



POLICE DEPARTMENT CITY OF NEW YORK

July 20, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Ostende Alvarado
Tax Registry No. 949837
Critical Response Command
Disciplinary Case No. 2015-13776

Police Officer Tim Myo
Tax Registry No. 950930
40 Precinct
Disciplinary Case No. 2015-13777

Charges and Specifications:

Disciplinary Case No. 2015-13776

1. Said Police Officer Ostende Alvarado, while on-duty and assigned to the 40th Precinct, on or about June 28, 2014, failed to generate a Complaint Report Worksheet after being informed that a complainant was the victim of a crime, as required.

Operations Order #5, 2012, Page 1, Paragraph 2(a) - PROPER
PRELIMINARY INVESTIGATIONS OF COMPLAINTS, COMPLAINT
RECORDING AND ACCURATE CLASSIFICATION OF COMPLAINTS;
P.G. 207-07, Page 1, Paragraph 3 - PRELIMINARY INVESTIGATION OF
COMPLAINTS

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COMPLAINTS

Appearances:

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

For Respondents: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street - Suite 640
New York, NY 10038

Hearing Date:
May 9, 2016

Decision:
Guilty

Trial Commissioner:
DCT Rosemarie Maldonado

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on May 9, 2016. Respondents, through their counsel, entered a plea of Guilty to the subject charges and testified in mitigation of the penalty. A stenographic transcript of the mitigation record has been prepared and is available for the Police Commissioner's review.

SUMMARY OF EVIDENCE IN MITIGATION

As Respondents have pled guilty, the underlying facts of this matter are not in dispute. Respondents worked together steadily as patrol partners while assigned to the 40 Precinct in the Bronx. On June 28, 2014, they responded to a "10-21" radio call of a past burglary at [REDACTED]. A male was waiting for them outside an apartment building and reported to them that "somebody broke into his house." When Respondents accompanied him upstairs to investigate, the male complainant asserted that an Xbox gaming console was missing. (Tr. 7-9, 11, 27-29, 31) Respondents continued to speak with the complainant but did not prepare a complaint report. The job was finalized over the radio as 90-Y ("unnecessary"). (Tr. 21-22, 39-40)

In opting to leave the location without preparing a report, Respondents violated Operations Order 5 ("Proper Preliminary Investigations of Complaints, Complaint Recording and Accurate Classification of Complaints"), issued January 17, 2012. The Order provides, in pertinent part:

- (a) Members of the service who (during the course of the initial interaction with a complainant) are informed that the complainant has been the victim of a crime must document that incident on a COMPLAINT REPORT WORKSHEET.
- (f) Member of the service will not take the following factors into consideration when determining whether a COMPLAINT REPORT WORKSHEET is to be prepared:
 - 1. The ability of the complainant to identify a perpetrator,
 - 2. The complainant's willingness to follow through on an investigation,
 - 3. The complainant's willingness to prosecute an offender,
 - 4. The complainant's refusal to return to a command and speak with detectives,
 - 5. The complainant's refusal to view photographs
 - 6. The complainant's ability to provide receipts for property they are reporting stolen (receipts are not required).

The above situations require a COMPLAINT REPORT WORKSHEET to be prepared and do not justify a complainant as being labeled "uncooperative."¹

Respondents have admitted their failure to comply with Operations Order

5. Thus, the only issue before this tribunal is whether Respondents should receive

¹ This subsection, "Processing Complaints Received from Uncooperative or Unwilling Complainants," further provides:

- (a) If a member of the service encounters a complainant who has been the victim of a crime and the complainant provides information that established elements of a crime to the member and then refuses to provide pedigree and contact information (name, address, date of birth, telephone number(s), email address(es)), the member MUST request the response of the patrol supervisor.
- (b) Patrol Supervisors will respond, interview the complainant (if available) and document in his/her activity log attempts to gain the complainant/victim's pedigree and contact information (e.g., interview of others present, witnesses, etc.).
- (c) Ultimately, if the elements of a crime have been established and the complainant refused to provide pedigree and contact information, the patrol supervisor will direct the initial member of the service who encountered the complainant to prepare COMPLAINT REPORT WORKSHEET and classify the incident in accordance with Department's Crime Complaint Reporting System Reference Guide
 - 1. The complainant will be listed as "PSNY."
- (d) Members of the service will not finalize an assignment indicating that a report will be taken at a later date.
 - 1. If a complainant expresses their inability or unwillingness to remain at the scene to speak with a supervisor or return to the command to view photographs and/or speak with a detective, the member of the service is to obtain the complainant's pedigree and contact information (name, address, date of birth, telephone number(s), email address(es)) and generate a COMPLAINT REPORT WORKSHEET.

the penalty of fifteen (15) vacation days recommended by the Department Advocate's Office, or whether, as proposed by Respondents' counsel, retraining adequately addresses their failure to follow proper procedures with regard to paperwork.

According to Respondent Alvarado, the complainant had not been at his apartment in three weeks. When he returned, he found the front door open and a new lock in place for which he did not have a key. The complainant told the officers that the apartment had been "somewhat" messy when he left, but that "some of the mess was due to somebody going through his stuff." Respondent Alvarado confirmed that the complainant's apartment was "dirty" and "a mess." (Tr. 10-11, 16-17)

Based on what he had been told, Respondent Alvarado would typically have filled out a complaint report for "burglary, lost property." He recalled advising the complainant "that we can do a report" and began their investigation. When the complainant asked if he would recover his property, Respondent Alvarado advised him that the chances were "very slim." The complainant then indicated that "[i]f he wasn't getting his property, that he didn't want the complaint done." (Tr. 12-13)

Respondent Alvarado alleges that he called a patrol supervisor to inform him of the "possibility of a past burglary" and ask for guidance. He told the supervisor that "the complainant wasn't sure if he packed [the missing property] or it was stolen." At trial, Respondent Alvarado did not recall the supervisor indicating that he would come to the scene, although he did state so at his official Department interview. (Tr. 19-21)

Furthermore, he denied having called a supervisor because he believed it was in fact a burglary. (Tr. 18)

When asked what he did next, Respondent Alvarado stated “[b]eing that the complainant didn’t want the report, we didn’t take the report.” (Tr. 13) He advised the complainant that if he found the serial number for the Xbox, or a receipt, he could file a report at a later time. (Tr. 14, 21-22)

Like his partner, Respondent Myo recalled the apartment being “disheveled” and that the complainant was in the process of moving. The complainant reported that he had found his apartment door open and lock changed. Respondent, however, noticed no sign of forced entry. (Tr. 29-31, 35-36) Within five minutes after arriving, Respondent Alvarado called a supervisor. (Tr. 32-33, 38)

When the complainant mentioned a missing Xbox, Respondent Myo asked if he wanted them to take a report. The complainant inquired about “the likelihood of him getting his property back.” He recalled responding that the odds were “slim” but if he had a serial number or receipt the precinct could check pawn shops. Respondent Myo recalled the complainant stating that he did not know where the box was, that he would look for it and that if he was “not going to get . . . [his] property back, there is no point.” Respondent Myo advised the complainant that if he changed his mind he could come to the precinct, fill out a stolen property form and speak to the burglary team. He estimated that they finalized the job and left the apartment after approximately 30 to 45 minutes and suggested there were about ten jobs pending when they left this location. (Tr. 31-33, 36-37) When asked why he did not prepare the complaint report, Respondent Myo explained, “We didn’t know that was the way to do it.”

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondents' service records were examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent Alvarado and Respondent Myo were both appointed to the Department on July 6, 2011. Information from their personnel records that was considered in making this penalty recommendation is contained in attached confidential memoranda.

The Department Advocate argued that there was no "legitimate or credible excuse" for this tribunal to consider minimizing the recommended penalty of fifteen (15) vacation days. (Tr. 50-52) In support of this recommended penalty, the Advocate cited to *Disciplinary Case No. 2012-8142* (December 12, 2014) (eight-year police officer, with no prior disciplinary history, negotiated a penalty of fifteen (15) vacation days for failing to prepare a Complaint Report and failing to conduct a complete investigation) and *Disciplinary Case Nos. 2012-7182, 2012-7183* (April 19 & 29, 2013) (nine and ten-year police officers, with no prior disciplinary histories, negotiated penalties of fifteen (15) vacation days each for failing to prepare a Complaint Report and failing to conduct a preliminary investigation.)

Conversely, Respondents' counsel asked this tribunal to consider Respondents' overall service records and suggested that reinstruction would be the appropriate mechanism to address their violation of Operations Order 5. Counsel argued that Respondents were not intentionally trying to hide a crime but were merely doing what they believed the complainant wanted and moving on to another job on a busy night. (Tr. 46-49)


The proper documentation of crimes, and the accurate classification of complaints, are essential to the Department's crime fighting function and reputation for

integrity. That is one of the reasons Operations Order 5 is unambiguous in its mandate. Accordingly, a penalty requiring the forfeiture of vacation days is warranted. As Respondents' counsel correctly conceded, ignorance of the Operations Order is not a defense.

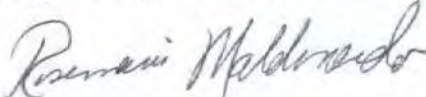
It should be noted that, unlike the matter at hand, in the cases cited by the Department Advocate a 15 day penalty was imposed as a sanction for two separate charges of misconduct, including the failure to conduct an investigation. In light of this distinction, the 15 day penalty imposed in those cases seems inapplicable and too severe. For example, in more recent cases where respondents were charged with failure to prepare a complaint report, multiple officers have received lesser penalties ranging from eight to ten vacation days. See *Case No. 2014-12514* (January 13, 2016) (five-year police officer, with no disciplinary record, negotiated a penalty of eight (8) vacation days for failing to prepare a complaint report); *Case No. 2014-12513* (April 3, 2015) (three-year police officer, with no disciplinary record, negotiated a penalty of ten (10) vacation days for failing to prepare a complaint report.)

Taking this recent precedent into account, I find that a penalty of ten (10) vacation days would reasonably and fairly address Respondents' failure to comply with the complaint reporting requirements outlined in Operations Order 5.

APPROVED

OCT 06 2016

JAMES P. O'NEILL
POLICE COMMISSIONER

Respectfully submitted,


Rosemarie Maldonado
Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER OSTENDE ALVARADO
TAX REGISTRY NO. 949837
DISCIPLINARY CASE NO. 2015-13776

Respondent was appointed to the Department on July 6, 2011. His last three annual performance evaluations were 4.0 overall ratings of "Highly Competent" in 2014 and 2015, and a 3.0 rating of "Competent" in 2013. He has no medals.

Respondent has no prior disciplinary history. [REDACTED]

For your consideration.

Rosemarie Maldonado
Deputy Commissioner Trials



POLICE DEPARTMENT CITY OF NEW YORK

From: Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER TIM MYO
TAX REGISTRY NO. 950930
DISCIPLINARY CASE NO. 2015-13777

Respondent was appointed to the Department on July 6, 2011. His last three annual performance evaluations were a 4.5 overall rating of "Extremely Competent/Highly Competent" in 2015, a 4.0 rating of "Highly Competent" in 2014, and a 3.0 rating of "Competent" in 2013. He has no medals.

Respondent has no prior disciplinary history. [REDACTED]

For your consideration.

Rosemarie Maldonado
Deputy Commissioner Trials