



POLICE DEPARTMENT

January 22, 2013

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Paul Pierre
Tax Registry No. 935513
Transit Bureau District 34
Disciplinary Case Nos. 2009-0982 and 2011-5778

The above-named member of the Department appeared before me on October 17, 2012, charged with the following:

Disciplinary Case No. 2009-0982

1. Said Police Officer Paul Pierre, while assigned to the Transit Bureau District #34, on or about February 2, 2009, while on-duty and assigned to patrol, failed to perform his duties as directed and was off post, to wit: said Police Officer was scheduled to be on a directed patrol from 0300 hours to 0345 hours at Bay 50th Street Station in Kings County, but was observed sleeping at approximately 0310 hours until 0315 hours, in the vicinity of Shore Parkway between Stillwell Avenue and West 16th Street in Kings County.

P.G. 203-05, Page 1, Paragraphs 1 and 2 – PERFORMANCE ON DUTY –
GENERAL

2. Said Police Officer Paul Pierre, while assigned to the Transit Bureau District #34, on or about February 2, 2009, while on-duty and assigned to patrol, in the vicinity of Shore Parkway between Stillwell Avenue and West 16th Street in Kings County, New York, wrongfully neglected to make appropriate Activity Log entries, as required.

P.G. 212-08, Page 1, Paragraph (c) – ACTIVITY LOGS

3. Said Police Officer Paul Pierre, while assigned to the Transit Bureau District #34, on or about February 2, 2009, while on-duty and assigned to patrol in the vicinity of Shore Parkway between Stillwell Avenue and West 16th Street, Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, in that said Police Officer was observed sleeping in his assigned vehicle.

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

P.G. 206-03, Page 1, Paragraph 26 – VIOLATIONS SUBJECT TO COMMAND
DISCIPLINE

Disciplinary Case No. 2011-5778

1. Said Police Officer Paul Pierre, while on-duty and assigned to Transit District 34, on or about November 14, 2010, was off-post without permission or police necessity.

P.G. 203-05, Page 1, Paragraph 2 PERFORMANCE ON DUTY

2. Said Police Officer Paul Pierre, assigned as indicated above, on or about November 14, 2010, while on-duty, failed to make appropriate entries that said Police Officer claimed to have performed in his Department issued Activity Log.

P.G. 212-08, Page 1, Paragraph 1c (2) – ACTIVITY LOGS

The Department was represented by Jamie Moran, Esq., Department Advocate's Office, and Respondent was represented by Craig Hayes, Esq.

In Disciplinary Case No. 2009-0982, Respondent, through his counsel, entered a plea of Not Guilty to Specification No. 1 and a plea of Guilty to Specification Nos. 2 and 3. In Disciplinary Case No. 2011-5778, Respondent, through his 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. 2009-0982

Respondent is found Guilty of Specification No. 1. Respondent, having Pleaded Guilty, is found Guilty of Specification Nos. 2 and 3.

Disciplinary Case No. 2011-5778

Respondent is found Guilty of Specifications Nos. 1 and 2.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Captain Jason Harrell, Police Officer David Gerald, and Sergeant Gerald Esposito as witnesses.

Sergeant Gerald Esposito

Esposito, a 15-year member of the service, has been assigned to Transit District (TD) 34 for almost seven years.

On February 2, 2009, Esposito was the assigned patrol supervisor that day. As the patrol supervisor, he conducted the roll call for that shift. The function of the roll call is to give police officers their assignments.

Esposito testified that the Roll Call reflected that the Respondent had directed patrol at 36 Street from 12:15 a.m. to 1:00 a.m., at Stillwell Avenue from 2:00 a.m. to 3:00 a.m., and at Bay 50 Street from 3:00 a.m. to 3:45 a.m. [Department's Exhibit (DX)

1]

Esposito testified that Stillwell Avenue is about five minutes away from Bay 50 Street. Since the assignment was at Stillwell from 2:00 a.m. to 3:00 a.m. and the next one was at Bay 50 Street from 3:00 a.m. to 3:45 a.m., Esposito would expect officers to reach Bay 50 Street no later than 3:10 a.m.

When asked what “cooping” means, Esposito explained that, “Every command has cooping prone locations, meaning that officers are not supposed to be there. Because it's known...that cops go there to essentially sleep and they are just not supposed to be there.” Esposito stated that if an officer is going to take a personal outside the Command, it should be noted in the Activity Log. An officer is not allowed to take a personal at a cooping location.

When an officer is assigned to directed patrol, that officer is expected to be on that directed patrol for the time indicated on the Roll Call that they are directed to be there. Esposito stated an officer is to do “platform coverage, mezzanine coverage, check the trains...make sure nothing is going on at the station” while on directed patrol. If an officer is assigned to a particular location, that officer must stay there. Officers are usually assigned directed patrols at locations where crimes were previously committed.

During cross-examination, Esposito stated that he would expect that the officers would arrive at Bay 50 Street no later than 3:10 p.m. He knew that on a midnight tour, an officer can walk from Stillwell to Bay 50 Street in 10 minutes.

He agreed that when an officer has been assigned two directed patrols, it could take from one minute to 10 minutes depending on the conditions to travel to the next location. Esposito would not give an officer a Command Discipline (CD) for being a minute or two late because of travel time.

Esposito agreed that if the officers were ending one directed patrol at 3:00 a.m. and starting another directed patrol at 3:00 a.m., they would need at least five minutes to get there. He agreed that a captain told him that Pierre and another officer were found sleeping at a location, but he did not observe it himself.

Police Officer David Gerald

Gerald has been a member of the service for 22 years. He has been assigned to Transit District (TD) 34 for 12 years.

With regard to Disciplinary Case No. 2009-0982¹, Gerald testified that on February 2, 2009, he was assigned to Transit 34. His partner was Respondent. Their midnight tour of duty assignment was in a sector car. One of their directed patrols was scheduled between 3:00 a.m. to 3:45 a.m. at the Bay 50 Street station.

Gerald recalled that at 3:10 a.m. he was at an intersection near the Bay 50 Street train station. It was in the vicinity of Shore Parkway between Stillwell Avenue and West 16 Street. Gerald described this location as “an off-ramp to the highway.” At that time, this intersection was considered a cooping location. He explained that a cooping location is a place where officers go to take breaks and just sit in between jobs. Police officers are not allowed at cooping locations while on duty. Gerald pled guilty to Charges and Specifications for the incident and received a loss of 18 vacation days as penalty.

During cross-examination on February 2, 2009, Gerald agreed that during his 12 years at TD 34, occasionally there have been two directed patrols back to back. He agreed that if they are in different locations, the job allows for travel time between one job and the other. Sometimes it takes a while to get there, depending on traffic conditions.

On the February date, Gerald had a directed patrol from 2:00 a.m. to 3:00 a.m. at Stillwell Avenue. He did remember that there was “discrepancy” about the times: “The

¹ Gerald’s testimony regarding Disciplinary Case No. 2009-0982 and his testimony regarding Disciplinary Case No. 2011-5778 are separated into two parts.

duty captain stated that we should have been there at such-and-such time...the sergeant told us at Roll Call it was -- it was another time. It was like a few minutes difference.”

Gerald estimated the distance between Bay 50 Street and Stillwell Avenue to be about four blocks. He stated that in back-to-back directed patrols in his command, when an officer arrives at the location only a few minutes after directed patrols have started, duty captains and sergeants do not consider that a violation. They take into account the amount of time it takes to get from one location to the other.

On redirect examination, Gerald testified that to drive from Stillwell Avenue to Bay 50 Street would not take long, maybe a minute or two. If he had directed patrol at Stillwell Avenue from 2:00 a.m. to 3:00 a.m. and the Bay 50 Street directed patrol was supposed to start right after that, he would expect to start directed patrol at Bay 50 Street within five or ten minutes. He would figure ten minutes in case “something...happened in between.” He testified that nothing happened that would have made them unable to arrive at Bay 50 Street at 3:05 a.m.

With regard to Disciplinary Case No. 2011-5778, Gerald testified that on November 14, 2010, he was doing a midnight tour. He was assigned to a marked Radio Motor Patrol (RMP) car with Respondent as his partner. Within the last year, Gerald had been partners with Respondent a few times. That night Gerald was the operator of the car.

They had directed patrol between 4:00 a.m. and 5:00 a.m. at Stillwell Avenue. When they arrived at the Stillwell Avenue station, they notified Radio Dispatch (Central) they were beginning their directed patrol.

For a brief period, they left their directed patrol assignment in order to respond to a radio run that came over from the intersection of 9 Avenue and 39 Street. He could not recall the exact time that they left.

They did not make it to the job because by the time they came down from the platform to their RMP, the job was already finalized.

He could not recall if they notified Central that they were leaving Stillwell Avenue to answer the job at 9 Avenue and 39 Street.

After looking at the SPRINT report (DX 2), Gerald agreed that it did not indicate that they notified Central that they were responding to that location. He agreed that it would have appeared on the Report if they had notified Central via the radio.

Gerald said that he may have moved the RMP a short distance. When asked how far he drove the RMP, he answered, "I probably moved it and then came back in because -- instead of going all the way around, I probably moved it maybe ten feet and just backed up right back into it again." He agreed that he did not even travel one whole block.

When the 9 Avenue job was finalized, Gerald was inside the car parked at Stillwell Avenue. Regarding these events of November 14, 2010, he accepted a CD and a loss of five vacation days.

During cross examination regarding the November 14 incident, Gerald testified that he did not recall having any conversations with the sergeant on his cell phone regarding who was handling the job or if he thought they needed help with the man on the tracks. As a practice, he communicates with his sergeant by cell phone.

He did remember receiving a cell phone call at about 4:06 a.m. around the time that he was responding to the job. The sergeant gave him “a heads-up” to let him know that the duty captain was in the area and to make sure that he was where he was “supposed to be.”

Captain Jason Harrell

Harrell has been a member of the service for 18 years and is currently assigned as the Commanding Officer for School Safety Investigations.

Harrell was assigned to Transit Borough Brooklyn from September 2010 to April 2011 as a Captain. On November 14, 2010, he was assigned to Transit Borough Brooklyn to work as the steady transit duty captain on the midnight tour. Harrell’s assignment was to visit all the districts within the boroughs of Brooklyn and Queens, to monitor the radio, respond to priority jobs and do site inspections. Site inspections involved checking up on police officers out on patrol and at fixed posts and directed patrols.

A fixed post is a post where a police officer is assigned for the entire tour. The only time the officer would ever actually leave that post is if someone came to relieve them for a meal or a personal reason.

A directed patrol is when a vehicle is assigned to a certain train station for a certain period of time to address some kind of condition at that location. On directed patrols, officers are expected to get out of their RMPs and go into the train station and do a site inspection. Usually there is a crime condition that they are there to address.

As duty captain, Harrell would look at the Roll Call to find out where officers were assigned. On November 14, 2010, Harrell was inside TD 34 at 4:00 a.m. TD 34 is

in Coney Island within the confines of the 60 Precinct on Stillwell Avenue and Surf Avenue near the Stillwell Avenue train station. The Stillwell Avenue train station is a very large train station, the length of a city block. The station is a multi-leveled train station above ground. The top level is where the platforms are for the trains. The second level is the entry point where subway riders swipe their Metro cards. The ground level is the street level.

At 4:00 a.m., Harrell parked in the lot of TD 34. He entered through the back door and went to the front desk. When he checked the Roll Call, Harrell saw that Sector 34 Adam had a directed patrol from 4:00 a.m. to 5:00 a.m. at the Stillwell Avenue train station. He knew that Respondent and Gerald were assigned to Sector 34 Adam. The front door for TD 34 went into the indoor Stillwell Avenue train station. He walked through the door into the train station. He went to look for the officers to check whether they were doing their directed patrol. He saw an RMP parked in the bus turnaround and assumed that that the RMP was the car belonging to Respondent and Gerald on the directed patrol. Harrell then walked through the entire train station looking for the officers.

In addition to the directed patrol, there was a fixed post where another officer was assigned. Harrell asked that officer if he had seen the two officers that were supposed to be on the directed patrol. The officer had not seen them, but had seen a car parked in the bus turnaround.

Harrell then walked down the stairs toward the car. Once he got to the main level, which is one level above street, Harrell stood there. He watched the car for five minutes to see what the officers were doing. He saw that they were sitting in the car. After five

minutes they got out of the vehicle and walked towards where Harrell was standing.

Harrell asked them what they were doing in the car.

They told him that they had gone “to back up” a job². Harrell asked them what the job was because he did not hear any priority job come over the radio. They explained that the job was for a man walking on the tracks.

Harrell then asked to see the officers’ Activity Logs. He observed that the last entry that was in their Logs was at 4:00 a.m. for the directed patrol. There was nothing recorded about the job they had described. Harrell signed their Activity Logs at 4:35 a.m. (Department Exhibit [DX] 1).

Harrell then told them that he was going to check whether there was a job that he had not heard about. Back at TD 34, he reviewed a copy of the SPRINT report from November 14, 2010. (DX 2)

Harrell explained that the SPRINT report showed that the job that Respondent and Gerard said that they had responded to came over the air at 4:06 a.m. The job was for a man walking on the tracks at 9 Avenue and 39 Street.

Harrell estimated that for a person to drive from the Stillwell Avenue train station to the 9 Avenue train station at approximately four in the morning would take less than ten minutes. Harrell testified that there is “really no traffic at night.”

When backing up another sector, officers are required to follow a specific procedure. In this case, Harrell explained, the officers should have called over the radio saying “34 Adam on the back. ”This call would have them added onto the SPRINT report by the radio dispatch.” This procedure is a requirement so that all police officers

² Harrell explained that if the job is a priority, like an altercation, it’s important to have two extra officers there to “back up”, that is, help out in case they have to apprehend somebody.

who might respond know that one patrol car is on its way. The procedure is necessary to prevent "a lot of cars flying to the same location" which could cause an accident.

When asked by the Court whether a man walking on the tracks is a priority, Harrell answered: "Obviously you don't want a civilian to be run over by a train, but it's not a scenario where a police officer would immediately need assistance."

He testified that if it was a priority job it would be marked with the radio code 10-30. The radio code 10-10 is a miscellaneous designation for a job. Whether they are responding to a priority or a nonpriority job, police officers are still expected to tell Central their location.

On cross examination, Harrell agreed that directed patrols are also done in regular commands like the 6 or the 23 precincts where Harrell previously worked. The rules are not the same for each command. A commanding officer has the discretion to modify the directed patrol.

Harrell testified that he spoke with the Borough Commander regarding how he wanted directed patrols to be performed. The borough commander required officers on the midnight shift who were on directed patrol to get out of their cars to do foot patrol.

Directed patrol in Transit involves walking the platform late at night looking for people that may be homeless, intoxicated or sleeping and ensuring that they are safe and not on the tracks. Harrell agreed that train stations in New York vary in size and in number of platforms. He agreed that it would take a different amount of time for an officer to do a directed patrol at one station than at another.

The Borough Commander told Harrell that the officers would have to check every platform and train for the entire 60 minutes. If the police officer was able to check the

area within 20 minutes, the officer was expected to “show omnipresence; in other words, to have the police officer physically stand on the platform for safety reasons. When the trains pull out, people are thinking about maybe robbing somebody or committing some kind of crime. They wouldn't do it because there's a cop standing there.” Harrell agreed that regardless how long checking the platform takes, the police officer should remain on the platform for the entire 60 minute period.

Harrell agreed that there could be a time when officers would be given directed patrols back to back. When asked whether there is any consideration of time built in for travel time between one directed patrol and another, Harrell answered that it depends on the locations.

When asked if taking time travelling from one directed patrol to another is a violation of the directed patrol rules, Harrell stated “I wouldn't think so.” If Harrell saw that the officers had directed patrol back-to-back, then he would expect them to take whatever time it would take to drive from one location to the next. Harrell did add that if traveling took time, the officers would have to articulate the reason for the delay.

Harrell agreed that sometimes when an officer has one assignment, a call on the radio can come over for another assignment that the officer believes is more important. The officer has discretion to decide whether to respond to the call. Harrell agreed that an officer has to apply common sense in almost every type of assignment.

Harrell agreed that these officers indicated that they responded to a job that was located about ten minutes away. He agreed that he never asked them how close they got to the job before the job was cancelled. He agreed that he did not ask them what time they left the directed patrol before they went to respond to the location.

He agreed that he did not ask or know what time they arrived back from the job to where their car was parked. He explained that he did not ask them because when he walked into the train station originally around 4:15 a.m., that's when he saw the car there.

Harrell agreed that based on his experience, officers sometimes fill out their Activity Logs at the start of a job and sometimes wait until the end of a job. However, he added that when an officer decides to leave a directed patrol assignment, he "would want to cover himself" by recording that.

Harrell stated that within the last five years, the Department has made it clear to the officers that they should record their Activity Log entries "expeditiously." He testified that there now exists a new and more serious Command Discipline for improper Activity Log entries, which is a Schedule "B"-CD. He stated that he issued the CDs to both Gerald and Respondent but did not adjudicate it. He issued a Schedule "A"-CD to the both of them. Harrell agreed that both Respondent's and his partner's Gerald, culpability were identical.

When questioned by the Court, Harrell stated that the job to which the officers said they responded, a man on the tracks, was "too generic" and "not verified." The SPRINT report showed that the job lasted four minutes, from 4:06 p.m. to 4:10 p.m. At 4:10 p.m., the sergeant radioed that somebody saw the man get off the tracks.

Harrell concluded, "So for them to get off the platform, to get back into their car to even go – to try and go to this job, they wouldn't have got very far. They were maybe two minutes away by the time the sergeant would have called them off."

Respondent's Case

Respondent testified on his own behalf.

Respondent

Respondent has been a member of the service for eight years and is assigned to TD 34.

Regarding Disciplinary Case No. 2009-0982³ on February 2, 2009, Respondent was assigned to the sector car for a midnight tour. His partner was Gerald.

Respondent had a directed patrol from 2:00 a.m. to 3:00 a.m. at Stillwell Avenue. His next directed patrol location was at Bay 50 Street. Respondent did not have the directive in his Activity Log, but he remembered at Roll Call that the Sergeant had given them a time of 3:15 a.m. to 3:45 p.m. for the assignment at Bay 50 Street station.

Respondent stayed at Stillwell Avenue for their directed patrol until 3:00 a.m. Respondent was the recorder for the tour. He was sitting on the passenger side and Gerald was driving. While Gerald was driving, Respondent's head was down. Respondent knew that it was a straight drive from Stillwell Avenue to Bay 50 Street. So when Gerald made a turn, Respondent lifted up his head to see where they were. After Gerald had made a turn and came to a stop, Gerald started to eat a sandwich. Respondent stated that he "was just sitting there."

Respondent testified, "And as he was eating the sandwich, and, I guess, that's about the time when I did fall asleep." He felt as though he was asleep for a couple of seconds.

At that time, Respondent was suffering from a medical condition called

³ Respondent's testimony regarding the two cases are separated into two parts.

██████████ Respondent's attorney submitted a three page document from Dr. ██████████, a physician at the clinic where Respondent was treated, which described ██████████ (Respondent's Exhibit [RX] A). Infection ██████████ can cause gastric ulcers.

Respondent's symptoms were "a lot of stomach pain" and a "lot of fatigue." On two prior occasions, Respondent asked his sergeant and the Administrative Lieutenant if he could switch his tour because the fatigue would affect him more at night than during the day.

On February 2, 2009, although he was feeling fatigued, he did not call in sick. Respondent believed that the fatigue caused by his medical condition made him fall asleep briefly that night.

On cross-examination regarding his having fallen asleep on February 2, 2009, Respondent agreed that his illness in February 2009 caused him to go out sick on occasion. He suffered from this illness from 2007 to 2009.

He admitted that at his official Department interview regarding the incident of the February 2, 2009, he did not mention his medical condition. Respondent stated that he did mention his medical condition to Sergeant Moreno. Respondent could not say whether he mentioned his condition to Moreno in February 2009.

Respondent stated that he had to see the District Surgeon because he had called out sick. When he told the District Surgeon how he was feeling, the Surgeon told

Respondent he looked fine. After he was diagnosed in October of 2008⁴, he informed the District Surgeon of his diagnosis.

Although he mentioned he was fatigued, the District Surgeon kept him on full duty. Respondent said it would not surprise him to learn that he only called out sick one time in June 2009 and that it lasted for five days.

On redirect, Respondent verified that he called out sick five times in 2008. These dates were: January 11, 2008, June 12, 2008, September 3, 2008, September 7, 2008 and November 6, 2008.

When Respondent was calling out sick in 2008, he did not know what was wrong with him. Shortly after the doctor diagnosed him with this condition, he received medicine and was put on a diet. He testified he "felt a little bit better afterward." He agreed that his condition improved after his diagnosis and treatment. He agreed that because his condition improved he called in sick only once in 2009, as opposed to five times in 2008. He agreed that his diagnosis was approximately three to four months prior to falling asleep while working.

He tried not to extend his sick leave so that he was not chronic. Even when he was not feeling well, he went to work. He tried to call in sick only when he had no choice.

Regarding Disciplinary Case No. 2011-5778, on November 14, 2010, Respondent was working a midnight tour with his partner, Gerald. Respondent believed that the time for his directed patrol on Stillwell Avenue was from 4:00 a.m. to 5:00 a.m.

⁴ Respondent's attorney submitted lab reports from Quest Diagnostics. The first page indicated a diagnosis [REDACTED] on October 1st, 2008. (Respondent's Exhibit B).

Just as he arrived at Stillwell Avenue and was getting out of the RMP, someone came over the radio screaming that there was a man on the track.

They decided to respond because the officer who had called for the job was recently hired and “did not quite know everything.” Respondent guessed “that’s one of the reasons why he came over the radio screaming.”

Respondent said that Gerald received a call around the same time they heard the job coming over the radio. He believed that call was about assisting the officer for the same job.

Respondent was not sure how far they drove to get to the job. Before they got there, the job was cancelled. Respondent and Gerald never radioed that they were responding to the job. Respondent explained that he did not get a chance to record the job in his Activity Log.

When Respondent believed that when Gerald spoke on the cell phone to the Sergeant, the Sergeant told Gerald that “the Captain is coming to scratch you guys.” The Sergeant asked if they were back from the job and if they were at Stillwell Avenue. They told him that they were at Stillwell Avenue.

Respondent then saw the Duty Captain in the station walking up the Q train platform. The Captain looked at them and walked towards them, meeting them in the mezzanine.

Respondent stated that the Captain asked them how they had just gotten out the vehicle. Gerald told him that there was a job that they were going to respond to that was just cancelled. Then the Captain asked to see their Activity Logs. He inspected and signed them. The Captain then told them to stay on the platform and left. When

Respondent and Gerald went back to the Command, the Sergeant told them that they were getting a CD from the Captain.

On directed patrols, Respondent would use his own discretion in deciding whether or not to respond to a job. He would base his decision on whether or not he thought it was important to assist someone.

On cross-examination regarding the incident of November 14, 2010, Respondent stated that Gerald had received two phone calls from a sergeant.

Respondent believed that the first phone call that came in at approximately 4:06 a.m. was from the Sergeant telling Gerald to check on the job. He believed that the first call was about responding to the job because the officer had come over the radio screaming.

The second phone call was from the sergeant telling them that the Duty Captain was around. He believed that the call came at 4:28 a.m.

Respondent agreed that when that second phone call came he was in the RMP. He said that "no less than ten seconds later" he opened the door to exit.

Respondent agreed that it is protocol to mark something 10-85, if there is something wrong with a police officer over the radio. After being shown the SPRINT report, Respondent agreed that the job was marked "gone on arrival when the police officers arrived at 4:10 a.m." Respondent agreed that he and Gerald were still in the car at 4:28 a.m.

When asked if they ever went to 9 Avenue and 39 Street, Respondent replied, "9 Avenue and Stillwell is about a good 15 to 20 minute drive." When asked if they went to the next job, he replied, "We -- we never got there."

Respondent testified to having a different recollection of the distance than Gerald as to how far they drove. He said, "We drove a good distance. . . ." Using lights and with no traffic, he said it took them five minutes to get from Stillwell Avenue to the Belt Parkway, which was about fifteen blocks.

FINDINGS AND ANALYSIS

Disciplinary Case No. 2009-0982

In Specification No. 1, Respondent was charged with being off-post and sleeping on February 2, 2009 from 3:10 a.m. until 3:15 a.m. in the vicinity of Shore Parkway between Stillwell Avenue and West 16 Street in Kings County during his directed post at Bay Street from 3:00 a.m. to 3:45 a.m.

Respondent pled guilty to Specification No. 2, which states that he failed to make required Activity Log entries and to Specification No. 3, which states that he was sleeping in his assigned vehicle. Both these specifications state the same date, time and location as Specification No. 1.

Respondent testified that he remembered that his second directed patrol began at 3:15 a.m. Respondent's partner that night, Gerald, indicated that he remembered some "discrepancy" regarding a few minutes difference about when the second directed patrol was supposed to start.

Gerald's testimony was vague about this discrepancy. He never explained further or stated specifically what the actual time discrepancy was between the Duty Captain's time frame and the Sergeant's. He seemed to indicate that he was following the time directed by the Sergeant at Roll Call.

Esposito, the sergeant who conducted Roll Call for Respondent and Gerald that night, testified that he assigned them a directed patrol from 3:00 a.m. to 3:45 a.m. The official Roll Call submitted by the Department corroborated Esposito's testimony. This Court found Esposito's testimony credible.

With respect to Specification No. 3, Respondent acknowledged guilt. He admitted that he was sleeping at a place which the evidence demonstrated was a cooping location. The other two specifications stemmed from this most serious specification. If Respondent was sleeping, then he was not on his post and he was not making the appropriate Activity Log entry.

Admitting the seriousness of Specification No. 3, Respondent offered mitigating testimony and documentation regarding a medical condition. He claimed that his medical condition caused him to fall asleep.

On October 1, 2008, approximately four months before Respondent fell asleep on the job, Respondent was diagnosed [REDACTED] [REDACTED]. Before his diagnosis, he was out sick four times. After his diagnosis, he testified that he received treatment through medication and diet and that his symptoms improved. He agreed that because his condition improved, he called in sick only once in 2009, as opposed to five times in 2008. At his official Department interview when he was questioned about falling asleep, Respondent never mentioned his medical condition.

While Respondent's attorney argued that it would take some time for Respondent to improve and still not suffer from fatigue, there was no medical evidence brought before this Court to support this argument⁵. Rather, the evidence indicated that on the

⁵ There was also no mention of fatigue in the document submitted by Respondent which described [REDACTED] and its symptoms.

date that Respondent was found sleeping, he had been receiving treatment for four months and could have made a full recovery. No persuasive documentation or testimony was presented to this Court that when Respondent fell asleep that he was or could still be suffering the symptoms of [REDACTED]. Therefore, Respondent is found Guilty of Specification No. 1.

Disciplinary Case No. 2011-5778

In Specification No. 1, Respondent was charged with being off post on November 14, 2010.

In Specification No. 2, Respondent was charged with failing to make required Activity Log entries on November 14, 2010.

There was a great deal of testimony on both sides as to how long it took or should have taken Respondent and Gerald to respond to another job during the time they were scheduled for a directed patrol at the Stillwell Avenue train station. Respondent and Gerald gave two different and conflicting statements about how long it took them and how far they drove.

When Harrell checked the SPRINT report, there was no record of a call made by Respondent and Gerald. Harrell explained that the two should have followed police procedures and radioed that they were responding to a job. They should have made this call, whether they were responding to a priority or a non-priority call.

The explanation from Respondent and Gerald that they responded to another job did not seem credible to Harrell. The call was not a priority and it

was “finalized” within a few minutes. Harrell testified that since the job lasted only four minutes, the officers could not have gotten too far.

But finally, this Court need not make a determination as to how long this job should have taken and where Respondent and Gerald were supposed to be at what time. Whether Respondent and Gerald made up a story about responding to another job or parts of a story is not the issue.

Harrell testified that he saw the RMP parked in the bus turnaround on the first level of the train station around 4:15 a.m. He assumed that Respondent and Gerald were doing their directed patrol and went to look for them. He checked throughout the station and could not find them. He asked an officer who was assigned to a fixed post at that train station if he had seen Respondent and Gerald on their directed patrol. The officer told him that he had not seen them, but he had seen the car parked in the bus turnaround. Harrell then returned to where he originally saw the RMP. He watched Respondent and Gerald sit in their vehicle for five minutes during the time that they should have been patrolling the train station. After five minutes, they got out of the car. Harrell asked them what they were doing and they told him about the other job. Harrell looked at Respondent’s Activity Log and made a notation in it at 4:35 a.m.

Respondent’s indication that Gerald had just pulled the car into the station after returning from the job is not plausible. Harrell gave credible testimony that he watched Respondent and Gerald⁶, sit in the car for five minutes. Since Harrell first saw the car at 4:15 a.m., and the other officer posted at the station had also seen the car parked before Harrell had, it is likely that the car was parked there

⁶ Gerald already pled guilty to this specification.

before 4:15 a.m. and that the two were sitting in the car for more than five minutes.

Even if Respondent and Gerald did respond to the call for this other job, there was no testimony by Respondent or Gerald explaining what they were doing for five minutes sitting in their RMP. Respondent, who was the recorder that night, did not use those five minutes to mark the job in his Activity Log. Whether they had responded to another job or not, and however long it did or did not take them to respond and return, this court can only conclude that Respondent and Gerald were taking a five minute break. Therefore, Respondent is found Guilty of Specification Nos. 1 and 2.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974).

Respondent was appointed to the Department on July 1, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Gerald received the same Charges and Specifications for both cases as Respondent did. With respect to specifications for February 2, 2009, Gerald accepted the 18 day penalty. With respect to specifications for November 14, 2010, Gerald received a CD and a five day penalty.

Respondent's attorney argued that Respondent should not be punished for rejecting the penalty that Gerald accepted. He argued that Respondent should be treated similarly and not receive a higher penalty.

In this case, Gerald's penalty is not controlling. Gerald has worked for the Department for 22 years, 14 more years than Respondent. Upon a finding of guilt, the penalty can always be greater or lesser than the plea offer. The real question is whether the penalty recommended by the Department is vindictive or unreasonable.

To support her argument for a 30 day penalty, the Advocate cited three cases. In *Case No. 85300/09* (January 26, 2011), Respondent was scheduled for his directed patrol, was not at his scheduled directed patrol location and was observed sleeping. This 13-year police officer with no prior disciplinary record negotiated 20 vacation days as a penalty. In *Case No. 85299/09* (February 22, 2011), a 21-year police officer with no prior disciplinary record negotiated a penalty of 18 vacation days for being off-post, failing to make proper Activity Log entries, and for being observed sleeping in his assigned vehicle. In *Case No. 86234/10*, (September 9, 2010) a 17-year sergeant with one prior adjudication negotiated a penalty of 15 vacation days for leaving his post for a period of 31 minutes to visit his girlfriend. In addition, the sergeant failed to maintain his Activity Log.

All three of these cases indicate that sleeping or being off post by a veteran officer with no prior disciplinary record would warrant, at minimum, a 15 day penalty. Two separate occurrences of the same misconduct would warrant a 30 day penalty.

Respondent's attorney did not cite any cases that suggested a 30 day penalty is vindictive or unreasonable.

Therefore, it is recommended that Respondent forfeit 30 vacation days as a penalty in this matter.

Respectfully submitted,



Amy J. Porter
Assistant Deputy Commissioner – Trials

APPROVED

FEB 12 2013
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER PAUL PIERRE
TAX REGISTRY NO. 935513
DISCIPLINARY CASE NO. 2009-0982 and 2011-5778

In 2011, Respondent received an overall rating of 3.0 “Competent” on his annual performance evaluation. He was rated 3.0 “Competent” in 2009 and 2010.

[REDACTED]
[REDACTED] Respondent has no prior formal disciplinary record.

For your consideration.



Amy J. Porter

Assistant Deputy Commissioner – Trials