

CHARGES AND SPECIFICATIONS

1. Said Police Officer Danny Acosta, on or about October 8, 2009, while within the confines of Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: Said Police Officer Acosta testified falsely in a grand jury proceeding regarding an on-duty police shooting in which he had been involved.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT –
PROHIBITED CONDUCT
Penal Law Section 210.15 PERJURY IN THE FIRST DEGREE

2. Said Police Officer Danny Acosta, on or about May 20, 2010, while within the confines of Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: Said Police Officer knowingly made a false entry in or falsely altered a record or other written instrument subsequently filed with a public office or a public servant.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT –
PROHIBITED CONDUCT
Penal Law Section 175.25 TAMPERING WITH PUBLIC RECORDS
IN THE FIRST DEGREE

3. Said Police Officer Danny Acosta, on or about June 4, 2015, while within the confines of Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: Said Police Officer falsely testified during an examination before trial regarding an on-duty police shooting in which he had been involved.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT –
PROHIBITED CONDUCT
Penal Law Section 210.15 PERJURY IN THE FIRST DEGREE

4. Said Police Officer Danny Acosta, on or about June 4, 2015, while within the confines of Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: Said Police Officer, with intent to obtain a benefit or deprive another person of a benefit, committed an act relating to his office but constituting an unauthorized exercise of his official functions knowing that such act was unauthorized.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT –
PROHIBITED CONDUCT
Penal Law 195.00(1) OFFICIAL MISCONDUCT

5. Said Police Officer Danny Acosta, on or about June 4, 2015, while within the confines of Bronx County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: Said Police Officer, with intent to obtain a benefit or deprive another person of a benefit, knowingly refrained from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office in that he failed to tell the truth regarding an on-duty shooting in which he had been involved.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT –
PROHIBITED CONDUCT
Penal Law 195.00(1) OFFICIAL MISCONDUCT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on July 9, 2021. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Andrew Owen and Sergeant Joseph Agosta as its witnesses. Respondent did not testify and refused an order to do so. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent Guilty of the charged misconduct and recommend that he be DISMISSED from the New York City Police Department.

ANALYSIS

On October 4, 2009, Respondent and his partner, Police Officer Laura Barbato, were involved in an encounter with Person A in a stairwell at ██████████ New York. When Respondent first saw Person A he was standing with an unidentified female; Person A then dropped a firearm and fled up the staircase. Barbato recovered the firearm, then joined Respondent to pursue Person A both officers made several unsuccessful attempts to place him in handcuffs. During their final struggle with Person A Barbato dropped the firearm she had recovered; Person A picked it up and pointed it at Barbato's head, causing Respondent to fire two shots at him. After being shot, Respondent and Barbato were able to handcuff Person A with the assistance of other responding police officers.

The following is a summary of the Department's case.

At approximately 2124 hours on October 8, 2009, Respondent and Barbato were conducting a vertical patrol when they encountered two people in a stairwell on the first floor: an unidentified woman and Person A (Dept. Ex. 7 at AT10-AT12; Dept. Ex. 8A at 4, 5; Dept. Ex. 3 at 35, 65-66). As soon as Respondent opened the door to the stairwell, both individuals began

running up the stairs (Dept. Ex. 7 at AT12; Dept. Ex. 8A at 5; Dept. Ex. 3 at 73-74). As Person A ran up the stairs, he dropped a firearm; Barbato, who was behind Respondent, picked up the firearm (Dept. Ex. 7 at AT12; Dept. Ex. 8A at 5, 6; Dept. Ex. 3 at 80, 82).

On the third-floor landing, Respondent caught up with Person A and they had a physical encounter. After Respondent made an unsuccessful attempt to handcuff Person A he resumed running up the stairwell. Person A reached the fourth-floor landing and attempted to open the door to the hallway; before he could do so, Respondent caught him and commenced a second struggle. Once again, Person A slipped away and continued running up the stairwell. Respondent eventually caught Person A on the stairwell between the fifth and sixth floors; Respondent grabbed Person A from behind by his pants, but Person A began slipping out of them. At this time, Barbato joined the struggle and attempted to handcuff Person A. As Barbato and Respondent struggled with Person A she dropped the firearm Person A had previously thrown to the floor. Person A grabbed Barbato by her neck and began punching her (Dept. Ex. 7, AT12-AT13; Dept. Ex. 8A at 4-6; Dept. Ex. 3 at 82-98).

After Barbato dropped the firearm, Person A picked it up with his right hand and held it to Barbato's head (Dept. Ex. 7, AT-13-AT14; Dept. Ex. 8A at 7-9; Dept. Ex. 3 at 99-100).

Respondent fired two shots at Person A enabling him to subdue Person A and place him in handcuffs, with the assistance of other police officers (Dept. Ex. 8A at 10-11; Dept. Ex. 3 at 101, 103-104, 105-108).

Respondent testified before a Bronx Grand Jury on October 8, 2009, that as Person A held a gun to his partner's face on the sixth-floor landing, he fired two shots at Person A from a position below him in the stairwell (Dept. Ex. 7 at AT13-AT14).

During an official Department interview on May 20, 2010, Respondent told investigators that he fired two shots at Person A as he held a gun to Police Officer Barbato's face with his right

hand (Dept. Ex. 8A at 21-23). Respondent claimed that when he fired at Person A he was between the fifth and sixth-floor landings in the stairwell, 5-10 feet away from Person A who was holding Barbato against a wall on the sixth-floor landing (*Id.* at 24-25).

In 2010, Person A filed a civil action for compensatory damages arising from his encounter with Respondent and Barbato (Person A v. *City of New York, et al.*, Index No. [REDACTED] Supreme Court of the State of New York, Bronx County). Respondent was deposed in that action on June 4, 2015. During the deposition, he testified that he drew his weapon and shot Person A from a position on the stairwell between the fifth and sixth floors (Dept. Ex. 3 at 100-102). He testified further that after he had shot Person A he got onto Person A's back (*Id.* at 115-116).

On March 2, 2017, Respondent had a meeting with Andrew Owen, Assistant Corporation Counsel for the City of New York, connected with the civil matter; they met at 1775 Grand Concourse, Bronx, New York (T. 33). During that meeting, Respondent admitted that his statements in the grand jury proceeding, his official Department interview, and the deposition were false (T. 36). Respondent admitted to Owen that rather than firing his second shot at Person A from approximately six feet away, Respondent had climbed onto Person A's back after he had fallen from the first shot and then fired the second round from that position (T. 37). Respondent told Owen that he gave the inaccurate testimony because he "feared for his job" (*Id.*). Owen took contemporaneous notes during his meeting with Respondent (Dept. Ex. 4). After their meeting, Owen sent Respondent a text message in which he reminded him not to discuss what they had talked about with anyone; Respondent replied, "You are the only one that knows about what really happened" (Dept. Ex. 6; Messages 7-8).

After their meeting, Owen reported the content of his discussion with Respondent to his supervisors (T. 37-38, 87). On March 13, 2017, Respondent met with other members of the Corporation Counsel's office and prepared an errata sheet, which detailed the differences

between the testimony he gave during the June 4, 2015 deposition and the version of events he disclosed to Owen on March 2, 2017 (Dept. Ex. 5).¹ On the errata sheet, Respondent reasserted the statements he made to Owen, writing that he got on top of Person A before firing the second shot (*Id.*).

In October 2018, Respondent was indicted for multiple counts of Perjury in the First Degree in Bronx County; the indictment was still pending as of the date of this hearing (*People v. Acosta*, Indictment No. 2171/18, Supreme Court, Bronx County, Criminal Division, Part 92).

Perjury

I find that the Department Advocate has met his burden of proof by a preponderance of the relevant, credible evidence that on October 8, 2009, Respondent testified falsely in a grand jury proceeding regarding an on-duty police shooting in which he was a participant.

I find further that the Department Advocate has met his burden of proof by a preponderance of the relevant, credible evidence that Respondent falsely testified on June 4, 2015, during an examination before trial regarding an on-duty police shooting in which he was a participant.

I find further that Respondent's commission of these offenses was prejudicial to the good order, discipline, and efficiency of this Department.

A person commits the crime of Perjury in the First Degree when he swears falsely, and his false statement consists of testimony which is material to the action, proceeding, or matter in which it is made (Penal Law § 210.15). Perjury in the First Degree is a class "D" felony (*Id.*).

¹ I take judicial notice of the March 15, 2019 decision (*People v. Acosta*, N.Y. Slip Op. 30676[U]) of the Supreme Court, Criminal Term, Bronx County (Fabrizio, J.) holding that: (1) Respondent accepted representation in the civil matter by the Office of Corporation Counsel under a representation agreement (Dept. Exs. 1, 2) which stated that the Corporation Counsel would disclose any wrongdoing discovered during the representation to his employer, the NYPD; and (2) Respondent's public disclosure of the errata sheet waived any expectation of privacy that the statements he made to his attorney about those matters would remain privileged (Court Exhibit I).

Under the Constitution of the State of New York, any individual charged with the commission of a felony may only be done so upon indictment by a grand jury unless he waives that right with the consent of the District Attorney (Art. 1, § 6, New York Constitution). In this case, Respondent appeared on October 8, 2009 before the Bronx grand jury, exercising its constitutional function of investigating serious crimes. Respondent was called as a witness, waived immunity, and took an oath to tell the truth (Dept. Ex. 7, AT6-AT8).

On March 2, 2017, Respondent admitted that he provided false testimony before the grand jury on a material matter, *i.e.*, he was actually on top of Person A when he fired a second shot into Person A's back, rather than six feet away as he previously testified during the grand jury proceeding.

Specification 1: Perjury before the Grand Jury

By a preponderance of the credible evidence, I find that Respondent committed the class "D" felony of Perjury in the First Degree concerning his testimony before the Bronx grand jury on October 8, 2009. I further find that his commission of this offense was prejudicial to the good order, discipline, and efficiency of this Department.

Members of Service must provide truthful testimony under oath in any proceeding, just like any other witness. By providing false testimony before the grand jury, Respondent frustrated both the grand jury's purpose, as due process protection for individuals accused of serious crimes, and undermined the legitimate expectation of the public that police officers tell the truth concerning the exercise of their duties as they affect citizens.

Accordingly, I find Respondent Guilty of Specification 1.

Specification 3: Perjury during the Deposition

By a preponderance of the credible evidence, I find that Respondent committed the class "D" felony of Perjury in the First Degree during his deposition on June 4, 2015. I further find that his commission of this offense was prejudicial to the good order, discipline, and efficiency of this Department.

As set forth above, Members of Service must provide truthful testimony under oath, even when such truthful testimony may subject them to professional criticism. In this case, I find that Respondent's false testimony in a deposition placed his personal interest ahead of his sworn duty to tell the truth, as well as the justice system which he serves.

Accordingly, I find Respondent Guilty of Specification 3.

Specification 2: Tampering With Public Records

I find that the Department Advocate has met his burden of proof by a preponderance of the relevant, credible evidence that on May 20, 2010, Respondent knowingly made a false entry in or falsely altered a record or other written instrument subsequently filed with a public office or a public servant.

I find further that Respondent's commission of this offense was prejudicial to the good order, discipline, and efficiency of this Department.

A person commits the crime of Tampering with Public Records in the First Degree when, knowing that he does not have the authority of anyone entitled to grant it, and with intent to defraud, he knowingly removes, mutilates, destroys, conceals, makes a false entry in or falsely alters any record or other written instrument filed with, deposited in, or otherwise constituting a record of a public office or public servant (Penal Law § 175.25). Tampering with Public Records in the First Degree is a class "D" felony (*Id.*).

“Written instrument” means any instrument or article, including computer data or a computer program, containing written or printed matter or the equivalent thereof, used for the purpose of reciting, embodying, conveying or recording information, or constituting a symbol or evidence of value, right, privilege or identification, which is capable of being used to the advantage or disadvantage of some person (Penal Law § 175.00[3]).

On May 20, 2010, Respondent answered questions in an official Department interview. By the nature of (1) the warning given to him at the beginning of the interview; (2) the identification of his questioners as members of this Department; and (3) the questions posed to him pertained to an on-duty discharge of his weapon during an attempt to arrest Person A I find that he was aware that the interview was part of the official business of this Department. I further find that the presence of a stenographer put Respondent on notice that a record was being created which would likely be maintained by this Department in the ordinary course of business; thus, I find that the transcript of Respondent's official Department interview is a "written instrument" within the meaning of the statute.

I find that Respondent knowingly made false statements to the investigators during this interview, which he knew to be untrue at the time he made them, with the intent to frustrate their purpose, that being the collection of all relevant information regarding his performance of duty, as it pertained to Person A on October 4, 2009.

I find by a preponderance of the credible, relevant evidence that Respondent committed the class "D" felony of Tampering with Public Records. I further find that Respondent's commission of this offense was prejudicial to the good order, discipline, and efficiency of this Department. Respondent's deliberate act of providing a false narrative to Department investigators attempted to thwart the legitimate aim of holding Members of Service accountable for their official acts.

Accordingly, I find Respondent Guilty of Specification 2.

Official Misconduct

A public servant commits the crime of Official Misconduct when, with intent to obtain a benefit or deprive another person of a benefit, he or she commits an act relating to her office but constituting an unauthorized exercise of his or her official functions, knowing that such act is unauthorized (Penal Law § 195.00).

“Public servant” means any public officer or employee of the state, of any political subdivision thereof, or of any government instrumentality within the state, or any person exercising the functions of any such public officer or employee (Penal Law § 10.00 (15)).

“Benefit” means any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary (Penal Law § 10.00 (17)).

Official Misconduct is a Class “A” misdemeanor.

Specification 4: Official Misconduct

I find by a preponderance of the credible, relevant evidence that Respondent committed the class "A" misdemeanor of Official Misconduct on June 4, 2015, concerning his commission of an act relating to his office but constituting an unauthorized exercise of his official functions knowing that such act was unauthorized.

I find further that Respondent's commission of this offense was prejudicial to the good order, discipline, and efficiency of this Department.

On June 4, 2015, Respondent provided sworn testimony in a deposition related to his performance of duty as a Member of Service on October 4, 2009; thus, I find that he was performing an official function. I further find that Respondent committed an unauthorized act

(i.e., providing a false narrative under oath), which constituted an unauthorized exercise of his official function. I further find that when Respondent committed this unauthorized act, he knew that it was unauthorized and performed it with the intent to deprive Person A of the right to seek judicial redress. I find that Person A's right to do so is a benefit within the meaning of Penal Law § 195.00.

As stated above, police officers are expected to tell the truth about the performance of their duties, especially when they do so as a part of a judicial proceeding. In providing the false narrative at the deposition, Respondent undermined the good order and discipline of this Department by ignoring his duty to tell the truth, which is implicit in his office and that of every Member of Service.

Accordingly, I find Respondent Guilty of Specification 4.

Specification 5: Official Misconduct

I find by a preponderance of the credible, relevant evidence that Respondent committed the class "A" misdemeanor of Official Misconduct on June 4, 2015, based upon his failure to tell the truth during a deposition relating to an on-duty shooting in which he was involved, as an obligation imposed by law, as well as being inherent in the nature of his office.

As set forth above with respect to Specification 4, in providing a false narrative during his deposition testimony, Respondent intentionally attempted to frustrate Person A's ability to seek redress in a court of law for the Respondent's alleged commission of a tortious act which caused him to suffer an injury. As set forth above, I find that Person A's right to do so is a benefit within the meaning of Penal Law § 195.00.

I find further that Respondent's failure to tell the truth in the deposition was prejudicial to this Department's good order, discipline, and efficiency. It is axiomatic that when a public official commits an act that harms a citizen, that citizen may seek redress to make himself whole.

The pursuit of a civil judicial remedy is one of the only means by which public officials may be held accountable to the public they serve. By his admission, Respondent sought to portray his actions on October 4, 2009, in a way to avoid being disciplined by this Department, as well as avoiding civil liability for how he used force against Person A

Accordingly, I find Respondent Guilty of Specification 5.

PENALTY

In order to determine appropriate penalties, the Tribunal, guided by the Department Disciplinary System Penalty Guidelines (“Disciplinary Guidelines”), considered all relevant facts and circumstances, including any aggravating and mitigating factors established in the record. Respondent’s employment history was also 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.

The Department has recommended that Respondent be terminated from his employment. Based upon the credible evidence in the record, I concur with their recommendation.

Respondent, who was appointed to the Department on July 18, 2007, has been found Guilty of three specifications based upon proof that he committed a felony (Specifications 1, 2, and 3) and two specifications that establish his commission of a misdemeanor (Specifications 4 and 5). According to the Disciplinary Guidelines, the presumptive penalty for engaging in conduct proscribed by New York State law as a felony is termination. The presumptive penalty for engaging in conduct proscribed by New York State law as a misdemeanor is 30 days; the aggravated penalty is termination.

Respondent did not offer any evidence of mitigation, and I find that none exists in this record. I further find the presence of the following aggravating factors:

- a. The nature of the events was such that it allowed time for deliberate reflection or action;
- b. Respondent's apparent motivation was of personal interest;
- c. Respondent's lack of candor;
- d. The adverse impact of Respondent's conduct on the Department with regard to its mission, reputation, credibility, and relationship with the community, and the impact upon public trust; and
- e. Respondent's overall pattern of behavior, indicating an inability to adhere to Department rules and regulations.

The overwhelming evidence, in this case, establishes that Respondent knowingly lied under oath before a grand jury, during an official Department interview, and during a sworn deposition. By his admission to Andrew Owen, he lied about how he used deadly physical force against Person A because he was afraid that he might lose his job if he gave a truthful accounting of his conduct.

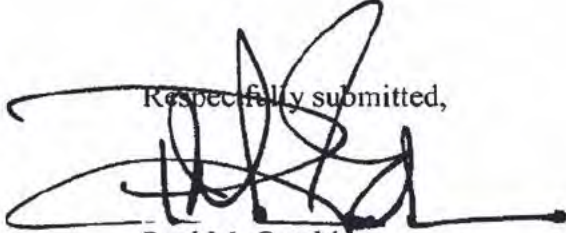
The Tribunal is under no illusion that calling for a Member of Service to admit error in his use of force can cause a cascade of adverse consequences, not the least of which is the possibility of criminal prosecution. On the other hand, the presumption that those sworn guardians of public safety possess the moral courage to admit their mistakes is the bedrock upon which public trust rests.

In making this choice, Respondent sought to protect his interests by lying, indifferent to the effect of his lies upon the members of this Department once those lies were exposed. Every Member of Service who performs his or her duties in an honorable manner has the right to be outraged whenever a fellow Member of Service disregards their oath of office. The failure to hold such members accountable for their misconduct has a corrosive effect on Department morale, faith in the Department and the criminal justice system. The full impact of Respondent's lies may be impossible to quantify, as members of the public who become aware of his misconduct are likely to disseminate that information within their communities. Those same

citizens may well sit on juries in the future and cast unwarranted scrutiny upon police testimony, thereby undermining the ability to hold criminals accountable for their acts.

Under these circumstances, it is inconceivable that Respondent remain a member of this Department. His continued presence is an affront to the mission and values of this Department, for which some Members of Service have made the ultimate sacrifice.

Accordingly, I recommend that, pursuant to Section 14-115 of the Administrative Code of the City of New York, Respondent be DISMISSED from the Department.

Respectfully submitted,

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED
SEP 13 2021

DENNIS S. RIVERA
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER DANNY ACOSTA
TAX REGISTRY NO. 944260
DISCIPLINARY CASE NO. 2017-17574

Respondent was appointed to the Department on July 18, 2007. On his three most recent annual performance evaluations, he received 4.5 overall ratings of "Extremely Competent/Highly Competent" for 2014, 2015, and 2016. Respondent has been awarded one Honorable Mention, one Medal for Valor, three medals for Excellent Police Duty, and one medal for Meritorious Police Duty.

Respondent has no disciplinary record. In connection with the instant matter, he was placed on Level I Discipline Monitoring on August 4, 2017, and was suspended on October 22, 2018. To date, Respondent remains suspended and subject to disciplinary monitoring,

For your consideration.

Paul M. Gamble
Assistant Deputy Commissioner Trials