The City of New York

POLICE DEPARTMENT

July 13, 2010

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Kent Frezzell
Tax Registry No. 913730
Housing Borough Bronx/Queens
Disciplinary Case No. 83229/07

The above-named member of the Department appeared before me on March 16, 2010, charged with the following:

1. Said Police Officer Kent Frezzell, while assigned to PSA 6, on or about August 21, 2006, while on duty, at a location known to the Department, in New York County, did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department, in that said Officer did remain at the scene of a traffic dispute and socialize with two female motorists for approximately fourteen minutes after said dispute was finalized.

P.G. 203-10, Page 1, Paragraph 4 – PUBLIC CONTACT – PROHIBITED CONDUCT – GENERAL REGULATIONS

2. Said Police Officer Kent Frezzell, while assigned to PSA 6, on or about August 18, 2006, at a location known to the Department, in New York County, while on duty, did fail to frequently inspect the interior of Housing Authority buildings when not on assignment and available.

P.G. 212-60, Page 1, Paragraph 1 – INTERIOR VERTICAL PATROL OF HOUSING AUTHORITY BUILDINGS

3. Said Police Officer Kent Frezzell, while assigned to PSA 6, on or about July 27, 2006, while on duty, at a location known to the Department, in New York County, did fail and neglect to take said Officer's meal period from 1240 hours to 1340 hours as instructed, in that said Officer, at approximately 1340 hours through 1352 hours, did take an extended meal period. (*Orally amended at trial*)

P.G. 212-02, Page 1, Paragraph 1 – MEAL PERIOD COMMAND OPERATIONS

PD 158-151 (Rev. 1-97)-Server

The Department was represented by Amy Avila, Esq., Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty of Specification Nos. 1 and 3 and Guilty of Specification No. 2.

Introduction

Specifications 1 and 3 are allegations made by Lieutenant Steven Kunak formally assigned to PSA-6, now retired. Since Kunak is solely responsible for the allegations in these charges he is an essential witness in this case and should have testified at this trial. Kunak, however, refused to appear when asked by the Assistant Department Advocate (Advocate) to do so.

The Advocate spoke to Kunak over the telephone and asked him if he was willing to testify in support of his allegations contained in the command disciplines that he generated for these charges. According to the Advocate, Kunak stated that he was not willing to come in to testify; he is retired, his parents are sick and that he is also named in a current lawsuit brought by the Respondent. The Advocate informed the Court that without going into more detail he basically stated that he would not come in, he is retired. As a result of Kunak's failure to appear the documents that he is responsible for generating were admitted as hearsay evidence.

The Documents that Kunak is responsible for generating is a Command "A" Discipline, dated August 21, 2006, pertaining to Specification No. 1 and signed by him (DX 2); his memo-book entries also pertaining to Specification No.1 (DX 3) and a second Command "A" Discipline, dated July 27, 2006, pertaining to Specification No. 3 (DX 4). This document was filled out and signed by a Sergeant Good as per instructions given by Kunak. It should be noted that Good did not witness the event.

At one point during the trial the Respondent, through his attorney, argued that the allegations against the Respondent were in retaliation for him being a member of the Latino Officers' Association who recently won a discrimination law suit against the Department. This Court was not presented with any evidence supporting retaliation against the Respondent and therefore retaliation will not be an issue in this case.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Lieutenant Robert Simmons and Police Officer Gilbert Figueroa[1] as witnesses. The Department also relied on Lieutenant Steven Kunak's hearsay evidence previously mentioned to support the allegations in Specification Nos. 1 and 3.

Simmons is a 15-year member of the Department and is currently assigned to Police Service Area (PSA) 8. He has worked there for almost one year as an Integrity Control Officer (ICO). Prior to PSA 8, he worked at PSA 6 as an Assistant ICO.

[1] While he introduced himself as Gilbert Figuero, his full name is Luven Gilbertfiguero.

Simmons knows the Respondent in this case because the Respondent was a police officer at PSA 6 when Simmons was assigned there. Simmons' relationship to the Respondent was professional and they did not have any conflict.

Simmons, on August 18, 2006, saw the Respondent and his partner in a patrol vehicle assigned to Sector A. Simmons stated that they were on the upper west side of Manhattan and they were driving down Amsterdam Avenue. He stopped them to inspect their Activity Logs. When Simmons checked their Activity Logs, he noticed that there was a significant amount of time, approximately one and a half hours[2] as far as not accounting for what they were doing. He testified that "it is a Housing Bureau rule, when you are not on assignment, you are supposed to be in a building conducting vertical patrols." According to Simmons, if an officer is assigned to a vehicle, "vehicles should be used to go from one building to another, but the primary responsibility of a PSA is the interior of the buildings." Simmons agreed that the Patrol Guide states that the primary responsibility of PSA in all of the police service areas is to "frequently" conduct patrols of the buildings. There is no specific time frame indicated. [3]

Approximately one month prior to August 2006, Simmons stated he had spoken to the Respondent about the responsibilities of PSA 6. Simmons had stopped the Respondent to inspect his Activity Log and noticed that there was a large gap of time in his documentation of activities. Simmons asked the Respondent what was he doing during this time period and the Respondent stated "exterior patrol." Simmons instructed the Respondent that he had to do verticals and he cannot "have a time gap this large in

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[2] The actual time was two hours and eight minutes as Simmons noted on his CD and also acknowledged in subsequent testimony.

[3] Patrol Guide section 212-60, Pg 1, Para 1-Uniformed members of the service, when not on an authorized assignment (i.e.,meal, personal necessity, etc.), shall *frequently* inspect the interior of Housing Authority buildings on assigned posts. (emphasis added)

[his] book." Simmons stated that at least every 30 minutes, some sort of activity should be performed and documented in the Activity Log. He marked the incident of August 18, 2006 as a Command Discipline ("CD"). Regarding the incident before August 18, Simmons stated he gave Respondent a warning, but did not issue him a CD on that date.

Simmons acknowledged that the Command Discipline Report Number 64/2006-806 [Department's Exhibit (DX) 1][4] was the one that he issued to the Respondent; for the August 18, 2006 incident. The document showed that the Respondent went two hours and eight minutes without having any activity in his Activity Log. The document did not have the back portion attached, which Simmons testified was back at the command. Simmons did not recall if the Respondent was ever shown the CD. Simmons agreed that it would have been his responsibility to show the Respondent the CD. It could have been Simmons or it could have been the ICO.

On cross-examination, Simmons testified that he has the ability to issue a CD. Simmons stated that there is no specific time frame in which to issue the CDs, but that it should be done at least within a year. Simmons stated, "For it to make sense, it should be done in a timely fashion." He agreed that the Department wants CDs to be adjudicated within 60 days. Simmons agreed that issuing a CD comes before the adjudication and it is 60 days from the date of issuance for adjudication. Simmons confirmed that he

[4] Command Discipline Report Number 64/2006-806 details the following: On Friday, August 18, 2006, Officer Frezzell did violate P.G. procedure # 212-60 in that he failed to inspect the interior of Housing Authority buildings when not on assignment and available. The undersigned inspected officer Frezzell's activity log at 2325 hours and discovered the following entries respectively: 1545 10-98, 1753 75V 55 W 100. No activity log entries were made and Officer Frezzell conducted no vertical patrols for a time period of two (2) hours and eight (8) minutes. When asked by the undersigned why neither activity log entries no vertical patrols were performed in that time frame, Officer Frezzell stated that he was doing exterior patrols. The undersigned warned and admonished Officer Frezzell regarding a similar incident that occurred on April 13, 2006, where he failed to make any activiy log entries and failed to conduct any vertical patrols for a time period of one (1) hour and twenty-four (24) minutes. Officer Frezzell was instructed at that time that he was to perform vertical patrols when not on assignment and available.

decided to issue a CD to the Respondent and wrote out the CD on the same day he saw the behavior. He went back to the command and typed it out. Simmons made a reference to the prior date when the Respondent had been warned about the same behavior. Simmons remembered confronting the Respondent but he did not remember what he did with the CD afterwards. Simmons did not remember showing it to the Respondent, but he knew it was filed within the Command.

Simmons testified that he issues CDs often in the command. He estimates that he has issued between 10 to 15 CDs during the four years he was at PSA 6. Simmons testified that it was not his practice to, after confronting the officer with the misconduct, to draft a CD and issue it to the officer. The procedure at PSA 6 was to write up a CD and file it. After that, it was supposed to be presented to the Executive Officer (XO) for adjudication. Simmons would write a CD and put it somewhere where the XO would see it. The XO would then decide what to do. Simmons agreed that the XO might have come to him and have asked for more details about the CD. Simmons did not remember anyone coming to him after he wrote the CD and filed it.

Simmons stated that he had a professional relationship with the Respondent at the command and he did not have any personal problems with the Respondent. He was not aware of any other supervisors in the command having a problem with him. Simmons heard something about the Respondent filing lawsuits against the Department in the past. He could not recall if he heard this through word of mouth or if it was from the officers. Simmons did not remember any specific instances where the Respondent made complaints against either the precinct, other members of the service or the Department in general. Simmons stated that the Respondent had notified him of something that was

offensive posted on someone's locker in the locker room at the command. When asked if it was a swastika the Respondent saw, Simmons could not recall, but he said it was something offensive.

When asked what his obligation was upon being notified of the offensive object, Simmons testified that he "provided [the Respondent] with the phone number to the Equal Employment Opportunity. [Simmons] gave him an office where he could speak to them in private and that's what he did." Simmons then testified that the Respondent actually informed him of two separate incidents: an article on the wall that the Respondent found offensive and the other involving a swastika. The Respondent reported the swastika incident to someone else. Simmons stated that Lieutenant Kunak was the lieutenant above him and he was the assistant ICO at the time of the incident. Simmons agreed that he was vaguely familiar with an incident that had occurred where Kunak had witnessed the Respondent and Officer Figueroa socializing with two females during a job they had. Simmons testified that he was not there during the incident. In reference to how he became aware of the incident, Simmons stated, "I guess he [Kunak] would have had to have told me."

During cross-examination, when asked if he was told by another sergeant or lieutenant or anyone else to keep a closer eye on the Respondent, Simmons said, "No." Simmons stated, "I do remember hearing, I think it was when I first got there, that Officer Frezzell, he had a lawsuit against the job, so if you are going to do anything disciplinary-wise, be careful. That's what I remember…I interpreted it to mean, because we didn't want regular discipline to be misconstrued as retaliations."

Simmons agreed that based on the CD (DX 1), he had spoken to the Respondent

on at least two occasions about doing more frequent verticals. He agreed that in the Housing Bureau, officers are told to put something in their logs every 30 minutes. He stated that it is not a written order but it is "basically stressed by myself and other supervisors at roll calls." Simmons was asked if a person is working an eight-hour tour, if he was hoping for at least 16 separate entries in a book, he said, "It depends. If you are on a job that takes you two hours,--all I mean is there can't be big gaps in the book between what you are doing...If it is a very quiet day, your book should be full of verticals." Simmons agreed that the Department wants housing officers to patrol the buildings themselves, the interiors as well as the exteriors. The housing buildings often contain four or five buildings together.

Simmons agreed that an officer could be responsible for the courtyards between buildings and the surrounding areas and sometimes even parks. He agreed that Sector A is a fairly large sector and it covers the whole 24 precinct. Simmons did not know how many buildings are covered by Sector A. When asked if it was 12 buildings, Simmons mentioned that it is definitely more than 12 buildings. Simmons was asked what is the longest distance between two buildings in the 24 precinct and he replied that "the main building is Douglas Houses. Other than that, it's small buildings, so I couldn't tell you, 5-10 blocks" between each building.

Simmons agreed that a police officer is responsible for taking police action if he sees misconduct in the building. Similarly, the officer is responsible for the courtyards and the spaces that are considered Housing Authority grounds. Simmons, who was a housing officer for 15 years, stated that a big part of being a housing officer is doing verticals. He agreed that the Patrol Guide describes how to perform vertical patrol.

When asked how many verticals would be completed on average in terms of a patrol car on a given tour, Simmons said, "It depends on the assignment. If you are assigned to a sector car, it depends on how busy you are. Like I said, if it is not a busy day, you should be in the buildings all day." Simmons said that a "proper vertical in a building that is approximately 20 stories high would take you about 20-25 minutes, you and your partner [sic] done properly." He stated that if an officer had no jobs and he included his meal, six verticals would be a good average.

Simmons agreed that housing officers are responsible for patrolling the exterior and that there are certain assignments within the PSAs where an officer is assigned to one building if there is a foot post. When asked if when the Respondent was there, were there foot posts, he stated, "Yes." Simmons does not recall the Respondent being on a foot post. Simmons agreed that the person on the foot post would be responsible for verticals of an area within walking distance. On the date in question, the Respondent was assigned a vehicle because he was covering a fairly large area. He was assigned radio runs that day and during his down time he was supposed to do verticals.

Simmons was shown Patrol Guide section 212-60, paragraph 11[5] and agreed that unless otherwise directed, officers should alternate between exterior and interior patrol. When asked if the Patrol Guide favored one over the other, Simmons stated that the procedure does. He testified, "The procedure says when you are not on assignment, you should frequently inspect the interior of the buildings." He agreed that the Department does not have an official position on what frequently means and that it is left up to common sense. Simmons disagreed that when an officer is assigned to a vehicle on

[5] Patrol Guide section 212-60, paragraph 11 states UMOS should "alternate between outside area patrol and interior vertical patrol of Authority grounds and buildings, unless otherwise directed."

patrol whether it is in a precinct or PSA that the officer is to suppose to drive around and keep an eye on things. Simmons replied that "patrol for the precinct is not the same as patrol for housing." Simmons agreed that people sell drugs in the projects outside sometimes, rapes have been committed outside and there is gang activity in the housing projects.

Simmons stated that the Respondent was a more senior officer. They would put a less senior officer on foot post, rather than a senior officer. The Respondent, as a more senior officer, was provided with a Radio Motor Patrol (RMP) vehicle. According to Simmons, the Respondent's responsibility was "expanded because now he [was] responsible for more developments.

Simmons worked closely with the ICO when he was assigned to PSA 6. He did his own integrity tests within the command. One of the things Simmons did was to hide something in a patrol car to see if the officer would search for it. Simmons used yellow post-its that were folded up to look like small heroin packets. Heroin numbers one through five were written on it and it said to return to ICO's office immediately. This test was actually coming from the Chief of Housing or Housing ICOs. According to Simmons, these test were done to "keep contraband in the RMPs down and since we have been doing it, the numbers have come way down in the Housing Bureau." Simmons stated that he would have a key to an RMP. He would put the post-its under a seat or whatever it could be hidden in the back of the RMP. This was used as a training tool. He said "it was never anything disciplinary and if the officer didn't find it, we would tell [them] that [they] failed it and we would show [them] where it was and that would be an additional place this officer would search the next time." Simmons does not recall the

Respondent either failing or passing these integrity tests. Simmons does not recall the Respondent finding alleged marijuana in a car and bringing it to the attention of the command. Simmons never heard the Respondent making a complaint to the Internal Affairs Bureau (IAB) because he felt that somebody was possibly trying to plant marijuana on him. No incidents like that came to Simmons' attention.

When asked by the Court if the Respondent was cited for frequently not doing verticals because there was too much time between entries in his Activity Log, Simmons replied, "Yes." Simmons was not sure what the Respondent was doing during that period of time. Simmons agreed that it was possible that the Respondent could have been doing police work during that time.

On re-direct examination, Simmons agreed that when an officer from PSA 6 is doing patrol, they are not supposed to be just driving around. They are supposed to be actually inspecting buildings, unless they are on assignment. According to Simmons, the Housing Bureau wants "you in the buildings where people can't[6] see you and where things can most likely be happening. The exterior is important, but not as important as the interior of the buildings, and we do know that there are officers that will drive around all night and not do anything, so this is another reason why it's stressed." Simmons reiterated that the procedure at the PSA was when a CD is written up, it is then filed. After that, it went to the Executive Officer (XO) for adjudication. He agreed that this was what he did in this case regarding the Respondent's CD that he wrote on August 18, 2006.

On re-cross examination, Simmons agreed that housing officers are not supposed to be just driving around all day doing nothing. Simmons did not follow the Respondent

[6] While this is what was typed in the transcript, this Court believes that Simmons actually meant "can."

to find out what exactly he was doing during the two-hour period in question. To Simmons' knowledge, Kunak was not following the Respondent on that day. Simmons was not sure if Kunak followed the Respondent from time to time. When asked if Kunak was doing surveillance on the Respondent that day, Simmons said he heard Kunak was actually inspecting some other officers in that same location. Simmons stated that he did not know who those officers were. Simmons stated that most likely, he heard it from Kunak. Simmons did not remember at any time if Kunak told him that he was going to follow the Respondent around to see that he did not make any mistakes.

Police Officer Gilbert Figueroa

Figueroa is a five year member of the Department and has been assigned to PSA 6 since July 2006. On August 21, 2006, Figueroa was assigned to work with the Respondent on patrol. They were not friends at the time, just co-workers. While on patrol driving with the Respondent, they became aware of a traffic dispute. Two women waved at them, asking for assistance. Apparently, a cab driver was following the women because they threw something at the vehicle that hit it. The Respondent spoke with the women and Figueroa spoke with the cab driver to get details on what had occurred. Figueroa stated that they had arrived at the scene at 2118 hours and finalized it over the radio at 2135 hours. The disposition code to finalize the job was "91-98."[7]

Figueroa testified that he and the Respondent did not leave the scene immediately because he stated, "At that time I was looking at their license. The registration expired,

[7] According to the Radio Code Signals Insert (PD-112-090) Disposition Code "91-98" refers two different radio codes which are 1091 and 1098. 1091 refers to Non-Crime Corrected and 1098 refers to Resuming Patrol/Available.

so I asked for registration, license and insurance." He said that this was after the job was finalized over the radio. Figueroa stated that he noticed that there was an insurance lapse. Figueroa stated, "There was a discrepancy with the time lapse on the insurance. It wasn't valid for three months and then they had another one after," meaning that one of the women had another insurance card for the vehicle showing that it was insured on that day. Figueroa stated that he and the Respondent used discretion and decided not to give them a summons for the insurance lapse.

The Respondent handled the job and spoke to the women. Figueroa was standing behind them. He observed the Respondent having a friendly, cordial conversation with the women. Figueroa agreed that the Respondent was laughing and joking with the women. One of the women stood up and poked her head out of the sun roof. Figueroa told her to sit back down. Figueroa stated that the Respondent was talking to the women for no more than ten minutes. Figueroa became aware that the Respondent gave personal information to the women because the Respondent had told him.

The Respondent told Figueroa that the women wanted to find out what time they finished working. The Respondent and the women exchanged numbers. Figueroa did not actually witness the exchange of numbers. Later on in the evening, Lieutenant Kunak, the ICO for PSA 6, spoke with Figueroa and the Respondent about the incident in question. Kunak gave Figueroa and the Respondent a CD for excessive talking. Figueroa stated that Kunak "scratched"[8] his Activity Log at 2152 hours.

On cross-examination, Figueroa stated he was warned and admonished for the CD. He did not lose any time. Figueroa was shown the CD about two months after the incident and signed the back of it. Figueroa mentioned that Kunak scratched his Activity

[8] The word "scratch" refers to a supervisor signing a subordinate UMOS' Activity Log.

Log at 2152 hours on August 21, 2006. Figueroa stated that he and the Respondent were not too far away from Kunak or from where the car stop had taken place when he scratched their Activity Logs. Figueroa agreed that Kunak's signature indicated 2152 hours and it said "West 175 and Old Broadway." He said that this location was on the other side of the block from where the car stop had taken place.

Figueroa and the Respondent were driving back from their sector when they first got involved in the car stop. When asked why were they not in the building, Figueroa said that there was a job assigned to them prior to the car stop. He stated that they had "just finished attending a job that came from a missing [person]. So we called over the missing. We went to obtain the child and then we were coming back roughly about that time."

When asked if the women had pulled them over, Figueroa stated, "Yes." Figueroa managed to pull the cab driver over as well because he was right behind the women. Figueroa mentioned that the women thought the cab driver was chasing them and they were concerned. Figueroa agreed that he spoke to the cab driver and the Respondent spoke to the women. Eventually, they decided that there was no criminality. Figueroa gave the job back over the radio as 91-98 at 2135 hours. Figueroa stated that the disposition code 91-98 meant "non-crime corrected and ready to go back on patrol available." He agreed that the car stop had not been assigned to him and that it was a "pick-up" job. Figueroa told the dispatcher that he was working on a job.

Figueroa noticed that there might be an insurance lapse on the car after he had put over the final disposition on the radio. He agreed that he took a few minutes to decide on what to do, which meant that he was technically still handling the job. Even though he

finalized it at 2135 hours, Figueroa and the Respondent did not actually complete the job until roughly five minutes later, which was around 2140 hours. Figueroa did not go back on the radio to take back the closing of the job.

During cross-examination, Figueroa agreed that they were not assigned any new jobs over the radio while they remained at the scene with the two women. They did not hold onto the job while they were chatting in order not to get any other calls. Figueroa said that Kunak pulled them over right after they resumed patrol. They saw Kunak speaking to the women. After he resumed patrol, Figueroa heard Kunak over the radio conducting a car stop. Figueroa was not sure if Kunak was following them, but he realized that Kunak had stopped the same car that he and the Respondent had stopped because he saw Kunak on the corner with the same car. Figueroa did not see Kunak the whole time he and the Respondent was dealing with the car stop but at some point he did notice him.

When one of the women poked her head out of the sun roof, Figueroa told her to sit back down. When Figueroa was asked if there was any law against poking your head out of a sun roof when a car is stopped, he replied, "No, but it just didn't look right, so I told her to sit back down." The woman's head was out of the sun roof for a few seconds.

Figueroa stated that Kunak did not tell them that they were receiving CDs until he ordered them to report back to the command at 2223 hours. Kunak spoke to both the Respondent and Figueroa separately. Kunak informed him that he was getting a CD for excessive talking. When asked by the Court if he was told by Kunak what was the excessive talking, Figueroa stated, "If he did, I didn't hear it. I was on the aggravated side because I have never been in trouble. So I don't know if he explained to me what

excessive talking was."

Lieutenant Steve Kunak

As previously mentioned, Kunak refused to appear at trial to testify in support of the allegations that he made against the Respondent under specifications 1 and 3. In lieu of his testimony the Department offered hearsay statements in the form of two Command Disciplines and a memo-book entry generated by Kunak in support of their case against the Respondent.

In support of the allegations contained in specification 1, the Department submitted Kunak's Command Discipline (DX 2) and his Memo-book entry (DX 3) both detailing similar facts underlying the charges in that specification.

Kunak's Command Discipline provides that:

> On Monday, August 21, 2006, from 2135 hrs. to 2149 hrs. PO Frezzell [the Respondent] and his partner PO Gilbert-Figueroa were observed in unnecessary conversation with two female[s] (known to the Department) in a black Lexus, [redacted]. The officers assigned to PSA 6 RMP #9246 had a P/U 10-52 involving the two females and the passenger of another auto in the north bound lane of Amsterdam Avenue between W125 & W126 Street[s] at approx. 2110 hrs. The officers finalized the pick up assignment at 2135 hrs. as 10-91 and remained at the scene talking and laughing with the two females, one of [whom] was standing in the sunroof of the black Lexus. The officers remained at the location for 14 minutes. At 2149 hrs the black Lexus with the two females left the location and was subsequently stopped by the undersigned at the corner of W125 Street & Old B, Way. At which time the driver of the black Lexus offered to the undersigned a bank receipt that contained Officer Frezzell's first name "Kent" and the home and cellular telephone number of Officer Frezzell.

On the CD, Kunak noted that the Respondent was in violation of the following Patrol Guide procedures: 203-10, Item #4, Engaging in conduct prejudicial to the good order, efficiency or discipline of the Department; and 206-03, Item #11, Unnecessary Conversation & Item #26, Failure to properly perform or improperly perform Patrol or other assignment.

Kunak's Memo-book entry states that:

> 2128 OBSERVATION OF 9246 PO GILBERT-FIGUEROA/FREZZELL. . P/U 10-52, N/B LANE AMST AVE BETWEEN W125-W126 STS. OFFICER OBSERVED TALKING W/2 FEMALES. 1 FEMALE WHITE DRIVER + 1 FEMALE BK PASS STANDING IN SUN ROOF OF BK LEXUS. [redacted].
>
> 2135 9246 MARKED P/U 10-52 AS 10-91, OFFICERS REMAIN AT ABOVE LOCATION STANDING @ BK LEXUS TALKING W/FEMALES + LAUGHING + GIGGLING WITH OFFICERS.
>
> 2149 BK LEXUS PULLED U TURN ON AMST S/B ON AMST AVENUE WEST ON W125 ST
>
> 2150 CAR STOP W125 + OLD BWY BK LEXUS [redacted] PO OMISOR/RANDALL 9211 84. OPER OF BK LEXUS [redacted], FRONT PASS + VEH OWNER [redacted] NJ DRIVE LIC. OPER INFORMED OF REASON FOR STOP (U TURN) ASKED ABOUT OFFICERS. STATED THAT THEY WERE VERY NICE + HAD HELP WITH A FIGHT WITH A LIMO DRIVER + THAT OFFICER "KENT" GAVE HER HIS #'S + TOLD HER TO CALL HIM. OPER PULLED # FROM HER BRA, #'S WRITTEN ON COMMERCE BANK RECEIPT [redacted] + [redacted]. OPERATOR STATED THAT I CAN HAVE THE PAPER W/THE #'S IF KENT DOES NOT GET IN TROUBLE. OPER + PASS OF VEH BOTH STATED THAT THEY WERE GOOD GUYS + WERE JUST TALKING

In support of the allegations contained in specification 3, the Department submitted the Command Discipline (DX 4) that was written and signed by Sergeant Good at the direction of Kunak.

Kunak's second Command Discipline provides that "[o]n Thursday July 27, 2006, Officer Frezzell [the Respondent] was instructed to take meal from 1240 hours to 1340 hours. Officer Frezzell reported to the desk at 1352 hours, thereby extending his meal by 12 minutes, and not in proper uniform."

The Respondent's Case

The Respondent testified in his own behalf.

The Respondent

The Respondent has been a member of the Department for over 17 years. He is currently assigned to PSA 6. Throughout his career, he has been assigned to the court section in Manhattan, Brooklyn and the Bronx. He was assigned to the different court sections at various times during his career because of several injuries that he had sustained causing him to be placed on medical restricted duty. When the Respondent was full-duty, he has been assigned to PSA 6, PSA 5, and PSA 4. He has spent over ten years on patrol in the various PSAs.

The Respondent stated that he is a member of a protected class of the Latino Officers Association (LOA) versus the City of New York class action lawsuit. The basis of the lawsuit was to address the discrimination, retaliation, and discriminatory discipline

that resulted in termination for all Hispanic and African American uniformed members of the New York City Police Department that served any time between 1996 and 2003.

In 2005, the Respondent, while assigned to PSA 6, was offered a settlement. He stated that people were talking to him about it and he overheard conversations in the locker room regarding it. The Respondent stated that he felt he was treated differently by his superiors at the command, starting the moment he got back there in 2003. The Respondent stated that he was constantly given undesirable post assignments. If he had a favorable assignment, it was changed by a supervisor and he was reassigned. The Respondent tried to seek help from the Department's OEEO office. He made OEEO complaints against supervisors at PSA 6 during this time period. He did not know how much investigation they actually did.

The Respondent found out that the supervisors knew about the OEEO complaints because he overheard conversations in the locker room. He was not sure who was talking because he just heard chatter. The Respondent stated he had made complaints to the attention of the Internal Affairs Bureau (IAB) that was related to discrimination while he was at PSA 6. He stated that he also made complaints on behalf of others when one officer told him about a swastika that was on display in the male locker room at PSA 6 so he notified IAB about it. The Respondent also referred to another occasion more recently where two black female officers were having CDs adjudicated, and they requested him to be their representative because of his position with the LOA. The Respondent reported this to IAB because he believed that there was discrimination involved. The Respondent stated that there is another civil suit pending against the Department and there are individuals who either currently work or have worked for the Department that are named

in the civil suit. The chief complaint of these suits is discrimination and retaliation.

The Respondent stated that Kunak was named in the original lawsuit with LOA in 2004 and is also named in the new lawsuit. Between the two lawsuits, he felt he was being discriminated and retaliated against by Kunak.

The Respondent stated that on August 21, 2006, he remembered being on patrol with Figueroa in a vehicle and being "flagged down" by the women. The driver of the other vehicle, which was a "gypsy cab," was also pulled over. Once the Respondent determined that there was some sort of dispute, he transmitted it over the radio.

The Respondent and Figueroa spoke to the occupants of both vehicles and completed the job. There was no action taken against either party. When asked how the demeanor of the two women was, the Respondent stated, "very excited, very animated, not calm at all." He stated he was able to calm them down by giving them the other driver's explanation and engaging them in small talk. At some point, they asked what he and Figueroa were doing later that night. One of the women asked for his phone number. The Respondent told one of the women,"...I told her while I'm working I don't hang out or anything like that, but when I'm on my own time, I am free to do whatever I want. So she wanted to contact me." He wrote his telephone number on a slip of paper and gave it to one of the women.

The Respondent stated that although the job was finalized, they were still involved because there was a discrepancy with the paperwork and the documentation for the vehicle registration and auto insurance. Upon further investigation, it was determined that "there was no discrepancy and everything checked out." Their radios were on and there were no jobs assigned to them while they were talking to the two women. The

Respondent and Figueroa stayed on the scene for an extra five minutes because he was talking to the women about a potential discrepancy with the paperwork. They wanted to make sure that the vehicle was not stolen. The Respondent stated that he has never contacted the women.

In regard to the charge of failing to frequently inspect the interior of the buiding, the Respondent stated that he was aware of the responsibilities of a police officer patrolling the housing authority area in a vehicle. He stated that when a police officer is assigned to patrol, they are supposed to be vigilant, look for irregularities and when assigned to a vehicle, verticals are to be done on foot. They should also monitor the radio for calls from the dispatcher. According to his knowledge and what the Patrol Guide states about exterior and vertical patrol, an officer should alternate between exterior and vertical patrol. When assigned to a vehicle, a police officer can respond to a larger area.

During direct-examination, the Respondent was asked if he knew the meaning of frequently. He stated, "Frequently is very broad, it basically means more than once." When asked how many verticals does he do during the course of a tour, he stated, "It depends on how busy it is. It depends on what else is going. Sometimes you get assignments from the stationhouse."

On August 18, 2006, the Department is alleging that there was a period of two hours and eight minutes where the Respondent had no activity. The Respondent stated that he "definitely had activity. [He] was doing exterior patrol." He stated that he was assigned to a very large area in the housing development within the 24 Precinct. The Respondent stated that he covered an area that extended form "the 100s, all the way down to the low 90s and it extends from Central Park West all the way over nearly to West End

Avenue." He stated that it could take up to three hours doing exterior patrol of the area because he has to drive slow to visually inspect to see if anything is going on.

When asked by the Court who decides which building to perform a vertical inspection, he stated, "If we are not specifically directed to a certain building we just pick randomly on our own, we decide." The Respondent stated that he was assigned to the Douglas Houses which is the largest development in the 24 Precinct.

The Respondent's attention was then drawn to the third specification regarding the extended meal. The Respondent testified that on July 27, 2006, he was assigned to appear at the Department Advocate's Office because he had an administrative trial hearing. He stated that he started his tour at 0800 hours at PSA 6 and left to go to the hearing. He could not recall if the hearing was either short or adjourned. When the Respondent called the command, he was told to pick up the payroll checks. When he went to pick the checks up, he was informed that someone else had to pick them up. The Respondent went back to the command sometime after 1300 hours and he was dressed in business attire. When he arrived at the command, he was told by the desk officer to go to meal. The Respondent stated that this was not the first time that he had appeared in the trial room and had returned back to the command. He stated that the normal procedure for returning to the command after a hearing was to take meal if there was time left in the tour. He also stated that if an officer was in a suit that they would be assigned to answering phones at the desk or doing something administrative. If there were three to four hours left in the tour, the desk officer would not send a police officer out on patrol. The Respondent stated that the Desk Officer, Sergeant Hart, told him to go to meal. He stated that during his meal he went upstairs and stayed inside the command for the

duration. While still on meal, he was called down to appear before the desk officer. He was still in business attire. The Respondent was instructed to change into his uniform. He continued his meal and changed into uniform after it was completed. He was assigned to a foot post and took the bus to his assignment.

Prior to going to his foot post, the Respondent was told that he had taken a long meal. He was issued a CD by Sergeant Good. The Respondent stated that Kunak was the supervisor who confronted him about wearing the uniform. Kunak was not the supervisor that told him to go to meal. The Respondent stated that when he was instructed to take his meal he was not informed to put his uniform on and that he was assigned to a foot post.

The Respondent stated that he felt that the basis of the charges was because he had spoken out against discriminatory practices at the command, the official complaints he had made and that Kunak is named in the LOA lawsuits. The Respondent stated that he has never been cited for failing to do a vertical in a two-hour period. He had never heard of someone receiving a CD for taking an extra 12 minutes on meal when coming back from court. The Respondent stated that he had never heard of anyone being cited for excessive talking or unnecessary talking.

During cross-examination, the Respondent was asked if the complaints that he made to IAB and OEEO "ever gone anywhere," he stated, "Not to my knowledge." He agreed that he stayed on the scene of the dispute with the vehicles after the job was finalized. He stated he doesn't remember laughing with the women. According to the Respondent, the women may have been laughing and joking because it was a result of him changing their mood to calm them down. He did not recall one of the women

standing through the sun roof. He gave them his number but he did not remember taking their numbers. The Respondent did not believe that it was inappropriate behavior to give them his number. When asked if he made plans to see them later, the Respondent stated, "That's why I gave the number, because I didn't want to make any plans because I was working."

The Respondent was asked if he remembered being instructed by Simmons prior to August 2006, that when he was not on assignment to conduct vertical patrol. He stated that he did not remember it, but he saw a copy of his Activity Log that showed Simmons had written the instruction. He agreed that he got along with Simmons but felt that other people were telling him (Simmons) to target the Respondent.

On August 18, 2006, between the hours of 1545 to 1753 hours, the Respondent was asked if he had any entries in his Activity Log regarding any activity conducted or action that he took between that time, he stated that there was no significant action or else he would have documented it.

On re-direct, the Respondent stated that as far as he knows, the Department or the Patrol Guide does not say it is inappropriate to give someone a piece of paper with his phone number on it while on patrol.

FINDINGS AND ANALYSIS

Specification No. 1

The Respondent is charged with remaining at the scene of a traffic dispute and socializing with two female motorists for approximately fourteen minutes after said dispute was finalized.

It is not in dispute that the Respondent and his partner, while on patrol, stopped to help two female motorists and a male taxi driver who were having a dispute. The officers resolved the problem they were having but Kunak, who was at the scene, found fault with the Respondent and Figueroa having a conversation with the females and staying too long at the location.

Kunak's hearsay statement contained in his CD (DX 2), a document pertaining to Department discipline, states that for a period of 14 minutes, from 2135 hours to 2149 hours, the Respondent and Figueroa "were observed [by Kunak] in unnecessary conversation with two female (sic) in a black Lexus..." Kunak acknowledges in the CD that the officers were involved in a pick up assignment involving the two females and the passenger of another automobile. The assignment was finalized at 2135 hours meaning that it was officially over. It is the understanding of this Court that once an assignment is finalized the officers should then resume patrol.

Kunak in characterizing the Respondent's and Figueroa's conversation as "unnecessary" leaves this Court to wonder what he was referring to. While Kunak was obviously in the vicinity of where the Respondent had stopped the female motorist and taxi driver, he was not close enough to hear what they were saying. In his Activity Log

he stated that "officer observed talking W/2 [with two] females...[and] Officers remain at above location standing @ BK [black] Lexus talking W/ [with] females and laughing and giggling with officers." He further states that after stopping the females they told him that "they [officers] were very nice and had helped with fight with limo driver and that officer "Kent" gave her his #'s [telephone number] and told her to call him....Oper. [Operator] and Pass. [Passenger] of vehicle both stated they were good guys and were just talking."(DX 3)

Because Kunak did not appear at trial, he could not be questioned further to give a fuller explanation at to what he was referring to in his reports. Figueroa and the Respondent did testify and both explained why they stayed at the location after they finalized the assignment.

They both testified that at one point they inspected the female's license, registration and insurance and found that there was a discrepancy in the driver's paperwork with regard to her automobile insurance. Figueroa and the Respondent testified that they noticed that the vehicle's registration gave one set of information and the insurance paperwork gave another. They stated that the time it took to straighten out the confusion was about 5 minutes after the assignment had been finalized. Kunak would not have known the content of their conversation because he was not in ear-shot of their location, so he had no idea of what they were talking about. He may have seen them laughing, but this fact in and of itself is not misconduct. And given the fact that the five minute estimate was an estimate because the officers were not looking at their watches, the time frame after finalization could have been longer possibly 14 minutes. Since there was no evidence that refuted the Respondent's version, this Court views it as

occurring as the Respondent claimed it did. In addition, while the Respondent did give the female his telephone number, this fact alone does not support the allegations in this specification.

Accordingly, I find the Respondent not Guilty as charged.

Specification No. 2

The Respondent is charged with failing to frequently inspect the interior of the Housing Authority buildings when not on assignment and available.

The purpose of Patrol Guide section 212-60 is "To ensure that Housing Authority buildings receive interior vertical patrol by uniformed members of the service." The procedure for carrying out this Patrol Guide's purpose is that "Uniformed members of the service, when not on authorized assignment (i.e., meal, personal necessity, etc.) shall frequently inspect the interior of Housing Authority buildings on assigned posts ...." The Patrol Guide then goes on to state the areas of the building that should be inspected including the interior of the lobby, elevators, staircases and hallways from the top floor to the ground floor and roof landings. It also points out that the officer should "make Activity Log entry of the time and street address upon entering the building...[and] upon exiting the building and make Activity Log entries indicating time building inspection completed and any condition noted."

From the plain language of this section, it is clear that the Department places a high priority on the safety and protection of those who live in New York City Housing. A simple check of the meaning of frequently shows that "often, regularly, recurrently [and] repeatedly" are words used to describe frequently.

On August 18, 2006, Simmons stopped the Respondent and his partner who were

on patrol in a Department vehicle and inspected the Respondent's Activity Log. Simmons observed that there was a lapse of more that 2 hours, from 1545 hours to 1753 hours, for which the Respondent had no entry or accounting for what he was doing. Approximately one month earlier, Simmons had spoken to the Respondent concerning him doing more frequent vertical patrols, because at that time he also inspected his Activity Log and noticed a large gap of time in his documentation of activities. At that time, the Respondent told him that he was doing "exterior patrol." Simmons then instructed the Respondent that he had to do verticals and that he could not have large time gaps in his book. Simmons noted that at least every 30 minutes some sort of activity should be performed and documented in the Activity Log. At that point, he gave the Respondent a warning.

For the August 18 incident, Simmons issued the Respondent a Command Discipline where he wrote in the violation section that:

> "No activity log entries were made and Officer Frezzell conducted no vertical patrols for a time of two (2) hours and eight (8) minutes. When asked by the undersigned why neither activity log entries nor vertical patrols were performed in that time frame (1545 to 1753 hours), Officer Frezzell stated that he was doing exterior patrols. The undersigned warned and admonished officer Frezzell regarding a similar incident that occurred on April 13, 2006, where he failed to make any activity log entries and failed to conduct any verticals patrols for a time period of one (1) hour and twenty-four minutes. Officer Frezzell was instructed at that time that he was to perform vertical patrols when not on assignment and available." (DX 1)

Simmons stated that if an officer is assigned to a sector car, the amount of verticals that he should perform would depend on his assignments or "how busy you are...if it is not a busy day, you should be in the buildings all day." He added that if an officer had no assignments, and including his time for meals, six verticals would be a

good average for an officer's tour.

Simmons stated that the basis for his allegations that the Respondent was not doing verticals was that there was too much time between entries in his Activity Log. While he acknowledged that it was possible that the Respondent could have been doing police work at the time, he further acknowledged that a Housing officer assigned to a vehicle is not supposed to be just driving around. They are required to be actually inspecting buildings, unless they are on assignment. He added that the exterior is important but not as important as the interior.

The Respondent testified that he does not remember Simmons, prior to August 18, 2006, instructing him that when he is not on assignment to conduct vertical patrols of the interior of the buildings. He did admit looking at his Activity Log, however, and saw that Simmons had written these instructions in his book.

The Respondent also admitted that he did not do vertical patrols during the period from 1545 to 1753, and while he could not explain exactly what he was doing during that period he did say that he was on routine patrol. He testified as to his version or understanding of the responsibilities of a Housing Authority officer where he talked about maintaining vigilance and to look for irregularities within his assigned area. He explained that vertical patrols are done on foot and exterior patrols in a vehicle are accomplished by driving through the streets. When the Respondent was reminded that he was required to do vertical patrols "frequently" he stated that the term was very broad and to him frequently meant more than once.

The Respondent's rationalizations are not grounded in the Patrol Guide or in any instructions that he received from his superior officers. The Patrol Guide is not

ambiguous about the importance the Department places in an officer doing vertical patrols. They are to be done frequently or "often" and "repeatedly" throughout an officer's tour if he is not otherwise on an assignment. If the Respondent's meaning of frequently was adopted than it would be appropriate to do vertical patrols only twice per tour.

The Respondent had no legitimate excuse for not doing the vertical patrols and he cannot claim that he did not know that he had to perform vertical patrols during that two hour period because he was not otherwise assigned and the Patrol Guide and Simmons made it perfectly clear that he was required to perform those patrols.

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

Specification No. 3

The Respondent is charged with failing to take his meal period from 1240 hours to 1340 hours as instructed in that at approximately 1340 hours through 1352 hours, he took an extended meal period of 12 minutes and was not in proper uniform.

Here again Kunak did not appear to testify in support of his allegations against the Respondent. This Court, therefore, must rely on hearsay statements that Kunak directed Sergeant Good to write in a CD. (DX 4)

In that CD, Kunak alleges that the Respondent was instructed to take meal from 1240 hours to 1340 hours and that he reported to the desk at 1352 hours thereby extending his meal by 12 minutes and that he was not in proper uniform. (DX 4)

It is not in dispute that the Respondent reported to the Department Advocate's office regarding a separate disciplinary case. He testified that he was wearing business

attire that day which in the opinion of this Court is a proper way to dress when appearing in the Department's trial room.[9]

He further testified and agreed that his meal period was from 1240 to 1340 hours and that he returned to his command at 1300 hours. When he arrived at the command the desk officer, Sergeant Hart, told him to go to meal. His meal period was for one hour which he took at the command. At one point he went back to the desk and the desk officer instructed him to change into his uniform. He then went back to his meal break because it was not yet over and before going to his post he changed into his uniform. According to the Respondent, Kunak was the one who confronted him about putting his uniform on.

This Court finds that the Respondent was properly dressed when he reported to the Advocate's office and there was no evidence presented that showed that he should not have reported back to the command before going to meal. Once at the command, he was not reprimanded for not going to meal, instead he was instructed to go to meal which he did. He was also not and should not have been reprimanded for walking into the command in business attire because as previously stated he was properly attired for his appearance in the trial room. Without further testimony from Kunak to shed some light on what motivated these allegations against the Respondent, this Court cannot find any credible evidence to support the charges against him.

Accordingly, this Court finds the Respondent Not Guilty of Specification No.3.

[9] It should be noted that the Respondent was also dressed in business attire during this trial.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). The Respondent was appointed to the Department on April 30, 1992. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent has been found Guilty of failing to frequently inspect the interior of Housing Authority buildings when not on assignment and available. It should be noted that the frequent inspection of the interior of these buildings is paramount in keeping those buildings and the people who live in them safe from the various crimes that can take place at those locations.

Based on the foregoing, it is recommended that the Respondent forfeit a penalty of 10 vacations days.

Respectfully submitted,

J. Grappone

John Grappone
Assistant Deputy Commissioner – Trials

APPROVED
AUG 02 2010
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER KENT FREZZELL
TAX REGISTRY NO. 913730
DISCIPLINARY CASE NO. 83229/07

On the last three performance evaluations contained in his file, the Respondent received ratings of 3.5, 4.0 and 3.5 in 2007 through 2009, respectively.

The Respondent has been the subject of three prior formal disciplinary adjudications. In 1994, he was the subject of charges and specifications for reporting late to his command. Although that case was dismissed, the Respondent received a Command Discipline and forfeited seven vacation days for his misconduct. In 2000, the Respondent pleaded Guilty and forfeited ten vacation days for harassing his [redacted]. In 2007, the Respondent was the subject of a Departmental trial and was found Guilty of failing to store and safeguard property and operating a Department vehicle without authorization or permission, for which he forfeited 15 vacation days.

[redacted] Based on his overall record, the Respondent has been on Level II – Discipline Monitoring since November 2006.

For your consideration.

John Grappone
Assistant Deputy Commissioner - Trials