



POLICE DEPARTMENT CITY OF NEW YORK

March 9, 2017

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Erik Powers
Tax Registry No. 944907
81 Precinct
Disciplinary Case No. 2015-14071

Police Officer Mark Xylas
Tax Registry No. 948160
81 Precinct
Disciplinary Case No. 2015-14072

Police Officer Ryan Galvin
Tax Registry No. 948997
Emergency Service Unit
Disciplinary Case No. 2015-14070

Charges and Specifications:

Disciplinary Case No. 2015-14071

1. Said Sergeant Erik Powers, on or about July 24, 2014, at approximately 1500 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED] engaged in conduct prejudicial to the order, efficiency, or discipline of the New York City Police Department, in that he authorized an entry into said location without just sufficient legal authority. (*As amended*)
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT
2. Said Sergeant Erik Powers, on or about July 24, 2014, at approximately 1500 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED] engaged in conduct prejudicial to the order, efficiency, or discipline of the New York City Police Department, in that he authorized a search of said location without just sufficient legal authority. (*As amended*)
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

Disciplinary Case No. 2015-14072

1. Said Police Officer Mark Xylas, on or about July 24, 2014, at approximately 1500 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], engaged in conduct prejudicial to the order, efficiency, or discipline of the New York City Police Department, in that he entered said location without just sufficient legal authority.

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

2. Said Police Officer Mark Xylas, on or about July 24, 2014, at approximately 1500 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], engaged in conduct prejudicial to the order, efficiency, or discipline of the New York City Police Department, in that he searched said location without just sufficient legal authority.

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

3. Said Police Officer Mark Xylas, on or about July 24, 2014, at approximately 1500 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED] County, engaged in conduct prejudicial to the order, efficiency, or discipline of the New York City Police Department, in that he threatened to damage Person A and Person B's property.

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

Disciplinary Case No. 2015-14070

1. Said Police Officer Ryan Galvin, on or about July 24, 2014, at approximately 1500 hours, while assigned to the 81st Precinct and on duty, in the vicinity of [REDACTED], engaged in conduct prejudicial to the order, efficiency, or discipline of the New York City Police Department, in that he entered said location without just sufficient legal authority.

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

2. Said Police Officer Ryan Galvin, on or about July 24, 2014, at approximately 1500 hours, while assigned to the 81ST Precinct and on duty, in the vicinity of [REDACTED], engaged in conduct prejudicial to the order, efficiency, or discipline of the New York City Police Department, in that he searched said location without just sufficient legal authority.

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

Appearances:

For CCRB-APU: Timothy Jones, Esq. and Simone Manigo, Esq.
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For the Respondents: John D'Alessandro, Esq.
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Hearing Date:

December 6, 2016

Decision:

Not Guilty

Trial Commissioner:

ADCT Nancy R. Ryan

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on December 6, 2016. Respondents, through their counsels, entered a pleas of Not Guilty to the subject charges. CCRB called Police Communication Technician Renee Peebles and Arthur Albano as witnesses. The hearsay statements of Police Officer Rikki Vanbrackle, Person A, Person C, and Person B were entered into evidence. Respondents testified on their own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondents Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The following facts are not in dispute. On July 24, 2014, Respondent Powers was the 81 Precinct's Anti-Crime sergeant. (Tr. CCRB Ex. 6). He was responsible for supervising four subordinate officers on the Anti-Crime team, including Respondents Xylas and Galvin. (Tr. 146). Respondents were dressed in plainclothes and assigned two unmarked police vehicles, one of which was a black Chevy Impala. (Tr. 131-133, 146).

At 14:35:16 hours, a 911 caller reported a group of black males outside of [REDACTED] one of whom had a firearm. (Tr. 16; CCRB Ex. 2). At 14:38:46 hours, the 81 Precinct Anti-Crime team notified central dispatch that they had arrived at [REDACTED]. At 14:39:39 hours, another 911 caller reported that the group was leaving the location and moving toward a nearby playground. (CCRB Ex. 2). Several units responded to [REDACTED] regarding the 911 call. (Tr. 20). At 15:07:29 hours, a notification was made to central dispatch that four individuals had been arrested by the 81 Precinct Anti-Crime team. (Tr. 16; CCRB Ex. 2).

Person A alleged that a group of officers entered and searched her apartment located at [REDACTED] at approximately 1500 hours on July 24, 2014, without her consent. (CCRB Ex. 3B, 3-4). [REDACTED] is situated near [REDACTED] within the same apartment complex. (Tr. 175). Following an investigation into the complaint, CCRB Investigator Arthur Albano determined that Respondents Xylas and Galvin searched Person A's apartment under the supervision of Respondent Powers, who stood in the doorway during the search. (Tr.

54). In addition, Albano determined that Respondent Xylas threatened to break down Person A's door. Each Respondent denied any involvement in the entry or search of Person A's apartment. CCRB presented Investigator Albano as a witness, but presented no witnesses at trial who were present during the alleged incident. Rather, the hearsay statements of Person A, Person B, Person C and Officer Rikki Vanbrackle were admitted into evidence. (CCRB Exs. 3A-5B).

During her August 19, 2014, CCRB interview, Person A told Albano that around 1500 hours she was asleep in her apartment having recently returned from work. (CCRB Ex. 3B, 5, 7). Officers entered her apartment, made her get out of bed and began "searching through stuff." (CCRB Ex. 3B, 3). According to Person A, the officers indicated that they had information that a boy with a gun lived in the apartment. (CCRB Ex. 3B, 19, 26). She could not recall how many officers were in her apartment, but stated that she was sure that there were two officers at the door and "some inside the apartment." (CCRB Ex. 3B, 5).

With regard to describing the officers who came to her apartment, Person A said it was "a lady and a male out the door." (CCRB Ex. 3B, 17). When asked if she could see any officers searching the apartment, Person A stated, "I can remember the cop was at the door," and added that she remembered their faces. (CCRB Ex. 3B, 21).

She described one officer as "a short black guy" who identified himself as a sergeant and told her his name, which she could not recall. (CCRB Ex. 3B, 28). She estimated his height to be around 5'6", but could not estimate his weight. She first stated that he was "really skinny" and then described him as "stocky." (CCRB Ex. 3B, 29). Initially she could not estimate his age, but then stated he was "maybe 40 something." She could not remember if he had facial hair, what

his hair style was, what color his eyes were, and did not think he wore glasses. (CCRB Ex. 3B, 29-30).

Person A also described "a big white guy," as the officer who entered the room she was sleeping in and woke her up. She further described him as "tall" and "big," 5'8" tall and "probably like 220" pounds. (CCRB Ex. 3B, 36). She could not recall any other descriptive features. (CCRB Ex. 3B, 37-38). When asked about how the officers were dressed, Person A first stated they were in plainclothes, but then stated she did not remember if they were in uniform or not. (CCRB Ex. 3B, 38-39).

With regard to the "lady," Person A first stated that did she not recall what race the lady was, but then stated she believed that the lady was "black" and "brown skinned." (CCRB Ex. 3B, 40). She estimated the lady's height to be 5'6" and weight to be either 120 or 150 pounds. (CCRB Ex. 3B, 41). She does not remember the lady's hair or eye color, nor could she estimate her age. She provided no other descriptive features. (CCRB Ex. 3B, 41).

Person A did not have any recollection of any other officer. (CCRB Ex. 3B, 43). When asked to describe the car she saw the men get into after they finished the search, she stated it was a regular blue and white police car. (CCRB Ex. 3B, 49-50). At one point in her interview, Person A said that Person C could explain it all to the investigators because she was asleep and added, "I don't remember what – what's true." (CCRB Ex. 3B, 33).

During his August 19, 2014, interview Person C told Albano that he had been sitting in Person A's backyard when he saw four officers running along a walkway behind Person A's apartment. A few minutes later, the officers returned to Person A's building and started banging on the door of Person A's upstairs neighbor. (CCRB Ex. 5B, 3-4). Shortly thereafter, one of the officers demanded that Person C open Person A's apartment door or he would "bang it in." (CCRB

Ex. 5B, 5). The officer then turned the doorknob, walked inside, and started searching Person A's apartment. As the officer entered, Person A's two dogs began barking, so Person C brought them to the backyard. (CCRB Ex. 5B, 6).

According to Person C, when he asked the officers why they were there, he was told that they were looking for "the kid that got away." (CCRB Ex. 5B, 41). He later learned that a group of boys had been arrested for having a BB gun. (CCRB Ex. 5B, 41-42). After searching the apartment, the officers returned to their unmarked black Impala and drove away. (CCRB Ex. 5B, 7). Person C stated that he recognized the officers and their vehicle from the area, but did not know their names. (CCRB Ex. 5B, 9).

With regard to descriptions of the officers, Person C described the sergeant as a "black young male," about 5' 8" or 5'9" weighing between 170 and 180 pounds. He had "brown, black hair," in "a little small afro," in his early thirties and was wearing jeans and a t-shirt. (CCRB Ex. 5A, 23-25). Person C stated that there was a female officer in uniform standing with the sergeant. He described her as black and about the same height as the sergeant with long black and gold braids. He estimated that she weighed about 180 pounds and her age to be mid-thirties. (CCRB Ex 5A, 26-28).

Person C described the officer who threatened to kick in the door as a "very stocky" white male about 200 pounds, between 5'9" and 6 feet tall, and in his early forties. (CCRB Ex. 5B, 29, 31). He further stated that he believed he was bald and dressed in plainclothes. (CCRB Ex. 5B, 30). Person C also described two additional plainclothes officers. The first, a stocky black male approximately 6 feet tall, between 205 and 210 pounds, bald, in his mid-forties with brown eyes. (CCRB Ex. 5B, 33-34). The second, a stocky white male, approximately 6'2", between 215 and 230 pounds, with black hair in his mid-forties. (CCRB Ex. 5B, 35-36).

CCRB also introduced into evidence the September 22, 2014, interview of Person A's husband, Person B. Person B stated that he was awoken by the sound of his two dogs barking in his apartment. (CCRB Ex. 4B, 14). When he got out of bed he saw that there was a "tall Caucasian" male officer, a female officer, a sergeant, and possibly one more officer in the apartment. (CCRB Ex. 4B, 3, 6, 12).

Person B estimated that the Caucasian officer was "seven feet tall," somewhat stocky, well groomed, with blue or possibly gray eyes. (CCRB Ex. 4B, 9-10). He stated that a black sergeant was standing by the front door. (CCRB Ex. 4B, 6). He described the female officer as a "blue and white officer" with brown hair. (CCRB Ex. 4B, 6). Person B stated that "[a]ll of them were in regular clothes except the senior officer." Person B also stated that he was unsure how he knew that the black officer was a sergeant. (CCRB Ex. 4B, 6). According to Person B, the officers searched the entire apartment looking for a boy.

Officer Rikki Vanbrackle was interviewed by CCRB Investigator Albano on May 19, 2015. She was not called to testify as a witness at this trial, though the transcript of her interview was entered into evidence. In relevant part, Officer Vanbrackle stated that on July 24, 2014, she was in uniform performing patrol duties with her partner. (CCRB Ex. 1B, 4). She stated that according to her memobook, at 1437 hours she responded to a dispute at 1545 Atlantic Avenue and at 1520 hours, she left that location. (CCRB Ex. 1B, 5). Initially, Officer Vanbrackle had no independent recollection of the incident at issue in this case. (CCRB Ex. 1B, 5). When Albano showed Officer Vanbrackle a photo of [REDACTED], Officer Vanbrackle responded by saying, "Okay, yeah, I actually do remember this building." (CCRB 1B, 7).

Officer Vanbrackle then stated that she responded to an apartment building where there were already a number of other officers. (CCRB Ex. 1B, 8). She stood in the doorway of the

apartment building "keeping guard" for "only a few moments." (CCRB Ex. 1B, 8, 14). Officer Vanbrackle did not remember the address of the apartment building she had stood in front of. When again shown a photograph of [REDACTED], Officer Vanbrackle stated, "[t]he buildings looked like that." (CCRB Ex. 1B, 9). Officer Vanbrackle stated that there were numerous uniformed and plainclothes officers at the apartment building, including Respondent Powers. (CCRB Ex. 1B, 10). She could not recall if Respondent Powers gave commands to any officers on the scene or directed that any action be taken. (CCRB Ex. 1B, 14-15). She did not see any officers enter or exit any of the apartments inside the building. (CCRB Ex. 1B, 10, 12). She also did not hear any officers knocking on any of the doors inside the building or threaten to break down anyone's door. She did, however, state that she heard a large dog barking. (CCRB Ex. 1B, 9). Officer Vanbrackle stated that she did not recognize Person A, Person C, or Person B when shown photos of each individual during her interview. (CCRB Ex. 1B, 13-14).

Albano testified at trial that he was the CCRB investigator assigned to Person A's complaint. (Tr. 38). After interviewing Person A, Person C, Person B, and one additional civilian witness, Albano requested the event summary and roll call from the 81 Precinct for July 24, 2014. (Tr. 46). In particular, Albano was looking for any events that occurred around the time and location of the incident relating to a firearm. (Tr. 46). According to Albano, the complaining witnesses stated that the officers were dressed in plainclothes. As a result, Albano directed his investigation toward finding a plainclothes unit that had responded. (Tr. 47).

Based on the roll call, Albano was able to determine that Respondents were assigned to the 81 Precinct's Anti-Crime team that day. (Tr. 47-48). Albano then interviewed the members of the Anti-Crime team, who all denied being at Person A's apartment. (Tr. 50, 55-56, 58).

Additionally, Albano interviewed Officer Vanbrackle because she was listed as a uniformed sector officer that responded. (Tr. 51).

Albano testified that the event chronology placed the 81 Precinct Anti-Crime team at [REDACTED] and after interviewing each of the officers, he determined that their descriptions matched what the complaining civilian witnesses had described. (Tr. 81-82). During the course of his investigation into Person A's complaint, he "connected that chase of those individuals to the event that the officers all admitted to responding to...a group of six kids with a firearm." (Tr. 63). Albano went on to say, "[d]ue to the time difference in which the call came over when the officers had responded and when the final disposition was put over and the officers' testimony which were inconsistent with each other as to that response to that...job," he determined that Respondents were the officers Person A complained of. (Tr. 63-64). Additionally, Person C had identified the vehicle that the officers drove as a black Impala, which was one of the vehicles assigned to the 81 Precinct Anti-Crime team that day. Albano stated that he also took into account "some circumstantial corroboration" by Officer Vanbrackle, namely that she heard a large dog barking in the house at the time of the search. (Tr. 64).

On cross-examination, Albano acknowledged that Person A never positively identified Respondents as being present in her apartment. In fact, he testified that he made no attempt to have Person A, Person B, or Person C identify the officers using a photo array. (Tr. 58). According to Albano, despite having access to Department photos of Respondents, he did not conduct a photo array because he "was solid on the identification" of Respondents after he interviewed Officer Vanbrackle. (Tr. 61). The interviews of both Person A and Person C had been conducted several months earlier and Albano did not believe it was necessary to bring them back to show them a photo array. (Tr. 65-67).

However, Albano did concede that Officer Vanbrackle did not mention either Respondents Xylas or Galvin by name at any point during her interview and did not state that she saw either enter Person A's apartment. (Tr. 62-63).

On further cross-examination, Albano acknowledged that many other units within the precinct work in plainclothes and may have responded to that that particular radio run. (Tr. 77).

As previously stated, each Respondent denied having been present at [REDACTED]. Respondent Powers testified that four males matching the description provided in the 911 call were stopped in front of [REDACTED], one of whom was found to be in possession of a firearm. The four males were taken into custody within minutes of the officers' arrival and did not resist the officers and made no attempt to flee at any point. (Tr. 121). According to Respondent Powers, between 10 and 15 minutes elapsed from the time that the four individuals were taken into custody and then transported back to the 81 Precinct. (Tr. 122).

When questioned regarding Officer Vanbrackle's statement to Albano that she was present with Respondent Powers outside [REDACTED], Respondent Powers testified that the buildings are indistinguishable and she was mistaken. (Tr. 109-110). In fact, Respondent Powers testified that approximately 30 addresses in that area, a complex known as the [REDACTED] look exactly the same. (Tr. 111).

Respondent Powers testified that approximately four to five patrol cars responded to [REDACTED] (Tr. 116). He explained that the 81 Precinct is a very busy command and it shares radio frequencies with the 83 Precinct. (Tr. 120). As a result, every unit that responds to a call such as the call in this case, may not notify central dispatch in an effort to prevent unnecessary radio traffic. (Tr. 120).

He acknowledged that at 15:07:29, central dispatch was notified that four individuals had been arrested, but testified that that is not necessarily the exact time at which those individuals were arrested. (Tr. 119).

On cross-examination, Respondent Powers acknowledged that his memobook entry from that day indicates that at 1507 hours, four individuals were arrested. (Tr. 125; CCRB Ex. 7). He asserted that his memobook entry of the arrest reflects the time at which he notified central dispatch that the arrests were made and as a result, central dispatch assigns an arrest time. (Tr. 126). Additionally, he acknowledged that his first entry regarding this incident occurred at 1459, though the event chronology indicates that he arrived at [REDACTED] at 14:38:36. (Tr. 128-130). He asserted, however, that he did not make an memobook entry indicating what time he actually arrived on the scene. (Tr. 128).

On further cross-examination, Respondent Powers testified that he did not chase any individual, but admitted that he was not sure that any of the other Anti-Crime officers chased anyone. (Tr. 136). He later learned that some of his subordinates ran after another individual. (Tr. 137). He acknowledged that he is unaware if other members of his team encountered other individuals in addition to the four that were stopped in front of [REDACTED]. (Tr. 143).

Respondent Xylas described [REDACTED] as part of a large apartment building complex with roughly 25 to 30 different addresses and identical buildings, often causing confusion regarding the addresses within the complexes. (Tr. 147, 153). Upon arrival, Respondent Xylas saw four males standing in a group and a fifth male standing approximately 100 to 150 feet further west down the street towards [REDACTED] (Tr. 148-149, 154). According to Respondent Xylas, someone indicated that the male further down the street was with the group as well, so he ran down the street to try to make contact with the fifth male. (Tr.

149). When the fifth male saw Respondent Xylas coming towards him, he took off running. According to Respondent Xylas, "there was a very slim chance that I would have been able to catch him." (Tr. 150). Once Respondent Xylas reached the intersection of [REDACTED] [REDACTED], where he had last seen the fifth male, he was unable to determine where the individual had gone. As a result, Respondent Xylas turned around and returned to the group of four individuals stopped in front of [REDACTED]. (Tr. 150).

Respondent Xylas testified that he did not enter [REDACTED], nor did he make comments to any of the individuals who lived at [REDACTED], on July 24, 2014. (Tr. 153).

On cross-examination, Respondent Xylas stated that once he learned that a gun had been recovered from one of the four males, he no longer cared about the fifth individual that he had chased. (Tr. 162). Respondent Xylas testified that he could not recall whether Respondent Galvin joined him in the brief chase after the fifth individual. (Tr. 163).

Respondent Galvin testified that upon arrival at [REDACTED], he was told by a uniformed officer at the scene that another individual was running on [REDACTED] (Tr. 172, 178). He then ran to [REDACTED] where he encountered Respondent Xylas who told him that the individual was gone. According to Respondent Galvin, at that point both he and Respondent Xylas returned to the original group of four males that were stopped in front of [REDACTED] [REDACTED] (Tr. 173). Upon their return, the other members of the Anti-Crime team indicated that they had recovered the firearm. The four males were placed under arrest and transported to the 81 Precinct for arrest processing. (Tr. 174).

Respondent Galvin testified that he did not enter [REDACTED], on July 24, 2014. (Tr. 175). Other units also responded to the scene, though Respondent Galvin could not recall whether any other plainclothes units had responded. (Tr. 176).

Respondent Powers is charged with authorizing the entry and search of Person A's apartment without sufficient legal authority. Respondents Xylas and Galvin are charged with entering and searching Person A's apartment. Respondent Xylas is also charged with threatening to damage Person A and Person B's property.

The preliminary issue to be decided is a question of identification. It must be determined whether the CCRB has proven, by a preponderance of the evidence that Respondents were at [REDACTED] on July 24, 2014, at approximately 1500 hours. After careful consideration of the evidence and testimony, I find that the record failed to establish by a preponderance of the credible evidence that Respondents engaged in the charged misconduct.

As previously noted, all three Respondents denied that they were present at [REDACTED] on July 24, 2014. Therefore, a finding of fact must turn on an assessment of witness credibility. CCRB relied primarily on the hearsay statements of Person A, Person C, Person B, and Officer Rikki Vanbrackle to prove its case. It is well established that although hearsay is admissible in an administrative tribunal, it must be sufficiently probative and reliable to be accorded probative weight. *Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't 1991). *lv. to app. den.*, 78, N.Y.2d 851 (1991). Further, the reliability of an out-of-court statement warrants particular scrutiny when, as here, it is both controverted and outcome dispositive. *See In re Matter of 125 Bar Corp. v. State Liquor Auth. Of the State of N.Y.*, 24 N.Y.2d 174 (1969). CCRB did, however, call its own investigator to testify before this tribunal regarding his investigatory steps.

The unreliability of the descriptions of the officers who were present and searched Person A's apartment that day cannot be overstated. Without the benefit of cross-examination, this tribunal could not assess their demeanor and critical factors, such as motive and bias, were not

discussed. Albano testified that it was Officer Vanbrackle's statement that Respondent Powers was at Person A's apartment that made him "solid on the identification" of Respondents after having identified them as being a plainclothes unit that were in the area at that time. (Tr. 61). However, initially, Officer Vanbrackle had no independent recollection of the incident. In fact, Officer Vanbrackle continued to have no independent recollection of the incident even after Albano described the incident in its entirety to her. She also did not have a memobook entry indicating she was present at [REDACTED]. Though Officer Vanbrackle did eventually place Respondent Powers at the apartment building, she did so by stating, "I would say that Sgt. Powers was there and I don't know, I really couldn't say for sure, so." (CCRB Ex. 1B, 10). Furthermore, she stated that she did not see any officers enter or exit the apartment or threaten to breakdown a door. (CCRB Ex. 1B, 10-12).

Officer Vanbrackle could not even remember the address of the building she was standing in and stated, "[t]he buildings looked like that" when shown a picture of [REDACTED] (CCRB Ex. 1B, 9). As established by the record, all of the buildings in that housing complex look the same. Therefore, Officer Vanbrackle's recognition of a photo of [REDACTED] is not dispositive to prove even her own presence at Person A's apartment. In addition, when Officer Vanbrackle was shown photos of Person A Person C, and Person B during her interview, she stated that she did not recognize any of them. (CCRB Ex. 1B, 13-14).

Moreover, as previously noted, Officer Vanbrackle did not testify at trial and was not asked to provide a physical description of herself during her CCRB interview. Person A described a "black...brown skinned" female officer around 5'6" and either 120 or 150 pounds; Person C described a female officer in uniform around 5'8" or 5'9", 180 pounds, mid-thirties, with long black and gold braids; Person B described a female "blue and white officer" with brown hair.

This tribunal has no way of knowing whether the relatively inconsistent descriptions of a female officer given by Person A, Person C, and Person B, are consistent with Officer Vanbrackle's actual appearance whatsoever.

Albano seemed to lend disproportionate weight to Officer Vanbrackle's mention of "a large dog barking" at the apartment building as corroboration of [REDACTED]'s account of the incident, in which he states that Person A's two dogs were barking at the officers. (CCRB Ex. 1B, 9). This fact alone is insufficient to adequately verify that Officer Vanbrackle was present outside Person A's apartment. Officer Vanbrackle mentions only one dog, despite witness statements that there were two dogs. Regardless, without more details, the sound of a barking dog is not a unique identifying factor. Even if Officer Vanbrackle had been outside Person A's apartment that day, her hearsay statement is simply too unreliable to prove that Respondent Powers was also there.

The descriptions of a sergeant at [REDACTED] provided by Person A, Person C, and Person B, were similarly unreliable. Albano testified that he identified Respondent Powers as the sergeant described by the witnesses because the descriptions matched the appearance of Respondent Powers. (Tr. 81-82). I cannot credit Albano's assertion on this fact given that the descriptions provided by the three witnesses were not consistent –Person A described "a short black" sergeant around 5'6" who was "maybe a little stocky" and in his forties; Person C described a "black young" sergeant in his early thirties, around 5'8" or 5'9", between 170-180 pounds, with "brown, black hair," in a "small afro," wearing jeans and a t-shirt; Person B stated only that he saw a black sergeant.

With respect to the descriptions of additional officers, Person A described "a big white guy" around 5'8" and 220 pounds and Person B described a white officer who was 7 feet tall,

somewhat stocky, well groomed, with blue or gray eyes. Person C provided descriptions of three officers in addition to the descriptions of the sergeant and female officer: the first, and the officer who threatened to kick in Person A's door, was a "very stocky" white male, about 200 pounds, between 5'9" and 6', in his early forties; the second, a bald stocky black male about 6' tall, between 205 and 210 pounds, in his mid-forties with brown eyes; and the third, a stocky white male, around 6'2", between 215 and 230 pounds, with black hair in his mid-forties.

Person A's own recollection of the incident and descriptions of the officers was too disjointed to be relied upon at all by this tribunal. Especially troubling was Person A's statement to Albano that "he [Person C] could explain it all to you 'cause I was asleep. I don't remember what--... --what's true." (CCRB Ex. 3B, 33). The statement of her husband, Person B was likewise unhelpful with respect to identifying the officers who allegedly searched the apartment. Although Person A specifically stated in her CCRB interview that she remembered the faces of the officers who were at her apartment, she was not shown a photo array at any point in an effort to identify the officers. (CCRB Ex. 3B, 21).

Albano testified that the identification of Respondents Xylas and Galvin was the result of him connecting the chase of an individual, described by both Respondents, to the chase Person C stated he witnessed. (Tr. 63). Albano also took into account that the 81 Precinct Anti-Crime team was the only plainclothes unit that notified central dispatch they had responded to [REDACTED]. However, as multiple witnesses testified to at this trial, a 911 call regarding a person with a gun generates one of the most active responses by police officers of any calls received and numerous units responded to the scene that are not identified as having done so on the event summary. (Tr. 19-20, 176). Albano acknowledged that he made no effort to investigate

whether any of the additional units that responded to the 911 call were dressed in plainclothes that day. (Tr. 77).

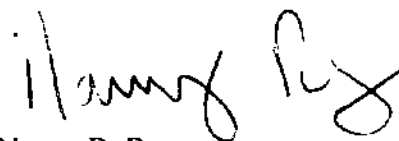
There was no indication at trial how exactly Respondent Galvin was identified by Albano as being present at Person A's apartment other than the fact that he was assigned to the 81 Precinct Anti-Crime team on July 24, 2014. Albano stated merely that the descriptions provided by the complaining witnesses matched Respondents, but did not explain which description he determined matched Respondent Galvin. As a result, this tribunal finds the identification of Respondent Galvin equally inadequate.

With respect to Respondent Xylas, only Person C provided a description of an officer who threatened to break down Person A's door. However, this tribunal finds that the relatively generic description provided by one hearsay witness is insufficient to identify Respondent Xylas as the allegedly offending officer without an in-court identification.

CCRB attempted to make up for the unreliable descriptions of Respondents by arguing that for a period of 30 minutes, Respondents actions are unaccounted for. CCRB argued that from 14:38:46 hours, when one of the 81 Precinct Anti-Crime units notified central dispatch that they had arrived at [REDACTED], until 15:07:29 hours, when they notified central dispatch that four individuals had been arrested, Respondents made no radio transmissions. Therefore, they must have been conducting a search of the area for additional suspects because only four individuals were arrested in front of [REDACTED], but the 911 caller stated that there were six black males and Respondents Xylas and Galvin stated that they had unsuccessfully chased after a fifth individual. Such an assumption is simply not supported by the evidence presented at trial. In fact, CCRB's own witness, Police Communications Technician Renee Peebles, stated at trial that the gap in time was not uncommon. (Tr. 32).

Particularly troubling to this tribunal is that at no point in the investigatory phase was a photo array conducted to attempt to identify Respondents, despite the investigator's access to Department photos. Without a positive identification at trial, or the benefit of cross-examination regarding the inconsistent recollections of the complaining witnesses, this tribunal cannot determine by a preponderance of the credible evidence that it was Respondents who engaged in the charged misconduct. Accordingly, Respondents Powers, Xylas, and Galvin are found Not Guilty of all the charges against them.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED


JUN 09 2017
JAMES P. O'NEILL
POLICE COMMISSIONER