



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

October 21, 2016

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Neil O'Donnell**
Tax Registry No. 955270
33 Precinct
Disciplinary Case No. 2015-12955

The above named member of the service appeared before Assistant Deputy Commissioner Paul M. Gamble on April 28 and 26, 2016, and was charged with the following:

DISCIPLINARY CASE NO. 2015-12955

1. Said Police Officer Neil O'Donnell, on or about April 13, 2014, at approximately 0037 hours while assigned to PBMN and on duty in the vicinity of West 159th Street and Broadway, New York County, abused his authority in that he stopped Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1

STOP AND FRISK

2. Said Police Officer Neil O'Donnell, on or about April 13, 2014, at approximately 0037 hours while assigned to PBMN and on duty in the vicinity of West 159th Street and Broadway, New York County, did wrongfully use force against Person A, in that he pushed Person A against a car, without police necessity.

P.G. 203-11

USE OF FORCE

3. Said Police Officer Neil O'Donnell, on or about April 13, 2014, at approximately 0037 hours while assigned to PBMN and on duty in the vicinity of West 159th Street and Broadway, New York County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he issued a Disorderly Conduct summons to Person A without sufficient legal authority.

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

**PUBLIC CONTACT –
PROHIBITED CONDUCT**

In a Memorandum dated July 26, 2016, Assistant Deputy Commissioner Paul M. Gamble found Police Officer Neil O'Donnell Guilty of Specification Nos. 1, 2, and 3 in Disciplinary Case No. 2015-12955. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

In consideration of the totality of the issues and circumstances in this matter I deem that a greater penalty is warranted. Therefore, Police Officer O'Donnell's disciplinary penalty shall be the forfeiture of eight (8) vacation days.


James P. O'Neill
Police Commissioner



POLICE DEPARTMENT CITY OF NEW YORK

July 28, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Neil O'Donnell
Tax Registry No. 955270
33 Precinct
Disciplinary Case No. 2015-12955

Charges and Specifications:

1. Said Police Officer Neil O'Donnell, on or about April 13, 2014, at approximately 0037 hours while assigned to PBMN and on duty in the vicinity of West 159th Street and Broadway, New York County, abused his authority in that he stopped Person A without sufficient legal authority.
P.G. 212-11, Page 1, Paragraph 1 – STOP AND FRISK
2. Said Police Officer Neil O'Donnell, on or about April 13, 2014, at approximately 0037 hours while assigned to PBMN and on duty in the vicinity of West 159th Street and Broadway, New York County, did wrongfully use force against Person A, in that he pushed Person A against a car, without police necessity.
P.G. 203-11 – USE OF FORCE
3. Said Police Officer Neil O'Donnell, on or about April 13, 2014, at approximately 0037 hours while assigned to PBMN and on duty in the vicinity of West 159th Street and Broadway, New York County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he issued a Disorderly Conduct summons to Person A without sufficient legal authority.
P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONTACT

Appearances:

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

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

Hearing Date:
April 28, 2016

Decision:
Guilty

Trial Commissioner:
ADCT Paul M. Gamble

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on April 28, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Civilian Complaint Review Board ("CCRB") called no witnesses but offered the hearsay statement of Person A in evidence. Respondent called Adam Cohen as a witness and Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The following is a summary of the facts which are not in dispute. On April 13, 2014, at approximately 0037 hours, Person A turned eastbound from Broadway onto West 159th Street (CCRB Transcript 4, T. 41, CCRB Ex. 2). Person A had recently left a group of dinner companions at Dallas BBQ Restaurant, on Broadway near West 168th

Street (CCRB T. 3). At the time Person A turned the corner, she was engaged in a telephone conversation with a friend, using the speaker function on her mobile phone (CCRB T. 4, T.16, 41).

As Person A walked east on West 159th Street, she was followed by three uniformed police officers, Police Officers Cohen, Sanchez and Respondent (CCRB Ex. 2). Respondent initiated a conversation with Person A which focused on the volume of her telephone conversation (T. 19, 44). Eventually, the three officers lined up and surrounded Person A. During this encounter, Person A faced the police officers with her back to a parked car and, beyond that, 159th Street (T. 19, 46). Person A had a cell phone and a pocketbook in her hands (T. 45). At some point in the encounter, Respondent asked Person A for identification (T. 46). After a period of time, Respondent placed Person A under arrest. Shortly thereafter, numerous police officers arrived at the scene. Person A was eventually taken away in custody to the 33rd Precinct, where she was placed in a holding cell (CCRB T.7, T. 21, 51). After being detained for approximately 10-15 minutes, Person A was released from custody and left the precinct (T. 52-53). On her way home, Person A examined her pocketbook and discovered three summonses which had been issued to her (CCRB T. 10, T. 53). The summonses alleged that Person A violated three subsections of the Disorderly Conduct statute: violent and threatening behavior, unreasonable noise and creating a physically offensive condition (P.L. §§ 240.20[1], [2], [7]; CCRB T. 10, T. 69, 93).

At issue in this case is: (1) whether Respondent had sufficient legal authority to stop and detain Person A for investigation of suspected unreasonable noise; (2) whether the three summonses Respondent issued Person A were supported by sufficient facts; and (3)

whether Respondent used excessive force against Person A by pushing her against a parked car.

The following is a summary of the disputed facts in this case.

In her statement to CCRB, Person A said that as she turned the corner of West 159th Street from Broadway, she heard a voice from behind her say, "Shut up; you can't make noise on this block. This is a community block" (CCRB T. 16). Person A turned around and saw three uniformed police officers approaching her, one of whom was Respondent. The police officers lined up in front of her as she turned to face them. Person A said Respondent asked her for identification, which prompted her to tell the person on the other end of the telephone call, "Cynthia, the police asked me for my ID. Girl, they crazy out here right now" (CCRB T. 23). Cynthia asked, "What? What's going on?" to which Person A responded, "Yo, the police is harassing me" (Id.). According to Person A Respondent asked her for identification again, which caused her to place her cigarettes and telephone in her pocketbook, then turn to face a parked car and begin searching within the pocketbook for her identification (Id.).

Person A said that she continued her conversation with Cynthia as she searched for her identification and told her, "The police behind me . . . I don't know, they're just telling me to shut up. I live three doors down; why would they stop me because I'm talking on my phone?" (CCRB T. 25). Person A continued that as she was looking for her identification, Respondent told her, "You're being unruly, wait there," then she felt her right arm go behind her back up toward her shoulder (CCRB T. 26).

Police Officer Cohen testified that he first became aware of Person A when he saw Respondent following her eastbound on 159th Street and heard her shouting into a mobile

telephone (T. 16). Cohen and Sanchez were finishing a car stop on the southwest corner of Broadway and West 159th Street (T. 16). Cohen and Sanchez joined up with Respondent and continued following Person A (Id.). Cohen testified that Person A initially appeared to be in distress but became "agitated, aggressive posturing and her volume increased" after Respondent asked her if she was in any kind of trouble (T. 16-17).

According to Cohen, Respondent "courteously instructed her . . . she needed to lower her voice as it was a residential area," which "caused her to become more aggressive" (T. 19). Cohen testified further that he, Sanchez and Respondent then formed a triangle around Person A as she "became more intense and physically aggressive" (T. 19-20). Finally, Cohen testified that after Respondent "repeatedly instructed her to lower her volume of voice and gave her ample opportunity to do so and to leave the situation, he then instructed her that she was under arrest" (T. 20).

On cross-examination, Cohen admitted that he recalled Person A responding to Respondent's initial inquiry by saying, "I fucking live here, you know, this is, you know, this is my house. I can speak however I want" (T. 25). Cohen further admitted that he did not perceive any threat to his safety at that point but that she later began "waving her hands, you know, exaggerated gesturing" (T. 27). According to Cohen, once Person A began gesturing, he, Sanchez and Respondent formed the triangle around her (Id.).

Respondent testified that when he first heard Person A, she was shouting into her cell phone (T. 41-42). He approached her and asked her if "she was okay" (T. 42). After Person A responded that she was on the phone with her friend, she continued to yell into her telephone and Respondent could see people shutting their windows (T. 43).

Respondent then told her to "keep it down, as this [is] a residential block and people are trying to

sleep" (T. 44). Respondent testified that Person A began raising her voice as she responded to his questions, even though she was "already screaming" (T. 45). In response to a question about what transpired at 1:35 mark on CCRB Exhibit 2 and the 30 second period thereafter, Respondent described moving into a "triangle" formation where Person A was no longer "free to leave because of the nature of her volume, and at that point I had also asked her for her identification multiple times which is why they had went into the triangle formation" (T. 46). Respondent testified further that Person A made no attempt to present identification to him and verbally stated "she would not fucking give me her identification" (Id.).

In response to a question regarding what transpired on CCRB Exhibit 2 at the 2:27 mark, Respondent testified that he informed Person A that if she did not give him identification, she would be placed under arrest (T. 47). According to Respondent, Person A "emphatically stated that she would not give me her identification," after which he informed her that he was under arrest (Id.). Respondent testified further that he reached for her arm to place her under arrest, then Person A pushed his hand away and attempted to walk westbound on 159th Street away from him (T. 48). Respondent testified that he "pulled her back to gain control of her and try to place handcuffs on her" (Id.).

CCRB Exhibit 2 in evidence, the accuracy of which has not been challenged by either party, reveals a somewhat different scenario from either Person A's or Respondent's perspective. First, the recording does not show Person A turning away from the officers and placing her bag on a car in order to look through it, directly contradicting her statement on that point. Second, the recording does not show Person A manifesting any physical indicia of aggressiveness, directly refuting Respondent's testimony. Finally, the recording does

not show Person A attempting to walk away in a westbound direction on 159th Street before she is eventually restrained. What the recording does show at the 2:26 mark is Respondent reaching out with his hand and shoving Person A against a parked car while she was looking down at something. It is possible that she did respond to being pushed by attempting to swat Respondent's hand away but I find at the point Respondent used force, he did so without police necessity. The recording then shows Respondent taking Person A's right hand, twisting it up behind her back and walking her westbound on 159th Street for several feet until he turns her 90 degrees to the left and places her face down on the hood of the car she was standing in front of.

1. Force

Even assuming, for the sake of argument, that Respondent had the authority to arrest or issue a summons to Person A, his action in pushing her against a car was without police necessity. As set forth above, the recording shows Respondent's hand shooting out toward Person A and making contact with her chest, causing her to fall backward against a parked car. There was no action by Person A immediately preceding Respondent's push which could objectively justify his use of force; in fact, the recording shows her in the same posture for 19 seconds before he made contact with her. Despite Respondent's testimony that Person A was "posturing toward him in a threatening manner," he conceded that Person A never swung at him, kicked him, spat on him or touched him (T. 67).

Moreover, the facts depicted on the video recording seem to refute Respondent's testimony that Person A never attempted to present identification; the recording clearly depicts her looking down and going through her pocketbook. It may be true that Person A verbalized her objection to being asked for identification and did not present it to

Respondent prior to her arrest. That is not to say that she was not attempting to locate her identification, regardless of how her verbal responses to Respondent's request may be characterized. The video recording also contradicts Respondent's testimony that Person A pushed his hand away when he attempted to restrain her; in fact, Respondent pushed Person A into a parked car before he ever sought to restrain her. Finally, the video recording does not show Person A attempting to walk westbound on 159th Street, again contradicting Respondent's testimony.

This tribunal has held that improper police action is punishable only if an officer acted "with knowledge that he was [acting] improperly, acted without concern for the propriety of his actions, or acted without due and reasonable care that his actions be proper" (*Police Department v. Ortiz*, OATH Index No. 1626/97, report and recommendation at 10-11 [Nov. 19, 1997] *modified on penalty*, Comm'r Decision. [Feb. 3, 1998]; *Police Department v. Hoffman*, OATH Index Nos. 1005-06/98 [Apr. 13, 1998]; *Police Department v. Wang*, OATH Index No. 657/98 [Jan. 12, 1998]).

Respondent's description of the events of that night before this tribunal was irreconcilable with the contemporaneous video recording. Thus, his use of force was gratuitous under these circumstances.

Accordingly, I find him Guilty of Specification 2.

2. *Issuance of Summons Without Authority*

After reviewing the credible relevant evidence in the record, I find that Respondent did not have a sufficient factual basis to arrest Person A for making unreasonable noise in violation of subsection 2 of the Disorderly Conduct statute (P.L. § 240.20[2]).

Penal Law Section 240.20 provides as follows:

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

(P.L. § 240.20).

In this case, Respondent testified that Person A was "shouting at the top of her lungs," yet was unable to hear or recall what she was saying prior to stopping her (T. 41-42, 45, 59). Likewise, Cohen confirmed that Person A was "screaming," but he too had no recollection of what she was saying, other than the comments which pertained to her interaction with the police (T. 31-33). The term "at the top of her lungs," is a colloquialism which does not provide the specificity required for a facially sufficient charge of making unreasonable noise under Penal Law Section 240.20(2). A summons must contain sufficient facts of "an evidentiary character" to support the charge (C.P.L. § 100.15[3]). Respondent's testimony before the tribunal did not provide such clarity. Under these circumstances, the tribunal is left to speculate what Person A's actual volume was, rendering Respondent's claim that her voice violated the unreasonable noise subsection of the Disorderly Conduct statute fatally infirm.

In this case, even if the tribunal were to assume Respondent had testified to sufficient facts from which it could infer that Person A had indeed spoken at an
unreasonably

loud volume, the offense lacks the public character which is an element of the offenses contained in the Disorderly Conduct statute.

In *People v. Gonzalez*, 25 N.Y.3d 1100 (2015), a defendant shouted obscenities at police officers in a subway station. "provoking looks of surprise and curiosity from some passengers and evasive movements from others" (*People v. Gonzalez*, 25 N.Y.3d 1100, 1101). The officers pursued the defendant to another level of the station where he was eventually detained. One of the police officers observed the defendant in possession of an illegal knife. The trial court denied the defendant's motion to suppress the knife as the fruit of an unlawful arrest. After a jury trial, the defendant was convicted of Disorderly Conduct and Criminal Possession of a Weapon in the Third Degree. The Court of Appeals reversed the conviction, granted the motion to suppress and dismissed the indictment, holding that a person may be guilty of disorderly conduct "only when the situation extends beyond the exchange between the individual disputants to a point where it becomes a potential or immediate public problem" (*Gonzalez*, 25 N.Y.3d at 1101; *People v. Baker*, 20 N.Y.3d 354, 363 [2013])[public character element not found when defendant cursed at police officer for running his girlfriend's license plate and group of bystanders gathered; no indication that the spectators were motivated by anything other than curiosity]].

Respondent testified several times during this proceeding that a crowd had gathered in response to Person A's conduct but that they were not visible on the video recording. When pressed for a more specific answer, Respondent explained that when he testified that a crowd gathered, he meant that people in their apartments on West 159th Street had opened their windows to observe the goings-on below (T. 63 64, 68, 82, 87.

89-90). Based upon the state of the record, there is no evidence that any of the observers "expressed any inclination, verbally or otherwise, to involve themselves in the dispute between [Person A and Respondent]" (*Baker*, 20 N. Y.3d at 363). Accordingly, this is too attenuated a link between Person A's conduct and her neighbors' actions to satisfy the public character element of the offense.

Respondent also issued summonses for violations of subsections (1) and (2) of the statute, which prohibit violent and threatening behavior, and the creation of a physically offensive condition. Respondent testified that Person A was waving her arms about in a violent manner, further creating the risk that Respondent or his brother officers might be injured (T. 69-70). Despite Respondent's testimony, the video recording of the encounter does not depict any such behavior by Person A. Accordingly, there is insufficient evidence of violent and threatening behavior to support a charge under Penal Law Section 240.20(1). Similarly, there is insufficient evidence of a physically offensive condition to support a charge under Penal Law Section 240.20(7).

I find that Respondent's interpretation was not "mere mistake," but an objectively unreasonable application of the statute. I also find, based upon the totality of the circumstances, that Respondent's issuance of the summonses was driven by his reaction to Person A's refusal to follow his directives and, furthermore, her challenging of the legitimacy of his actions. Based upon the circumstances set forth in the record, her arrest and the issuance of summonses thereafter appear to be vindictive. Accordingly, I find Respondent Guilty of Specification 3.

3. *The Stop*

Based upon the relevant credible evidence in the record, I find that Respondent did not have sufficient legal authority to forcibly stop Person A.

Respondent's decision, along with Police Officers Cohen and Sanchez, to move into the "tripod" formation effectively seized Person A, restricting her freedom of movement, regardless of what his subjective intent may have been. The Patrol Guide permits a police officer to stop and detain an individual when he "reasonably suspects a person has committed, is committing or is about to commit a felony or a Penal Law misdemeanor" (P.G. § 212-11). Since the only offense Respondent suspected Person A of committing was a violation, he did not have the lawful authority to stop her. Accordingly, I find him guilty of Specification 1.

PENAL TY RECOMMENDATIONS

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 9, 2013. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB has recommended a penalty of eight vacation days. In a recent case, a respondent lost two vacation days for stopping a suspect without sufficient legal authority (*Disciplinary Case Nos. 2014-11787 & 2014-11788* [signed October 13, 2015])[Two eight-year police officers with no prior disciplinary record forfeit two vacation days each for stopping complainant without sufficient legal authority. Respondents were at most justified in making a level-two inquiry to speak with complainant about their concern that

he might be carrying an illegal gravity knife. Neither Respondent provided enough detail to establish reasonable suspicion)).

In previous cases, respondents have forfeited between three and five days for pushing suspects without police necessity (*Disciplinary Case No. 2013-10687* [signed January 7, 2016])[Fourteen-year detective with no disciplinary record forfeits three vacation days for pushing a possible robbery suspect against the side of a van and then twisting the suspect's arm up behind his back. Although Respondent had the right to detain the suspect, Respondent did not have probable cause to arrest the suspect or use physical force, unless the suspect attempted to leave. In addition, there were inconsistencies in the Respondent's trial room testimony concerning the circumstances of the incident]; *Disciplinary Case No. 2013-10920* [signed September 2, 2015])[Four-year police officer with no prior disciplinary record forfeits five vacation days for pushing complainant without police necessity. Respondent attempted to justify his action by testifying that when complainant was walking toward him he heard complainant mumble something and make a face that was not a welcoming look. None of these factors justified Respondent's initiation of physical contact]).

Cases dealing with the improper issuance of a summons have involved penalties ranging from a reprimand to the forfeiture of 15 vacation days (*Disciplinary Case No. 2010-86522* [signed November 27, 2010])[Fifteen-year police officer with no prior disciplinary record reprimanded for issuing a summons without sufficient legal authority. Summons was issued based upon Respondent's mistaken belief that he could issue one for disorderly conduct without ordering complainant beforehand to disperse]; *Disciplinary Case Nos. 2010-912 & 2010-915* [signed December 7, 2011])[Eleven-year

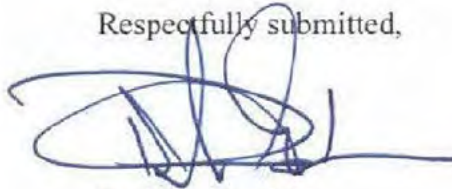
police officer and six-year officer with no prior disciplinary records forfeit ten vacation days each for stopping complainant and arresting him for disorderly conduct without having the requisite legal authority to do so. Respondents claimed they arrested complaint for impeding traffic; even accepting their testimony at face value, impeding New York City traffic for 10 to 15 seconds was too petty to substantiate the issuance of a summons, let alone an arrest]; *Disciplinary Case No. 2010-86108* [signed October 17, 2011][Eight-year police officer with one prior adjudication forfeits 15 vacation days for issuance of a summons for disorderly conduct without sufficient legal authority. Respondent cited the Penal Law section for failure to obey a lawful order to disperse but there complainant was not congregating with other people and he lacked the intent to cause a public inconvenience, annoyance or alarm. Respondent also pleaded guilty to failure to record the incident in his activity log)).

This case illustrates the challenges inherent in enforcing minor, quality-of-life ordinances with proportional responses to a recalcitrant citizen. This task often requires a balancing of the societal benefits of compelling strict adherence to certain norms of behavior against the need for the public to see the professionalism and integrity of the members of this Department as a non-negotiable core value.

In this case, Respondent's initial contact with Person A was brought about by the volume of her voice and a corresponding concern for the peace of the neighborhood, such as it may have been that evening. Respondent exceeded his authority in the manner in which he attempted to compel Person A to modulate her tone out of deference to her neighbors. In attempting to seek Person A's capitulation to his authority, he created the circumstances for a disproportionate response to a minor transgression. On balance, his

conduct reflected poorly on the public image of this Department without a commensurate return on the maintenance of public order. Accordingly, I recommend that Respondent forfeit seven vacation days.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be "Paul M. Gamble", written over a horizontal line.

Paul M. Gamble
Assistant Deputy Commissioner Trials





POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER NEIL O'DONNELL
TAX REGISTRY NO. 955270
DISCIPLINARY CASE NO. 2015-12955

On his last three performance evaluations, Respondent twice received an overall rating of 4.0 "Highly Competent" and once received an overall rating of 3.5 "Highly Competent/Competent." He has not been awarded any medals. [REDACTED]

He has no prior disciplinary history.

Paul M. Gamble
Assistant Deputy Commissioner Trials