



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

CHAN

November 26, 2014

Memorandum for: Deputy Commissioner, Department Advocate

**Subject: UNIFORMED MEMBER OF THE SERVICE DIRECTED TO
RECEIVE TRAINING FROM THE POLICE ACADEMY**

1. **Police Officer Sean O'Brien, Tax No. 950967**, was recently the subject of Disciplinary Case No. 2013-9658.
2. Separate and apart from the disciplinary process, the Police Commissioner directs that Police Officer O'Brien receive training from the Police Academy in Patrol Guide Procedure 212-11 (Stop, Question and Frisk).
3. Forwarded for your necessary attention.

BY DIRECTION OF THE POLICE COMMISSIONER

Cecil Wade
Inspector
Executive Officer
Police Commissioner's Office

cc: Deputy Commissioner, Training



POLICE DEPARTMENT

September 8, 2014

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Alan Hassel
Tax Registry No. 950571
33 Precinct
Disciplinary Case No. 2013-9657

Police Officer Sean O'Brien
Tax Registry No. 950967
110 Precinct
Disciplinary Case No. 2013-9658

The above-named members of the Department appeared before the Court on March 13, 2014, and March 14, 2014, charged with the following:

Disciplinary Case No. 2013-9657

1. Said Police Officer Alan Hassel, on or about February 28, 2012, at approximately 1425 hours, while assigned to Patrol Borough Manhattan North and on duty, in the vicinity of [REDACTED] New York County, abused his authority as a member of the New York City Police Department in that he frisked John George without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 – STOP AND FRISK

Disciplinary Case No. 2013-9658

1. Said Police Officer Sean O'Brien, on or about February 28, 2012, at approximately 1425 hours, while assigned to Patrol Borough Manhattan North and on duty, in the vicinity of [REDACTED] York County, abused his authority as a member of the New York City Police Department in that he frisked John George without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 2 STOP AND FRISK

2. Said Police Officer Sean O'Brien, on or about February 28, 2012, at approximately 1425 hours, while assigned to Patrol Borough Manhattan North and on duty, in the vicinity of [REDACTED] New York County, abused his authority as a member of the New York City Police Department in that he searched John George without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 3 STOP AND FRISK

3. Said Police Officer Sean O'Brien, on or about February 28, 2012, at approximately 1425 hours, while assigned to Patrol Borough Manhattan North and on duty, in the vicinity of [REDACTED] York County, abused his authority as a member of the New York City Police Department in that he wrongfully and without just cause failed to courteously and clearly state his shield number when requested by John George.

P.G. 203-09, Page 1, Paragraph 1 – PUBLIC CONDUCT - GENERAL

The Civilian Complaint Review Board (CCRB) was represented by Vanessa McEvoy, Esq. and Paul Scotti, Esq. Respondents Hassel and O'Brien were represented by John Tynan, Esq., Worth, Longworth and London, LLP.

Respondents, through their counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2013-9657

Respondent Hassel is found Not Guilty of Specification No. 1.

Disciplinary Case No. 2013 9658

Respondent O'Brien is found Guilty of all the Specifications and Charges.

SUMMARY OF EVIDENCE PRESENTED

The CCRB's Case

CCRB called John George and Darnell Jiles.

John George

At the time of the incident, George was 44 years old and lived in New York County. He was unemployed and [REDACTED] George testified that he had diabetes, high blood pressure, and suffered from poor circulation in both legs. He also had ulcers on his left leg between his shin and ankle.

George testified that on February 28, 2012, he was on the corner behind 143 Street and Seventh Avenue, in front of a pharmacy. George said he stood there because he was waiting to pick up medicine. While he stood on the corner, he said that a group of police officers "walked by me and one yelled out and asked us to leave the corner. There were kind of other people in the area and asked us to leave the corner." George had never seen that officer before. George complied with the officer's order, turned around and walked toward his building. He walked about 10 or 15 feet down and stood by a gate or handrail of the wheelchair ramp. There were other people on the street, but he was not with any of them. Civilian Complaint Review Board Exhibit (CCRBX) 1 is a photograph depicting the corner of West 143 Street and Seventh Avenue. On CCRBX 1, George drew a circle around the entrance to his building, and drew an "X" to illustrate where he generally stood when the officer "yelled" at him to "get off the corner." He stood on the corner of Adam Clayton Powell Junior Boulevard.

CCRBX 2 is a photograph which depicts the front door entrance of George's building located at [REDACTED]. While he stood by the wheelchair ramp, George used his phone to text and check e-mail; he was waiting to pick up his medicine. Then he went into his building to check his mailbox where he met his friend Darnell Jiles. He left the building with Jiles and then walked over to the pharmacy, picked up his medication and returned to the wheelchair ramp.

George stood in front of his building by the ramp. At some "time frame period" later, Respondents returned and one of them told him, "didn't I tell you to get off the corner." George testified, "At that time I asked him, I said, 'I'm not doing anything. I'm just sitting here waiting to get my medicine. I live in the building.' He began to just scream and yell at me." George identified Respondents as the officers who approached him. George took pictures of Respondents. George testified that "after I asked him for his badge, they threw me against the wall and stuff. I'm like that got kind of confusing and everything. He like refused me to give me his badge number."

George explained that Respondent O'Brien asked to see his identification. George removed his driver's license from his back left pocket and held it up to Respondent O'Brien. He stated that Respondent O'Brien accused him of "being smart" and then pushed him against the wall and told him to put his arms up and snatched his identification. Respondent Hassel then walked over and removed his Activity Log and wrote something down. Respondent O'Brien also wrote in his Activity Log. George had his hands on the wall with his feet "spread wide apart."

George testified that Respondent O'Brien started to frisk him and described the frisk in detail. George said both of his arms were stretched out and he was against the

wall with his face toward the wall. He said “[Respondent O’Brien] started at the top of my wrist and pulled my shirt down with each wrist left and right. Pulled my shirt sleeve back a little. And then proceeded to go down my arm, down across my shoulder, around my collar area, around up under my chest, around my stomach to my waist.” Around his waist area, Respondent O’Brien felt his belt buckle, pulled his shirt up, and then asked him if he had guns or knives. He said Respondent O’Brien then continued to frisk his legs and “squeeze[d]” his left leg. George said he explained to Respondent O’Brien that his leg was swollen and that he has bad circulation but Respondent O’Brien continued to squeeze and hurt his leg. Respondent O’Brien then pulled up the pants on the leg, looked at it, and then pulled it down again.

George testified that Respondent O’Brien went inside both of his front pants pockets during the frisk. He said he had some loose change and a cell phone in his pocket and that his keys were hanging from his belt loop.

George wore a compression stocking on his leg to promote blood circulation. The compression stocking is thin and made from nylon. George wore a similar stocking during his testimony in this Court and showed the Court his stocking. It was a nude colored stocking that ran from his knee to his ankle. It did not have any bulges or bumps.

The second time the officers approached George, his hands were in front of him and he was on his phone. George was leaning against the metal rail of the ramp, and when the officers approached him, he stood upright.

George said he shifts his weight when he stands because of “sharp pain” in his leg and an “unbalance problem.” He said he was about 11 or 12 pounds heavier at the time of the incident.

George said that he asked Respondent O'Brien three times for his shield number. After George's first request, Respondent O'Brien told him, "You don't need it. Don't worry about it." After the second request, Respondent O'Brien told him, "Turn around, just stay against the wall. Don't turn around. Just don't move." And after the third request, Respondent O'Brien told him, "It's not going to do you any good."

George used his phone to photograph Respondents. (CCRBX 3). George took the photograph of Respondents while they were interrupted by bystanders who wanted to know why Respondents had George against the wall.

George testified that Respondent O'Brien had a "purpose" and a "mean" expression on his face. George agreed that he (George) did get angry.

George testified that Respondent Hassel stood about two feet behind Respondent O'Brien and "wasn't really doing anything," except transmitting George's pedigree information, from his identification card to the radio dispatcher and ascertaining warrant information.

George testified that in 1987 he was convicted of possession of heroin with the attempt to distribute and was sentenced to five years probation. On June 2, 1989 he was found guilty of Penal Law section 220.03. Around September 26, 1990, George recalled that he had two cases pending against him.

George testified that in the late 1980s to early 1990s, he was convicted in Virginia for Attempt to Distribute Heroin and was sentenced to eight years, but he served four years and four months. On December 28, 1997, George said he served five years in prison and an additional five years of supervisory release for Conspiracy to Distribute PCP. This was his last conviction. He has since completed drug counseling programs.

George drew a "W" on CCRBX 2 to indicate the wall he was against when he was frisked. George testified, "[A]fter I was standing in front of the gate, Officer O'Brien kind of like - - not really shoved, but nudged me towards it. And he told me put your hands against the wall and spread your legs."

As a result of this incident, George was issued a summons for disorderly conduct. The summons was later dismissed.

On cross-examination, George acknowledged that he lived in the building for about 43 years. He said there was a "no loitering" sign outside on the front of the building. However, he said that the sign was not there in 2012 and that it was placed there recently. He agreed that he used to sell drugs. When he sold drugs, he would loiter in front of the location where he sold the drugs. George explained that he would not sell drugs in front of the building where he lived. He sold the drugs in other neighborhoods. He agreed that he would loiter in other neighborhoods to sell drugs unless the area had posted signs prohibiting loitering "because that would be the one reason why the police would, you know, approach you."

George agreed that he has about five drug-related convictions. He also agreed that he had conducted hundreds of drug sales during his lifetime.

George testified that on the date of the incident, his pharmacist called him at about 9:30 a.m., and told him to pick up his and his mother's medication whenever he was ready. George spent the day going "back and forth, in and out...like going back upstairs. Like I come downstairs. And then I went, because I actually went to check my mailbox and stuff. Things like that." George clarified that on the day of the incident, after the pharmacist told him to come over, "I didn't come out exactly right then and

there. And it was about -- I left my house maybe like about -- I don't know about 11 for the first time come out. I went back in." He continued, "Sometimes usually like I go outside I see some of my old friends and like that. And we sit there and talk or something like...."

George said he did not immediately pick up the medication because he was busy talking to his friends. George agreed that he was going in and out of his building for about five hours. George testified that because his leg had poor circulation, it was painful for him to walk a lot. However, he walked because he wanted to lose weight because he was "heavy," and because his doctor told him to walk. Also, as part of his daily routine, he would sometimes walk his friend's dog. He left his house for the first time at about 11:00 a.m. Because he was busy talking to his friends, he did not pick up the prescriptions right away. He said he went back and forth between his apartment and the street a few times before he picked up the medication.

George agreed that when Respondent O'Brien initially asked him to move from the corner, Respondent O'Brien "somewhat" yelled at him, but did not use profanity. George moved away from the corner, but did not leave the area. This was because he was still waiting to pick up his medication. He agreed there were other people on the street but said that he was not talking or hanging out with any of them.

George said that CCRB did not ask for the receipt showing that he had picked up his medication.

George was leaning on the railings when the officers returned the second time and Respondent O'Brien said, "[D]idn't I tell you to get off the corner?" George replied, "I'm not on the corner, I come down and stand in front of the building that I live at and

where I pay rent at.” After a brief exchange of words, Respondent O’Brien asked George to get up against the wall and patted him down. The patting down took about 30 seconds and George was then issued a summons. He said he took photographs of Respondents before he was issued the summons. George took photographs of Respondents where he had marked a “W” on CCRBX 2. He said he told Respondent O’Brien that he was blocking the handicap ramp and then Respondent O’Brien moved him over.

Darnell Jiles

Jiles testified that on February 28, 2012, at about 2:40 p.m., he was standing in front of his residence, [REDACTED] with George. Jiles said that George told him that he was “going to the pharmacy. He walked to the corner. He went to the pharmacy. I didn’t go to the pharmacy with him. When he came back out of the pharmacy we came back to go back down the block by my vehicle. And maybe three or four, five minutes the officers walked up.”

Jiles stated that he was sitting on the bumper of his vehicle when the officer (later identified as Respondent O’Brien) approached him and questioned him about the vehicle. Jiles said that Respondent O’Brien then “immediately” turned to George. Jiles said Respondent O’Brien confronted George but he could not hear what George or Respondent O’Brien were saying to each other. CCRBX 5 is a photograph depicting the entrance to the building. Jiles marked CCRBX 5 with a “G” to indicate where George stood and marked “DJ” to indicate where he stood. He said another officer was also there but that officer stood on the side. After George and Respondent O’Brien spoke for “quite

awhile," George handed an "item," to Respondent O'Brien. Jiles did not know what the item was.

Jiles testified that about a minute later, Respondent O'Brien asked George to move away from the handicap rail and toward the wall. Jiles observed Respondent O'Brien and George talk a little bit more before Respondent O'Brien turned George's body toward the wall. He then observed Respondent O'Brien pat George down from his arm to his ankles. While Respondent O'Brien patted George's ankle, Jiles heard George lightly yell, "Ow, ow. That's my leg. That's my leg." Jiles did not know if Respondent O'Brien was squeezing his leg. Jiles stated that George had a "regular" demeanor that day.

On cross-examination, Jiles testified that he had lived at the building for about four years. He did not recall if the "no loitering" sign was on the building in 2012, but said it might have been. Jiles only observed Respondents approach George one time and was not aware of any interactions that George had with Respondents 10 or 15 minutes earlier. Jiles had not observed George earlier in the day carrying a bag from the pharmacy. Jiles did not recall what the weather was like on that day.

Respondents' Case

Respondents testified in their own behalf.

Respondent Hassel

Respondent Hassel, a three-year member of the Department, testified that on February 28, 2012, he worked from 1:00 p.m. to 9:35 p.m., and was assigned to Post 8

with Respondent O'Brien as his partner. Post 8 covered the area between West 140 Street to West 142 Street on Seventh Avenue. He testified that while assigned to Post 8, "we received numerous complaints of robberies occurring in that area by gang members...that lived in the building on that area. We were receiving a lot of complaints as well as drug conditions, loitering in the area." He was also instructed about these complaints during roll call by the anti-crime team and the conditions team.

While on his post, Respondent Hassel observed George along with two other (unidentified) individuals on the corner of West 143 Street and Seventh Avenue. Respondent Hassel explained that he had heard of George's name when he was addressed by the conditions team. He said the conditions team addresses the "conditions" in the precinct such as robberies and the sale of drugs.

Respondent Hassel testified that he observed other people with George. He recognized those people as "gang associates." He stated that the pharmacy was basically a "front for gang members to have a reason to be at that location. They were basically intimidating the owner of the store to try to convince him that they were working there, but they weren't working there."

When Respondent Hassel asked George and his associates to disperse from the corner, George complied but did not say anything about where he resided. Respondent Hassel then walked away and continued to survey his post. He returned to the corner of 143 Street and Seventh Avenue about 5 or 10 minutes later and observed George standing on or near the same location as before. This time, Respondent O'Brien asked George for his identification. Respondent Hassel was standing next to Respondent O'Brien. Respondent O'Brien handed Respondent Hassel George's driver's license and

Respondent Hassel conducted a warrant check. The warrant check procedure took about 30 to 60 seconds and returned with negative results. Respondent Hassel told Respondent O'Brien about the negative results. That is when Respondent Hassel said George "was making suspicious movements," and "I believe at the time he tried to take a picture of us. At the time I didn't know what he was doing. So I just went over to check to see if he had a possible weapon on him. But it wasn't a weapon; it was just a cell phone." Respondent Hassel then issued George a "C" summons for disorderly conduct, failure to disperse, New York State Penal Law Section 240.20(6). George did not ask him for his name or shield number. Respondent Hassel indicated that this entire incident took place next to a telephone booth as depicted in CCRBX 1. Respondent Hassel clarified that he stood on the right side of the telephone booth.

Upon examination by the Court, Respondent Hassel clarified that the store owner told Respondents that the gang members "were working there. We tried to push him more to find out more information. He told us that they weren't really working there; they were just intimidating him, basically."

On cross-examination, Respondent Hassel said he did not make an Activity Log entry after he asked George to move the first time. During his CCRB interview from July 5, 2012, page 18, line 19, Respondent Hassel agreed that George was blocking the entrance to [REDACTED]

Respondent Hassel said that he checked George for weapons by "put[ting] my hand by his hand, by his right hand, and it was a cellphone at the time. I placed my hand on his hand." He agreed that was the only part of George's body that he touched.

Respondent Hassel agreed that during his July 5, 2012 interview, he told the CCRB interviewer that he wanted to frisk George to “catch what [Respondent O’Brien] misses.” When asked if he suspected George of having a weapon on him, Respondent Hassel answered, “No.”

Respondent Hassel testified that George’s suspicious movements involved keeping his hands in his pockets. He did not recall if he asked George to remove his hands from his pockets. He stated that when he approached George the second time, the other people who were also standing there, began to leave the location. He agreed that some of those people who had left returned during his interaction with George, but those people were not frisked or issued a summons. He agreed that he did not recover any evidence from George.

Respondent Hassel defined a frisk as “running your hands over the clothing of a person, of an individual, looking for a weapon.” He stated that using that definition he did not frisk George. Respondent Hassel recalled that, on page 7 line 14 of the July 5, 2012 CCRB interview, he had stated that he frisked George after Respondent O’Brien had already frisked him.

On redirect examination, Respondent Hassel testified that he was not asked to define a frisk during his CCRB interview. He said he was not asked about the four levels of suspicion or the relevant *Patrol Guide* procedure relating to stopping an individual. He was also not asked about his conversations with the conditions team. Respondent Hassel explained that he prevented George from taking a photograph because George could have had a small caliber weapon.

On recross-examination Respondent Hassel agreed that he received training on levels of suspicion and frisk in the Police Academy. He did not recall if he had frisked people before February 28, 2012. He said he did conduct frisks between February 28, 2012 and July 5, 2012.

Respondent O'Brien

Respondent O'Brien was partners with Respondent Hassel on February 28, 2012 and his testimony was similar to Respondent Hassel's testimony with the following distinctions.

Respondent O'Brien, a three-year member of the Department, testified that [REDACTED] was a "problem building that we had within the impact [zone]." He said he had been in front of that building before February 28, 2012. Although he could not read the words on the red and white sign above the blue building title on the right-hand side of CCRBX 2, he said, "It's like most signs that are posted outside of NYCHA [New York City Housing Authority] buildings." He said the sign basically notes that no trespassing, no loitering, and no sitting on the steps in front. He agreed that the sign was there on February 28, 2012.

He testified that at some point during roll call, he was informed that there was a lot of gang activity and robberies linked to [REDACTED] building. Before this incident, he had never met George.

Respondent O'Brien testified that George stood between the telephone booth and the "circle (CCRBX 1)" or (CCRBX 5), the handicap ramp.

Respondent O'Brien told George and the two individuals he was with to "disburse [sic] from the area that they were congregating." All three individuals acknowledged his order. Respondent O'Brien then continued to survey his post. He explained that he gave them some time to leave the area.

When Respondent O'Brien approached 143 Street again, the other two individuals with George started to walk away but George did not. Respondent O'Brien asked George for his identification and told George "that he would be given a summons for disobeying a lawful order to disburse [sic]." George did not reply and handed his driver's license over to Respondent O'Brien.

The moment Respondent O'Brien handed the driver's license over to Respondent Hassel, "[George's] back was to the wall. He was facing me. He kept shifting his weight around. He kept moving. He was fidgety." Respondent O'Brien explained that George "kept leaning like his left shoulder in towards me a little bit and sort of trying to angle off. So his body would be almost vertical to me...he was making furtive movements." Moreover, Respondent O'Brien said George kept moving his hands around, "he kept going from having them straight down to constantly adjusting his jacket. I believe it was a jacket. He kept moving his jacket around. The right side of his body to me at that point seemed like he was trying to conceal something." Further, Respondent O'Brien said that at that point he was in fear that George might have a "firearm or something of that significance that could cause immediate severe damage to me, my partner, other members of the public. So for everyone's safety, I kindly asked him to turn around, place hands on the wall." Respondent O'Brien said that he then frisked George.

Respondent O'Brien explained that the frisk took about 15 to 30 seconds. While conducting the frisk, he noticed that George's "right pocket had a bulge in it...I started to feel it. I was a little bit unclear what it was, in fear that it might be some sort of deadly weapon or something of that sort. I started to work it up from his pants to see what it was." He explained that he worked it up to the top of George's pants because he was trained in the Police Academy to not go into a person's pocket because there could potentially be a hypodermic needle in the pocket. Respondent O'Brien learned that the object in George's pocket was a set of keys. He explained that he did not search because his "full hand was never inside [George's] pocket." He said that there might be a possibility that his "thumb was on the somewhat inner layer [of George's pocket]...but no, I would not consider that a search."

Respondent O'Brien did not recall George asking for his name or shield number at anytime during the incident. After the incident, Respondent O'Brien continued to survey his post but did not find anyone else loitering where this incident took place.

Respondent O'Brien stated that he prepared a Stop Question and Frisk Report (UF-250) after the incident. Prior to February 28, 2012, Respondent O'Brien said he probably prepared one UF-250 because he had just graduated from the Police Academy in January of 2012.

Respondent O'Brien recalled that he was questioned about his UF-250 during his CCRB interview, but did not recall whether he was asked if he made a mistake on it. Respondent O'Brien admitted that he made one or two mistakes on his UF-250. He said a senior officer did not help him prepare a UF-250 nor did a supervisor provide any negative feedback.

When questioned by the Court, Respondent O'Brien explained that George was standing in a "fight stance...with one of their feet forward and their other one back, sort of like they are squaring off a little bit. They sort of angle their body a little bit." He further explained that he was told by senior officers that gang members or people that hide weapons "when you have them stopped...they are trying everything in their effort, because a lot of guns that they carry a decent amount of weight and it pulls down in their pants and sometimes it's very easily shown through a bulge."

On cross examination, Respondent O'Brien agreed that George was a heavysset person. He said he "clear[s] corners when there's something suspicious of some sort...if there's just one person on the corner, they have every right to stand there. They have to be congregating with three or more individuals."

Respondent O'Brien did not believe Jiles was standing with George when Respondent O'Brien came to 143 Street the second time. He agreed that the other two people with George were not issued a summons nor were they arrested.

Respondent O'Brien said he was not sure if George actually resided in the address that he provided.

Respondent O'Brien testified that on his second encounter with George, George was shifting his weight and making furtive movements and "I believed at that moment in time he was concealing a firearm."

Respondent O'Brien said he did not recall if he told the CCRB interviewer whether George was "blading" his body.

Upon questioning by the Court, Respondent O'Brien testified that he had been on patrol for four to six weeks when this incident took place.

While he agreed that he did frisk George, Respondent O'Brien had very little recollection of when he frisked George. Respondent O'Brien said, "As to where on his body, so on and so forth, did I touch him arm, I can't recall this frisk." Respondent O'Brien recalled that there was an issue with George's leg but whether "I frisked that part of him or not, I can't recall...I remember hearing something about like it might be a fake leg." He did not recall lifting George's pant leg.

Respondent O'Brien did not recall answers he gave from his August 31, 2012 CCRB interview.

Respondent O'Brien agreed that he felt a bulge on George during the frisk. He explained that when he "worked it up" George's pants pocket, he placed his fingers on the outside. In other words, he kneaded George's pocket.

Respondent O'Brien agreed that on the UF-250 he prepared for George, he indicated that he suspected George of robbery. He agreed that George did not match the description of any suspects. He said he did not issue George a summons.

On redirect examination, Respondent O'Brien explained that he frisked George for his safety, his partner's safety, and the community's safety.

FINDINGS AND ANALYSIS

Background

John George stated that on February 28, 2012 he was standing on the corner of 143 Street and Seventh Avenue in front of a pharmacy. He was waiting outside there for a prescription for medicine to be filled. While he was waiting, some police officers walked by and asked people in the area to "leave the corner." George turned around and

walked toward his building. After errands at his home and bumping into a friend, George returned to the pharmacy to pick up his medicine. Then he went to stand in front of his building by the wheelchair ramp. The ramp was about 10 or 15 feet from the pharmacy.

A little while later, Respondents returned and one of them said, "Didn't I tell you to get off the corner?" One of them was screaming at him. George said, "I'm not doing anything. I'm just sitting here, waiting to get my medicine. I live in the building."

The officers approached and Respondent O'Brien asked George for his ID. George reached in the left side of his back pocket. He pulled out his wallet and driver's license and held it up to Respondent O'Brien. Respondent O'Brien said, "You're being smart. I asked you let me see." George said, "I did. I'm complying with what you said." As George started to put it back into his wallet, Respondent O'Brien snatched it from him.

George testified that he asked Respondent O'Brien three times for his shield number. After George's first request, Respondent O'Brien told him, "You don't need it. Don't worry about it." After the second request, Respondent O'Brien told him, "Turn around, just stay against the wall. Don't turn around. Just don't move." And after the third request, Respondent O'Brien told him, "It's not going to do you any good." To get a record of Respondents' shield numbers, George took a picture of Respondents with his cell phone.

Then Respondent O'Brien pushed George against the wall. Respondent O'Brien told George to put his arms up. George had his hands up against the wall with his legs spread and, he described, with "[m]y feet spread wide apart." Respondent O'Brien then frisked him.

When George stands, he shifts his weight because of "sharp pain" in his leg and problems with balance. George is a heavy man and was almost 12 pounds heavier then. His left leg is swollen because of bad circulation, so he has to wear a compression stocking. He remembered that Respondent O'Brien, while frisking him, hurt his left leg.

George testified that when Respondent O'Brien frisked him, Respondent O'Brien "went around my waist" and "put his both hands inside my pocket." George explained, "Like he got his first like the first four, five fingers inside it on each side, left and right."

George admitted on both direct and cross-examination that he had about five drug related convictions from 1987 through 1997 for which he served almost ten years in prison. He admitted on cross-examination that in between his past convictions he could have made about a thousand drug sales. His last conviction was on December 28, 1997. He has since completed drug counseling programs. George was now 46 years old. He said he was on [REDACTED] for medical conditions including problems with his legs and diabetes, and taking care of his elderly mother and disabled brother.

Respondents testified that they had been advised that around the [REDACTED] Street building there was a lot of gang activity, drug conditions, loitering and robberies. Respondent Hassel recognized the people with George in front of the pharmacy as "gang associates." The pharmacy was a place Respondents had learned was a "front for gang members."

Respondents told George and the others to leave. About ten minutes later, Respondents returned and saw George near the same location. According to Respondent

O'Brien, there was a no loitering sign in front of the building. Respondent O'Brien asked George for his identification and then handed Respondent Hassel George's driver's license.

Respondents looked at and checked George's identification, learning that George had no outstanding warrants. George's identification confirmed that he lived in the building at [REDACTED] Respondent O'Brien also recorded on the UF-250 form that George lived at [REDACTED]

Respondent O'Brien did not recall George asking him for his name or shield number.

After George gave Respondent O'Brien his identification, Respondent O'Brien observed the following behavior:

[George's] back was to the wall. He was facing me. He kept shifting his weight around. He kept moving. He was fidgety.... [George] kept leaning like his left shoulder in towards me a little bit and sort of trying to angle off. So his body would be almost vertical to me...he was making furtive movements.

Respondent O'Brien also said George kept moving his hands around:

[H]e kept going from having them [his hands] straight down to constantly adjusting his jacket. I believe it was a jacket. He kept moving his jacket around. The right side of his body to me at that point seemed like he was trying to conceal something.

When asked what Respondent O'Brien meant by "stance position," Respondent O'Brien explained that he was referring to a "fight stance," which is a position people take "with one of their feet forward and their other one back, sort of like they are squaring off a little bit. They sort of angle their body a little bit." He explained that he was taught by senior officers that when you stop a gang member or someone who has a gun, they will assume a squaring off stance to try to hide the weapon "because a lot of

guns that they carry a decent amount of weight and it pulls down in their pants and sometimes it's very easily shown through a bulge." Respondent O'Brien did not remember whether he mentioned this specific stance at his CCRB interview. Nor did he remember that at his interview he had described George's furtive movement only as George's shifting his weight.

Because of George's movements, Respondent O'Brien said he was afraid that George might have a firearm or something that "could cause immediate severe damage to me, my partner, other members of the public. So for everyone's safety, I kindly asked him to turn around, place hands on the wall." Then Respondent O'Brien frisked George.

Analysis

Case No. 2013-9658

Specification No. 1 alleges that Respondent O'Brien abused his authority as a member of the Department by frisking John George without sufficient legal authority.

Respondent O'Brien believed that when he checked George's identification, he saw George's address listed as [REDACTED] Respondent O'Brien also recorded on the stop and frisk form that George's address was [REDACTED] Thus, Respondent O'Brien knew that George was standing in front of his own home.

To conduct a frisk Respondent O'Brien needed to reasonably suspect that he was in danger of physical injury or that George was armed. *People V. DeBour*, 40 N.Y.2d 210 (1976); CPL § 140.50 [3]. Here there is no indication of any violence. Shifting weight, moving, fidgeting, and adjusting one's jacket are not movements which would justify such a belief. The stance Respondent O'Brien described, which an ordinary citizen who is not concealing anything but who might be nervous would assume, does not

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qualify as an independent reasonable belief that there is an immediate danger. *Case No. 9648/13* (June 17, 2014).

The Court notes that Respondent O'Brien's partner, Respondent Hassel, did not corroborate what Respondent O'Brien claimed to see and suspect. Whereas Respondent O'Brien spoke about George's constant hand movements, Respondent Hassel testified that George's suspicious movements were keeping his hands in his pockets. At his CCRB interview Respondent Hassel also stated that he did not suspect George of having a weapon.

Therefore, Respondent O'Brien is found Guilty of frisking John George without sufficient legal authority.

Specification No. 2 alleges that Respondent O'Brien abused his authority as a member of the Department in that he searched John George without sufficient legal authority.

While frisking George, he noticed "a bulge" in George's "right pocket." To check whether the bulge was a weapon, Respondent O'Brien conducted a kneading motion with his hands. He felt a set of keys. This kneading motion that Respondent O'Brien described and demonstrated was very close to a squeezing motion. Squeezing a pocket is a greater intrusion than a traditional pat down in a frisk. *People v. Smith*, 216 A.D. 2d 233 (1995). While he was feeling George's pocket, Respondent O'Brien conceded his thumb may have been "on the somewhat inner layer" of George's pocket. Respondent O'Brien's kneading motion constituted a search for a weapon under *Terry v. Ohio*, 392 U.S. 1 (1968).

This Court notes that George testified that Respondent O'Brien put his hand in George's pockets. However, Respondent O'Brien's own testimony established that he was searching George for a weapon. As Respondent O'Brien is found to have conducted a frisk without sufficient legal authority, his continued search for a weapon was also improper.

Therefore, Respondent O'Brien is found Guilty of searching John George without sufficient legal authority.

Specification No. 3 alleges that Respondent O'Brien failed to courteously and clearly state his shield number when requested by John George.

Respondent O'Brien claimed that he did not recall George asking him for his shield number, while George claimed that Respondent O'Brien failed to comply with George's request three times. Respondents argued that George's testimony could not be trusted because of his drug related convictions.¹

While having a criminal history is a factor to consider, it does not by itself automatically render a witness not credible. George's last conviction was 17 years ago and he is now 46 years old. In his testimony and during a vigorous cross-examination, George was very forthcoming about his convictions and the drug history he had as a young man. He has since been in drug counseling. George stated that he was now [REDACTED] [REDACTED] several medical conditions, which included problems with his legs and diabetes. At the time of trial, he was tending to his elderly mother and disabled brother.

George's description of his encounter with the police was convincing. Being frisked in front of his home, he was more apt to remember details of that encounter than

¹ Because there were questions about George's criminal history, this Court gave Respondent's attorney full opportunity to cross-examine George about that history.

Respondents would. George testified that after Respondent O'Brien would not tell George his badge number, George took a picture of Respondents for a record of their shield numbers. One picture showed Respondents standing, not frisking George. (CCRBX 3). A second picture showed Respondent O'Brien standing, with his badge clearly displayed. As CCRB argued, George's only reason to take pictures of police officers standing and not doing anything wrong would be to get a record of Respondents' shield numbers.

Therefore, this Court credits George's testimony and Respondent O'Brien is found Guilty of Specification No. 3.

Case No. 2013-9657

Specification No. 1 alleges that Respondent Hassel, on February 28, 2012, frisked John George without sufficient legal authority.

Respondent Hassel denied that he conducted a frisk of George on February 28, 2012 and testified that he had merely touched George's hand to determine whether George was holding a weapon. The object turned out to be a cell phone.

The chief evidence that CCRB had to prove its charge was Respondent Hassel's own words during his CCRB interview on July 5, 2012 that he had frisked George. Respondent Hassel explained that when he was interviewed in 2012, he was not too familiar with the definition of the word "frisk." When he was interviewed, Respondent Hassel had been working as a police officer for around only six months.

Darrell Jiles, George's friend, witnessed Respondent O'Brien frisk George. Both Jiles and George testified that the only officer who frisked George was Respondent

O'Brien. Thus the CCRB's own witnesses corroborated Respondent Hassel's testimony that Respondent Hassel never frisked George.

Therefore, Respondent Hassel is found Not Guilty of Case No. 2013-9657.

PENALTY

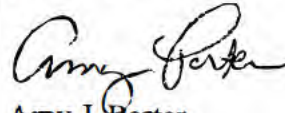
In order to determine an appropriate penalty, Respondent O'Brien's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent O'Brien was appointed to the Department on July 6, 2011. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB recommended a penalty of eight vacation days with reinstruction. Although it is not within this Court's jurisdiction to recommend it, Respondent O'Brien could benefit from retraining and instruction. However, CCRB's recommendation is excessive. At the time of this incident, Respondent O'Brien had only been on street patrol for about four to six weeks, right out of the Police Academy. When he received his training, he was told about the blading position and believed that this position was something that would justify a frisk. He did not deliberately attempt to violate John George's rights. As he had misinterpreted his training, he believed at that time that he

was conducting a proper frisk and search. However, Respondent O'Brien should have known that he must give his shield number to a civilian who requests it.

Therefore, it is recommended that Respondent O'Brien forfeit one vacation day.

Respectfully submitted,



Amy J. Porter

Assistant Deputy Commissioner -- Trials

APPROVED

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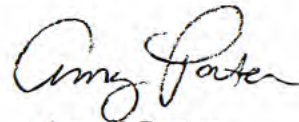
WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER SEAN O'BRIEN
TAX REGISTRY NO. 950967
DISCIPLINARY CASE NO. 2013-9658

Respondent's only annual evaluation is an overall rating of "Competent/Competent" in 2013. In his three years of service, [REDACTED] occasions. He has no prior formal disciplinary record.

For your consideration.



Amy J. Porter
Assistant Deputy Commissioner – Trials