POLICE DEPARTMENT

In the Matter of the Disciplinary Proceedings	:	
- against -	:	FINAL
Police Officer Kevin Marcial	:	ORDER
Tax Registry No. 937879	:	OF
Police Service Area 5	:	DISMISSAL

Police Officer Kevin Marcial, Tax Registry No. 937879, having been served with written notice, has been tried on written Charges and Specifications numbered 2022-25553, as set forth on form P.D. 468-121, dated April 22, 2022, and after a review of the entire record, Respondent, having pleaded Guilty, is found Guilty.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Kevin Marcial from the Police Service of the City of New York.

HONORABLE JESSICA S. TISCH
POLICE COMMISSIONER

EFFECTIVE: 2/18/25

POLICE DEPARTMENT

July 31, 2024

In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2022-25553
Police Officer Kevin Marcial	:	
Tax Registry No. 937879	:	
Police Service Area 5	:	

At:	Police Headquarters One Police Plaza New York, NY 10038
Before:	Honorable Vanessa Facio-Lince Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department:	Jamie Moran, Esq. Department Advocate's Office One Police Plaza, Room 402 New York, NY 10038
For the Respondent:	John Tynan, Esq. Worth, London & Martinez, LLP 111 John Street, Suite 640 New York, NY 10038

To:

HONORABLE EDWARD A. CABAN
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

CHARGES AND SPECIFICATIONS

1. Said Police Officer Kevin Marcial, while off duty and assigned to the 101 Precinct, on or about April 21, 2022, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer discharged his firearm from his personal vehicle.

   A.G. 304-06, Page 1, Paragraph 1 — PROHIBITED CONDUCT

2. Said Police Officer Kevin Marcial, while off duty and assigned to the 101 Precinct, on or about April 21, 2022, failed to safeguard his firearm, in that said Police Officer intentionally discharged his firearm outside of Department guidelines.

   A.G. 305-07, Page 1, Paragraph 1 — FIREARMS– GENERAL REGULATIONS

3. Said Police Officer Kevin Marcial, while off duty and assigned to the 101st Precinct, on or about April 21, 2022, failed to remain at the scene of an off duty incident.

   P.G. 212-32, Page 1, Paragraph 1 — OFF DUTY INCIDENTS INVOLVING UNIFORMED MEMBERS OF SERVICE

4. Said Police Officer Kevin Marcial, while off duty and assigned to the 101st Precinct, on or about April 21, 2022, failed to request the response of a patrol supervisor after being involved in an off duty incident.

   P.G. 212-32, Page 1, Paragraph 2 — OFF DUTY INCIDENTS INVOLVING UNIFORMED MEMBERS OF SERVICE

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 26, 2024. Respondent, through his counsel, entered a plea of Guilty to the subject charges and testified in mitigation of the penalty. The Department did not call any witnesses, but offered video evidence. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Respondent, having pleaded Guilty, is found Guilty as charged. Having

reviewed all of the evidence in this matter, I find no mitigation is warranted and recommend Respondent be dismissed from the New York City Police Department.

SUMMARY OF EVIDENCE IN MITIGATION

This mitigation hearing stems from an off duty incident during which Respondent intentionally and wrongfully discharged his firearm and subsequently failed to remain at the scene of the off duty incident and request the response of a patrol supervisor. The underlying facts of this matter are not in dispute, and Respondent readily admitted to the charged misconduct.

Specifically, on April 21, 2022, Respondent was driving through the East New York section of Brooklyn after concluding his tour of duty in Queens. Shortly after meeting with a female friend and driving her to her car, Respondent noticed that he was being followed by an unfamiliar black car. Respondent was followed for several blocks until he decided to unholster his service weapon and discharge it out of the window of his moving vehicle. Respondent did not remain at the scene after he did this nor did he request a patrol supervisor to the scene. In fact, Respondent did not formally report this incident until several hours after it occurred. (Tr. 14-20, 40-45)

Respondent testified that on the day of this incident, after completing his tour, he met his friend, [redacted] (hereinafter "DTW") at her place of employment in Brooklyn to drop off groceries. He proceeded to drop off DTW about a block away from her vehicle and continued on his way home. As Respondent drove, he noticed a small, black car following him at a high rate of speed and in close range. (Tr. 14-16) Respondent testified that he continued driving through East New York and accelerated his speed to try to get away from the black car following him. Respondent recalled:

> On a certain block, like, it was a like a driveway. It was like a -- like an industrial driveway. Like, you know, a business driveway. I went on top of the curve to try to get around so that -- you know, so I can alleviate him from chasing me. As I was doing that, that car came in back of me, and revved up and banged into the back of my vehicle. (Tr. 16)

Respondent testified that despite the fact that he had his cellphone, he did not call 911 because he just wanted to "get away from the situation." He recalled that at some point while he was being pursued, he passed a police precinct. Respondent explained that he decided to discharge a round from his firearm because he was still being chased and he wanted to "alert somebody in the precinct." (Tr. 17-18)

When asked if he knew who was chasing him, Respondent stated that although he could not see inside the car because the windows were tinted, he believed that the person chasing him could be DTW's estranged husband. He added that he has had "problems" with DTW's husband in the past. Respondent testified that in hindsight he realized he could have just pulled into the precinct rather than discharging a round of ammunition from his service weapon, but he did not want to put anyone else in danger. After he discharged his weapon, Respondent noticed that the car chasing him made a left turn away from him and Respondent was able to make a right. (Tr. 19-20)

Respondent continued driving and, after a couple of blocks, observed police officers on the street. He testified that he stopped his car and asked the officers to check it for damage. According to Respondent, he did not identify himself as a member of service or inform the officers of what just transpired because he "really didn't want to involve the officers because I (he) know how the Department is." (Tr. 21) Respondent admitted that he knew at that point that he was in a lot of trouble and did not want to involve anyone else.

After Respondent's interaction with the officers, he called DTW to inform her of what happened. He then called another friend who is a fellow police officer. His friend suggested that Respondent contact his delegate. Respondent testified that he called his delegate approximately a half hour after he discharged his firearm. According to Respondent, his delegate counseled him to either call 911 or report to a precinct. Respondent then pulled into the nearest precinct's parking lot and waited in the car. Respondent further testified that his delegate reached out to a lawyer and that the lawyer told him to wait for them to arrive before walking into the precinct. Respondent estimated that he waited approximately an hour for his delegate and attorney to arrive before they entered the precinct together. Once Respondent was at the precinct, he reported what happened. (Tr. 21-23)

Respondent acknowledged, during cross-examination, that his delegate instructed him to call the Operations Unit. He admitted that he did not call Operations until almost three hours after he discharged his firearm. Respondent further disclosed that when he finally called Operations, he did not tell them that he discharged his weapon or that he suspected that the car following him was the estranged husband of his female friend, DTW. (Tr. 40-41)

Respondent testified that after the above-mentioned incident occurred, he had one subsequent interaction with DTW's husband. He detailed that DTW accompanied him to get a haircut and as he was walking toward his car, DTW's husband approached him on the street and was yelling at him. Respondent got into his vehicle and attempted to leave, but DTW's husband blocked him from doing so. Respondent was able to maneuver his car on the curb to get away from DTW's husband. He recalled that on this occasion, when DTW's husband began to chase him, he immediately drove to a local precinct and reported it. (Tr. 23-24)

The Department offered nine videos (Dept. Exhibits 1-9) and still images in evidence depicting the car chase at various points. The videos largely corroborate Respondent's testimony in that he was pursued by a small, black car for a number of blocks. The videos also demonstrate that much of the pursuit occurred in broad daylight, on commercial streets with both vehicular and pedestrian traffic. Additionally, Department's Exhibit 12 (Crime Scene Diagram) shows where the shell casing discharged from Respondent's firearm was recovered. This exhibit confirms that Respondent discharged his weapon in the vicinity of Sutter Avenue between Williams Avenue and Hinsdale Street.

At trial, Respondent took responsibility for his actions. With regard to the discharge of his firearm, Respondent testified that he recognizes in hindsight that he should have stopped his car and gone into the precinct when he was being chased rather than discharging his weapon, but he did not want to "put anybody else in danger or crash into cars." (Tr. 19) He also stated that although he is familiar with the Patrol Guide and its requirements surrounding off duty incidents such as this one, he did not stay on scene or immediately report it because of the "threat" posed by the vehicle chasing him. Respondent further indicated that the reason he waited to report this was because he was trying to "collect" himself and he was "traumatized" by the fact that he discharged his weapon, understanding that he was in a lot of trouble. (Tr. 25-26)

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent's employment history also was examined. *See* 38 RCNY § 15-07. Information from his personnel

record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent, who was appointed to the Department on July 11, 2005, pled guilty to all of the specifications, the most serious of which involves discharging his firearm outside Department guidelines. He has previously been the subject of two disciplinary cases, which were adjudicated together at a mitigation hearing, after which he received a penalty of 30 vacation days and dismissal probation in 2015. In the first matter, he pled guilty to failing to maintain a current driver's license for three months and being observed with his eyes closed while assigned to guard a prisoner. In the second case, he pled guilty to improperly registering his personal vehicle with NJ plates and operating his vehicle with an improperly registered and then an expired registration for one month.

The Department Advocate seeks the penalty of termination, arguing that Respondent did not present any mitigating evidence to support a lesser penalty and that his actions on the date of the incident were reckless and irresponsible. Respondent's counsel argued that a total penalty of 30 vacation days and one-year dismissal probation would be appropriate in this matter, when taking into consideration Respondent's remorse and candid acknowledgement that his actions were wrong, as well as his 25 years of service (including his time as a traffic agent) to the Department. As noted above, Respondent has prior disciplinary history which resulted in dismissal probation. The fact that Respondent engaged in misconduct of a serious nature after being previously placed on dismissal probation, demonstrates to this Tribunal his inability or unwillingness to conform to the Department's expectations. I, therefore, agree with the Advocate's recommendation that dismissal is appropriate in this case.

Department precedent supports that members who intentionally discharge a firearm in a reckless manner may be dismissed from the Department. *See Disciplinary Case No. 2007-83211* (May 17, 2011), aff'd *Amador v. Kelly*, 109 A.D.3d 762 (1st Dept. 2013) (nine-year officer with no disciplinary history dismissed for firing his gun in the direction of his girlfriend, recklessly creating a risk of injury while placing her in fear of losing her life, in addition to failing to report the incident); *Disciplinary Case No. 2007-83438* (Aug. 4, 2009) (six-year officer with no disciplinary history dismissed after pleading guilty to failing to safeguard his firearm, notify the Department and remain at the scene after discharging his firearm during an off duty traffic dispute. Respondent contended he was in fear for his safety and was not going to wait to see if the driver had a weapon).

Although this Tribunal credits Respondent's candor and remorse, no amount of contrition can absolve him of the seriousness of his misconduct. Respondent, intentionally and with wanton disregard for the safety of others, discharged his service weapon from a moving vehicle. Even if the firearm was pointed in the air, shooting in this manner creates a public risk not only of serious physical injury, but of death. It also contradicts Respondent's own testimony that he did not want to put others at risk. The fact that he subsequently failed to make the appropriate notifications about said incident is also quite troubling given the number of years he has been employed by this Department. Discharging a firearm from a moving vehicle as a means to summon police intervention, as suggested by Respondent in his testimony, is not only unreasonable, but evinces a serious lapse in judgement that is incompatible with continued service as a member of this Department.

After carefully considering the testimony of Respondent, and reviewing each of the exhibits submitted, I am not persuaded that mitigation is warranted. There are no exceptional

circumstances here that would justify a penalty short of dismissal. Respondent, through his actions, demonstrated that he lacks the prudence and sound judgment required of members of the Department. Therefore, based upon the severity of Respondent's misconduct, his prior disciplinary history and the lack of mitigating factors, I recommend that Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,

Vanessa Facio-Lince
Assistant Deputy Commissioner Trials

APPROVED
FEB 18 2025
JESSICA S. TISCH
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER KEVIN MARCIAL
TAX REGISTRY NO. 937879
DISCIPLINARY CASE NO. 2022-25553

Respondent was appointed to the Department on July 11, 2005, having previously served from September 1999 to July 2005 as a Traffic Enforcement Agent. On his three most recent annual performance evaluation, he was rated "Meets Standards" for 2021, 2022 and 2023.

In 2015, Respondent forfeited 30 vacation days and was placed on one-year dismissal probation for misconduct that was the subject of two disciplinary cases. In the first matter, Respondent pled guilty to (i) failing to keep a hospitalized prisoner under close observation in that he closed his eyes for one minute while guarding the prisoner, (ii) failing to maintain a current NY driver's license, as required and (iii) failing to safeguard a Department tint meter. In the second case, Respondent pled guilty to (i) improperly registering his personal vehicle with a temporary NJ plate and (ii-iii) operating that vehicle with improper and expired registration over a one-month period.

In connection with the instant matter, Respondent was suspended without pay from April 22, 2022 through May 22, 2022. He was placed on Level 2 Discipline Monitoring in July 2022; monitoring remains ongoing.

For your consideration.

Vanessa Facio-Lince
Assistant Deputy Commissioner Trials