The City of New York

POLICE DEPARTMENT

May 3, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer John Davis
Tax Registry No. 938324
73 Precinct
Disciplinary Case Nos. 2010-0168 & 2011-5352

Police Officer George Luti
Tax Registry No. 933952
73 Precinct
Disciplinary Case No. 2010-0422

The above-named members of the Department appeared before the Court on January 12, 2012, charged with the following:

Disciplinary Case No. 2010-0168

1. Said Police Officer John Davis, assigned to the 73rd Precinct, on or about December 31, 2008, did fail to properly perform his duties as directed by competent authority, in that said Police Officer did fail to conduct a proper and thorough search for a special category missing person, identity known to the Department.

P.G. 203-05, Page 1, Paragraph 1 PERFORMANCE ON DUTY GENERAL
GENERAL REGULATIONS

Disciplinary Case No. 2011-5352

1. Said Police Officer John Davis, assigned to the 73rd Precinct, on or about February 9, 2011, while on duty, at a location known to the Department in Kings County, having stopped a female prostitute known to this Department, did thereafter fail to prepare a Stop, Question and Frisk Report (UF-250) relating to said encounter.

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

2. Said Police Officer John Davis, assigned to the 73rd Precinct, on or about February 9, 2011, while on duty, at a location known to the Department in Kings County, having stopped a female prostitute known to this Department, did thereafter fail to make an entry in his activity log relating to said stop.

P.G. 212-08, Page 1, Paragraph 1 ACTIVITY LOG

3. Said Police Officer John Davis, assigned to the 73rd Precinct, on or about February 9, 2011, while on duty, at a location known to the Department in Kings County, having stopped a female prostitute known to this Department, did thereafter fail to notify central radio that he had stopped said individual.

P.G. 202-23, Page 1, Paragraph 7 RADIO MOTOR PATROL RECORDER

4. Said Police Officer John Davis, assigned to the 73rd Precinct, on or about and between February 9, 2011, and February 15, 2011, engaged in conduct prejudicial to the good order and efficiency of the Department, to wit said officer inappropriately sent said female text messages unrelated to official Department business.

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

5. Said Police Officer John Davis, assigned to the 73rd Precinct, on or about and between February 9, 2011 and February 15, 2011, did abuse his authority as a member of the New York City Police Department in that he searched the car in which a female prostitute known to the Department was an occupant in without having the requisite legal authority to do so.

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

6. Said Police Officer John Davis, assigned to the 73rd Precinct, on or about February 9, 2011, did utilize a Department computer to conduct an unauthorized Omni Form inquiry on one occasion.

P.G. 219-14, Page 1, Paragraph 2 – DEPARTMENT COMPUTER SYSTEMS

Disciplinary Case No. 2010-0422

1. Said Police Officer George Luti, assigned to the 73rd Precinct, on or about December 31, 2008, did fail to properly perform his duties as directed by competent authority, in that said Police Officer did fail to conduct a proper and thorough search for a special category missing person, identity known to the Department.

P.G. 203-05, Page 1, Paragraph 1 PERFORMANCE ON DUTY GENERAL
GENERAL REGULATIONS

The Department was represented by Mark Berger, Esq., Department Advocate's Office. Respondents were represented by John Tynan, Esq., Worth Longworth & London LLP.

In Case Nos. 2010-0168 and 2010-0422, Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. In Case No. 2011-5352, Respondent Davis pleaded Guilty and testified in mitigation of the penalty. A stenographic transcript of the trial-mitigation record has been prepared and is available for the Police Commissioner's review.

DECISION

In Case Nos. 2010-0168 and 2010 0422, Respondents are found Guilty. In Case No. 2011 5352, having pleaded Guilty, Respondent Davis is found Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Police Officer Efrain Flores and Sergeant Raymond Hawkins as witnesses.

Police Officer Efrain Flores

Flores was assigned to the 73 Precinct. On December 31, 2008, he was working a 4x12 tour and was assigned as the telephone switchboard operator (TS). He was asked by Sergeant Titus Parham, the desk officer, to speak to Sergeant Kevin Lang of the 25 Precinct. Lang informed Flores of a missing "mentally retarded" male that "quite possibly was located" within the confines of the 73 Precinct. Lang asked Flores to send a sector to 26 Powell Street. This was within Respondents' sector, and Flores directed them to respond. The time of assignment was a little after 2200 hours.

Flores spoke to Lang five or six times that night. As Flores received information from Lang, he relayed it to Respondents. He was speaking specifically to Respondent Luti.

The second time Flores spoke to Lang, the sergeant wanted Respondents "to get any information from the bus lot contact person, maybe." Lang also gave Flores a specific three-digit bus number; Flores remembered that it began with a 9. Flores gave the number to Respondents. He told them that it was a bus; he did not use the term "school bus."

Respondents told Flores that they were at 26 Powell Street. Respondent Luti told him that he spoke to the security guard from the bus company. Respondent Luti described the security guard as not being in uniform, not very knowledgeable, and "look[ing] a little homeless." Respondents stated that they looked in the lot for the "bus number," but did not find it. They asked for a better description.

Flores called Lang back. Lang gave him a "route number," which Flores relayed to Respondents. They could not find this either.

While Respondents were searching the lot, Lang told Flores that the bus was a "short bus." After Respondents were unsuccessful at the first lot, Flores relayed this information to them, using the same term.

Flores testified that after searching the lot without success, Respondents re interviewed the security guard. The guard said that there were other bus lots. One was just over the precinct border, in the 75 Precinct. Flores did not recall whether Respondents said they were going to search those other lots, or whether Respondent Luti requested assistance due to locked gates in the other lots.

Flores believed that at one point "during their canvas[s]," he gave Respondents a description of the color of the bus. When asked, however, "So you remember later on telling them the color but you don't remember what color it was?," Flores answered, "No. I it was a bunch of descriptions."

Flores did not instruct Respondents to search anywhere other than 26 Powell Street. He was the only Department member with whom Respondents were in contact during this assignment.

Flores testified that Respondents never found the "special category missing person" (SCMP). He believed they finalized the job as 10-91, non-crime corrected.

On cross examination, Flores agreed that the block of 26 Powell Street was occupied on both sides with lots for buses and other transportation companies. Solid aluminum fences blocked in the yards. The fences possibly were higher than 15 feet. There were no buildings that had "definitive signs" as to what was in the lots.

Flores agreed that Parham was involved with several other "activities" that night. It was busy toward the end of the tour because it was New Year's Eve. The command was short staffed

and Respondents were covering several sectors, not just the one in which 26 Powell Street was located. These were the only phone calls Flores was dealing with at the time, but he was also assigned as the cell attendant and to handle walk in complainants.

"[T]he Sergeant" never sent anyone else to search for the missing person. Parham did not tell Flores that this was "the priority job" in the precinct that night, as Parham "was on the phone." After Parham got the initial phone call, he left everything up to Flores and had no further involvement. All Flores could do was relay information to Respondents or answer their questions.

Flores agreed that the information from Lang kept changing. He did not know where Lang was getting his information.

Flores was speaking to Respondents by telephone. Their total time on the assignment was between 45 and 90 minutes, but "[p]robably approximately" 90 minutes.

Sergeant Raymond Hawkins

Hawkins had been a member of the Department for 22 years and was assigned to the Brooklyn North Investigations Unit. Hawkins testified that on December 31, 2008, Person A, a 22-year-old severely mentally handicapped individual, was left unattended on a bus in a Brooklyn depot. Person A had the mental capacity of an infant and was non-vocal. He attended a school in Manhattan and received transportation from and to his residence on a bus. On that New Year's Eve, Person A never returned home from school. His parents went to their local precinct to report this.

Outstanding Transport, Inc., was the bus company. The bus driver was responsible for Person A's safe return. Hawkins did not recall if there was an attendant as well.

Hawkins testified that the Department did not find Person A. On January 1, 2009, between 0900 and 1000 hours, Person A's father found him at 26 Powell Street on bus number 962. Person A was suffering from hypothermia and was hospitalized.

Hawkins explained that a special category missing person encompassed various definitions. In Person A's case, the classification was based on his handicap.

The allegations against Respondents were that they failed to conduct a proper investigation. The lot that they searched was 22 Powell Street, directly across the street from 26 Powell. Respondents drove onto 22 Powell, where there was a small security booth. They interviewed a "security officer," Person B. Respondents asked Person B if the lot was 26 Powell, and he said yes.

Hawkins was unable to interview Person B after various attempts to locate him, including going to the lot. The security company, Canidae Security, was "very uncooperative" and would not give Hawkins any contact information.

Hawkins testified that when Respondents entered 22 Powell Street in their radio motor patrol (RMP) vehicle, they could see numerous buses. The lot was not well-lit. They used their flashlights, but never got out of the RMP to inspect the buses physically. Hawkins asserted that they should have done so because they would not be able to see inside the buses from the RMP.

Respondents told Hawkins that they did not search all the buses. Hawkins contended that they should have done so.

Hawkins testified that 26 Powell Street had a "26" stenciled upon it (see Department Exhibit [DX] 7, daylight photograph of walk-in entry to 26 Powell, with corrugated metal door open). This was right across the street from 22 Powell Street. The sign would have been visible using a flashlight.

Similar aluminum fences were on each side of Powell Street. DX 2 was a photograph showing the open drive-through gate of 26 Powell Street in daylight. On the door was a sign that was visible only if the door was open. In other words, the sign was on the inside of the fence. The sign had the name Outstanding Transport, Inc., and the address 26 Powell Street. Outstanding Transport identified itself on the sign as "The Next Generation in Medicaid Transportation." One white ambulette type van was visible inside the lot; another was on the sidewalk.

Hawkins learned that Respondents also searched a lot on Van Sinderen Avenue, or attempted to do so. They knew of another bus lot on that street. That block of Van Sinderen, however, also was "pretty much" bounded on both sides by corrugated metal fencing. Respondents said that they pounded on the fence and whooped the siren in an effort to alert a security guard that might have been there.

Hawkins testified that if Respondents believed Person A was in that lot, they should have contacted a supervisor, specifically the platoon commander, because Person A was an SCMP. The Emergency Service Unit (ESU) also would have been available with bolt cutters to gain access to the bus yard.

On cross examination, Hawkins testified that because Person A was an SCMP, a supervisor should have been present at the location. The search was being run by the TS operator. Hawkins agreed that information was being relayed from Lang, to Flores, then to Respondent Luti. Respondent Luti was asking for bus color, bus type, bus number, and a physical description of Person A. Hawkins did not review 73 Precinct staffing numbers as part of the investigation.

Hawkins agreed that there was little illumination on the block of 26 Powell Street other than "the occasional streetlight." When Respondents got to the street, 26 Powell was chained and padlocked. They "were never told the name of the company initially that owned the bus."

When asked if the buses at 22 Powell "at night are parked to maximize the space so as many buses can get into the lot," Hawkins answered, "I would assume so." Hawkins agreed that the buses were parked "very, very close to one another." They would be "kind of like sardines or soldiers." Respondents were able to view only half to two-thirds of the buses.

Hawkins agreed that the numbers on the buses at 22 Powell Street did not match the number Respondents were looking for. Once Respondents were informed that they should be looking for a "short bus," Person B told them that it might be at another location.

Hawkins agreed that while Respondents were instructed to search 26 Powell, Patrol Guide § 207 23 stated that officers should check adjoining areas and widen the search to make sure they were searching "in all areas near and at that location."

Hawkins testified that Respondents only whooped the siren at the Van Sinderen lot.

Upon questioning by the Court, Hawkins explained that a Level I mobilization was declared due to Person A's handicap. Level I was the least serious level. One thing that was supposed to happen in a Level I mobilization was that the Aviation Unit was to be notified. That did not happen here, but this notification was not Respondents' responsibility.

Hawkins testified that if Respondents believed Person A was at a lot other than 26 Powell Street, but could not gain access to these other lots, they should have called a supervisor because of the importance of the assignment.

Hawkins stated that for an SCMP, the 73 Precinct platoon commander should have been notified. If the platoon commander was unavailable, the duty captain should have been notified.

Hawkins testified that Flores received a schedule "A" command discipline (CD) for failing to document the assignment in the telephone message and dispatch logs. Parham or Lang received a schedule "B" CD, but Hawkins did not recall the reason.

On re-cross examination, Hawkins testified that he did not know whether a platoon commander was working on the evening in question. Parham, not Respondents, should have notified the platoon commander. Hawkins agreed that "it's unclear or it never happened at all that Sergeant Parham ever told anyone other than Officer Flores to take action."

Respondents' Case

Respondents testified on their own behalf.

Respondent Luti

Respondent Luti was assigned to the 73 Precinct and had been a member of the Department for approximately eight years. In December 2008, his steady partner was Respondent Davis. They worked 4x12 tours.

Respondent Luti testified that he and Respondent Davis were working together on December 31, 2008. Respondent Luti believed the command had full staffing that day. They were assigned to three sectors. Sergeant Thomas Lent was the patrol supervisor. Respondent did not know if anyone of a rank higher than sergeant was working that day.

Respondent testified that at approximately 2200 hours on December 31, 2008, he received a telephone call from Flores. Flores had received a job regarding an SCMP, Person A. He told Respondents a location, 26 Powell Street, and gave them a description of Person A. The description was 17 years old, male Hispanic, "with a mentally ill disability."

Respondents were in a marked RMP. Respondent Luti testified that no businesses were open at that time on that section of Powell Street. When Respondents arrived, the street was lit dimly and there were no cars on the street (see Respondents' Exhibits [RX] A & B, 22 and 26 Powell Street, respectively, at night, photographed with illumination). They did not see any numbering. The only opening they saw was at 22 Powell Street. When they approached it, they saw a security booth with an officer, Person B. They asked Person B whether it was 26 Powell, and he said yes. Respondents told him that they were looking for a "special category missing teenager," and had a description of a yellow school bus with a three-digit number. Respondent Luti believed that Flores told him the number was 962.

Person B said that there were no buses with three digits in that lot. Respondents asked to search the lot anyway, and he gave them permission. Respondents drove around with the turret lights on. They shone their flashlights out the window, looking for the bus numbers. All they found were five-digit numbers.

Respondent Luti informed Flores that the buses had five digits. Flores put him on hold. He then instructed Respondent Luti to get Person B's contact information and to mark the job 10-91.

After transmitting the guard's information to Flores, Respondents drove "just to do a canvas[s] just in case we missed any spots." Shortly thereafter, Flores called with additional information. He said that the bus in question was a "smaller school bus, smaller in size," also with three digits. They returned to what they thought was 26 Powell Street and spoke to Person B again. He said there were no "shorter school buses" in that particular lot, but that an "associated" lot on Van Sinderen Avenue had such buses.

Respondents went to the Van Sinderen lot. Again, there were solid metal gates. They banged on the gate, and used the siren and public address system, looking for a security guard, but there was no answer. Respondents went to a third lot one or two blocks away, on Blake Avenue. This lot had chain link fences. They saw a school bus with its ignition running, and again banged on the gate, "made broadcast, we honked the horn," but no one responded. Respondent Luti called Flores and marked the job 10-90U.[1]

Respondent Luti testified that Flores never directed him to speak to a supervisor at their command. Flores was relaying the information from Respondent Luti to Parham; Flores was getting information from either Parham or Lang. When Respondents marked the job 90U, Parham did not speak to them.

On cross examination, Respondent Luti denied that the description of **Person A** included the term "brain damaged." He recalled, however, possibly reciting that description in his official Department interview.

Respondent Luti agreed that Respondents did not see the number 26 spray-painted on the fence across the street from the first lot they searched. He agreed that it was clearly visible with a flashlight or camera flash upon it, as in RX B. That was not the case on the night in question. Respondent Luti testified that they "initially" used their flashlights, but they came upon the open lot, "which was the bus depot we initially had searched, and that's why we proceeded to investigate there." It did not occur to him to search the lot across from the open lot because they could not see into it.

Respondent Luti first testified that Person B was wearing a security uniform with his name on it. When, however, Respondent Luti was confronted with Flores's testimony that he told

[1] Respondent Luti described this as meaning "unfounded," but the Radio Code Signals Card (PD 112-090-A) defines it as "[u]nable to gain entrance."

Flores that Person B was not wearing a uniform, he admitted that Person B probably did not have a uniform. He agreed that he described Person B as not very knowledgeable. He relied on Person B anyway instead of "getting out of your RMP and making sure you were at the right address."

Respondent Luti testified that even when Respondents saw that all the buses at the first lot had five digits, they still thought they were at 26 Powell Street.

Respondents could not drive past every bus in the first lot because they were "parked kind of like sardines." 20 to 30 were inaccessible by car. Respondent Luti asserted that even if they exited the RMP, Respondents only could access the buses in front. Respondent Luti first agreed that they could have gone under the buses "[i]f the circumstances permitted." He would have done so if he knew that Person A was in one of those back buses. He then said that it would not have been possible to go under the buses. One of the reasons that Respondents did not look into the buses in the back was that the visible buses had five digits.

Respondent Luti testified that he could see into the seats in the front half of the front buses from his recorder seat in the RMP.

Respondent Luti stated that the second description of the bus, which they relayed to the guard, was a "shorter yellow bus." Respondent Luti still believed they were at 26 Powell Street; he simply thought that Person A was in a different lot.

Respondent Luti admitted that he did not notify Flores that they could not enter the other lots, or that there was a running school bus in one of them. When Respondent Luti called out Person A's name, he thought he might be able to respond. Respondent Luti conceded, however, that "one of the characteristics of the special category missing person is not being able to verbally communicate."

Respondent Luti admitted that he really did not believe Person Awas in the Blake Avenue lot.

Respondent Luti insisted that he did nothing wrong that night.

Upon questioning by the Court, Respondent Luti stated that there were no vehicles parked on Powell Street that night.

The second description from Flores of the bus was "shorter yellow bus," although he might have said "short bus." Respondent Luti testified, "It could be short bus but I could assume it was the same color."

Respondent Luti said that Flores described Person A as 17 years old. On re-cross examination, however, he agreed that he said in his official Department interview that Flores described Person A as 22 years old. He also agreed that Flores said "school bus," without indicating a color. On re-direct examination, Respondent Luti testified that to him, the term "yellow bus" conjured up the image of a yellow school bus.

Respondent Davis

Respondent Davis had been a member of the Department since July 2005 and worked in the 73 Precinct. In December 2008, he was assigned to patrol. His steady partner was Respondent Luti.

On December 31, 2008, Respondent Davis was assigned to three sectors with Respondent Luti on the 4x12 tour. Respondent Davis was the operator. At approximately 2200 hours, they received information from Flores. He directed Respondents to go to 26 Powell Street. The information was that there was a "mentally ill" missing person from Manhattan, possibly left on a bus.

When Respondents arrived on Powell Street, Respondent Davis did not observe any pedestrians.

Respondent Davis looked at approximately 40 to 50 buses in the first lot. They used their turret and spotlights to look into the buses. They could see somewhat inside the front of these buses. Other buses were parked behind the buses in front, so closely together that one could not get through. They were there for five to ten minutes.

Other than the first lot that Respondents searched, Respondent Davis did not see any "locked gated areas" on Powell Street. There was no streetlight above the entrance to the actual 26 Powell Street, where the stenciled 26 was. The stencil was located at a walkway, not a car or bus entrance.

Respondent Davis testified that Respondents' continued canvass was done on their own initiative.

The second bus description given to Respondent Davis was a "yellow school bus" with a three digit number, 962. The description might have been "smaller school bus." Respondent Davis did not see any buses fitting that description.

One of the reasons Respondents returned to the first lot was that they wanted to see if there were smaller buses there that they did not see originally.

On direct examination, Respondent Davis testified that after the search at the Van Sinderen Avenue lot, Respondents marked the job 10-91. On cross examination, he said that they marked the "secondary search" 10-90U. The total time spent searching was over an hour.

At the time of trial, Respondent Davis was the "assistant field and intel officer" at the 73 Precinct. His duties were to "divulge information given . . . to us by the community and by

confidential informants that are registered with the Police Department" and to assist in obtaining search warrants.

On February 9, 2011, Respondent Davis was assigned to the conditions unit. At approximately 1600 or 1700 hours, he and Police Officers Matthew Pena and Alejandro Villalona stopped two individuals near a hotel or motel. It was still light out. The individuals were in a vehicle parked head-in at the rear of the motel. A male was in the driver seat and a female was in the passenger seat.

Respondent Davis and his team approached the vehicle because of "high criminal activity in that area, including prostitution in that hotel." The conditions team was in a marked van. When the individuals were asked what they were doing, the male said that the female was his girlfriend; she said she did not know the male.

Respondent Davis and the team "asked" the occupants to exit the car, and they complied. When asked if the team searched the car, Respondent Davis said, "I didn't look in the vehicle in a reachable, grabbable plain view to see if anything was danger any weapons in plain view, any narcotics in plain view."[2] He admitted that when he searched the car, to the best of his knowledge, no crime had occurred yet. He believed, however, that prostitution was about to occur.

The conditions team spoke to the female about the confidential informant (CI) program. She told them that she had a lot of information about firearms. She and Respondent Davis exchanged phone numbers, but Respondent Davis did not prepare a stop, question and frisk report (UF 250). Respondent Davis assumed that either Pena or Villalona was taking care of it because he did not have the individuals' pedigree information. He did not enter the stop in his

[2] Based on the Court's recollection, and the context of the specifications and the rest of the testimony, it is probable that Respondent Davis said he *did* search the vehicle.

Activity Log. Nor did he notify the radio dispatcher of the team's location; he did not know if his partners did so either.

Respondent Davis testified that the entire stop took about 15 minutes.

Respondent Davis stated that he contacted the woman one time after February 9, 2011. He believed this was on February 15, 2011. He wanted to "keep in a friendly communication with her because we hadn't heard from her after 5 days later." Respondent Davis wanted to know if she was still interested in the CI program. He sent her a "joking text message" saying "Happy Valentine's Day and I asked her if she was busy last night." He asserted that he asked her this because she had not gotten back to the conditions team.

Respondent admitted that he ran a check on the woman's criminal history. He did not have permission of a supervisor to do so. He believed, however, that Pena notified a supervisor that they encountered a possible CI prospect.

Respondent Davis testified that Villalona received two CDs, for failing to fill out a UF-250 and for improper Activity Log entries. Pena was facing a criminal case regarding the incident. (The Advocate stated that Pena "ultimately" was charged with soliciting the woman for prostitution).

On cross examination, Respondent Davis said that he was aware that the SCMP was mentally challenged, but not that he was non-verbal.

Person B approached Respondents when they entered the first lot. They did not drive past all the buses because a significant number were inaccessible by car. Respondent Davis agreed that the RMP was significantly lower than a school bus. For many of the buses, he could only "see in one side because they were next to other buses that were between them." The whole front of the bus, nevertheless, was illuminated by their spotlight. The spotlight could not be

tilted up and down. It was not a safe idea for him to climb on the hood of the bus to see into it. He agreed that this could have been done with assistance from other personnel.

Respondent Davis testified that the buses were parked so closely together that one could not walk between them. The front buses would have had to have been pulled out in order to get to the ones in back. One reason Respondents did not "go down that avenue" was that the front buses had five digits. They assumed the ones in back did as well.

The reason that Respondent Davis believed Respondents were at 26 Powell Street, notwithstanding Flores's second description of a shorter bus, was Person B's confirmation of such. Person B was not wearing a uniform. He did not appear homeless, but he did not look very well put together. He was dressed appropriately for the weather, which was cold. Respondent Davis agreed that Respondent Luti described Person B to Flores as not very knowledgeable. They did not ask Person B what was behind the fence across the street.

Respondent Davis testified that Respondents thought the first lot was the only bus depot on Powell.

When Respondent Davis was asked about making notifications to gain access with ESU to the Van Sinderen lot, he stated that he assumed Parham knew about the situation. They did not make inaccessibility notifications after searching the Blake Avenue lot either. Respondent Davis did not recall if the Blake bus was running, but it did have its lights on.

When asked if he believed he did anything wrong in connection with the job, Respondent Davis answered that he thought Respondents were given incorrect information.

Respondent Davis admitted that on February 9, 2011, he had no authority to search the vehicle.

Respondent Davis searched the woman's criminal history on the same day as the stop. He said that "[e]ventually, yes, you would need" this to begin the CI enrollment process. But he conceded that in the five days he did not hear from the woman, he took no steps to start the CI enrollment process. He believed that one of his partners talked to a supervisor about it, but "can't say yes or no."

Upon questioning by the Court, Respondent Davis testified that Flores originally told their sector that there was a mentally disabled SCMP possibly on a bus in a depot at 26 Powell Street. Respondent Davis did not know that the SCMP had been left there by the driver and other personnel. On re-cross examination, however, he recalled stating in his official Department interview that he was told of an individual "possibly left on a bus."

When asked about the possibility of contacting a supervisor to say that Respondents could not find the SCMP at what they believed was 26 Powell, Respondent Davis answered that he believed Parham "was making the call based on our findings."

FINDINGS AND ANALYSIS

Respondents Davis & Luti

Case Nos. 2010-0168 & 2010-0422

The unfortunate facts of this case are mostly undisputed. On December 31, 2008, Person A, a 22-year-old man with severe mental disabilities, was supposed to return home to his parents from the program he attended during the day. He never made it. His parents went to the 25 Precinct station house, near their residence, and reported Person A missing. Person A was deemed a special category missing person and a Level I mobilization was declared.

All that was done by the Department to find Person A was not necessarily in evidence at this trial. Nevertheless, it was determined that the bus company that transported Person A had a depot within the confines of the 73 Precinct, at 26 Powell Street. Sergeant Kevin Lang of the 25 Precinct contacted Sergeant Titus Parham, the desk officer at the 73 Precinct, and informed him of the situation. Respondents, covering three sectors that New Year's Eve, were assigned the job.

Exactly what was told to Parham, through whom, if anyone, that information was relayed, and what was told to Respondents and by whom, was not entirely clear. Police Officer Efrain Flores, the TS operator, appears to have been the conduit between Lang and Parham, and between Parham and Respondents.

Sometime after 2200 hours, Flores assigned the job to Respondents. He told them that there was a missing mentally-disabled individual at least possibly located on a bus in a lot at 26 Powell Street. Respondent Luti said that Flores used the term "yellow bus" at first; Flores said that he originally said "bus." Flores gave Respondents a three-digit number as the bus number.

When Respondents arrived on the block, they found that it was walled on both sides by solid metal corrugated gates. Respondents drove through the only opening, into a parking lot. They encountered an individual later identified as Person B. Person B was not dressed as a security guard but appeared to be working at the lot. Respondents asked Person B if the lot was 26 Powell Street and he responded that it was. Respondents drove into the lot, only to find it packed with full-length yellow school buses with five digit bus numbers. They testified that the buses were parked so closely to each other that one could not walk between them. They remained inside the RMP and attempted to use the turret and spotlights to get Person A's attention. They were unsuccessful.

Flores then told Respondents, after getting further information, that Person A was located on a shorter bus than the typical long yellow school bus. Respondent Luti said that Flores used the term "shorter yellow bus;" Flores said that he used the term "short bus." Respondent Davis said that it might have been "smaller school bus." But no such buses were in Person B's lot. Respondents asked him if there were any nearby lots that had shorter buses. He suggested one on Van Sinderen Avenue. Respondents tried to use their lights, sirens and public address system, but were unsuccessful. They were similarly unsuccessful at a lot they knew of on Blake Avenue, where they found a bus whose ignition was running – or at least the lights were on. They could not gain access to either the Van Sinderen or Blake lots.

Respondents' original final disposition of the job was 10-91, non-crime corrected, after their search of the Powell Street depot. After their additional searches, they marked it as 10-90U, unable to gain entry.

Person B was wrong. The lot Respondents drove into was not 26 Powell Street, but 22 Powell Street. 26 Powell Street was across the street from Person B's lot. The lot was apparently closed and locked at the time, but the door was marked with a small "26" that easily was visible if illuminated. Respondents did not use their flashlights to illuminate the area. If they did, they would have found the correct address.

Person A was not found that night by members of the service. The next morning, his father went to 26 Powell Street, which was closed, climbed the fence, and found his son. Person A was actually not in a school bus as that term generally is understood, but in a white ambulette or paratransit van. He had been left there by the bus driver and monitor. Person A was suffering from hypothermia and was hospitalized for four days.

Respondents are charged, under Patrol Guide § 203-05 (1), with failing "to conduct a proper and thorough search for a special category missing person." The cited procedure of the Patrol Guide directs members to "[p]erform all duties as directed by competent authority." Here, that authority was either Lang or Parham; their instruction to conduct a search of 26 Powell Street for Person A was conveyed through Flores.

The Patrol Guide does not specify how, physically, to conduct a search for a missing person. It does state that an "immediate investigation and/or search is required" for SCMPs. See Patrol Guide § 207-23, Missing Persons, p. 3, note 2 (italics omitted). Nevertheless, the Patrol Guide is a guide to proper conduct of members of the service. It is impossible to anticipate every situation that will arise in the complex environment of law enforcement. As such, the Patrol Guide is not subject to strict interpretation. It is the context of the rule that must be examined. See *Case No. 82103/06 et al.*, p. 146 (Oct. 16, 2009).

It cannot be said that Respondents were not required to do anything in the lot they searched merely because the Patrol Guide did not specify what they were to do there. They were faced with a missing person with mental disabilities. They knew or should have known that Person A's capacity to communicate was limited. The Court has no problem finding that a competent search required them, at the very least, to get out of the RMP, rather than remain inside and try and rouse the missing person by spot and turret lights. See *Case No. 80769/05 et al.*, pp. 7, 10 (Apr. 11, 2006) (upon responding to a radio run concerning drug activity, officer went to location, asked for callback, drove around the block, but never exited vehicle or looked in any nearby buildings); *Case No. 78548/03*, p. 4 (Dec. 22, 2003) (upon responding to call of suspicious vehicle, officer did not exit RMP or perform a proper canvass). All this accomplished was the illumination of a small part of the buses, and only some of them at that.

Furthermore, if Respondents came to a judgment that the buses could not be searched because they were too close together, i.e., that their assignment could not be completed, they should have contacted a supervisor. Patrol Guide § 207-23 (14) directs the patrol supervisor or assigned detective to "[r]equest additional personnel, as required." This could include ESU "if needed" or Aviation "to survey rooftops, when necessary." The supervisor or detective, however, only would know to request more personnel if the officers present at the search location so notified him. This did not happen, and it should have.

The other key failure by Respondents was not ensuring that they were at the correct address. Doing so is the responsibility of the officers assigned to a job. Cf. *Case No. 80354/04* (Apr. 4, 2005) (officer failed to confirm with CI the exact address of target building on narcotics operation, leading to search of wrong apartment and three residents being injured). It was insufficient for Respondents simply to drive into the first open passage they found and ask if they were in the right place. A proper investigation would have entailed driving down the street and looking for a sign that indicated the correct address. Had Respondents done so, using their flashlights, they would have found the sign marked "26."

Moreover, Respondents should have realized that they were not at 26 Powell Street when (a) they saw that the bus numbers at the lot did not match the description, and (b) they received the updated description of a shorter or smaller bus and saw that there were no such buses on the lot. Any comfort in relying on the guard's assurance that they were at 26 Powell should have dissipated at that point.

The combination of these omissions constituted a failure "to conduct a proper and thorough search for a special category missing person." As such, Respondents are found Guilty as to Case Nos. 2010-0168 & 2010-0422.

Respondent Davis

Case No. 2011-5352

Respondent Davis, having pleaded Guilty, is found Guilty.

PENALTY

In order to determine an appropriate penalty, Respondents' service records were examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). Respondent Davis was appointed to the Department on July 11, 2005. Respondent Luti was appointed to the Department on January 20, 2004. Information from their personnel files that was considered in making this penalty recommendation is contained in the attached confidential memoranda.

Respondents Davis & Luti

Case Nos. 2010-0168 & 2010 0422

Respondents have been found Guilty of failing to conduct a proper search for a special category missing person. They were told that the missing individual was mentally disabled and might be in a bus at a depot on 26 Powell Street. Respondents first went to the wrong address. There, they did not exit their RMP and merely drove up and down the lot, searching into the parts of the buses they could see with the spot and turret lights. They were not able to see into the buses to any great degree. When told by the TS operator that the individual might be in a shorter bus, Respondents tried searching other lots but were unable to find any such shorter buses. They did not ask for ESU's assistance in accessing any buses.

In fact, the missing individual had been in the depot across the street from the first lot Respondents searched the whole time. He had been left on the bus by the driver and monitor.

When found the next day by his father, he was suffering from hypothermia and had to be hospitalized.

The Department recommended a penalty of 12 vacation days for Respondent Luti. For Respondent Davis's two matters, the Department recommended 30 vacation days.

Twelve vacation days is on the lower end of precedent for similar matters and it is unclear how the Department arrived at such a number, other than suggesting it for plea purposes. In *Case No. 84787/08* (May 25, 2010), a 6 year officer with no disciplinary record forfeited 15 vacation days. He responded to two related calls of an assault in progress, but failed to do a thorough investigation. The deceased victim's body was later found at the scene. In *Case No. 78830/03* (Mar. 1, 2004), a 3-year officer with no record responded to a radio run of shots fired. He did not exit the RMP or ask for a callback. Three hours after marking the job unfounded, 23 spent shells were found at the location. That officer was penalized 20 vacation days. In *Case No. 75816/00* (Apr. 14, 2001), a 7 year officer with no record took 45 minutes to respond to a radio run of a commercial burglary alarm. Upon arriving, the officer did not exit the vehicle to check on the premises. That officer was penalized 10 vacation days.

A penalty of 15 vacation days is mid-range here. Respondents did not cause a severely disabled individual to go missing, but their omissions in responding to the job made the situation worse. The simple fact of the matter is that had they looked for the correct address upon arriving at Powell Street, they would have found 26 Powell Street and a full police response could have been put in place. They failed in that very basic duty. As such, each Respondent should be penalized 15 vacation days as to Case Nos. 2010-0168 & 2010-0422.

Respondent Davis

Case No. 2011-5352

Respondent Davis, upon pleading Guilty and testifying in mitigation of the penalty, has been found Guilty in the instant matter. On February 9, 2011, he was working a conditions assignment and observed a car parked behind a motel. There was one male and one female occupant. Respondent Davis was aware that prostitution was a condition at this motel. The team approached the vehicle and asked the occupants to get out. Respondent Davis searched the vehicle, an act he admitted he had no authority to perform. He did not transmit anything to the radio dispatcher, prepare a UF-250, or document the encounter in his Activity Log.

Respondent Davis testified that the female occupant indicated that she could provide information to the police about firearms. Respondent Davis wanted to develop her as a CI, although she had not gotten in contact with him and he took no steps in the CI enrollment process. He testified that one of his partners might have taken such steps. Respondent Davis conducted an unauthorized Department computer search to obtain information on the woman. About a week after the initial encounter, Respondent Davis sent her text messages asking, in sum and substance, if she had been busy the previous night, which was Valentine's Day. Respondent Davis testified that he was using humor to try and see if she was still interested in becoming a CI. He should have known, however, that such text messages were an inappropriate way to contact a member of the public, especially a sex worker. This is especially pertinent considering that a member of the same conditions team, Police Officer Matthew Pena, was charged criminally with soliciting the same woman as a prostitute.

As noted, the Department requested a penalty of 30 vacation days for Respondent Davis, taking into account both of his cases. The recommendation for Respondent Luti on the single

case was 12 days. Prior cases have resulted in similar penalties to the difference, 18 days. See, e.g., *Case No. 85064/09* (Oct. 5, 2010) (5-year police officer with no prior record forfeited 25 vacation days for fraternizing with an 18-year-old high school student where he was assigned as the youth officer); *Case No. 81147/05* (Dec. 5, 2005) (15 days for 11 year member with no record who failed to process a complaint; instead, while on duty, he asked complainant out on a date); *Case No. 77127/01* (Dec. 28, 2001) (20 days for 4-year member with no record who told prisoner she did not have to take breathalyzer test, gave her his home number and asked her out for drinks); *Case No. 73128/99* (Apr. 13, 2000) (15 days for 13-year member with no record who, after helping female motorist, used Finest to get her phone number, then called her in the middle of the night to tell her of problems with her vehicle registration; over a year later, he called again, and after she contacted Internal Affairs Bureau and a controlled call was arranged, he admitted getting her number from Finest and asked her out).

Here, Respondent Davis did not actually ask out the complainant, but it easily could have been misinterpreted that way. In fact, a member of Respondent Davis's conditions team has been criminally charged with doing the same thing in exchange for consideration. Respondent Davis's questionable actions were made worse by the fact that he made no documentation of his original encounter with the woman. A reasonable conclusion by an outside observer might have been that Respondent Davis was trying to cover up the fact that he met a woman working as a prostitute while on duty, then asked her out. It should also be noted, however, that the Department does not appear to dispute Respondent Davis's contention that he was taking police action in trying to develop a CI, although concededly he did so in an improper way. Accordingly, the penalty for Case No. 2011-5352 should be on the lower range of the precedent, 15 vacation days.

Summary

The total penalty recommended by the Court for Respondent Luti is 15 vacation days. The total recommended for Respondent Davis is 30 vacation days.

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED
DEC 27 2012
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JOHN DAVIS
TAX REGISTRY NO. 938324
DISCIPLINARY CASE NOS. 2010-0168 & 2011-5352

In 2011, Respondent received an overall rating of 4.5 "Extremely Competent/Highly Competent" on his annual performance evaluation. He was rated 3.5 "Highly Competent/Competent" in 2009 and 4.0 "Highly Competent" in 2010. He has been awarded one medal for Excellent Police Duty. [redacted] Respondent has no prior formal disciplinary record.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER GEORGE LUTI
TAX REGISTRY NO. 933952
DISCIPLINARY CASE NO. 2010 0422

In 2011, Respondent received an overall rating of 4.0 "Highly Competent" on his annual performance evaluation. He was rated 3.5 "Highly Competent/Competent" in 2009 and 2010. He has been awarded one medal for Excellent Police Duty and one for Meritorious Police Duty. [redacted]. Respondent has no prior formal disciplinary record.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner [redacted] Trials