



POLICE DEPARTMENT

May 29, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Martin Maloney
Tax Registry No. 944114
Midtown South Precinct
Disciplinary Case No. 2010-3236

The above-named member of the Department appeared before the Court on March 2, 2012, charged with the following:

1. Police Officer Martin Maloney, while assigned to the 14th Precinct,¹ while on-duty, at approximately 2230 hours, on or about April 29, 2010, in the vicinity of 8th Avenue, between West 30th and West 31st Streets, New York County, wrongfully and without just cause was discourteous to an unidentified woman, to wit: said Police Officer Martin Maloney threw liquid from a cup onto the unidentified woman's face.

P.G. 203-09 Paragraph 2 PUBLIC CONTACT DISCOURTESY

The Department was represented by Mary Lynne Frey, Esq., Department Advocate's Office. Respondent was represented by John Tynan, Esq., Worth, Longworth, & London, LLP.

Respondent, through 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

Respondent is found Not Guilty.

¹ I.e., the Midtown South Precinct.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department did not call any witnesses. It introduced into evidence the phone interview by a Civilian Complaint Review Board (CCRB) investigator of Person A after Person A called 311; the CCRB interview of Person B after Person B called 311; and the in-person CCRB interview Person A

CCRB Phone Interview of Person A

(see Department's Exhibit [DX] 3, recording; DX 3a, transcript)

Person A was called back by an investigator on May 3, 2010. He said that he was standing on the east side of Eighth Avenue between 30th and 31st Streets (in Manhattan). He was with a friend, Person B. They had just taken a class together.

Person A stated that he heard the police "hit their siren real quick." Person A looked across the street and saw a woman standing in front of a double-parked police car. He agreed that he previously had provided a vehicle number of 2400 [Respondent later testified that this was his radio motor patrol car (RMP) on the tour in question; this was confirmed by the roll call (DX 1) and vehicle assignment sheet (DX 2)].

Person A said that it looked like the woman was about to cross from the west to the east side of Eighth Avenue. She appeared to be Hispanic and in her mid- to late 30s.

Person A said that the woman looked into the car, and she and the officers "exchanged some words." It did not appear that they were speaking very loudly or arguing. It was not "necessarily like a pleasant interaction" but "it didn't look like anything big . . . was going on."

Person A described the passenger as a male white with at least a receding hairline. He had a medium build, with perhaps a few extra pounds. **Person A** could only say that the driver was male. They were in a blue and white sedan. The woman “came around” and the officers drove up so that the passenger window was next to her. After they exchanged some more words, the officer in the passenger seat “threw whatever he was drinking” in her face. The officers laughed and drove off. **Person A** said that the woman “ran off so fast.”

CCRB Phone Interview of **Person B** (see DX 4, recording; DX 4a, transcript)

Person B was called by an investigator on May 13, 2010. **Person B** knew **Person A**. He stated that the incident occurred “about 10:30” on April 29th (in 2010) [this was a Thursday] on the west side of Eighth Avenue between 30th and 31st Streets. It was in front of “the like Chinese restaurant.” He called 311 a few minutes later.

Person B was standing near Amadeus Pizza and a deli. He was with **Person A** and two individuals named Matt J. Weir and Matt B. Weir. **Person B** and **Person A** were in an improv class together.

He stated that he heard the whoop of a siren and saw a woman walking with a clamshell foam food container. She was walking up Eighth Avenue and eating in the street. She was in her 50s and had short brown or black hair. She was a little over five feet tall, perhaps 5'2" and might have been Latina.

Person B stated that a police car was driving and slowed down next to the woman. She was in their way. The two uniformed male officers told her something and she said something back. **Person B** also said that the woman said something first and the officers responded. It was not a “huge confrontation.” The woman was muttering, not yelling. Whatever she was saying did not

seem very cogent. Person B stated that the police officer on the passenger side laughed and threw a drink in her face. The driver laughed too and quickly drove away, as the light had changed.

The officer that threw the item had dark brown hair. Person B chuckling as he attempted to describe the officer's ethnicity, said that he was "Latin Italiano." When the investigator followed up, Person B concurred, saying that he was "[l]ike Hispanic" but "sort of more . . . towards the olive spectrum." Person B noted that it was dark out, however. The officer had a large build and Person B did not think he was short. He was in his mid-30s. Person B believed that the driver had brown or black hair, but "it happened so quickly. You know how it is." The driver might have been Hispanic as well.

Person B thought the woman was intoxicated on either alcohol or drugs, and noted that she did not have much of a reaction to having a drink thrown in her face. Thus it did not appear to be a hot drink. He could not tell further what kind of beverage it was. It might have been water as it appeared to be clear. The liquid hit her on the left side of her face, and probably her chest as well because of the angle. The officer did not appear to throw any container. When asked if he could see "what kind of cup the officer was holding," Person B answered, "No. . . . I just saw liquid go in her face."

Person B said that the woman "froze" and appeared to be stunned. She "straightened up a little bit" and closed her eyes. She kept walking and got onto the sidewalk. Person B took down the "license plate" of the police car; it was 2400.

Person B stated that he was standing two or three feet ahead of the police encounter. It was not raining.

In-Person Interview Person A (see DX 5, recording; DX 5a, transcript)

Person A was interviewed on May 12, 2010. His date of birth was March 20, 1985. He stated that during the incident, he was standing and talking to one person with whom he had just finished a class, and two people with whom he participated in a show. It was not raining. The police sounded their siren when the woman was in front of them.

Both officers were in uniform and in vehicle number 2400. Person A could only see two officers in the car. The encounter took place in the middle of the block, not the crosswalk. The woman did not have the right of way.

Person A gave several descriptions of the individuals involved, including the officer described by the lead investigator as the one "who threw the contents of his cup." Person A described this officer as neither obese nor thin, although the second investigator recounted his description as "heavyset" and Person A did not correct him. This officer was in his 40s, perhaps, and had very short hair.

Person A described the woman as in her late 30s or early 40s, although the second investigator recounted his description as "late thirties" and Person A did not correct him. She was 5'6" or 5'7". She was "relatively thin" and might have been wearing a hat.

The woman "sort of like glared" at the officers and looked annoyed that they had used the siren. They spoke for ten seconds.

Person A said that the officer did not throw the cup itself, only the contents. It appeared to be a plastic fast food cup. The material hit the woman in the middle of the face. Person A could see that there was liquid on her face. She stood there and wiped it off. She looked frustrated but walked away almost immediately, southbound.

Person A stated that he was directly across the street from the encounter or just "a couple of feet" north of it.

Person A said that he called 311 "[r]ight away," within two minutes of the incident. Another person he was with called as well.

Respondent's Case

Respondent testified on his own behalf.

Respondent

Respondent had been a member of the Department for over five years. At the time of trial, he was assigned to the Madison Square Garden (MSG) detail, a 1600x0035 tour.

Respondent was very familiar with the block of Eighth Avenue between West 30th and 31st Streets. It had four bars; three on the east side of the street. Brother Jimmy's was one of them. Blamey Stone was down the 31st Street corner from Brother Jimmy's. An entrance to Pennsylvania (Penn) Station was near the location as well. Respondent also noted the presence of the central post office (the James A. Farley Post Office Building).

Respondent regularly was at the location in question on Thursday evenings between 2200 and 2300 hours. Pedestrian traffic there was "extremely high" at all times, however.

On April 29, 2010, Respondent was working the 4x12 tour in the Midtown South Precinct. He was assigned to sector Henry, a low priority precinct-wide sector that handled car accidents, past larcenies and commercial burglaries. He was the recorder; his partner, Police Officer Al (Alberto) Ortiz, was the operator.

At approximately 2230 hours, Respondent was on the block in question travelling in a marked RMP. He and Ortiz stopped the car because Ortiz was going to get his meal. When Ortiz got out of the car, Respondent saw the owner or manager of a Chinese restaurant having "a little argument" with a woman on the west side of the street. Respondent thought she was either a pedestrian or a customer. The proprietor was "being a little more aggressive" and the woman was not responding.

Respondent and Ortiz approached the two individuals. Respondent was "not quote unquote but pretty much" the woman "wasn't a customer." She was just sitting inside the place and the manager wanted her to leave. The restaurant had counter service and about twelve tables.

The officers spoke to the woman and told her she had to leave. She appeared to be "very more irrational" and was not in the right state of mind. After a "couple seconds," however, she was walking with the officers up Eighth Avenue toward the post office. She walked in front of the officers and they left her near the corner of 31st Street. The woman did not say anything to them. The officers returned to their RMP and got in.

There were no bars between the Chinese restaurant and the corner.

Respondent testified that within seconds of him and Ortiz getting back into the RMP, the woman walked back toward them, "in traffic." The officers were double-parked in the left-most lane of traffic. The woman was walking in the next traffic lane over. There were four lanes of traffic altogether. There was parking on either side.

When the woman passed Respondent's window, Respondent told her she had to get out of traffic. Ortiz told her much the same thing.

Respondent stated that the woman did not appear to be intoxicated, but "it was more like she wasn't all there." She "really didn't say anything." She shook her head and kept walking past the officers, but got out of traffic.

Respondent was unsure if Ortiz then got food at the Chinese restaurant or a pizza place, but they returned to the station house and took their meal.

Respondent denied having physical contact with the woman. "A hundred percent absolutely not I would never" throw anything at her. "A hundred percent I definitely would never do something like that." Respondent did not see anyone else throw anything at the woman.

On cross examination, Respondent said that he was not familiar with "the particular people that were regularly on that block." He could not say if he had "consistent conflicts" with anyone there. He had more now that he was assigned to the MSG detail.

Respondent testified that Ortiz was getting either food or a drink, or at least "something that he needed." Respondent first denied that Ortiz brought back food, then said that he did not remember if he did so or not.

Respondent described the woman as black or African American. He was "90 percent sure" of this. She had a dark complexion and was in her 40s. He did not recall seeing anything in her hands.

The total encounter took three minutes, perhaps less. Respondent admitted that he did not make an Activity Log entry concerning the incident. It was "such a small thing" that Respondent did not consider it to be a job. On other occasions, he had "sat there for five minutes and had conversations with people and I wouldn't put that in my memo book if I am just interacting there was no crime or anything committed." Respondent agreed that he made several

other entries that tour. The assignments were “nonstop” for sector Henry. These other entries, as many as twenty of them, were for radio runs.

It was possible that Respondent had an encounter that evening with four males in their 20s, as that was common considering the bars in that area. He did not recognize Person A's photograph when CCRB investigators showed it to him. He was not familiar with that name or Person B name. If he had felt “confronted . . . by four male individuals,” he would have put that in his Activity Log.

FINDINGS AND ANALYSIS

Respondent is charged with throwing a drink in the face of an unidentified woman. The alleged incident took place on Eighth Avenue in Manhattan between West 30th and 31st Streets on Thursday, April 29, 2010, around 2215 or 2230 hours. Two men, Person A and Person B called 311 after seeing an encounter between a woman and two police officers seated in a RMP. The woman had walked into the street and the officers were speaking to her. She was in the street, to the right of the RMP; the vehicle was in the left-most lane of traffic. Both Person A and Person B alleged that the recorder threw a drink in the woman's face, the officers laughed, and then drove off.

Respondent agreed that an encounter took place, but the operative details were different. He testified that he and his partner, Ortiz, were assigned to sector Henry within the confines of the Midtown South Precinct. This, Respondent explained, was a precinct wide assignment that focused on low-level but high-volume incidents, like calls for assistance. Respondent testified that Ortiz stopped their RMP on the west side of Eighth Avenue between 30th and 31st Streets, possibly intending to get something to eat or drink. Respondent and Ortiz, however, ran into the proprietor of a Chinese take-out type of restaurant. The man was having a problem with a

woman who was sitting in the restaurant but had not ordered or paid for anything. Respondent and Ortiz told her to leave. She did and the officers returned to the RMP. The woman, however, walked into the street right next to the window of Respondent, who was the recorder. Respondent told her to get onto the sidewalk. She complied.

The Department argued that the accounts of Person A and Person B were worthy of belief because their allegation was not the type of thing to make up. In the Department's view, it was just too odd of an incident to fabricate.

That cannot be the end of the inquiry. The allegation itself is just as strange, being that it happened in public in one of the busiest areas of the city. It is possible that the witnesses saw an encounter but misinterpreted the situation. Thus, their accounts must be examined closely.

The Department's case relies entirely on hearsay. Although hearsay is admissible in this forum, see Matter of Ayala v. Ward, 170 A.D.2d 235 (1st Dept. 1991), there are significant reasons for caution in cases like this that present close questions of credibility. The hearsay is central to the Department's case, so there is a question of basic fairness in using the hearsay to reach a finding of fact. See Case No. 77005/01, p. 6 (May 27, 2002) (hearsay declarations are insufficient to support findings of guilt in cases that pose close questions of credibility).

The Department relies on the assertions of Person A and Person B that Respondent threw a drink in the woman's face. Thus, their believability is crucial to the Department's case. The Department offered no evidence to corroborate their claims.

Person A and Person B were contacted by the Department in reference to this case but did not appear for trial. In light of their failure to testify, their ability to have seen what they alleged to have seen cannot be tested. Moreover, the Court cannot observe their demeanor, explore

possible motives to lie, or assess the credibility of their accounts after the test of cross-examination.

This is especially true because much of the witnesses' accounts was consistent with Respondent's trial testimony. It was undisputed that the incident occurred on the west side of Eighth Avenue, with the RMP in the westernmost lane of moving traffic. The woman was at the passenger side of the vehicle. It was undisputed that she was mentally ill or intoxicated. Although the witnesses did not corroborate Respondent's testimony that a Chinese restaurant was involved, Person B stated that the woman was carrying a foam food container, eating from it in the street. The officers used the "whoop" siren feature to get the woman's attention. The woman spoke to the officers.

The incident took place at night, well after dark. Person A and Person B were standing across the street. There were three lanes of traffic and one of parked cars between them and the woman. They did not state what traffic was like, or how many people were on the street. The location, however, was just one block south of Madison Square Garden and Penn Station. The east side of the block, where Person A and Person B were standing, in particular was the location of several bars, including Brother Jimmy's and Blarney Stone. It was a Thursday night.

No relevant information is known about Person A or Person B other than the fact that Person A was 25 years old. The Advocate stated that they were "classmates;" in actuality, they simply were coming from an improv class. Person A noted that he was a performer. Everything else, from possible other occupations to relations with law enforcement, is unknown. Additionally, the 311 calls, if recorded, were not introduced into evidence. Nor were any written 311 summaries introduced. Thus, the Court cannot address what the men said to the operator during their first report of the incident.

Further, while Respondent was facing Person A and Person B the woman was facing away from or at least perpendicular to them. The witnesses were standing even with or slightly to the north of the RMP. Person B quantified it as two to three feet. That would yield a very sharp angle from across the street. The Court questions how Person A and Person B could see not only that Respondent threw a liquid, but that it landed on the woman's face. Neither man was sure exactly what was thrown. Person A believed that it was a fast-food type of cup and that the liquid was clear. Person B did not even see a cup; he only saw a liquid coming onto the woman's face. Their descriptions of the woman's height varied Person B described her as short while Person A gave an average height.

As a party to the action, Respondent was an interested witness. See People v. Agosto, 73 N.Y.2d 963, 967 (1989) (defendant is interested witness as a matter of law); Coleman v. New York City Transit Auth., 37 N.Y.2d 137, 142 (1975) (an actor in the transaction, having motive to shield self from blame, is an interested witness, even if not a party). He did not remember every detail either, and hedged on some of them, but nothing in his testimony stands out as concocted for trial purposes. He explained that there was an interaction between him and the woman, and that he directed her to move on. It is possible that part or all of this interaction was what Person A and Person B saw.

The Department argued that the lack of a notation in Respondent's Activity Log (Court Exhibit 1) about his version of the incident demonstrated the falsity of his testimony. Respondent's Activity Log is highly detailed, noting several calls for assistance, aided calls and larceny complaints. The Department suggested that Respondent also would have noted ordering a nonpaying individual in a restaurant to move on, and repeating that instruction when she stood in the street. The Court disagrees. Activity Log entries are not required every time a

Department member interacts with a citizen. The incident here was not major enough that it per se had to be noted in the Activity Log. As Respondent noted, it was not a radio run and did not involve a crime.

Moreover, the Department asserted that Respondent was not credible because he testified that the woman was black, while Person A and Person B said that she was Latina. The Court does not see why one description is more credible than the other, as no photograph or other image of the woman was produced for the Court to make its own judgment.

On the other hand, while Person A accurately described Respondent as white and with a receding hairline, Person B described him as "Latin Italiano. . . Like Hispanic . . . but . . . sort of more . . . towards the olive spectrum." The Court does not find Person A correct description of Respondent as proving his ability to see that Respondent threw a drink in the woman's face.

In sum, the Court's analysis does not mean that it would not have credited Person A and Person B had they testified at trial. Because they did not, however, their hearsay accounts were never examined with the test of cross examination and their ability to perceive the events accurately could not be evaluated. Thus, Court concludes that the Department failed to prove that Respondent threw a drink in the face of the unidentified woman. Accordingly, Respondent is found Not Guilty.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED
OCT 09 2012

RAYMOND W. KELLY
POLICE COMMISSIONER