



POLICE DEPARTMENT

August 26, 2021

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In the Matter of the Charges and Specifications :

Case No.

- against - :

2018-19686

Police Officer Viviana Ayende :

Tax Registry No. 938007 :

Warrant Section :

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Josh Kleiman
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department:

David Green, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent:

Eric Sanders, Esq.
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To:

HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Said Police Officer Viviana Ayende, while assigned to the Central Park Precinct, on or about October 22, 2018, while on duty, at about 2330 hours, wrongfully failed to comply with the lawful order of New York City Police Sergeant Philip Falkowski to resume patrol as the recorder of her assigned police vehicle.

P.G. 203-03,¹ Page 1, Paragraph 2

COMPLIANCE WITH ORDERS
GENERAL REGULATIONS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on July 7, 2021.

Respondent, through her counsel, entered a plea of Not Guilty to the subject charges. The Department called retired Sergeant Philip Falkowski, Police Officer Mahfuz Chowdhury, and Police Officer Charanjit Bhandal, as its witnesses. Respondent testified on her own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty of the charged misconduct, and recommend the forfeiture of 22 pre-trial suspension days.

SUMMARY

It is undisputed that on October 22, 2018, Respondent approached her assigned partner, Police Officer Mahfuz Chowdhury, and insisted that he give her the keys to their assigned vehicle so she could drive. When he refused, Respondent told him that if he was driving she would refuse to accompany him on patrol. In earshot of their dispute, the assigned First Platoon Desk Officer, Sergeant Philip Falkowski, asked Respondent and her partner for their tax numbers and informed them that whomever had the lower tax number, and, therefore, more seniority,

¹ The original Charges and Specifications, dated October 23, 2018, included a typographical error, wherein the applicable Patrol Guide section was listed as 203-05. At trial, the Department Advocate clarified that Patrol Guide section 203-03 is the correct procedure applicable in this matter.

would be given priority to select between the roles of operator and recorder. Police Officer Chowdhury was identified as the senior officer and informed Sergeant Falkowski of his preference to be the operator of their assigned vehicle. Respondent then told Sergeant Falkowski that she refused to go on patrol if Police Officer Chowdhury was the driver. Sergeant Falkowski ordered Respondent to go on patrol multiple times. Each time, Respondent refused. Sergeant Falkowski then informed her that she would be suspended and contacted the assigned Duty Captain. Respondent was subsequently suspended for 22 days.

Despite admitting to the above recitation of facts, Respondent claimed that the incident resulting in her suspension was the product of retaliation rather than insubordination. Respondent explained that she had previously made allegations of “cooping” (avoiding work, often in an out-of-view location) against several members of her command, including an officer frequently assigned as the operator of Department vehicles to which Sergeant Falkowski was assigned. Her allegations, some of which involved photographs and videos she took of members of her command sleeping in their Department vehicle, resulted in several Command Disciplines being issued to members of her command. At trial, Respondent averred that Sergeant Falkowski must have known about the allegations she made against members of their command and suspended her in retaliation for her actions. Respondent did not take this position at her official Department interview, however, explaining only that she believed it was her turn to drive and Officer Chowdhury was not following Department procedure and the customs of her command in permitting her to drive.

Respondent further claimed that prior to the day of her suspension, when Police Officer Chowdhury was her assigned partner, he was the assigned operator of their vehicle and purposely delayed his response to an assigned job, as well as refusing to help her with “the

reports” once they arrived. Respondent explained at trial that she did not want Police Officer Chowdhury to be assigned as the operator of her assigned vehicle because she feared he would use it as an excuse to behave in a similar manner in order to avoid work and, therefore, put her safety and the “public safety” at risk.

For the reasons set forth below, the Tribunal finds that the preponderance of the record evidence establishes that Respondent was given a clear and lawful order that she disobeyed without justification. Insufficient evidence was produced that Sergeant Falkowski suspended Respondent for a retaliatory purpose or that Respondent possessed an objectively reasonable belief that an imminent threat to her health or safety, or that of another, existed if she obeyed Sergeant Falkowski’s order. Accordingly, the Tribunal herein finds Respondent Guilty of the sole specification charged and recommends that she forfeit 22 pre-trial suspension days.

ANALYSIS

Retired Sergeant Philip Falkowski testified that on October 23, 2018, he was assigned as the first platoon Desk Officer at the Central Park Precinct. At approximately 11:30 p.m. (on October 22, 2018), Sergeant Falkowski had just started his tour and was sitting at the Desk when he heard Respondent and Officer Chowdhury engage in a loud argument in front of the telephone switchboard (“TS”), which was located approximately 10 to 12 feet away from him. He stated that he heard yelling that was “very loud” regarding who was going to drive an RMP that night. They went back and forth saying, “I want to drive, no I’m driving,” for approximately 20 to 30 seconds. (Tr. 28-34)

Sergeant Falkowski testified that he approached the officers and asked them what was the problem. They reiterated that they both wanted to drive. Sergeant Falkowski testified that

typically, based on his 34 years of experience with the NYPD, two officers assigned to an RMP would decide amongst themselves who would assume the role of operator and recorder after roll call. Here, however, he decided to settle the dispute based on who was the senior officer, which is something he routinely did when settling disputes among officers. Sergeant Falkowski asked Respondent and Officer Chowdhury for their tax numbers to assess seniority, as the lower tax number denotes more seniority. (Tr. 34)

At first, Sergeant Falkowski made a mistake and initially thought that Respondent had greater seniority, but Officer Chowdhury interrupted him, correcting him that he was “the senior guy.” After realizing his mistake, Sergeant Falkowski asked Officer Chowdhury what he wanted to do. Officer Chowdhury responded that he wanted to drive. Sergeant Falkowski then stated, “[O]kay, Officer Chowdhury’s driving, go on patrol.” (Tr. 35)

Following this order, Sergeant Falkowski testified that Respondent replied, “I’m not gonna go on patrol if he’s driving.” Sergeant Falkowski thought that he “settled the dispute fairly so [he] was kind of taken back by that.” He explained himself again and said, “[L]isten, I’m giving you a direct order to go on patrol so take your post and go on patrol.” Respondent replied, “I’m not going on patrol if he’s driving,” without providing any further explanation. Sergeant Falkowski responded, “Let me clarify this. I’m giving you a direct order to go on patrol and that’s it, so please go on patrol.” Respondent replied, “[N]ot if he’s driving.” (Tr. 35-36)

Sergeant Falkowski said, “[I]f you’re refusing to go on patrol, you’re refusing a lawful order; I’m going to notify the duty captain and whatever happens from there happens,” to which Respondent replied, “[F]ine.” Sergeant Falkowski added that he never explicitly threatened Respondent with suspension. Sergeant Falkowski testified that he proceeded to call his precinct captain and provide him with a short synopsis of the events that had transpired. The precinct

captain told him that he was coming in and instructed him to call the “bureau,” which Sergeant Falkowski did. He stated that investigators arrived at the precinct, while Respondent and Officer Chowdhury stood by. (Tr. 36-39)

Sergeant Falkowski described his relationship with Respondent prior to the suspension as “a good relationship, no issues.” He also testified that he was not aware that Respondent had reported allegations to the Internal Affairs Bureau (“IAB”) that she had observed his occasional operator, Police Officer Bhandal, sleeping while on patrol, and he never saw any pictures of Police Officer Bhandal being inattentive in an RMP. (Tr. 37, 39-44, 49-52, 55)

Sergeant Falkowski explained that Respondent never offered an explanation for her refusal. He did not ask her questions when he observed the dispute as to why she did not want to ride in the car with Officer Chowdhury because “it didn’t seem like it was a big issue.” He also did not did not have a discussion related to sharing the operator and recording duties with Respondent. He stated that his goal was to solve the problem between the two officers and get them on patrol, and he believed that he accomplished this goal when he gave the order. (Tr. 34-37, 40-43, 49, 55)

Police Officer Mahfuz Chowdhury’s testimony at trial was consistent with that of Sergeant Falkowski concerning the argument between himself and Respondent leading to her suspension. Officer Chowdhury added that he was standing by the TS when Respondent approached him “aggressively” and demanded the RMP keys with “an attitude.” Officer Chowdhury denied raising his voice during the dispute, which took place for “a few minutes.” He testified that, during the argument, Respondent told him that she wanted to drive because he always drove. She did not provide any other explanation. Officer Chowdhury further testified that Sergeant Falkowski directly ordered him and Respondent to go on patrol approximately

three or four times, and Respondent refused each time. He did not recall if Respondent provided Sergeant Falkowski with a reason or explanation as to why she was refusing his order. Officer Chowdhury did not know of any reason why Respondent refused to go on patrol with him. (Tr. 69-75, 77)

Officer Chowdhury clarified that he and Respondent were not steady partners, but had worked with each other five (5) to seven (7) times previously. He stated that while they had a “good relationship” when they worked together she often second-guessed his decisions. Officer Chowdhury admitted that, at the start of his tour on the day in question, he was not happy that he was assigned to work with Respondent because of her habit of second-guessing his decisions. He stated that he would have preferred to work with someone else or work a separate assignment. Officer Chowdhury voiced his concerns to Sergeant John Rendon and asked him for a different assignment on the day of the incident, but Sergeant Rendon denied his request for a change of partner or assignment. (Tr. 64-68, 78, 83-84)

Police Officer Charanjit Bhandal testified consistently with Sergeant Falkowski and Officer Chowdhury concerning Respondent’s exchange with Sergeant Falkowski. Officer Bhandal added that, on the day of the incident, he was assigned to the TS. He further stated that he occasionally worked as Sergeant Falkowski’s operator. While at the TS, Officer Bhandal heard Respondent state that Officer Chowdhury drove all the time. After hearing Sergeant Falkowski order Respondent and Officer Chowdhury to go on patrol, he heard Respondent reply, “I want to drive...I refuse to go on patrol.” Sergeant Falkowski repeated the order “three, four, five times.” Respondent’s response to Sergeant Falkowski did not change. Officer Bhandal also testified that he did not hear Respondent provide an explanation, other than wanting to drive, during the conversation. (Tr. 97-99, 102-06)

Police Officer Charanjit Bhandal testified further that he was first assigned to work with Respondent on March 19, 2018, where they had a stationary post on 109th Street and East Drive that involved preventing individuals from entering the park after it closed. At approximately 1:00 a.m., he was talking to Respondent about the rough day he had at home and conveyed that his eyes were dry. Respondent told him that it was okay for him to close his eyes. He said that he was going to take a few minutes and then she could close her eyes too. Officer Bhandal proceeded to close his eyes for less than five minutes, but stated that he did not fall asleep. Respondent then closed her eyes for awhile. Officer Bhandal stated that he was accused of misconduct after Respondent took a picture of him with his eyes closed from inside the RMP, which resulted in him receiving a Command Discipline with a penalty loss of four hours. His experience with Respondent was similar to the experiences of a few other officers who had also worked with Respondent. (Tr. 90-95, 97, 106, 110, 114)

Despite the Department's efforts to receive the testimony of Retired Sergeant John Rendon, he did not appear at trial. As a result, the Department entered the audio (Dept. Ex. 1) and accompanying transcript (Dept. Ex. 1A) from Retired Sergeant Rendon's official Department interview into evidence. Rendon explained that the incident occurred after he had conducted roll call and gave the officers their assignments. He explained that Respondent refused Sergeant Falkowski's order to go on patrol three times. He stated that Respondent's refusals were adamant and verbal. He remembered Sergeant Falkowski telling Respondent, "[I]f you refuse your assignment, you will be suspended." Sergeant Rendon stated that Respondent did not offer an explanation as to why she needed to be the operator as opposed to the recorder. (Dept. Ex. 1A at 3-9)

Respondent testified that she believed that Officer Chowdhury had a “work ethic problem” based on a prior experience when they worked together and responded to a “53,” “hit and run” job. She stated that Officer Chowdhury first delayed accepting that the job was in their assigned sector, and then, after being instructed by the lieutenant to pick up the job, he drove slowly to the incident location using a roundabout route. When they arrived, Officer Chowdhury told her that she needed to complete the reports on her own since she was the operator, and he refused to help her inform the lieutenant of the hit and run. Afterwards, Officer Chowdhury initially delayed driving her to the hospital to check on a victim. Respondent said that Officer Chowdhury refused to help her and did not inform the lieutenant of the incident. Respondent also claimed that Officer Chowdhury’s “work ethic issue” included falling asleep when she was partnered with him. (Tr. 135-37, 139-40)

Regarding the October 22, 2018, incident, Respondent testified that she was talking with Officer Chowdhury by the TS when she asked him for the keys to their assigned vehicle since “he drove last time.” She told him that he was using the excuse of being an operator of the vehicle to avoid police work. He refused to give her the keys. When Sergeant Falkowski approached them, he was “very upset,” “red,” and immediately “yelled” at her as he asked what was going on. She replied, “I’m just asking for the RMP keys; he drove last time, but let me – let me say why.” Respondent testified that she tried to explain to Sergeant Falkowski that she wanted the RMP keys based on the prior work experience she had with Officer Chowdhury, but Sergeant Falkowski interrupted, asking, “[N]o, what’s your tax?” Respondent stated that seniority did not play a role in who is the driver of an RMP. Respondent testified that she told Sergeant Falkowski that she was “more than willing to go out and take [her] post” with Officer Chowdhury, assuming he did not drive. Respondent admitted that she had not discussed the “cooping”

misconduct she had previously reported with Sergeant Falkowski. (Tr. 137-38, 142, 146, 154, 174)

Respondent testified that at her official Department interview on October 22, 2018, her PBA delegate refused to represent her, explaining that her fellow Members of the Service were upset at her for taking pictures of her partners while they were sleeping and then reporting them to Department supervisors and investigators. When Respondent asked the interviewers if this disciplinary matter was connected to her complaints of misconduct, she stated that they turned the recorder off and informed her that she was suspended for 30 days. (Tr. 143, 145-48)

On cross-examination, Respondent admitted that Sergeant Falkowski ordered her “probably twice” to go on patrol with Officer Chowdhury as the driver. She claimed, however, that she was confused by the order: “I didn’t understand the order. Why would he order me to go out as the recorder without being concerned of the reason why I didn’t want to be the recorder.” She testified that her refusal to follow Sergeant Falkowski’s direction was not wrong and that she did not do anything wrong in the situation because she was concerned for her “safety.” She further believed Sergeant Falkowski was retaliating against her when he gave her the order because he knew of the complaints she made against his driver, Officer Bhandal. (Tr. 147-48, 151-64, 170-74)

In connection with her retaliation defense, Respondent explained that, in March 2018, she contacted IAB regarding a fixed post assignment on 110th Street and Lenox, where she had come across several officers who had fallen asleep. Respondent reached out to the Manhattan North Investigations Unit after an incident where she was asked to be the meal relief and the two officers she was supposed to relieve asked her to standby and serve as a second pair of eyes while they slept, which she refused to do. After she made this initial report, she provided

photographs of officers sleeping in RMPs as evidence. Respondent stated that, after reporting the officers and having a conversation about the incident with a sergeant at the Central Park Precinct, her work environment changed in that the officers “basically didn’t want to work with [her].” (Tr. 122, 128-30)

Regarding the incident with Officer Bhandal that occurred on March 19, 2018, Respondent denied suggesting to Officer Bhandal that he should close his eyes. Respondent also denied closing her eyes. Respondent stated that on the occasions that she worked with Officer Bhandal, he requested to be the recorder and then fell asleep. When she took the picture of him sleeping in the RMP, this was not the first time that she had observed Officer Bhandal sleeping in her presence. (Tr. 131-32, 134)

Respondent stipulated to the introduction of her official Department interview into evidence (Dept. Exs. 2 & 2A). During her interview, Respondent explained that the reason she gave to Officer Chowdhury as to why she insisted on driving was that he had always driven before when they were partnered together and she wanted to drive this time. Respondent did not claim that she felt unsafe working with Officer Chowdhury if he was driving. Respondent did, however, explain that a few nights earlier, Officer Chowdhury hung up on her when she called him about a job (a “53 with injuries”) they had handled. She denied that Sergeant Falkowski had given her an order more than once or that Sergeant Falkowski had first mistakenly thought she was the senior officer before realizing it was Officer Chowdhury. In her description of Sergeant Falkowski’s actions, she did not describe him as threatening her with suspension, but rather he stated that due to her refusal he wanted her to standby while he contacted a “Duty Captain.” Respondent claimed that she was unsure what constituted a “lawful order” and questioned whether Sergeant Falkowski’s order to her was “lawful” because she believed she had a right to

drive. She admitted, however, that she did not mention to Officer Chowdhury, or to Sergeant Falkowski prior to being informed that she was being suspended, that she wanted to drive half of the tour.² Respondent further admitted that it was her intention when she told Officer Chowdhury that she wanted to drive that she would drive for the whole tour. Respondent noted that the common practice in her command was to take turns driving for the full tour either daily or weekly. Respondent denied that she was in the wrong in refusing Sergeant Falkowski's order. She stated that "tonight's incident" is a chain of events stemming from an earlier investigation, but no further details were provided by Respondent and Department investigators did not seek further details from her. (Dept. Ex. 2A at 12)

The sole specification in this matter charges Respondent with wrongfully failing to comply with the lawful order of Sergeant Falkowski to resume patrol as the recorder of her assigned police vehicle.

Prior Patrol Guide procedure 203-03[2], in effect on the charged date, required that Members of the Service "obey lawful orders and instructions of supervising officers."³ Respondent was ordered by her supervisor, Sergeant Falkowski, to go on patrol with Officer Chowdhury as the assigned recorder, and disobeyed that order. To establish a disciplinary charge of failing to comply with a lawful order, the Department must prove by a preponderance of the credible evidence that: (i) an order was communicated to Respondent, which she heard; (ii) the content of the order was clear and unambiguous; and, (iii) Respondent willfully refused to obey the order. *See Disciplinary Case No. 2016-16421* [Oct. 23, 2017], citing *Dep't of Correction v.*

² Prior Patrol Guide provisions required the recorder and operator to switch rolls after four hours. Those provisions were removed in May 2021, however, because they were "not done in practice." *See* Summary Department Manual Revisions: Patrol Guide section 202, "Duties and Responsibilities" and Administrative Guide section 303 "Duties and Responsibilities" at 1 (May 6, 2021). Respondent admitted that switching every four hours was not done at her command either (Tr. 157).

³ P.G. 203-03 has since been moved to Administrative Guide section 304-03.

Hipp, OATH Index No. 337/00 [Dec. 3, 1999] [insubordination charge dismissed where insufficient proof that captain clearly communicated order and thus no proof of willful disobedience].

Here, it is undisputed that Sergeant Falkowski communicated the order to go on patrol as the recorder of the RMP to Respondent more than once, and Respondent heard that order. Although Respondent claimed that she did not understand why Sergeant Falkowski gave her the order and did not agree with the order, she clearly and unambiguously understood that Sergeant Falkowski was ordering her to go on patrol as the assigned recorder. Respondent refused to obey Sergeant Falkowski's order when she did not go on patrol as ordered.

There are three well-recognized exceptions to this principle: (i) where the order is clearly outside of the supervisor's authority; (ii) where the order is unlawful; or (iii) where obeying the order would threaten the health/safety of the employee or another person (*see Ferrari v. N.Y.S. Thruway Auth.*, 62 N.Y.2d 855 [1984]). At trial, Respondent attempted to invoke the safety exception,⁴ contending that she believed that Officer Chowdhury would not perform police work or fall asleep if assigned as the operator of the RMP. For the safety exception to apply, an officer must show an objectively reasonable belief that an imminent threat to their health or safety justified disobedience of the order. *Disciplinary Case No. 2015-14396* [July 13, 2017], citing *Dep't of Envtl. Prot. v. Nuccio*, OATH Index Nos. 2360/08 [Sept. 26, 2008], citing *Dep't of Sanitation v. Jones*, OATH Index No. 2186/99 [Oct. 5, 1999].

⁴ Respondent's attorney argued: "It's not just a straight she didn't want to take her post. She had a safety consideration and the Department knows this. . . . Meanwhile, what really happened was, she didn't want to ride with Chowdhury and these other people, because they were impacting her safety and the public safety. . . . It's about more than the car keys; it's about safety." On cross-examination, when asked, "What crime would you have been committing if you had complied with his order?", Respondent replied, "My safety concerns," later adding, "Am I not entitled to actually be concerned about my safety?" (Tr. 11, 24-25, 159, 161, 187).

I find that Respondent failed to demonstrate that she possessed an objectively reasonable belief that an imminent threat to her safety would have likely resulted if she obeyed Sergeant Falkowski's order to assume her patrol duties with Officer Chowdhury as the operator of her assigned vehicle. There is no evidence before the Tribunal that Respondent, at any time prior to trial, claimed a safety concern as the reason she refused Sergeant Falkowski's order. The credible testimonies of Sergeant Falkowski, Officer Chowdhury, and Officer Bhandal, supported by Sergeant Rendon's hearsay statements, consistently described Respondent's response as stating that she wanted to be the operator of the RMP without providing any further explanation for her refusal. Respondent also did not claim having safety concerns at her official Department interview, which occurred the same night as the refusal. Rather, at her official Department interview, Respondent was quite clear that Officer Chowdhury had driven the previous times they were assigned together and she believed that it was her turn to drive. Furthermore, at trial, and at her official Department interview, Respondent stated that she did not have a problem working with Officer Chowdhury and that she would have gone on patrol if she were the operator of the RMP. If Respondent truly had safety concerns concerning Officer Chowdhury it is curious that those concerns would have disappeared if Officer Chowdhury were assigned as the recorder, especially given that, according to Respondent, she had never before worked with Officer Chowdhury when he was assigned as the recorder since he "always" drove (Dept. Ex. 2).

While the Tribunal credits the sincerity of Respondent's deeply felt feelings of fairness and equity as to whose turn it was to drive, the custom and practice of trading off operating duties between police officers does not trump an officer's duty to comply with the lawful orders of their superiors. The correct course of action where an officer disagrees with a lawful order is to comply first and complain later (*Ferrari v. N.Y.S. Thruway Auth.*, 62 N.Y.2d 855 [1984])

[“work now, grieve later”], *Disciplinary Case No. 2018-19382* [Aug. 29, 2018]; *Disciplinary Case No. 2014-12793* [Aug. 24, 2017] [“[A] an employee must promptly obey a supervisor's order, even if he believes it to be improper, and then may later dispute its propriety through formal grievance procedures.”]). Otherwise, the paramilitary structure of the Department, organized to respond effectively and efficiently to emergency matters, might come to a grinding halt in order to prioritize the adjudication of individual grievances.

Finally, Respondent failed to establish that Sergeant Falkowski’s disobeyed order was given in retaliation for Respondent making “cooping” complaints against other members of her command. Sergeant Falkowski testified that he was not aware of the allegations and there is no evidence, other than Respondent’s conclusory suspicion that he knew, that would support a finding that Sergeant Falkowski was not credible. Nevertheless, even assuming that Sergeant Falkowski did have knowledge of Respondent’s prior reports, including one against his occasional driver, Officer Bhandal, Sergeant Falkowski addressed the disagreement between Respondent and Officer Chowdhury in a facially neutral way using seniority. Indeed, the testifying witnesses, save Respondent, stated that Sergeant Falkowski, at first, mistakenly believed Respondent to be the senior officer. This would have been an unusually complex subterfuge if Sergeant Falkowski’s true intent were to retaliate against her.

Based on the totality of the circumstances, the preponderance of the credible evidence does not support a finding that Respondent had an objectively reasonable belief that an imminent threat justified her disobedience of an order or that the order constituted a retaliatory act. Rather, the preponderance of the evidence supports the Department’s position that Respondent disobeyed a lawful order.

Accordingly, for the foregoing reasons, I find Respondent Guilty of the sole specification charged.

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 her 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 11, 2005, has been found guilty of failing to comply with the lawful order of Sergeant Falkowski to resume patrol as the recorder of her assigned police vehicle. The Department has recommended the aggravated penalty of the forfeiture of 30 penalty days be imposed because Respondent, at trial, "refuse[d] to acknowledge that what she did was wrong when it is painfully obvious to everyone else in the room that it was[, demonstrating] that she has not learned her lesson" (Tr. 196).

The Tribunal disagrees with the Department that an aggravated penalty is warranted. While the Disciplinary Guidelines establish "acceptance of responsibility" as a mitigating factor, they do not establish the refusal to admit fault at trial as an aggravating factor. That is because this Tribunal adheres to the American and common law tradition of conducting legal proceedings based on an adversarial system wherein a plea of Not Guilty is an acceptable opening move rather than a scarlet letter. Here, the outcome of this disciplinary matter is lesson enough; and if Respondent should engage in the same misconduct again, then the Disciplinary Guidelines

would require this Tribunal to adhere to its policy of progressive discipline. Here, however, Respondent has come before the Tribunal with no prior disciplinary history and a positive employment record, including positive annual evaluations. There is no reason to suggest that the instant matter constitutes a repeated or chronic problem. Rather, it is more likely that the instant disciplinary manner is evidence of a temporary lapse in judgment in an otherwise upstanding career.

Nevertheless, while Respondent was suspended for 22 days prior to trial and the presumptive penalty under the Disciplinary Guidelines is 20 penalty days, I do not find the instant disciplinary case to be one in which the restoration of suspension days is warranted. Respondent blatantly disobeyed a direct order and, at the time, suspensions exceeding twenty days were not atypical for refusals to comply with lawful orders. If any mitigating factors applied I would be convinced otherwise; here, however, a penalty of the forfeiture of 22 pre-trial suspension days already served is not excessive or inappropriate under the circumstances.

Respectfully submitted,



Josh Kleiman
Assistant Deputy Commissioner Trials

APPROVED
DEC 16 2021

DERMOT SHEA
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER VIVIANA AYENDE
TAX REGISTRY NO. 938007
DISCIPLINARY CASE NO. 2018-19686

Respondent was appointed to the Department on July 11, 2005. On her three most recent annual performance evaluations, she twice received overall ratings of “Meets Standards” for 2018 and 2019, and received an overall rating of “Exceeds Expectations” for 2017. Respondent has been awarded two medal for Excellent Police Duty.

Respondent has no disciplinary record. In connection with the instant matter, Respondent was suspended from October 23, 2018, to November 13, 2018. She was also placed on Level 2 Discipline Monitoring on December 4, 2018; that monitoring remains ongoing.

For your consideration.

Josh Kleiman
Assistant Deputy Commissioner Trials