



OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

CHAN

February 19, 2015

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Daniel Silverio**
Tax Registry No. 943816
9 Precinct
Disciplinary Case No. 2013-9653

Police Officer Sergio Delamota
Tax Registry No. 943137
Police Commissioner's Office
Disciplinary Case No. 2013-9654

The above named member of the service appeared before Assistant Deputy Commissioner Claudia Daniels-DePeyster on March 5, 2014 and was charged with the following:

DISCIPLINARY CASE NO. 2013-9653

1. Said Police Officer Daniel Silverio, on or about January 25, 2012, at approximately 1506 hours while assigned to the 9th Precinct and on duty, inside the L train subway station at East 14th Street and 1st Avenue, New York County, abused his authority as a member of the New York City Police Department in that he stopped Person A without sufficient legal authority.

P.G. 212-11, Pages 1, Paragraph 1

STOP AND FRISK

2. Said Police Officer Daniel Silverio, on or about January 25, 2012, at approximately 1506 hours while assigned to the 9th Precinct and on duty, inside the L train subway station at East 14th Street and 1st Avenue, New York County, abused his authority as a member of the New York City Police Department in that he frisked Person A without sufficient legal authority.

P.G. 212-11, Pages 1, Paragraph 2

STOP AND FRISK

**POLICE OFFICER DANIEL SILVERIO
& POLICE OFFICER SERGIO DELAMOTE**

**DISCIPLINARY CASE NO. 2013-9653
DISCIPLINARY CASE NO. 2013-9654**

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P.G. 212-11, Pages 1, Paragraph 2

STOP AND FRISK

3. Said Police Officer Sergio Delamota, on or about January 25, 2012, at approximately 1506 hours while assigned to the 9th Precinct and on duty, inside the L train subway station at East 14th Street and 1st Avenue, New York County, abused his authority as a member of the New York City Police Department in that he searched Person A without sufficient legal authority.

P.G. 212-11, Pages 1, Paragraph 3

STOP AND FRISK

In a Memorandum dated October 23, 2014, Assistant Deputy Commissioner Claudia Daniels-DePeyster found Police Officer Silverio Guilty of Specification Nos. 1 and 2, in Disciplinary Case No. 2013-9653 and found Police Officer Delamota Guilty of Specification Nos. 1, 2 and 3, in Disciplinary Case No. 2013-9654. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalties.

After considering all of the evidence presented and Respondents Silverio's and Delamota's otherwise good service records with the Department, the disciplinary penalty for each Respondent shall be reduced to the forfeiture of three (3) vacation days.


William J. Bratton
Police Commissioner



POLICE DEPARTMENT

October 23, 2014

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Daniel Silverio
Tax Registry No. 943816
9 Precinct
Disciplinary Case No. 2013-9653

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Tax Registry No. 943137
Police Commissioner's Office
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P.G. 212-11, Page 1, Paragraph 2 STOP AND FRISK

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P.G. 212-11, Page 1, Paragraph 3 STOP AND FRISK

The Civilian Complaint Review Board (CCRB) was represented by Raasheja Page, Esq. and Heather Cook, Esq. Respondents were represented by John Tynan, Esq., Worth, Longworth & London LLP.

Respondents, through their 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. 2013-9653

Respondent Silverio is found Guilty.

Disciplinary Case No. 2013-9654

Respondent Delamota is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is undisputed that on January 25, 2012, Respondents (both seven-year members of the Department) were assigned to the 9 Precinct conditions team and working in plainclothes with the objective of addressing burglary patterns. At approximately 3:00 p.m., they observed complainant, Person A, in front of an elementary school. They followed him two or three blocks to a subway station, where they initiated a stop. During the course of the stop, Respondent Silverio frisked Person A. Respondent Delamota frisked his pockets and waistband. According to a Stop, Question and Frisk Report (UF-250), Respondent Delamota also searched Person A. Respondents found no weapons, drugs, or any other type of contraband on Person A never became physically aggressive. Respondents released him.

CCRB's Case

CCRB called Daniel DiRocco as its sole witness,¹ and entered into evidence Person A's out of court statement.

Daniel DiRocco

DiRocco is currently employed as an assistant supervisor at CCRB. He investigated the complaint that Person A lodged against Respondents over the telephone on the day of the incident. Person A identified Respondents by shield number. DiRocco conducted an interview of Person A on March 14, 2012.

[CCRB Exhibit (CCRBX) 1A and 1B are the interview recording and transcript. In the interview, Person A stated that he was waiting in front of the school for his two children to come out in order to drop them off with their grandmother. He first noticed Respondents during the 20 minutes that he was outside the school. Respondents were standing 20 feet away and looking at him. At some point, they separated and walked away in different directions. Person A said he waited at the school. His mother informed him that she would be late picking up the children, so he went to the school and waited for their dismissal at 2:50 p.m. He waited for his mother to arrive and then he gave the children to her. He then headed back to work. After leaving the school, Person A walked alone to a corner store on 14 Street and First Avenue. At the store, he purchased a honey bun then continued to the subway station located at the same intersection.

¹ The CCRB Prosecutor noted that Person A was served with a notice to appear at CCRB as well as a subpoena to appear at trial. Although Person A signed the notices delivered to his residence, he failed to appear at the CCRB office or at this trial and a hearsay case ensued.

Person A further stated in the interview that he next saw Respondents when they approached him on the train platform. Respondent Delamota pulled out his shield and asked Person A to come to him. Respondent Delamota informed him that he was being stopped because there were a lot of robberies in the train station. Next, Respondent Delamota asked him for ID. Respondent Delamota was holding a notepad, and Person A handed his ID to Respondent Silverio. Respondent Delamota also looked at the ID and asked Person A where he lived. One of the Respondents then said, "I don't like this guy, let's search him." Respondent Delamota proceeded to pat down Person A's front and back pants pockets. Person A had his ID card, some papers, and money in his pockets. He did not have a wallet. Respondent Delamota put his hand in one of the pockets, removed papers, and then placed the papers back inside. Person A's jacket pockets were also patted down. Person A kept his cell phone in his jacket pocket. During the course of the encounter, Respondent Delamota told Person A to put aside a zippered bag that he was carrying. The bag contained papers and pay stubs. Respondent Silverio looked inside the bag.

During the course of DiRocco's investigation, he contacted the New York City Comptroller's Office and learned that Person A did not file a lawsuit in regard to the incident. He also discovered that the name Person A gave him differed from the name on Person A's New York State ID. Person A said his name was Person A, but the name listed on the ID [had a different first name] [CCRBX 2 is a copy of the ID]. DiRocco was unable to obtain witnesses or video surveillance of the incident. He has not spoken with Person A since the March 2012 interview.

Respondents' Case

Respondent Delamota and Respondent Silverio testified in their own behalf.

Respondent Delamota

Respondent Delamota testified that at the time of the incident, he had made more than 300 arrests and participated in more than a thousand other stops or arrests. On the day of the incident, he observed Person A walk back and forth a few times in front of the school and just "kind of linger." Person A stood out to him because he was the only adult in the area. After watching him for several minutes, Person A began walking northbound on First Avenue, and Respondents followed him to the subway station on 14 Street. Respondent Delamota "briefly questioned him about what he was doing at the school" and requested his ID.

Respondent Delamota described Person A as irate, very loud, and combative. Though Respondent Delamota did not see a bulge on Person A, he frisked Person A's waistband and pockets for "safety purposes." The frisk lasted a few seconds. Person A was not handcuffed or restrained. Respondent Delamota informed Person A why he had been stopped, but Person A continued to be irate and combative. The entire encounter lasted no longer than three minutes.

Respondent Delamota explained that he was aware of a burglary pattern in the area. Prior to the incident, he had reviewed the burglary pattern sheet [CCRBX 4]. While the pattern sheet indicated dates and times of occurrence, it did not include descriptions of perpetrators. Respondent Delamota testified, "What [Person A] looked like . . . had nothing to do with why we stopped him." He agreed that he did not observe

Person A engaging in any criminal activity, but he thought that Person A was “possibly casing” the school and furthermore Person A was in the “vicinity of where the crimes were happening.”

Respondent Delamota prepared a UF-250 for the stop. Respondent Delamota testified that he did not recall searching Person A. On the UF-250, however, he indicated that a search of Person A was conducted. On the UF-250, under the section entitled “Circumstances Which Led to Stop,” Respondent Delamota checked the boxes for “actions indicative of casing victim or location,” “actions indicative of acting as a lookout,” and “furtive movements.” When asked how someone cases a location, Respondent Delamota responded, “They linger, they walk back and forth, they stay in a place without apparently without purpose.” When asked to explain what a lookout means, he responded, “It’s somebody that’s either looking out for police cars or looking out for what would hinder him from committing a crime.” When asked what furtive movements he observed Person A make, he responded, “When we finally stopped him, him being combative and irate.” [CCRBX 3 is a copy of the UF-250].

In an April 3, 2012 interview with CCRB, Respondent Delamota indicated that he had no independent recollection of the incident. He generally makes one to five stops a day, and he made a total of three stops on the day of the encounter with Person A. He testified that he is now able to recall details because he has read through “a whole bunch more paperwork” given to his attorney from CCRB that helped him to remember.

Respondent Silverio

Respondent Silverio testified that at the time of the incident, he had made more than 300 arrests and assisted in more than a thousand other arrests. Prior to the incident, he reviewed the burglary pattern sheets in conjunction with a "different printout [containing] narratives and 911 calls." He also spoke with a Detective McCullough concerning the burglary patterns in the precinct. McCullough provided him with an "overview of different burglary recidivists and also persons outstanding, specifically a male Hispanic." McCullough described this male Hispanic as "approximately 5'8 to 6 feet, thin to average build."

Respondent Silverio testified that he observed Person A walking "aimlessly back and forth" between the entrance of the school and the parking area. He watched Person A for about five minutes, at which point Person A began walking toward 14 Street. Respondents followed Person A waiting to see if they could observe "him doing something else."

When Respondents stopped Person A in the subway station, they asked him "where he came from." Person A, who immediately became agitated, walked back and forth and screamed. He accused Respondent Silverio of being racist and complained that he was being stopped because he was Spanish. Respondent Silverio pointed out to Person A that he is Spanish in an attempt to "appease him." Respondents also explained to Person A that they stopped him because they were investigating a burglary pattern in the area. Person A remained very upset.

At some point during the encounter, Respondent Silverio noticed that Person A had "overly stuffed pockets" and saw the outline of a rectangular-shaped bulge.

Respondent Silverio touched the bulge and felt that it was hard. Because Respondent Silverio was unsure if the bulge was a weapon or something that could be potentially harmful to him or his partner, he did a quick pat down of the outer garments and a search of the bulge. He could not recall if he went into Person A's pockets or if Person A pulled the items out. The bulge ended up being a phone and a couple of chargers. The stop lasted no longer than five minutes.

Respondent Silverio did not observe Person A committing any crimes. He explained that his reasonable suspicion to conduct the stop was based on Person A pacing near the school and leaving without children. Person A's ethnicity was not a factor on which the stop was based. Respondents conducted the stop because they suspected Person A was "casing the location" by walking back and forth. Person A did not relay to Respondents that he was waiting at the school to meet his children.

FINDINGS AND ANALYSIS

Both Respondents stand charged with stopping and frisking Person A without sufficient legal authority. Respondent Delamota has also been charged with conducting an unlawful search. Person A did not testify in person, but a transcript and a compact disc containing the audio of his out-of-court interview with CCRB investigator DiRocco were entered into evidence. Person A's failure to appear made it impossible to observe his testimonial demeanor. His absence also made it impossible to assess his credibility after his version of this event had been tested by cross-examination. Fortunately, however, no such credibility determination is warranted in the instant case, as Person A's out of court statements were corroborated by the testimony of both

Respondents. Thus, there is no genuine dispute of the material facts, and the only issue to be resolved is whether Respondents met the requisite reasonable suspicion standard for conducting the stop, frisk, and search of Person A.

It is well settled law that “the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks probable cause.” *United States v. Swindle*, 407 F.3d 562, 566 (2d Cir.2005). “While reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop.” *Illinois v. Wardlow*, 528 U.S. 119, 123, (2000).

Additionally, in *People v. De Bour*, 40 N.Y.2d 210, 223 (1976), the New York Court of Appeals articulated the Four Levels of suspicion. For the purposes of this case, a discussion of the first Three Levels will suffice. *De Bour's* Level One encounter permits an officer to approach an individual and ask basic questions. A Level Two encounter, otherwise known as the common law right of inquiry, permits an officer to ask questions which are predicated upon a founded suspicion that criminal activity is afoot. A Level Three encounter is a forcible stop and detention, activated by a reasonable suspicion that a specific individual has committed, is committing or is about to commit a felony or misdemeanor. Under the Third Level of interference, an officer making a forcible stop has authority to conduct a protective frisk of the individual if there is a reasonable threat of physical injury.

Disciplinary Case No. 2013-9654

Respondent Delamota is charged with stopping, frisking and searching Person A without sufficient legal authority. Respondent Delamota was a conditions officer, in plainclothes, who was addressing crime patterns in the precinct involving burglaries. A burglary pattern was in existence at the time. (See CCRBX 4). Respondent Delamota admitted that his basis for stopping Person A stems from his observations of Person A while Person A was in front of the school. Respondent Delamota contends that he observed Person A walking back and forth a few times, “kind of linger[ed],” and that he was the only adult in the area. After watching him for several minutes, Respondents followed Person A to the subway station, where they initiated the stop. Respondent Delamota’s account of the incident corroborates Person A’s account of the incident.

It is Respondent Delamota’s contention according to his UF-250 that he reasonably suspected that Person A was committing or about to commit a burglary (a felony), and therefore a forcible detention was permitted under *De Bour’s* Level Three encounter. However, this Court finds that his suspicion failed to meet the predicate reasonable suspicion standard. Respondent Delamota’s own testimony that he only observed Person A walk back and forth and lingering in an area that has a known burglary pattern, clearly establishes that his suspicion fits into *De Bour’s* Level Two encounter, instead of Level Three. As such, he was only permitted to ask Person A specific questions that may or may not have been enough to establish reasonable suspicion. In addition, Person A was observed at approximately 3 :00 p.m. in front of an elementary school. When viewed objectively, it is reasonable to assume that Person A,

as he contended in his interview, was just waiting for his two kids to be dismissed from school.

Moreover, Respondent Delamota did not offer any evidence that he observed Person A engage in any activity other than “casing” and “walking back and forth” that might have given rise to a higher level of suspicion. More importantly, Person A was stopped two or three blocks away at the subway station. There is nothing in the record that suggests that Respondent Delamota came across additional facts, as he followed Person A along those blocks, which could have led him to believe that he had enough evidence to forcibly detain Person A. In addition, Respondent Delamota’s suspicion that Person A was “casing” the area in the vicinity of the school was too far attenuated from the location where he was actually stopped. As such, Respondent Delamota did not articulate enough facts that criminality was afoot nor did he meet the minimal level of objective justification required to stop Person A.

Accordingly, Respondent Delamota is found Guilty of Specification No. 1.

Since Respondent Delamota is found guilty of the initial stop, it follows that there is “no basis for even considering conducting a frisk.” *De Bour* at 223. However, even if the stop had been lawful, Respondent Delamota did not provide enough articulable facts that he reasonably suspected he was in danger of physical injury a predicate for performing a protective frisk but rather his only basis for frisking Person A was because he was “very loud, irate and combative.” (Respondent Delamota’s testimony established that he did not observe a bulge on Person A’s person, and that Person A never lunged or swung at him).

Accordingly, Respondent Delamota is found Guilty of Specification No. 2.

Lastly, Respondent Delamota testified that he did not recall if he searched Person A, but on the UF-250 (See CCRBX 3) that he prepared and attested to, he indicated that he did in fact conduct a search. The Court credits the UF-250, which is consistent with Person A's version of the incident. As such, "in the absence of any basis for detaining appellant, the subsequent search lacks a lawful foundation." *In re Darryl C.*, 98 A.D.3d 69 (2012). It, therefore, follows that because the initial stop did not meet the requisite reasonable suspicion standard to detain Person A, the subsequent search of Person A's person was without sufficient legal authority.

Accordingly, Respondent Delamota is found Guilty of Specification No. 3.

Disciplinary Case No. 2013-9653

Respondent Silverio was Respondent Delamota's partner on the day of the incident. His testimony corroborates both Respondent Delamota's version of the incident and Person A's CCRB interview. After observing Person A walk aimlessly back and forth in front of the school for five minutes, Respondent Silverio followed him for the purpose of catching him "doing something else." For the reasons already discussed above, had Respondent Silverio approached Person A by the school, he would have been permitted to ask specific questions as provided by *De Bour*'s Level Two encounter, under the common law right of inquiry.

The Court acknowledges that this area was the subject of recent burglaries, however, the protections "against unwarranted intrusion by an agent of the State are not to be relaxed when an individual goes for a walk, or engages in otherwise innocent behavior, in a public area statistically known for a high incidence of crime." *People v.*

Cornelius, 113 A.D.2d 666 (1986). Here, Respondent Silverio's testimony established two articulable facts to stop Person A a burglary pattern in the vicinity, and the fact that Person A was walking back and forth. When viewed objectively, the Court cannot find that Respondent Silverio had the requisite reasonable suspicion that criminal activity was afoot. Further, he did not articulate any additional facts, from the time he observed Person A in front the school to the time Person A was actually stopped, that might have justified a forcible detention. As such, Respondent Silverio did not have sufficient legal authority to stop Person A and he is found Guilty of Specification No. 1.

Since Respondent Silverio is found Guilty of stopping Person A without sufficient legal authority, it follows that there is "no basis for even considering conducting a frisk." *De Bour, supra*. Assuming for a moment that Person A had been lawfully stopped, and although a protective frisk is permitted when an officer has a suspect stopped for reasonable suspicion, "a pat down or frisk conducted in the course of an authorized investigatory stop may not be predicated merely on the observation of an unidentifiable bulge in a jacket." *People v. Barreto*, 161 A.D.2d 305 (1990). Respondent Silverio testified that Person A had "overly stuffed pockets" and a "rectangular" shaped object in his pocket that ultimately led him to fear for his personal safety which prompted him to do a "quick pat down" of Person A's outer garments and a "search" of the bulge.

A protective frisk in this instance could have perhaps been permitted based on Person A's "combative" behavior, his walking back and forth, the bulge in his pockets, and his screaming and agitated demeanor. However, even if a frisk was permitted, it would only have been limited to the pocket with the bulge, not of Person A's "outer garments," as Respondent Silverio performed here. In sum, since the stop itself was

without sufficient legal authority, it follows that the frisk of Person A was also without sufficient legal authority. *In Re Darryl C*, Id. at 74 citing *De Bour* at 223.

Accordingly, Respondent Silverio is found Guilty of Specification No. 2.

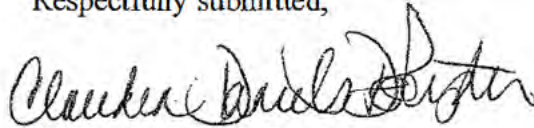
PENALTY

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). Both Respondents were appointed to the Department on January 10, 2007. Information from their personnel records that was considered in making this penalty recommendation is contained in the attached confidential memoranda.

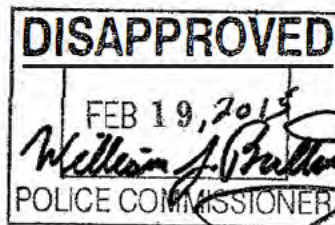
Both Respondents have been found Guilty of stopping and frisking Person A without sufficient legal authority. Respondent Delamota has also been found Guilty of an unlawful search. CCRB made a penalty recommendation of not less than eight days for both Respondents. In *Case No. 2013-9648* (Jun. 17, 2014), a six-year officer forfeited eight vacation days for similar misconduct. As such, the CCRB's penalty recommendation of eight vacation days seems reasonable for Respondent Delamota. In Respondent Silverio's case, however, it seems that a lesser penalty is warranted since he has been found Guilty of one less charge of misconduct.

Based on the foregoing, it is recommended that Respondent Delamota forfeit a penalty of eight vacation days and Respondent Silverio forfeit a penalty of five vacation days.

Respectfully submitted,



Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials



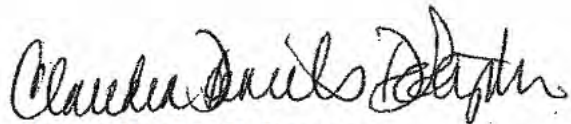
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DANIEL SILVERIO
TAX REGISTRY NO. 943816
DISCIPLINARY CASE NO. 2013-9653

In 2011 and 2013, Respondent Silverio received an overall rating of 4.5 "Extremely/Highly Competent" on his annual performance evaluation. He was rated 4.0 "Highly Competent" in 2012. He has been awarded seven medals for Excellent Police Duty. [REDACTED]

[REDACTED]. Between September 2009 and March 2010, he was on Level I Force Monitoring for receiving three or more CCRB complaints within a year. He has no prior formal disciplinary record.

For your consideration.



Claudia Daniels-DePeyster
Assistant Deputy Commissioner Trials

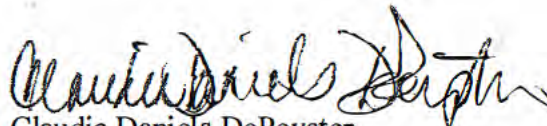
POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER SERGIO DELAMOTA
TAX REGISTRY NO. 943137
DISCIPLINARY CASE NO. 2013-9654

On his last three annual evaluations, Respondent Delamota received an overall rating of 4.5 "Extremely Competent/Highly Competent." He has been awarded nine medals for Excellent Police Duty. [REDACTED]

[REDACTED]. Since April 2013, he has been on Level I Force Monitoring for receiving three or more CCRB complaints within a year. He has no prior formal disciplinary record.

For your consideration.



Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials