



POLICE DEPARTMENT CITY OF NEW YORK

October 13, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Christina Rosado
Tax Registry No. 956219
Transit Bureau District 11
Disciplinary Case No. 2015-13694

Police Officer Ramon Maldonado
Tax Registry No. 937011
Transit Bureau District 3
Disciplinary Case No. 2015-13695

Charges and Specifications:

Disciplinary Case No. 2015-13694

1. Said Police Officer Christina Rosado, on or about December 12, 2014, at approximately 1433 hours, while assigned to the Transit Bureau and on duty, in the vicinity of West 125th Street and St. Nicholas Avenue A/B/C/D subway station, New York County, abused her authority as a member of the New York City Police Department in that she stopped Andre Pointer without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 – STOP AND FRISK

Disciplinary Case No. 2015-13695

1. Said Police Officer Ramon Maldonado, on or about December 12, 2014, at approximately 1433 hours, while assigned to the Transit Bureau District 3 and on duty, in the vicinity of West 125th Street and St. Nicholas Avenue A/B/C/D subway station, New York County, was discourteous to Andre Pointer in that he stated in sum and substance SHUT THE FUCK UP AND JUST DO WHAT SHE SAYS.

P.G. 203-09, Page 1, Paragraph 2 – PUBLIC CONTACT – GENERAL

2. Said Police Officer Ramon Maldonado, on or about December 12, 2014, at approximately 1433 hours, while assigned to the Transit Bureau District 3 and on duty, in the vicinity of West 125th Street and St. Nicholas Avenue A/B/C/D subway station, New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that he participated in the detaining of Andre Pointer without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

3. Said Police Officer Ramon Maldonado, on or about December 12, 2014, at approximately 1433 hours, while assigned to the Transit Bureau District 3 and on duty, in the vicinity of West 125th Street and St. Nicholas Avenue A/B/C/D subway station, New York County, was discourteous in that he refused to state his name and shield number when requested to do so by Andre Pointer.

P.G. 203-09, Page 1, Paragraph 1 – PUBLIC CONTACT – GENERAL

Appearances:

For CCRB-APU: Cindy Horowitz, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

For the Respondents: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street-Suite 640
New York, NY 10038

Hearing Dates:

May 12 and July 22, 2016

Decision:

Not Guilty

Trial Commissioner:

DCT Rosemarie Maldonado

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on May 12, and July 22, 2016. Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. CCRB-APU called Andre Pointer as a witness. Respondents testified on their own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondents not guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The following is a summary of the undisputed facts. On December 12, 2014, Respondent Rosado and Police Officer Hui were patrolling the 125th Street and St. Nicholas Avenue subway station in Harlem. (Tr. 120) At approximately 1430 hours, Andre Pointer was at this station standing by a steel support beam adjacent to the token booth. The subway entrance was very busy at that time with a constant flow of riders entering and departing the station. (Tr. 19, 25, 121, 123; CCRB Exhibit ("CCRBX") 1) Respondent Rosado and Officer Hui, exited the subway mezzanine area through the turnstiles and walked toward the token booth area. (Tr. 30, 32 122-123; CCRBX 2) Respondent Rosado noticed Pointer making a hand movement as he leaned against the beam with his arm draped over a pay phone. When she approached Pointer, she directed him to the back wall and asked for identification. Pointer questioned why he was being stopped and was told that it was for solicitation. (Tr. 32, 35, 121, 124; CCRBX 3) After several requests, Pointer provided Respondent Rosado with a Maryland driver's license and [REDACTED] (Tr. 36, 125)

Respondent Maldonado who was assigned to Transit District 3, witnessed part of this interaction and walked over. He did not know Respondent Rosado, but had observed a significant disparity in size between Pointer and the officers. (Tr. 37, 126, 147-148, 150) Pointer complained to Respondent Maldonado about the stop. In reply, Respondent Maldonado told him to cooperate with Respondent Rosado's investigation. (Tr. 39, 152) As Respondent Rosado called the administrative office for a warrant check, Respondent Maldonado handcuffed Pointer. (Tr. 42, 128, 153) Respondent Maldonado removed the handcuffs when Respondent Rosado informed them that Pointer had no outstanding warrants. (Tr. 43, 154) Pointer requested the names and shield numbers of the three officers. (Tr. 43, 128, 155) The token booth clerk gave

him paper on which Respondent Rosado wrote her information, as well as that of Officer Hui.
(Tr. 44-45, 129; CCRBX 4)

Pointer was not issued a summons. He subsequently filed a civil lawsuit against the City based on this incident. That lawsuit is currently pending. (Tr. 14, 61, 140) At trial, Pointer conceded that in 1999 he was convicted of distributing heroin in Maryland and that in 2014 he pled guilty to heroin possession in New York. (Tr. 14, 82-83) He has attended [REDACTED] [REDACTED] for the past five years and takes [REDACTED] prescribed by his doctor for daily pain management. (Tr. 65-66) On cross-examination, Pointer also admitted that his "memory is vague" as a result of a head injury that had an adverse impact on his long-term memory. (Tr. 77, 80)

Video footage of the stop was captured by three different security cameras at the subway station. What follows is a summary of the most relevant images: (CCRBX 5)

- Camera 7, 14:06:56: Pointer, wearing a white coat and holding an umbrella, is standing at the back of the station next to the MetroCard vending machines.
- Camera 10, 14:31:35-14:33:40: Pointer moved to a different location and is standing next to a station support beam in front of the turnstiles and adjacent to the token booth. He drapes his left arm over the pay phone affixed to the support beam.
- Camera 7, 14:32:37: As his left arm is over the pay phone, Pointer repeatedly moves his hand at the wrist.
- Camera 10, 14:33:42-14:34:00: Respondent Rosado and Officer Hui exit the turnstiles and approach Pointer. All three walk toward the back wall.
- Camera 7, 14:34:02: Respondent Rosado motions for Pointer to stand up against the wall.
- Camera 7, 14:34:11: Pointer complies.
- Camera 7, 14:34:12-14:35:36: Respondent Rosado and Pointer engage in a discussion. Pointer gestures, goes into his pockets and takes side-to-side steps.
- Camera 7, 14:35:40: Respondent Maldonado enters the scene.
- Camera 7, 14:35:56: Pointer bends down to pick up items from the floor.
- Camera 7, 14:36:01: Pointer bends down a second time to pick up items from the floor.
- Camera 7, 14:36:02: Pointer and the three officers continue to engage. Pointer sways side-to-side.

- Camera 7, 14:36:25-14:36:30: Pointer leans toward Respondent Maldonado and then leans back. He repeats this movement a second time.
- Camera 7, 14:36:31: Respondent Maldonado steps forward and rear cuffs Pointer as Respondent Rosado looks on and uses her phone.
- Camera 7, 14:40:15: Respondent Maldonado uncuffs Pointer. Pointer walks away from the officers.
- Camera 7, 14:40:19: Respondent Maldonado walks away.
- Camera 11, 14:40:19–14:41:21: Pointer approaches the token booth, then walks back toward Respondent Rosado. She hands something to Pointer and their encounter concludes with the officers walking in one direction and Pointer in the other.

Disciplinary Case No. 2015-13694:
Respondent Rosado's authority to conduct a stop

Respondent Rosado stands charged with stopping Pointer without sufficient legal authority. At trial, CCRB-APU presented the testimony of Andre Pointer to support their claim that Respondent Rosado engaged in misconduct by conducting this stop.

Pointer testified that on December 12, 2014, he had attended a methadone maintenance program with his fiancé and her sister before entering the 125th subway station. (Tr. 16, 64, 85) At the station he purchased two one-way fares for the women to travel to 149th Street and back. (Tr. 16-17) He expected their errand to take 30 to 45 minutes and decided to wait at the subway station for their return. Pointer explained that he became disabled four years ago, after sustaining injuries while working as a general contractor, and was experiencing pain as he waited. He looked around for an area where he could “stretch and support” himself without blocking those walking through the station. He chose a support beam located approximately six feet from the token booth and five feet from the turnstile. (Tr. 13-14, 18-19, 67) Pointer raised his left arm against the beam to take weight off his leg and alleviate his pain. He subsequently draped his arm over the pay phone affixed to the beam and “adjust[ed]” his “fingers” because he had “poor circulation from [a] shoulder injury.” (Tr. 20, 23-24) At trial, Pointer admitted that he

moved away from the support beam but added that he walked back to stay out of the way of those entering and leaving the station. (Tr. 31)

As he continued to wait, Pointer observed Respondent Rosado and Officer Hui in the station. He described Respondent Rosado as being in a “hyper mood trying to check everybody moving around her.” In contrast, he characterized Officer Hui as “calm.” (Tr. 26) According to Pointer, Respondent Rosado “pushed” him in the chest and told him to move up against the wall behind the token booth. (Tr. 31-33; CCRB Ex. 3) Once Pointer backed up toward the wall, Respondent Rosado asked for identification. (Tr. 35) Pointer testified that he repeatedly asked the officers why he was being stopped and that Respondent Rosado eventually answered that it was for “solicitation of a phone booth” – a statement that did not make sense to him. After about “a minute to two minutes,” he handed her his Maryland driver’s license. As he did so, the contents of his wallet fell to the ground. When Respondent Rosado saw his [REDACTED] [REDACTED] she told Pointer to “give me [REDACTED] too.” (Tr. 32-38)

Respondent Rosado took the stand in her defense. She testified that she observed Pointer standing with his arm draped over the pay phone, “motioning in an up and down swiping manner...” That motion indicated to her that Pointer was “asking for a swipe or entry into the subway system.” Respondent Rosado based that conclusion on her experience during which she had seen this motion made to solicit MetroCard swipes to ride the subway system. (Tr. 121-122)

When the officers walked through the turnstiles, Respondent Rosado approached Pointer and asked him to step back. (Tr. 122-123) Pointer’s initial response was to ask what he had done. She responded that he was soliciting a swipe. (Tr. 123) Respondent Rosado then asked him a second time to step back up against a wall located behind the token booth clerk. (Tr. 124)

Once Pointer was standing against the wall, she asked him for identification multiple times, which he initially refused to provide. (Tr. 124-125)

Shortly thereafter, Respondent Maldonado approached and Pointer made a comment directed at Respondent Maldonado which she could not recall. Pointer complied when Respondent Maldonado directed him to produce his identification. With Pointer's identification in hand, she called the administrative office to do a name check for outstanding warrants. Once it was determined that Pointer did not have any outstanding warrants, he was uncuffed and his identification was returned. Respondent Rosado warned Pointer not to solicit swipes but clarified that he was not being ejected from the station. Pointer then asked for her shield number and name, and when he returned with a piece of paper, she wrote it down for him. (Tr. 126-129, 140, 144)

On cross-examination, Respondent Rosado testified that Pointer was roughly thirty feet away when she first noticed him. (Tr. 131) She observed Pointer for three to five minutes, and although she saw the suspicious hand movements, she did not see him speak to anyone or approach the turnstiles. (Tr. 132-133) Respondent Rosado added that at first she was not sure Pointer was asking for MetroCard swipes. As she got closer, however, she became certain that he, in fact, was. (Tr. 133)

In dispute is whether this stop was legally authorized. Whether Respondent was justified in elevating the level of this encounter to a forcible stop turns on a thorough consideration of all relevant facts. A tribunal must be particularly careful to assess the factual circumstances known by the police officer at the time. *People v. Medina*, 107 A.D.2d 302 (2nd Dept. 1985) Here, the preponderance of the credible evidence supports a finding that this stop was legally justified and consistent with New York State law.

Section 1050.6 (b) of the New York Codes, Rules and Regulations (NYCRR) prohibits, among other things, "solicitation of money or payment for food, goods, services or entertainment" and notes that "no person shall panhandle or beg upon any facility or conveyance." At trial, Respondent Rosado credibly testified that she observed Pointer engaging in conduct that violated Section 1050.6(d). Specifically, she explained that she watched Pointer's hand "motioning in an up and down swiping manner" which, based on her experience, was a signal for soliciting the use of a MetroCard to gain entrance into the subway system.

Given the totality of circumstances presented at trial, I find that this was an objectively reasonable conclusion. First, Pointer lingered in close proximity to the turnstiles in the unpaid section of the station and positioned himself at a location that would allow him to observe the continuous flow of foot traffic and be seen by riders. Second, because his arm was draped over a pay phone, his hand, and hand motions, were more visible to those walking by. Finally, although no clear conclusions can be drawn from the videos in evidence, the images corroborate that Pointer moved his entire hand in a manner consistent with Respondent Rosado's description. Thus, based on her direct observations, Respondent had probable cause to stop Pointer and ask for identification to issue him a summons for violating NYCRR Section 1050.6 (b). That she used her discretion not to issue the summons is not dispositive of this case.¹

In making this finding I note that Pointer was not a reliable witness. His demeanor during portions of the trial was notably belligerent and obstinate. Even allowing for the fact that his cross-examination was particularly difficult, and Pointer may have been in pain, his reaction was extreme and unwarranted. Pointer also volunteered that he had suffered a head injury that

¹ It is important to note that Respondent Rosado was charged with violating Patrol Guide Number 212-11, Page 1, Paragraph 1, which addresses investigative encounters made pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). See also *People v. DeBour*, 40 N.Y.2d 210 (1976). A *Terry* stop, however, is inapplicable because it involves a brief detention of a person by police on reasonable suspicion of involvement in criminal activity, but short of probable cause to arrest. As noted above, Respondent Rosado had a reasonable basis on which to believe that she had probable cause to stop Pointer and issue him a summons.

affected his long term memory. Most troubling, however, was his tendency to alter certain facts to support his account that Respondent had no reason to stop him. For example, when asked what he had been doing with his hands he responded, "nothing," but immediately added that he had been "adjusting" his "fingers" and flexed only his fingers before the court as a demonstration. The artificial distinction he was attempting to make sounded both false and contrived. Moreover, Pointer has a lawsuit pending against the City which provides significant motivation to make exactly this type of misrepresentation.

In contrast, Respondent Rosado's deportment at trial was that of a professional police officer attempting to present the facts in a straightforward manner. Although she has an obvious interest in the outcome of this disciplinary case, her testimony seemed, on balance, to be candid and devoid of significant embellishments.

Case No. 2015-13695:

Respondent Maldonado's authority to handcuff;
discourtesy; and, failure to provide identification

Respondent Maldonado stands charged with (i) speaking discourteously to Pointer in that he stated, "Shut the fuck up and just do what she says," (ii) participating in the detainment of Pointer without sufficient legal authority, and (iii) being discourteous to Pointer in that he refused to state his name and shield number when requested to do so.

Not surprisingly, the parties presented disparate descriptions of the interaction between Pointer and Respondent Maldonado. Pointer testified at trial that when he saw Respondent Maldonado approach he stated, in sum and substance, "good, somebody is walking up. Maybe I can make some sense out of what's going on here." Respondent Maldonado, however, responded by "loudly" saying, "shut the fuck up and do what she said to do." (Tr. 39-40)

Respondent Rosado proceeded to run a warrant check. Pointer asked permission to put his cards back into his wallet and proceeded to do so when it was granted. According to Pointer, as he was organizing his wallet, Respondent Maldonado said to Officer Hui, "he's fumbling, give me your handcuffs" and then handcuffed him. Pointer's recollection is that he remained handcuffed for approximately three to five minutes until Respondent Rosado indicated that he had no outstanding warrants. (Tr. 40-43)

During this encounter, Pointer asked the officers for their names and shield numbers. He recalls specifically looking at Respondent Maldonado when he made this request because of the profanity he had used to address him. (Tr. 43-44) According to Pointer, as soon as Respondent Maldonado removed the handcuffs from his wrists, he walked away without providing the requested information. (Tr. 46) In contrast, Respondent Rosado and Officer Hui complied with his request. (Tr. 44; CCRB Ex. 4)

Respondent Maldonado testified that at approximately 1433 hours he entered the 125th Street station to use the restroom. As he descended the stairs, he heard "yelling." He observed two officers talking to a "regular person" he recognized as one who "comes in the subway, just stands there, doesn't buy a MetroCard [and] doesn't enter the system." Although he did not know why this individual had been stopped, Respondent Maldonado became concerned because Pointer was "flailing his hands" as he screamed at two officers who were about one foot shorter in stature. Respondent Maldonado is 6'5" and believed he could assist the officers. (Tr. 127, 148-151, 157)

When Pointer saw Respondent Maldonado approach he said, "come on, brother. These two cops are harassing me." Respondent Maldonado replied, "Sir, I don't know why they have you stopped, but what I do know is that we need you to cooperate and let these officers conduct

their investigation....” As he explained, “I just didn’t walk down the steps and handcuff him. I actually stood there, I was observing the situation.” Respondent Maldonado remained calm but grew alarmed because a crowd could gather as a result of Pointer’s “yelling” and “cursing” in the crowded subway station. (Tr. 150-153, 158-159, 167)

As Respondent Rosado was conducting the warrant check, Pointer “flailed” his hands and reached into his pockets. At trial, Respondent Maldonado explained:

...I asked him several times, I said, sir, stop moving your hands, stop putting your hands in your pocket. As a police officer with 10 years on the job at the time, I know because of my training if I don’t see your hands, my life can be at risk and so can my fellow officers’ life [sic] be at risk. And I asked him several times just stop moving your hands I told him, I gave him several warnings. I said, sir, if you continue to flail your hands, I am going to place you in handcuffs....

Similarly, at his CCRB interview Respondent Maldonado recounted that:

...[Pointer] put his hands in his pockets. I asked him several times, I said, sir, this is a safety issue. I don’t know if you’re armed. I don’t know if you have a weapon. All we’re asking you to do, please put your hands where we can see them.

When Pointer failed to comply, Respondent Maldonado rear cuffed him for his “safety and my fellow officers’ safety.” Pointer did not resist and was polite once handcuffed. (Tr. 153, 167, 172)

Respondent Rosado returned, stating that Pointer had no warrants. Respondent Maldonado recalls asking whether she was going to issue him a summons or give him a warning. She chose to give Pointer a verbal warning. Respondent Maldonado removed the handcuffs and told Pointer that he was free to go. (Tr. 154) Pointer then asked for his shield number. Respondent Maldonado told him his name and shield number and offered him a pen to write down the information, but Pointer walked away. (Tr. 155) He testified, “When [officers are] in uniform, [we] have plenty of ways to identify who we are, and I was standing right in front of him.” (Tr. 152) When Pointer walked away, he asked Respondent Rosado and Officer Hui if

they were okay, and then resumed patrol. (Tr. 155) Before leaving, Pointer told him that he was planning to file a complaint, to which he replied, "you have the right to do that, sir." (Tr. 169) He denied using profanity at any point during his encounter with Pointer. (Tr. 151)

On cross-examination, Respondent Maldonado stated that though he had seen Pointer many times in that particular subway station, he had never seen him solicit subway swipes or break the law. (Tr. 157) During his CCRB interview he stated that he witnessed Pointer "screaming and cursing, raising his hands." (Tr. 160, 163) In addition, at trial he could not recall how many times Pointer requested his name and shield number but during his CCRB interview noted he had been asked for his badge number when he first told Pointer to cooperate. (Tr. 161, 168)

The first matter in dispute is whether Respondent "participated in the detaining of Andre Pointer without sufficient legal authority." At trial, CCRB-APU argued that under the legal standards established in *DeBour*, Respondent Maldonado did not have reasonable suspicion Level 3 "to handcuff Mr. Pointer." (Tr. 189) As noted above, however, a level 3 *DeBour* analysis is inapplicable because the officers in this case had probable cause to issue a summons.

In addition, New York courts have consistently noted that handcuffs may be used even in a "nonarrest detention" of a suspect where there is valid concern for the officers' safety. In *People v. Allen*, 73 N.Y.2d 378 (1989), the Court of Appeals held that, "Where police officers find themselves in a rapidly developing and dangerous situation presenting an imminent threat to their safety, they must be permitted to take reasonable measures to assure their safety" The Court warned that the use of handcuffs should not be gratuitous. Finally, the court noted that justification for a nonarrest detention is a mixed question of law and fact that should be

supported by the evidence in a particular record. *See People v. Williams*, 73 AD3d 1097 (2d Dep't 2010); *People v. Robinson*, 282 A.D.2d 75 (1st Dep't 2001)²

Respondent Maldonado testified at trial that he handcuffed Pointer for safety purposes because he "flail[ed]" his hands and "reached into his pockets." His exact explanation warrants repetition:

I asked him several times, I said, sir, stop moving your hands, stop putting your hands in your pocket. As a police officer with 10 years on the job at the time, I know because of my training if I don't see your hands, my life can be at risk and so can my fellow officers' life [sic] be at risk. And I asked him several times just stop moving your hands I told him, I gave him several warnings. I said, sir, if you continue to flail your hands, I am going to place you in handcuffs. (Tr. 153)

I credit Respondent Maldonado's testimony. His demeanor at trial was especially professional, straightforward and unembellished. Upon review of the record I could find no evidence that revealed undue bias against Pointer. In fact, Respondent Maldonado readily made a statement against his interest by candidly admitting that he had seen Pointer standing around that same station on many other occasions without violating any laws.

In making this finding I acknowledge that Respondent Maldonado was not an impeccable witness. For example, to the extent that Pointer's hands are visible in the videos, they did not definitively confirm his characterization of Pointer as "flailing." I also note that Respondent Rosado was silent on whether Pointer used profanity during their exchange. On balance, however, Respondent Maldonado was the more credible witness.

Not only was Respondent Maldonado credible, he also articulated an objectively reasonable justification for his actions and persuasively explained that he was motivated by his obligation to ensure the safety of the officers and Pointer. As he stated more explicitly during his

² It is instructive that in *U.S. v. Coppedge*, 2008 U.S. Dist. LEXIS 92428 (D. Del., November 10, 2008), a federal court addressed a similar issue in the context of a motor vehicle stop. There the Delaware federal court found that an officer's application of handcuffs on an individual who he had stopped for failure to stop at a traffic light was reasonable in a high crime area to ensure the officers' safety.

CCRB interview, Pointer's actions suggested to this veteran police officer that he could be in possession of a weapon. In fact, the video in evidence captured Pointer repeatedly moving from one side to the other as he faced Respondent Rosado. More significantly, in the seconds immediately before he is handcuffed, Pointer turned to and leaned forward toward Respondent Maldonado not once, but twice, in a movement that would objectively raise safety concerns. It is also noteworthy that Pointer engaged in these suspicious movements when Respondent Rosado was verifying Pointer's identity and determining whether he was wanted by law enforcement. This can be a particularly risky moment in a police encounter. Also, I have no doubt that Pointer was agitated as he expressed displeasure over this stop. As noted above, Pointer revealed this tendency at trial when he became incensed, truculent and hostile during cross-examination. Based on the foregoing, I find that, under these limited circumstances, Respondent Maldonado acted "in the reasonable exercise of his official powers." *Police Department v. Fiore*, OATH Index No. 690/90 (Mar. 26, 1990)

For the reasons set forth above, I also credited Respondent Maldonado's assertion that he did not use profanity when addressing Pointer and that he did answer Pointer's request for identification. With respect to the latter it is worth noting that the video does not support Pointer's claim that Respondent Maldonado walked away when he asked for this information. As noted in more detail above, Pointer walked away first.

Accordingly, I find Respondent Maldonado not guilty of the charged misconduct.

APPROVED

DEC 19 2016

James P. O'Neill
JAMES P. O'NEILL
POLICE COMMISSIONER

Rosemarie Maldonado

Rosemarie Maldonado
Deputy Commissioner Trials