



POLICE DEPARTMENT

January 28, 2013

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Robert Rodriguez
Tax Registry No. 926015
Patrol Borough Bronx Task Force
Disciplinary Case No. 2012-7170

The above-named member of the Department appeared before me on December 18, 2012, charged with the following:

1. Said Police Officer Robert Rodriguez, assigned to Patrol Borough Bronx Task Force, on or about January 7, 2012, while off-duty and in Bronx County, failed to safeguard his Smith & Wesson .38 Special in that Police Officer Rodriguez lost said weapon.

P.G. 204-08, Page 2, Paragraph 7 FIREARMS

2. Said Police Officer Robert Rodriguez, assigned to Patrol Borough Bronx Task Force, on or about January 7, 2012, while off-duty and in Bronx County, carried a firearm in a clip-on holster.

P.G. 204-08, Page 2, Paragraph 10 & Note FIREARMS

3. Said Police Officer Robert Rodriguez, assigned to Patrol Borough Bronx Task Force, on or about and between January 7, 2012 and January 9, 2012, failed to immediately notify the Department upon discovering the loss of his firearm.

P.G. 219-21, Page 1, Paragraph 1 LOST/STOLEN FIREARM, SHIELD,
IDENTIFICATION CARD

The Department was represented by Scott Rosenberg, Esq., Department Advocate's Office, and Respondent was represented by Craig Hayes, 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 testified that he has worked for the Department for 12½ years. He currently works in traffic enforcement in the Bronx Task Force.

Before he became a police officer he had a permit for and owned a Glock 19 semi-automatic pistol and a Smith & Wesson Titanium .38 Special. This .38 Special is the same gun which is the subject of the instant charges.

This weapon has always been listed on Respondent's "Ten Card" (Force Record) and the Department always knew about the weapon. Respondent kept the gun in a locked box in his bedroom, for his own protection. He never carried it while he was either on-duty or off-duty. In compliance with the rules of the Department, Respondent brought in his .38 Special for inspection on a yearly basis.

On January 7, 2012, Respondent was going to his girlfriend's house for the night and the next day. He was carrying his .38 Special with him because he had to present it at a gun inspection on January 7, 2012. He carried his off-duty Glock 26 in a holster that had a thumb-break snap and which was affixed to his belt. He carried the .38 Special in a clip-on holster located in his pants between his Glock and his body.

He drove from his home in [REDACTED] toward his girlfriend's home in [REDACTED]. As he was driving off the Saw Mill River Parkway onto Interstate 87, Respondent felt his right rear tire sliding. He pulled over the side of the road to look at his tire. When he tried to remove the tire, he bent over to check it. He pulled out a jack from his car and tried to loosen the lug nuts of the tire. While he was performing these activities, he believed that at some point he knelt down. Unable to change the tire, he drove slowly to his girlfriend's house.

When he got back into the car and continued to drive, he noticed that he felt more comfortable than usual. This was a sign that something was wrong because usually, when wearing a weapon, he would be feeling uncomfortable. When he got to his girlfriend's home, parked the car and got out, he realized that his .38 Special was missing. He checked the car for the gun. When he could not find the gun, he drove back to the spot where he believed that he might have dropped the gun. At about 10:30 p.m., it was dark and he could not find it. He searched for the gun for about an hour and a half. Thinking that he might have left the gun at home, he drove back to his house that night and checked his home and lockbox.

The next morning at about 9:00 a.m., he drove back to the same spot to look again in the daylight. He looked around a wider area, about a ¼ of a mile radius from the spot, checking the road and under the leaves on the side of the road. He spent most of the day looking. That night he drove to his girlfriend's house and spent the night. When questioned by the Court whether he believed the gun was missing at that point, he testified that he was second guessing himself, trying to figure out where he could have left it. He said he wanted to make certain that the gun was missing. He did not want to

have police officers notified and prevent them from responding to actual emergencies if he could actually find the gun.

The following day, he came in a couple of hours before his tour of duty, which began at 4:00 p.m. He checked his locker at the precinct to make sure the gun was not there. Then he reported the gun missing to his immediate supervisor.

The weapon was never recovered.

PENALTY

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 March 1, 2000. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent's attorney argued that the case law supports a 20-day penalty. He further argued that officers generally delay reporting their weapons missing because they try to find them first. In this case, because Respondent did not have a regular practice of carrying the .38 Special, he had reason to believe that he might have left it at home or somewhere else. Respondent wanted to eliminate all other possibilities before he could be sure that the gun, in a clip-on holster, fell out of his pants on the highway.

Respondent's attorney argued that officers generally receive a 20-day penalty when they carelessly leave their gun in every conceivable place. This includes leaving guns in football fields while playing touch football, in schoolyards where children play, in diaper bags, under mattresses in homes where children live, in bars, in their cars, and

in the street. Respondent's attorney argued that, in other cases, delays have been for weeks, months and even years before reporting. Guns have been left in more dangerous situations in which officers have been more careless. In this case, Respondent was not carelessly leaving the gun somewhere, but was dealing with an emergency related to his car and the gun accidentally fell out of his pants.

Respondent's attorney further stressed that Respondent has no form of disciplinary history, a good arrest record, medals and an excellent sick record.

When asked whether he could cite to any specific cases to support his argument, Respondent's attorney stated that he would provide them to the Court within 5 business days. The Court never received these cases.

The Department argued that the case law supports its 25-day penalty recommendation. In support of his argument, the Department Advocate cited seven cases.

In *Case No. 5134/11*, (May 15, 2012), a six-year police officer with no prior disciplinary history negotiated a penalty of 20 vacation days for failing to safeguard his firearm, which he reported lost. Twenty-two days later, the officer found the firearm in his baby's diaper bag. He also admitted to using an unauthorized clip-on holster. The Department argued that this case can be distinguished from the instant one as the officer found the gun. The Court further notes that in *Case No. 5134/11* the officer was not charged with failing to immediately report the loss of his firearm and did report it the same day that he discovered it was missing.

In *Case No. 1570/10*, (January 18, 2012), a ten-year police officer with no prior disciplinary history negotiated a penalty of 25 vacation days for failing to secure his

firearm and shield by leaving them under a mattress at his friend's residence. In this case, the gun was not lost or stolen.

In *Case No. 4506/11*, (January 5, 2012), a seven-year police officer with no prior disciplinary record negotiated a penalty of 20 vacation days for failing to safeguard her on-duty firearm which was lost or stolen when she left the firearm unattended and unsecured inside of a vehicle. In this case, the officer immediately reported the incident.

The Department claimed that in other cases where the weapon was not found or was stolen, the penalty was between 25 and 30 days. The Department Advocate referred to the three following cases.

In *Case No. 6514/11*, (June 12, 2012), a 12-year police officer with no prior disciplinary record negotiated a penalty of 25 vacation days for failing to safeguard his off-duty firearm and his official Department identification card. The officer left his firearm and Department identification card inside a bag that was left unsecure on the ground near his parked car, resulting in the loss or theft of the Department property.

In *Case No. 1132/10*, (November 8, 2011), a three-and-a-half-year police officer with no prior disciplinary record negotiated a penalty of 30 vacation days for failure to safeguard his on-duty firearm. The officer left his firearm inside of his Police Academy duffel bag in his vehicle that was unattended. When he returned to the vehicle, the bag was gone.

In *Case No. 0454/10*, (June 15, 2011), a three-year police officer with no prior disciplinary record negotiated a penalty of 30 vacation days for failure to safeguard his firearm. The officer left his firearm in the center console of his personal vehicle and

went to the movies. When he returned to his vehicle, the firearm was missing from the center console.

In *Case No. 2010-2394*, (April 18, 2011), a 15½-year police officer with no prior disciplinary record negotiated a penalty of 30 days time already served on suspension for failure to safeguard his firearm, leaving the firearm unattended in his vehicle and wrongfully carrying his firearm unsecured in a holster. The officer had his firearm holstered insecurely in his waistband, which was uncomfortable for him so he decided to leave his firearm unattended in the middle console of his vehicle and could not remember if he locked his vehicle. He did not discover the loss for several days. The officer received a severe penalty because he had previously lost several items of Department property.

The Department also argued that what distinguished this case from the others was the use of the clip-on holster. Ordinarily, this use of the prohibited clip-on holster would be considered minor misconduct. But in this case, the use of a clip-on holster appeared to be the reason for the loss of the gun.

The Department noted that Respondent could reasonably argue for a delay in reporting that first night. But the next day when he could not find the gun, Respondent could have gone to his command and searched his locker. He could even have gone to his command early the next morning, rather than wait until 2:00 p.m. the next day.

However, the Department emphasized that Respondent was required to notify the Department as soon as he realized that he had lost the firearm. This was when he arrived at his girlfriend's residence. Had he notified the Department then, the Department could

have used its significant resources to try to locate the firearm. By waiting as long as he did, Respondent undermined the ability of the Department to locate the firearm.

The Court agrees with the Department and recommends that Respondent forfeit 25 vacation days.

Respectfully submitted,



Amy J. Porter
Assistant Deputy Commissioner Trials

APPROVED



MAR 07 2018
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ROBERT RODRIGUEZ
TAX REGISTRY NO. 926015
DISCIPLINARY CASE NO. 2012-7170

In 2011, Respondent received an overall rating of 4.5, “Extremely Competent/Highly Competent” on his annual performance evaluation. In 2010 and 2009, he was rated 4.0, “Highly Competent.” [REDACTED]

[REDACTED] Respondent has no prior formal disciplinary record. He has been awarded two medals, one for excellent police duty and the other for meritorious police duty.

For your consideration.



Amy J. Porter
Assistant Deputy Commissioner–Trials