POLICE DEPARTMENT CITY OF NEW YORK

MEMORANDUM FOR: Police Commissioner

Re: Sergeant John Gumpel
Tax Registry No. 934978
114 Detective Squad
Disciplinary Case No. 2014-12760

Charges and Specifications:

1. Said Sergeant John Gumpel, on or about August 15, 2013 at approximately 1330 hours, while assigned to the 103rd Command and on duty, in the vicinity of [redacted] Queens County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched a vehicle in which Person A was an occupant without sufficient legal authority.

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

Appearances:

For CCRB-APU: Nicole Junior, Esq.
100 Church Street, 10th floor
New York, New York 10007

For the Respondent: Matthew Scheiffer, Esq.
The Quinn Law Firm
Crosswest Office Center
399 Knollwood Road-Suite 220
White Plains, New York 10603

Hearing Date:
December 2, 2015

Decision:
Guilty

Trial Commissioner:
DCT Rosemarie Maldonado

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on December 2, 2015. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. CCRB called Police Officer Daniel Haggerty as a witness and entered into evidence the hearsay statement of Person A. 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 facts are undisputed. On August 15, 2013, Respondent was working in plainclothes as an Anti-Crime supervisor. During his tour, Respondent and Police Officer Daniel Haggerty conducted patrol in an unmarked Department vehicle, which Haggerty drove. (Tr. 25-26, 59)

At approximately 1330 hours, the officers were behind Person A's vehicle as they drove eastbound on [redacted]. They activated the turret lights and pulled Person A over near the intersection of [redacted] Person A complied immediately. (Tr. 30) Haggerty approached the driver side of the vehicle and Respondent approached the passenger side. (Tr. 76) Person A provided his license and registration and Haggerty told Person A a rear light was out. (Tr. 29, 39; CCRB Exhibit

("CCRBX") 1 at 32). Haggerty acknowledged at trial that weeks before he had stopped Person A for the same traffic violation.[1] (Tr. 47)

Haggerty directed Person A to step out. (Tr. 39) Person A complied and stood with Haggerty toward the rear of the vehicle. (Tr. 40, 43, 79; CCRBX 1 at 32, 34, 39) Respondent then entered the front seat area of Person A's car and conducted a search which yielded no weapons or contraband. (Tr. 44-46, 80-83, 92) Person A used his cell phone to call 911 and the officers left the scene without issuing a summons. (Tr. 50-51; CCRBX 1 at 35; CCRBX 2 at 3-11)

In dispute is whether Respondent had the legal authority to conduct a vehicle search. Person A did not appear to testify at trial. Instead, the APU prosecutor entered into evidence a transcript of his initial 911 call and his September 16, 2013 interview with CCRB investigators. What follows is a summary of his statements.

Person A told investigators that he recognized the Caucasian officer (later determined to be Haggerty) as the one who had recently stopped him for a broken rear light. (CCRBX 1 at 32, 41) According to PersA, he retrieved his license from his center console before the officers reached his vehicle. When Haggerty claimed that his rear light was out again he responded, "No, no, no . . . The last time you guys stopped me it was out and I got it fixed . . . . we went through that last time." (CCRBX 1 at 31-32, 43) Haggerty opened the car door and asked him to step out. (CCRBX 1 at 32, 41-42) Person A asked, "What do you want with me?" Haggerty replied by asking if he had anything sharp in his pockets and warning that he would be searched. Person A asserted that he was neither "boisterous" nor "threatening" during this exchange but admitted telling

[1] This incident is the subject of Disciplinary Case No. 2014-12759, which was tried on the same date as the instant matter.

Haggerty, "I'm so tired of you" and that the police had no right to search him. (CCRBX 1 at 33-34)

Person A recounted that as he spoke to Haggerty the "more senior" officer (later determined to be Respondent) began searching his vehicle. Specifically, he saw Respondent open the passenger door and go through the glove compartment and middle console. He further noted that Respondent "slid my seats back and forth. He moved the back seat . . . he pulled the back armrest down. He reached, he lifted my mats up on the driver's side and the passenger side. And he looked over the visors." (CCRBX 1 at 39; CCRBX 2 at 9) According to Person A, the officers left after he dialed 911. This account was consistent with what he told the IAB officer on the phone when he made that 911 call just moments after the incident. (CCRBX 2 at 6-10)

CCRB also called Officer Haggerty as a witness. Haggerty provided a markedly different account, testifying that before they approached Person A's vehicle, he was "moving around a lot." As they approached he moved from side to side and was "leaning down as if he was in between the seats." (Tr. 31-34) He was not able to see Person A's hands and felt concern that he might be handling a weapon. (Tr. 34-37)

Haggerty asserted that Person A "screamed" when asked for his license and registration. He described Person A as "irate" and noted that he waved his arms as he stood outside the car. (Tr. 40-42) Haggerty confirmed that during this interaction Respondent conducted a brief search of the "lungeable area from inside the car." He further acknowledged that Person A called 911 in his presence, but claimed not to recall what Person A communicated to the operator. (Tr. 42, 44-45, 49-50)

Haggerty testified that he intended to issue Person A a summons for the broken rear light but explained that he was not in possession of any actual summonses. Although he would typically ask another RMP to deliver them, a priority job was called on the radio and he did not want to "clog up the airway." (Tr. 50-54) Haggerty agreed that he and Respondent did not respond to the priority job. (Tr. 53-54)

Respondent corroborated most of Haggerty's account. He described Person A as "visibly agitated" but could not recall what he said. (Tr. 61, 76-77) According to Respondent, as he and Haggerty stopped Person A's vehicle, he observed Person A repeatedly moving back and forth and "dipping" his head down where Respondent could no longer see it. (Tr. 67-68) The latter in particular caused Respondent to worry that Person A was retrieving or concealing a weapon. (Tr. 59-61, 74-75) Respondent admitted that he searched the "reachable/grabbable" area of Person A's vehicle but recalled no details about its interior. (Tr. 80, 82-83, 86)

Having reviewed the evidence and testimony I find that Respondent's search of Person A's vehicle was unreasonable and unjustified. As a preliminary matter, the tribunal acknowledges that because Person A did not appear to testify at trial, and was not subject to cross-examination, his out-of-court statements would generally be accorded limited probative weight. This finding of guilt, however, is based primarily on the undisputed facts and Respondent's articulated reasons for the vehicular search.

New York courts recognize that a police officer's entry into an automobile and inspection of the personal effects therein are significant encroachments on a motorist's privacy interests. In recognition of those rights, the New York Court of Appeals has held that, with few exceptions, an officer must have probable cause that an unoccupied vehicle contains a weapon or evidence of a crime of arrest before he or she can search that vehicle.

See People v. Torres, 74 N.Y.2d 224 (1989)[2] More recently, in *People v. Newman*, the Appellate Division First Department addressed the question of what showing must be made to search an unoccupied vehicle following a traffic stop.[3] 96 A.D.3d 34 (2012) The Court opined, "[w]here a vehicle's occupants have been 'removed . . . without incident [such that] any immediate threat to [the officer's] safety [has been] eliminated, it is generally unlawful for the officer - - in the absence of probable cause - - to 'invade the interior of a stopped car.'" *Id.* at 41, *citing People v. Carvey*, 89 N.Y.2d 707, 710 (1997), *citing Torres*, 74 N.Y.2d at 226. Only where information is revealed during the stop that indicates a substantial likelihood of a weapon being present in the vehicle which poses "an actual and specific danger to the officer's safety" is an officer justified in "engaging in a 'limited intrusion' into the suspect's vehicle." Newman, 96 A.D.3d at 42, *quoting Carvey*, 89 N.Y.2d at 710-11. The Court specified that an "officer must have more than reasonable suspicion" that a weapon is in the vehicle; "mere hunch or gut reaction will not do." *Newman*, 96 A.D.3d at 42, *citing People v. May*, 52 A.D.3d 147 (2008). Finally, the Court added that, "[c]onclusory assertions by an officer that a car's occupants have engaged in 'furtive behavior' or caused them apprehension cannot validate further intrusions into the interior of a vehicle." *Id.*

Here, Respondent's justification fell far short of this articulated standard. Both Respondent and Haggerty stated that as they conducted the car stop of Person A's vehicle to

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[2] The Court of Appeals specifically noted that they were unpersuaded by the U.S. Supreme Court in *Michigan v. Long*, 462 U.S. 1032 (1987), a case that was cited by Respondent's counsel in his summation. In that case, the Court expressed concern that an individual who was stopped and then released might, upon returning to his vehicle, reach for a weapon and threaten the departing officers' safety. The Court of Appeals held that this was "an insufficient basis upon which to predicate the substantial intrusion [of an extensive automobile search]."

[3] The First Department distinguished this set of circumstances from *Arizona v. Gant*, 556 US 332 (2009), noting that *Gant* applies only where a search occurs incident to arrest. For the same reason, *Gant* is inapplicable to the instant matter.

address the traffic violation, they observed Person A move from side-to-side and Respondent saw him "dip" his head. Although this tribunal acknowledges the safety risks associated with traffic stops, given the totality of circumstances presented here, I am unpersuaded that Respondent's justification was sufficient to authorize a vehicular search subsequent to a traffic stop for a broken rear light. In sum, Respondent did not convince this tribunal that his account established a "substantial likelihood" that a weapon was in the vehicle that posed a "specific" and "actual" danger to their safety.

The testimony presented that Person A was "irate" and "screamed" was not credited and in any event would not have elevated the level of suspicion in this case. Although Person A admittedly complained about the stop, I find that at trial both Haggerty and Respondent embellished the intensity of Person A's verbal objections. As he admitted at trial, Haggerty was the officer who had stopped Person A for a broken rear light only weeks before. At the scene Person A asserted that he had just fixed the light after that stop and called 911 in the officers' presence to complain that they were using the excuse of a minor traffic violation as a pretext to search his car. Although Person A told the IAB investigator that he was being targeted, the tone and substance of the call belies Respondent's claim that Person A's onsite conduct could reasonably be interpreted as an immediate safety risk. Moreover, that the motorist called 911 to express his concerns and to seek the assistance of other officers to address his grievance leads to a reasonable inference that he was not a likely danger.

Based on this record, and the established New York law outlined above, I find that Respondent was not legally authorized to search Person A's vehicle and that he is guilty of the charged misconduct.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 1, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The APU prosecutor requested a penalty of ten vacation days. Recent improper search cases have resulted in lesser penalties. For example in *Case No. 2013-11066* (September 2, 2015), a fourteen-year police officer with two prior adjudications forfeited five vacation days for searching a vehicle without sufficient legal authority and making a discourteous remark to the driver. *See also Case No. 2013-9777* (July 27, 2015), eighteen year police officer with one prior adjudication forfeited six vacation days for improperly searching a vehicle and frisking its driver.

Here, I note that, unlike the cases cited above, Respondent was only charged with one specification, the improper vehicle search. However, as a long-time supervisory member of the service, Respondent should have known that searching Person A's vehicle pursuant to a stop for a broken rear light without more was not legally permissible. I am also troubled by the gratuitous nature of this search. Accordingly, I recommend that Respondent's penalty be the forfeiture of six (6) vacation days.

Respectfully submitted,

Rosemarie Maldonado

Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

MAY 24 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
SERGEANT JOHN GUMPEL
TAX REGISTRY NO. 934978
DISCIPLINARY CASE NO. 2014-12760

Respondent was appointed to the Department on July 1, 2004. His last three evaluations were as follows: he received 4.5 ratings of "Highly/Extremely Competent" in 2012 and 2014 and a 4.0 rating of "Highly Competent" in 2013. He has received one medal for Excellent Police Duty and six medals for Meritorious Police Duty.

[redacted]

He has no prior formal disciplinary record.

Rosemarie Maldonado
Deputy Commissioner Trials