that, at the precinct, he was able to tell investigators the specific clothing colors worn by both men; that one of the men had a dog which he thought was a pit bull; the races of both men; and, which direction one of the men ran. He did not recall if he provided their general height and age. He did not recall if he was able to tell the color of the jacket of one of the men but after looking at the transcript of his interview he agreed that he had. He agreed that he told the detectives he actually had seen a muzzle flash.

He agreed that it was his testimony that when Ramos came to his home he did not offer any of this information because he did not recall it until several hours later. He agreed that he did not ask Ramos for his card but that Ramos gave him one, and he did not use the card to contact Ramos between the time Ramos left and the time he saw the sergeant outside his house.

He agreed that he was aware that an off duty member of the service had been shot in the head before Ramos left his apartment; that he did not call 911 after hearing shots fired; that he had received a copy of the Police Academy Recruit Officer Handbook before the incident; that he had been told to familiarize himself with it; and, that he had been instructed to read and re-read it. He did not recall being told that excuses or ignorance about what was inside the book would not be tolerated. He agreed that he signed in at classes at the academy; that on January 28, 2008, he attended a lecture that was given by the Recruit Discipline Unit; that he had been instructed as to what to do if

he witnessed an off-duty incident; that he had an obligation to report; and, that when Ramos came to his apartment, he had a responsibility to tell him that he had seen at least part of the shooting.

On re-direct examination, Respondent asserted that he fully cooperated at the [REDACTED] Precinct and at his official Department interview. He denied impeding the investigation or providing any false information.

FINDINGS AND ANALYSIS

At the time of this incident, Respondent was a police recruit in his fourth month at the Police Academy. He was present in his apartment with his mother and younger brothers when he was awakened by gunshots and was quite scared. He checked on his family, then peeked out the window. He saw some activity related to the shooting but did not see any faces. He was in the process of calling 911 when he heard police officers responding so he did not complete the call. At the same time, his mother was yelling. She had not wanted him to become a police officer and did not want him to become involved in this incident.

ESU entered his apartment and noticed his recruit uniform. Respondent identified himself as a member of the service. Shortly after that, Ramos came to conduct his investigation. Respondent indicated that, at that time, he was so nervous and worried for the safety of his family that he could not really recall what he saw. He testified that he panicked and this is quite credible given the chaotic situation and very real danger.

Respondent testified that he truthfully told Ramos that he did not see the face of the shooter. However, when he calmed down and reflected on the situation, he remembered what had occurred and wanted to help investigators. He went downstairs,

met with a member of the service and was taken to the precinct where he was fully cooperative.

Respondent is charged with impeding an investigation by failing to cooperate with detectives who came to his apartment in the early morning hours of May 9, 2008, to investigate the shooting of an off-duty member of the service that had occurred outside Respondent's residence.

There are two questions that arise from the charge in this case; did Respondent's actions impede the investigation, and if so, did he intend to do so.

As to the first issue, it must be kept in mind that the Department did not merely charge Respondent with failing to provide information, it has charged him with impeding the criminal investigation. Impeding is a very specific type of act. Certainly, a failure to provide information under the circumstances set forth in this case might constitute a failure to assist the investigation but "impeding" requires an action which blocks or slows down an investigation. There is no evidence that Respondent's failure to provide information had that effect, or for that matter, any effect at all on the investigation.

The specific act of withheld information according to Ramos' testimony is that when he showed the Respondent a photograph of a piece of clothing that had been worn by the shooter, the Respondent said he had never seen it before.

The only evidence presented to support the Department's contention that Respondent impeded the investigation is Ramos' surmise that Respondent's failure to acknowledge seeing this clothing might have helped in locating the perpetrator. That certainly seems logical but the information might not have had any effect on the investigation and it should be noted that the shooter was arrested within four hours without Respondent's information.

In assessing Ramos' ability to determine if Respondent impeded the investigation, it should be kept in mind that he was not the main investigator on the case. He responded to the scene from another precinct. Respondent presented a report prepared by Miller in which she recorded her conversation with the assigned investigator, Flood, of the [REDACTED] Precinct Detective Squad. Flood informed her that Respondent "cooperated fully" with the investigation (see RX C). Indeed, it is uncontested that Respondent imparted the information he had to investigators within a few hours of his interview with Ramos.

An additional report prepared by Miller (RX B) recounted a conversation with the commander of the [REDACTED] Precinct Detective Squad, Rafferty, who pointed out that Respondent "identified gang members who were persons of interest to the investigation."³

Moreover, apparently, the only way the Department knew that Respondent withheld information initially is that he voluntarily came forward with the information a few hours later.

As noted above, there is a second issue with relation to the charge that Respondent impeded an investigation. It is axiomatic that one cannot obstruct an investigation without intending to do so. Thus, a second critical question in this case is whether Respondent acted with the requisite intent to impede an investigation.

It is beyond doubt that Respondent lived in a very dangerous, high-crime area with much gang activity. Every witness at this trial agreed that this was the case. The Threat Assessment Unit authorized the issuance of a Department radio to him and he was allowed to commute to and from the Police Academy in civilian clothes for his safety.

³ It should be noted that Rafferty credited Respondent with providing information that helped in the shooter's arrest. This is apparently in error. Pursuant the timeline agreed to by counsel, the shooter was apprehended before Respondent made his statement at the precinct.

Respondent testified credibly that he has known the gang members who live in and around his building his whole life. It stands to reason that they knew him and his family. In her report, Miller recounted that Flood, who works in that precinct, told her that Respondent was "most likely hesitant to talk with investigating officers because the individual identified as the shooter is a known gang member of the Bloods and does hang out in front of [Respondent's] apartment building." She reported that Rafferty said that Respondent's initial withholding of information was "appropriate" given the danger of the gang situation in and about his residence. It is not disputed that Respondent had every reason to be concerned about the safety of himself and his family. In fact, he and his family had to relocate after this incident.

The Respondent testified that, at the point in time when Ramos questioned him, he was in a very high emotional state and did not really recall what he saw. In the calm, cool world of the courtroom several years after the event, it may be hard to understand how someone could not recall an incident he had just witnessed and then recall it several hours later. But the human condition is complex. The pressures on Respondent at that moment, concern not for his own safety but for that of his family, might well have interfered with his recollection. Certainly, Respondent has made a credible case that he did not intentionally withhold the information.

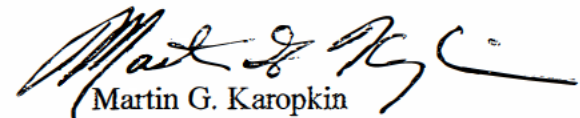
But as has been noted, Respondent is not charged with simply withholding information, he is charged with the far more serious offense of impeding an investigation. Even if one were to find that Respondent knew he was withholding information from Ramos, it is very clear that the reason for doing that involved fear for his family's safety and respect for his mother's concerns on that issue. There is no evidence or reason to believe that he intended to impede the apprehension of the shooter. He certainly did not

provide any false or misleading information designed to throw the investigation off track. Indeed, the information he ultimately provided, according to Rafferty, was accurate and useful. Respondent's conduct in coming forward with the information he had, even if it was somewhat delayed, indicates that his intention was to help the investigation.

Because there is no evidence that Respondent intended to impede the investigation and because there is no evidence that he did, in fact, impede the investigation, the Respondent is found Not Guilty as charged.

Additionally, it is recommended that Respondent be credited with the 30 days he previously served on suspension.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner Trials

APPROVED

MAY 08 2012
RAYMOND W. KELLY
POLICE COMMISSIONER