



POLICE DEPARTMENT

April 9, 2013

MEMORANDUM FOR: Police Commissioner

Re: Police Officer David Smart
Tax Registry No. 939483
48 Precinct
Disciplinary Case No. 2011-5180

The above-named member of the Department appeared before me on March 21, 2013, charged with the following:

1. Said Police Officer David Smart, while assigned to the 48th Precinct, on or about and between January 1, 2010 and August 9, 2010, engaged in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: said Police Officer requested the assistance from a member of the service to prevent the processing and adjudication of a summons.

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

2. Said Police Officer David Smart, while assigned to the 48th Precinct, on or about January 25, 2010, engaged in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: said Police Officer provided incomplete information at a Traffic Violations Bureau Hearing, resulting in the dismissal of a summons.

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

The Department was represented by Vivian Joo, Esq., Department Advocate's Office, and Respondent was represented by John Tynan, Esq.

Respondent, through his counsel, entered a plea of Guilty to the subject charges and testified in mitigation of the penalty. A stenographic transcript of the mitigation record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent, having pleaded Guilty, is found Guilty as charged.

SUMMARY OF EVIDENCE IN MITIGATION

Respondent, a seven and-a-half-year uniformed member of the service (UMOS), is currently assigned to the 48 Precinct. Upon graduating the Police Academy in 2005, he was initially assigned to the 40 Precinct, where he had worked for two months.

Respondent testified that he was then transferred to his current command in the Bronx, which covers the neighborhoods of Tremont Avenue, Webster Avenue, Arthur Avenue, and Southern Boulevard.

Respondent testified that in his time as a police officer he had written "a lot" of summonses. Respondent stated, "I can't say a number. I have written a lot of summonses", but he agreed that he had written more than 250 summonses.

Respondent acknowledged that in 2011 he was questioned and testified truthfully in an official Department interview regarding summonses that were issued by him in the Bronx. Respondent further acknowledged that he was questioned about a summons that he had issued to an individual named Person A. Respondent agreed that he was contacted by Police Officer Christopher Scott regarding the summons issued to Person A. Respondent testified that based on his conversation with Scott, when Person A's case appeared in court, Respondent testified at court that he didn't have any notes or Activity Log entries. Respondent stated that he did not receive any benefit from Scott. Respondent testified that he did not personally know Person A nor had he ever met him prior to the date that he wrote him the summons. Other than writing Person A the summons,

Respondent denied having any other contact with Person A. Respondent also denied knowing Police Officer Virgilio Bencosme. Respondent testified that other than his one conversation with Scott, no one ever spoke to him about the summons he had written to Person A.

Respondent volunteered at his official Department interview that he had asked approximately a year prior for help with a summons that was issued to his uncle. Respondent testified that he asked another member of the service named Police Officer Christopher Letizia if he could "pull the summonses for my uncle." Respondent testified that Letizia had not asked for anything in return nor did Respondent give him anything. Respondent also denied receiving anything from his uncle for the steps that Respondent had taken.

Respondent testified that he is 37 years old and prior to becoming a New York City police officer he worked in Rockland County for the East Ramapo Central School District. Respondent has lived in [REDACTED] his entire life, he is married, and he has four children ages 15, 13, 8, and 4. Respondent acknowledged that his three oldest children are currently in school. Respondent testified that his wife is employed in Rockland County as a Child Support Investigator. Respondent denied that he or his wife suffer from any medical conditions. Respondent testified that [REDACTED] Minor B, suffers from [REDACTED] which is when the [REDACTED] Minor B was diagnosed within the first three weeks of his life, and between that time and the first three months, Minor B had [REDACTED] operations. Respondent stated that Minor B "was fine up until November 2011 where he went into [REDACTED] and he had to have another operation." Respondent testified that in the fall of 2011, "The machine that they

put in [REDACTED] it stopped working. So he had to go to [REDACTED] [REDACTED] to have an operation, an emergency operation.” Respondent was working in the 48 Precinct at the time and he had requested and been granted time off. Respondent testified that he had used a few days of his allotted time to take care of Minor B but not all of his days.

Respondent testified that Minor B has had further problems because of the new [REDACTED]. Respondent stated that “Five months later, the [REDACTED] [REDACTED] again and he had to have another operation...He had [REDACTED] he was very [REDACTED] and he [REDACTED].” Respondent testified that Minor B was hospitalized for three or four days and they [REDACTED]. Respondent further testified that Minor B has not been hospitalized since then. Respondent stated that in order to care for Minor B “I just have to monitor him, make sure that, you know, he doesn’t have any [REDACTED]. Any time he complains about [REDACTED] it’s kind of scary because [REDACTED]

Respondent testified that the penalty in this case, of the loss of 25 vacation days and 5 suspension days, will affect his family’s ability to care for Minor B and his other children because, “If he does go into [REDACTED] again, I won’t be able to take off to be with my family, with my son.” Respondent further testified that he has never had disciplinary charges prior to the charges in this case and to the best of his knowledge on his last evaluation that he received from the 48 Precinct he received a “four.” Respondent is currently performing patrol assignment duties in the 48 Precinct.

On cross-examination, Respondent acknowledged that he has been a UMOS for seven and-a-half years and that he was initially assigned to the 40 Precinct. Respondent

testified that [REDACTED] (Mnor B), [REDACTED]
[REDACTED]. Respondent testified that he currently works the 4 x 12 tour, in squad C1, and he has rotating regular days off (RDOs). Respondent further testified that he has [REDACTED] other children, [REDACTED].

Respondent acknowledged that his wife works 9 x 5 hours, with weekends off. Respondent further acknowledged that when he was having issues with Mnor B, the Department accommodated him when he was taking days off. Respondent agreed that he has medical benefits through the PBA but his children are not under his benefits. Respondent further agreed that they are all under his wife's medical insurance and he stated, "No, actually they are under my wife's. I am under my wife's too. I don't have insurance with the Department." Respondent acknowledged that he did that because his wife had better medical coverage and he stated, "Yes it was a conflict. Every time we went to the doctor, they couldn't figure out whose was the majority. So I decided to just drop mine and just keep hers." Respondent acknowledged that his wife was covered under Rockland County.

Respondent testified that he works 4 x 12 and he is at home during the day so that just in case anything happens at school, he can get to the kids. Respondent agreed that the scheduling with the kids works out with his wife and he stated, "I've worked 4 to 12, that's the tour day they put me on ever since I got to the 48. It's always worked out for the both of us." Respondent denied that there is any special treatment that Mnor B requires while he is at school.

Respondent testified that he did not recall if he had written Person A a summons for a "stop sign" violation, but he acknowledged that he wrote Person A a legitimate summons.

Respondent acknowledged that when he went to Court he testified that he had no notes or Activity Log entries and therefore could not remember what happened. Respondent further acknowledged that the case was dismissed and Person A benefitted because the case was dismissed.

Respondent acknowledged that the ticket for his uncle was a parking summons. Respondent further acknowledged that once Letizia pulled the summons, his uncle no longer had an obligation to pay for the ticket.

Upon questioning by the Court, inquiring whether Respondent had previously received a Command Discipline (CD) related to a summons as represented by the Department Advocate (Advocate) in the beginning of this mitigation, Respondent stated, "I remember saying that. I don't remember getting a CD in regards to a summons, sir."

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on July 11, 2005. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent did not present any evidence in mitigation. He did appeal for a lesser penalty based on the personal hardship the penalty proposed by the Advocate would cause him and his family. Respondent noted that he is the father of four children one of whom has medical problems. His wife is also expecting another child.

One of the issues raised was that the child with medical problems sometimes has a sudden and unexpected need for medical care. Certainly a suspension even one of short duration might impact this child however during questioning by the Advocate, Respondent explained that the family's health coverage is taken care of through his wife's plan.

Counsel for Respondent has also argued that the courtesy extended by and for Respondent was part of a historic practice within the Department. He has also argued that, in essence, fixing a ticket is not different than the exercise of discretion an officer is allowed to make at the time a summons is issued.

The difference between the discretion an officer may use at the time a summons is issued is very different from the practice of "fixing" a summons after it has been issued. This issue was discussed in detail in *Case No. 2011 6397 (December 17, 2012)*.

Additionally, as counsel for Respondent pointed out in his closing statement, officers need to have discretionary power at the time a summons is issued to avoid engaging in foolish or counterproductive activity.

Discretion is not appropriate when it is used to excuse someone from having to adhere to the law simply because he or she is the relative or friend of a member of the service as occurred in this case.

As has been noted this case is part of a series of cases arising from an investigation in Bronx County. In several other cases arising out of this investigation, this Court has found some mitigation and reflected that in its recommended penalty. That mitigation has related to the specific nature and character of the events that led to the charges. As I have already noted no such mitigation exists in this case.

In this case one of the events charged involves Respondent appearing at Traffic Court and purposefully throwing the case by failing to bring materials necessary to the prosecution of that case. Interfering with the legal process in this manner is one of the most egregious and corrupt acts a police officer can be involved in.

There is no question that the traffic offense involved was minor and that the practice of fixing tickets, whenever it had started, was widespread in the Bronx. It is also regrettable that Respondent, who has an otherwise excellent record, became involved in this unfortunate practice.

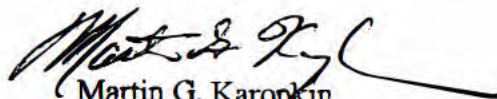
The penalty proposed by the Advocate, which has been imposed in numerous other similar cases takes all of this into consideration. The penalty, particularly in a case such as this one, is appropriate.

Based on the above, this Court recommends that Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Section 14-115 (d) of the Administrative Code, during which time he remains on the force at the Police Commissioner's discretion and may be terminated at anytime without further proceedings. Further, this Court recommends that Respondent forfeit 25 vacation days and 5 suspension days.

APPROVED
MAY 06 2013

RAYMOND W. KELLY
POLICE COMMISSIONER

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner -- Trials

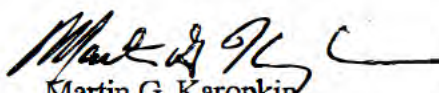
POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DAVID SMART
TAX REGISTRY NO. 939483
DISCIPLINARY CASE NO. 2011-5180

In 2010 and 2012, Respondent received an overall rating of 4.0 "Highly Competent" on his annual performance evaluation. He was rated 3.5 "Highly Competent/Competent" in 2011. [REDACTED]

[REDACTED] Respondent has no prior formal disciplinary record.

For your consideration.


Martin G. Karopkin
Deputy Commissioner – Trials