



POLICE DEPARTMENT

September 11, 2018

-----X

In the Matter of the Charges and Specifications	:	Case Nos.
against -	:	
Police Officer Dax Guardado	:	2016-16228
Tax Registry No. 947051	:	
78 Precinct	:	
Sergeant Margaret Franco	:	2016-16229
Tax Registry No. 945395	:	
71 Precinct	:	

-----X

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Daniel Maurer, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For Respondent Franco: John D'Alessandro, Esq.
The Quinn Law Firm
Crosswest Office Center
399 Knollwood Road Suite 220
White Plains, NY 10603

For Respondent Guardado: Michael Martinez, Esq.
Worth, Longworth & London, LLP
111 John Street Suite 640
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA

COURTESY • PROFESSIONALISM • RESPECT

Website: <http://nyc.gov/nypd>

CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2016-16228

1. Said Police Officer Dax Guardado, while on duty and assigned to the 78th Precinct, on or about July 11, 2016, failed to conduct a thorough field investigation in connection with a reported trespass.

P.G. 207-07, Page 1, Paragraph 4

PRELIMINARY INVESTIGATION
OF COMPLAINTS (OTHER THAN
VICE RELATED OR NARCOTICS
COMPLAINTS)

Disciplinary Case No. 2016-16229

1. Said Sergeant Margaret Franco, while on duty and assigned to the 78th Precinct, on or about July 11, 2016, failed to conduct a thorough field investigation in connection with a reported trespass.

P.G. 207-07, Page 1, Paragraph 4

PRELIMINARY INVESTIGATION
OF COMPLAINTS (OTHER THAN
VICE RELATED OR NARCOTICS
COMPLAINTS)

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on July 30, 2018. Respondents, through their counsels, entered pleas of Not Guilty to the subject charges. The Department called retired lieutenant Jorge Jimenez, Sergeant Ivan Acevedo and Lieutenant Richard Tully as witnesses. Respondents testified on their own behalves. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having carefully reviewed all testimony and evidence in this matter, I find Respondents Guilty of the charged misconduct.

ANALYSIS

It is undisputed that on July 11, 2016, Respondents were both police officers on patrol at approximately 00:30 hours. They responded to the vicinity of [REDACTED] in [REDACTED] after receiving a call of a trespass in progress. They were informed the job had been called in by a retired member of the service who was armed. When Respondents arrived at the location, already present were two transit district police officers, Jorge Jimenez (a retired NYPD lieutenant), and a male being put into handcuffs. Mr. Jimenez was bleeding in the area of his nose. Mr. Jimenez and the Respondents disagree on what was said and what actions were taken after Respondents arrived.

Mr. Jimenez testified that he called 911 after he saw two males in front of his house. One of the males went onto Mr. Jimenez's property and then hopped over a wall into an adjoining construction site. (Tr. 15) After calling 911, Mr. Jimenez confronted the male who had been standing in front of his house. Mr. Jimenez testified that after an RMP pulled onto the block, he saw the male start to walk away so he approached him and asked him twice what he was doing there. The male then punched Mr. Jimenez in the nose. When the male hit him again, Mr. Jimenez went down on one knee. Mr. Jimenez saw the two transit officers and yelled to them. The transit officers and Mr. Jimenez handcuffed the male. (Tr. 17-19)

Mr. Jimenez testified that he observed the Respondents arrive on the scene, saw Respondent Franco speak to the transit officers, and heard her ask the transit officers if they were taking the arrest. When the transit officers told her they were not, he heard Respondent Franco say, "I guess we can't shit can this." Mr. Jimenez further testified that while he was being attended to in an ambulance, he saw Respondent Franco talking to the man who had been arrested and opening up his backpack, which contained burglar's tools. Respondent Guardado

approached Mr. Jimenez as he was exiting the ambulance and took his pedigree information.

(Tr. 20-22)

Mr. Jimenez testified he had no other interaction with Respondent Guardado, but he asked Respondent Franco twice if she was going to call ESU to clip the locks on the gate leading to the construction site in order to go after the other man. She told him no, that they didn't do that. According to Mr. Jimenez, Respondent Franco also answered, "No" when he asked if she was going to call the sergeant to the scene. (Tr. 22-23)

Mr. Jimenez acknowledged that he was "pissed" and that he told Respondent Franco that he was going to call Chief Powers and tell him what happened. Mr. Jimenez denied ever physically touching, cursing at, or spitting at the man who was arrested after he was in handcuffs. (Tr. 24-25) He testified that he never got closer than 12-15 feet from him. (Tr. 36) Mr. Jimenez did see the Respondents making a phone call, and Sergeant Acevedo and a transit sergeant arrived at the scene within about 20 minutes. Mr. Jimenez gave the sergeants the description of the man he had observed going into the construction site and the two sergeants jumped over the wall and entered the site for approximately 15 minutes. (Tr. 26-27, 30)

On cross-examination, Mr. Jimenez, when asked if he was giving the Respondents information after they arrived at the scene, stated, "No. ...I only spoke to him about the pedigree information and I only asked her a couple of questions. My whole interaction with her was, 'no, no,' and with him it was just a pedigree." When directly asked if he ever told her [Franco] what happened or what he had seen, Mr. Jimenez responded that she never came up to him. (Tr. 47) Mr. Jimenez assumed that the Respondents knew there was another suspect from the 911 call and their conversations with the transit officers. (Tr. 53-54)

Sergeant Acevedo, who was Respondents' supervisor at the time, testified, after having his memory refreshed, that Respondents put out a call over the air for him to respond to the

scene. (Tr. 82-83) He also received two phone calls from the Respondents requesting his presence. He couldn't respond at first because he was processing evidence from a rape, so he told the Respondents to bring the arrest back to the precinct. During the second call he was told the case involved more than an assault and that the victim was making a "stink." Sergeant Acevedo told Respondents to take no further action until he got there and could assess the situation. At that point he responded to the scene, arriving about 25 minutes after the initial radio run from the 911 call and about five minutes after receiving the second call from Respondents. (Tr. 65-68, 74, 84-85) When he arrived, Respondent Franco asked him if they were allowed to call ESU or jump over a fence, and he told her that they could, depending on the situation. (Tr. 69) Sergeant Acevedo then spoke to Mr. Jimenez, who told him about observing two males, one of whom entered his property and went to the construction site. (Tr. 70) Sergeant Acevedo testified that he and the transit sergeant on the scene then jumped over the fence and conducted a vertical search of the building in the construction site. They did not find anyone in the construction site. (Tr. 72-73)

The final Department witness, Lieutenant Tully from Brooklyn South Investigations, had been assigned to investigate the July 11, 2016 incident involving Respondents. He testified on direct examination that he was familiar with resources available to members of the service responding to a trespass or possible burglary call. While stating that every incident is different, he noted that there are emergency service units, canine units, and aviation units that can be used. He further testified that officers are trained to request additional units and to broadcast descriptions of possible perpetrators in such situations, and that none of those things were done by Respondents in this case. (Tr. 96-97) When he asked Respondent Franco during an interview why she didn't hop the fence or make attempts to gain entry into the property, she told him it was because she did not believe the story Mr. Jimenez told her. (Tr. 121-22)

On cross-examination, Lieutenant Tully testified that officers also have a duty to safeguard prisoners at all times. (Tr. 104) He confirmed that when he interviewed the Respondents, they told him that Mr. Jimenez was repeatedly going after the prisoner and was grabbing and shaking him. (Tr. 116) Lieutenant Tully further testified that he became aware that the male who was arrested ultimately received a dismissal with a drug program and that the ADA assigned to the case had problems with Mr. Jimenez's credibility. (Tr. 108-10) Lieutenant Tully also acknowledged that officers, while trained to call for additional units, are also not supposed to call additional units unnecessarily. (Tr. 111) He didn't recall aviation ever being called for a criminal trespass. (Tr. 113) He also agreed that when ESU is called to cut a lock, it is because there is no other way in, and that canine is used to conduct searches when it is either impractical or dangerous for the officers to do so. (Tr. 114)

Respondent Franco testified that she responded to a trespass in progress call and when she arrived on the scene, she saw Mr. Jimenez bleeding from his nose, two transit officers and a male being placed in handcuffs. She called for EMS to respond and asked Mr. Jimenez what happened. She testified that Mr. Jimenez told her he saw a man sitting on a fire hydrant outside his house who he thought was acting as a lookout, and saw two other males go over the fence into the construction site next door. When she asked for a description of the males, he told her it was dark and that they were possibly white or Hispanic. Respondent Franco further testified that Mr. Jimenez told her he had grabbed the male who was outside his house and that he pushed the male down before the male punched him. According to Respondent Franco, Mr. Jimenez told her he had been agitated and had "effed" up. (Tr. 133-35)

Respondent Franco testified that the Respondents looked through the windows in the plywood wall around the construction site, which she described as being in a well-lit area, but did not see anyone in there. She asked the transit officers what they saw and learned that as they

were driving, they saw Mr. Jimenez chasing a man down the street and that the man was the person who flagged them down for help. The transit officers told her that Mr. Jimenez told them, "this is the guy," and they arrested him. Respondent Franco radioed for her sergeant to come to the scene. She had further conversations with Mr. Jimenez, who told her she should charge the apprehended male with a burglary. When she told him she didn't have sufficient reason to do that, Mr. Jimenez asked if she knew who he was and then, "started throwing out names." (Tr. 135-36)

Respondent Franco next spoke to the male in handcuffs. He told her he was on a meal break from his construction job nearby when he had an asthma attack and had to sit on the fire hydrant. He also told her that Mr. Jimenez grabbed him and pushed him down before he punched Mr. Jimenez and ran. Respondent Franco testified that while she was having the conversation with the arrestee, Mr. Jimenez was very animated and, with spit coming out of his mouth, was talking over her to interrogate the arrestee. She told Mr. Jimenez to back up, which initially he did, but then Mr. Jimenez grabbed the arrestee on the shoulder and started shaking him and yelling at him to stop lying. When she told Mr. Jimenez to back up the second time, he spit at the arrestee, so she put the arrestee in the RMP while she stood by the door. (Tr. 137-38)

Respondent Franco then learned from Respondent Guardado that Sergeant Acevedo was not going to respond to the scene and had advised them to bring the arrest back to the precinct. At this point, Respondent Franco called Sergeant Acevedo and told him that Mr. Jimenez has been grabbing the arrestee and throwing out names of people he knows, including Chief Powers, and that she needed Sergeant Acevedo to come to the scene. Respondent Franco testified that while they waited for the Sergeant to arrive, if she or Respondent Guardado stepped away from the arrestee, Mr. Jimenez would come over and start interrogating him. (Tr. 139, 156) She also testified that the transit officers just wanted to leave the scene. (Tr. 140)

Respondent Guardado testified similarly to Respondent Franco. When he arrived at the scene he saw Mr. Jimenez, who was bleeding, pacing back and forth and seeming irate, and he saw two transit officers with a male in custody. He described Mr. Jimenez as being about a foot or two away from the arrestee the whole time. Respondent Franco searched the arrestee and found a box cutter. He believed that the transit officers told Respondent Franco that Mr. Jimenez was struck in the face and there was possibly another perpetrator that might have "jumped the scene." Respondent Guardado called to ask Sergeant Acevedo to come to the scene. (Tr. 166-68) Respondent Guardado testified that while he was trying to calm Mr. Jimenez down, Mr. Jimenez told him he fucked up and put his hands on the arrestee first. (Tr. 169) Respondent Guardado spoke to both the arrestee and Mr. Jimenez and believed the situation was an assault, but Mr. Jimenez kept saying, "it's a burg." He testified that at one point Mr. Jimenez lunged at the arrestee. (Tr. 170-71) Respondent Guardado had to grab Mr. Jimenez and escort him away from the arrestee, who had told Respondent Guardado that he didn't feel safe. Respondent Guardado persuaded Mr. Jimenez to go into the ambulance to treat his injury. (Tr. 172-73)

Respondent Guardado testified that because Mr. Jimenez had told him that possibly two males had jumped over the fence, he asked Mr. Jimenez for a description. Mr. Jimenez told him he didn't know whether they were white or Hispanic. He told Mr. Jimenez he needed more than that. Respondent Guardado walked over to the plywood wall around the construction site and looked in the windows and listened for any sounds, but didn't see or hear anything in the site. He remembered the gate had a lock on it. (Tr. 175-77)

Respondent Guardado testified that when Sergeant Acevedo arrived, he first spoke to Mr. Jimenez and then told Respondent Guardado that the arrest was going to be a burglary. Respondent Guardado told Sergeant Acevedo that Mr. Jimenez had only described an assault.

Respondent Guardado eventually charged the arrestee with assault and with possession of burglary tools since he had crowbars and a two way radio on him. (Tr. 178-80)

After this incident, Respondent Guardado testified that the Respondents were called into the Commanding Officer's office and told that Chief Powers was not happy. They were advised that they would never work together again, which they never did. (Tr. 182-83)

Both Respondents are charged with failing to conduct a thorough field investigation in connection with a reported trespass. It is clear from their own testimony that Respondents had information that a possible trespass had taken place before they even arrived at the scene. It is also clear from their testimony that once they were on the scene, through a combination of their conversations with the two transit officers and Mr. Jimenez, they had information that a male white or Hispanic had entered the construction site.

The Respondents claim that their attention was focused on protecting the arrestee from Mr. Jimenez, who was irate. While the Court does recognize that it is always necessary to protect an arrestee from harm, in this situation there were initially four officers on this scene who could have either divided up their responsibilities to protect the arrestee and investigate for other trespassers, or if they couldn't have taken those actions by themselves, called for back-up units. No back-up units were called. Also, both Respondents, according to their testimony, had time to leave the arrestee in order to look through the Plexiglas windows in the construction site. If they had time to do this, it is not clear why one of them wasn't able to do a more thorough investigation of the site. Sergeant Acevedo, when he arrived, was apparently able to manage to jump into the construction site to check for a possible trespasser.

The Court finds that while it is unreasonable, as Lieutenant Tully's testimony suggested, to expect the Respondents' to have called in the Aviation, Canine or ESU units, in a situation such as this, a thorough field investigation in this case, based on the information the Respondents

had, would include at least broadcasting that there was possibly a male white or Hispanic trespassing in the vicinity of the scene. It is also reasonable to conclude that a thorough field investigation would include gaining access to search the premises, which could have been done as easily as Sergeant Acevedo had done it. Moreover, if Respondents were unable to do that by working with the other officers to safeguard the arrestee, they should have called for back-up to assist in the field investigation. I therefore find both Respondents Guilty as charged.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent Guardado was appointed to the Department on July 8, 2008 and Respondent Franco was appointed to the Department on January 7, 2008. Information from their personnel records that was considered in making this penalty recommendation is contained in attached confidential memoranda.

The Department has requested penalties of the loss of five vacation days for each Respondent. I concur with their recommendation.

While there are no recent cases exactly on point with the facts of this case, there are cases imposing penalties for the dereliction of duty. In *Disciplinary Case No. 2015-13361* (April 7, 2016), a ten-year police officer with no prior disciplinary history negotiated a penalty of 15 vacation days for (i) failing to properly investigate the circumstances surrounding the stabbing of an individual, in that he failed to interview witnesses or retrieve evidence at the scene, (ii) failing to voucher a knife used in the stabbing of an individual, (iii) failing to prepare a complaint report in connection with an assault, including a stabbing with a knife, and (iv) failing to provide an accurate final radio disposition to the Communications Center. This matter, however, can be distinguished from the current case in that it involved a stabbing, a violent crime with a weapon.

In another case, an eleven year sergeant, with no prior disciplinary history, negotiated a penalty of fifteen (15) vacation days for failing to interview all witnesses and conduct a thorough investigation after being informed by an individual that she was spit on, called racially charged names and that her mother was grabbed by the arm and dragged alongside a vehicle, while the perpetrator drove off in his vehicle and left the scene. Despite being armed with information from his subordinates about the perpetrator's actions and being instructed by an Inspector to interview all witnesses involved, Respondent failed to conduct a thorough investigation resulting in misinformation being communicated to the Inspector. *Disciplinary Case No. 2016-16533* (Jan. 18, 2018). This case is distinguishable from the instant matter, in that it concerned a supervisor and also because that supervisor not only failed to properly investigate the situation, but disregarded an instruction to do so from a supervisor.

In a final recent case, a nine-year police officer with one prior adjudication negotiated a penalty of 5 vacation days for (i) failing to properly prepare a complaint report worksheet and failing to comply with the crime complaint reporting system reference guide, (ii) failing to properly investigate the circumstances surrounding a complaint for a stolen wallet in that he did not speak with any potential witnesses and did not inquire whether video surveillance existed that might aid in the investigation, and (iii) causing false entries to be made in Department records in that he indicated that property had been lost when the complainant had indicated it was stolen. *Disciplinary Case No. 2015-14948* (Jan. 18, 2018). While this case can be distinguished from the current case in that the Respondents are not charged with creating any false or inaccurate paperwork, the Respondents in the present matter similarly failed to take simple immediate field investigation actions, resulting in a missed opportunity to search for, and possibly apprehend, a trespasser.

I therefore recommend a penalty of the loss of five vacation days for each Respondent.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

NOV 09 2018



JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DAX GUARDADO
TAX REGISTRY NO. 947051
DISCIPLINARY CASE NO. 2016-16228

Respondent was appointed to the Department on July 8, 2008. On his last three annual performance evaluations, he twice received 3.5 overall ratings of "Highly Competent/Competent" for 2014 and 2016, and received a 4.5 "Highly Competent/Extremely Competent" rating in 2015. [REDACTED]

Respondent has no disciplinary history.

For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner Trials



From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
SERGEANT MARGARET FRANCO
TAX REGISTRY NO. 945395
DISCIPLINARY CASE NO. 2016-16229

Respondent was initially appointed to the Department as a police officer on January 23, 2007 under Tax Number 944161. She resigned on June 12, 2007, but was reinstated under Tax Number 945395 on January 7, 2008. On her last three annual performance evaluations, she twice received 3.5 overall ratings of "Highly Competent/Competent" for 2014 and 2016, and received a 4.0 "Highly Competent" rating in 2015. [REDACTED] sick on [REDACTED]

Respondent has no disciplinary history

For your consideration.

Nancy Ry-

Nancy R. Ryan
Assistant Deputy Commissioner Trials