The City of New York

POLICE DEPARTMENT

September 7, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Alex Viera
Tax Registry No. 945080
77 Precinct
Disciplinary Case No. 2011 4888

The above-named member of the Department appeared before the Court on May 16, 2012, charged with the following:

1. Police Officer Alex Viera, assigned to the 77th Precinct, while on duty in Kings County, on or about November 25, 2009, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that Police Officer Viera prepared a Complaint report for Criminal Mischief without directly speaking to the Complainant/Victim resulting in said report being inaccurate.

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

The Department was represented by Scott Rosenberg, Esq., Department Advocate's Office. Respondent was represented by Michael Martinez, Esq., Worth, Longworth & London LLP.

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

Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Lieutenant Michael Brill and Sergeant Nicholas Spataro as witnesses. Also submitted were the transcripts of the official Department interviews of Sergeant Person A and Police Officer Person B, as well as Person A's plea to related charges and specifications.

Lieutenant Michael Brill

Brill had been a member of the Department since 1993 and was assigned to the Quality Assurance Division (QAD).

Brill testified that he conducted an investigation into allegations of improper crime reporting, referred from the Internal Affairs Bureau (IAB). He investigated a complaint report (or UF-61, or '61') prepared by Respondent on November 25, 2009, for a complainant named Person C. In February 2010, Brill obtained Department's Exhibit (DX) 1, the Sprint report of a 911 call on November 25, 2009. DX 1 indicated that a male named Person C called 911 on November 25, 2009, at 1658 hours for a past burglary. Further, DX 1 indicated that the complainant's residence, [redacted], had been broken into and a television had been taken from the premises.

Brill testified that Police Officers Person B and Urszula Mucha, assigned to the 77 Precinct, sector Ida, were dispatched to the complainant's address. The officers responded and

finalized the call as 10-90Y, indicating the assignment was unnecessary, because although Person C had lost a television, someone with Person C stated that she knew where the television was and would be able to retrieve it. As such, the officers "assumed" the television would be returned "and all would be forgotten."

DX 2 was the Sprint report of Person C's second 911 call at 1758 hours the same day. The report indicated the call was made by a man named Person C, but the telephone number and address were the same as for the complainant in DX 1. The call also was for a past burglary. The caller stated that officers had responded to a previous call from Person C, but refused to take a report. Person C therefore requested that a supervisor respond to his location to take a complaint report in connection with the prior incident.

Person B and Mucha responded to Person C's residence again, this time accompanied by the 77 Precinct patrol supervisor, Sergeant Person A, and Respondent, Person A's operator that day.

Person A questioned Person C. Respondent prepared a scratch copy of the complaint report, DX 3, for misdemeanor criminal mischief with Person C as the complainant. Respondent included a narrative in the scratch copy which stated that Person C "states that unk perp came to his residence and intentionally either kicked or punched [Person C's] door causing property damage." DX 4 was the finalized computer printout of the complaint report.

Brill testified that based upon Person C's complaint, criminal mischief would not be an accurate classification because Person C reported the theft of a television from his residence. Criminal mischief only would pertain to the damage done to the apartment door, not theft. Rather, the incident should have been classified as burglary in the second degree, a felony.

On cross examination, Brill stated that the case was generated by an anonymous letter from someone claiming to be a supervisor in the 77 Precinct. It alleged widespread downgrading of crimes. The letter specifically indicated that a high-ranking supervisor had downgraded index crimes, underreported crimes and "things of that nature."

In order to investigate the allegations, Brill looked at all cases within a certain period of time, in which a 911 call came in at one level and was closed at a lower level. He also attempted to ascertain whether reports were being generated and then discarded, as also was alleged in the anonymous letter.

Brill testified that during Person B's official Department interview, Person B was questioned as to why the incident came over the radio as a burglary, but was classified as criminal mischief. Person B stated that although he believed Person C had been intoxicated at the time, it was not the reason Person B did not take a report. Person B mentioned that one of the reasons he chose not to write a report was because Person C had someone staying with him and Person B believed the incident was a misunderstanding between Person C and the other individual. Person B never indicated that he had informed Respondent of a stolen television or anything of that nature.

Person B stated that within minutes of arriving at the scene in response to Person C's second 911 call, an additional high-priority job was dispatched. Person A told Person B and Mucha to handle the other job, and he and Respondent would stay at the scene. As such, Person B and Mucha left the scene as directed.

Official Department Interview of Person B (see DX 5, recording; 5a, transcript)

Person B was interviewed in December 2010. On November 25, 2009, Person B was working sector Ida-John on a 4x12 tour with Mucha, who was his steady partner at the time. During the tour, Person B and Mucha responded [redacted], where they spoke to the complainant, who owned the apartment in question. The complainant was accompanied by a female friend who lived on the same block. The complainant informed the officers that he believed one of the men he was permitting to stay at his apartment had broken in and taken property from the apartment. The complainant's female friend knew who the man was and stated that she would retrieve the complainant's property.

Person B stated that the complainant was intoxicated and possibly high at the time and "his demeanor was at that point he wanted his property back." Person B and his partner concluded that the friend would retrieve the property and the incident would be resolved. The theory of who was responsible for taking the property was mere speculation. Person B did observe damage to the front door and believed that the property taken from the apartment was a flat-screen television. He finalized the assignment as 90Y.

Person B stated that the complainant's female friend had seen the property and knew it was "apparently two houses down," referring to the individual who had permission to stay at the complainant's apartment. Although she knew the location of the missing property, the woman and the complainant did not want the officers to arrest the individual. The complainant did not want the individual to get in trouble, as he was staying at his house; he simply wanted his property back. Person B was unable to recall why the individual was staying with the complainant.

Person B and Mucha's failure to write a report was not due to the complainant's apparent intoxication, but rather the fact that he did not care about anything other than getting his television back. Upon their departure, the complainant did not express a desire to have a report taken but also was leaving the apartment, apparently to accompany the friend to pick up his television. Person B testified that the decision to not take a report was not an effort to avoid taking a report for burglary.

Upon the second 911 call, Person B believed he and Mucha were requested to respond to the scene again to notify the sergeant of what they had assessed from the matter. Person B only spoke to Person A, the supervisor at the scene. Person B informed Person A what had happened, of what they were informed by the complainant, and how they had finalized the job.

Person B stated that he informed Person A property had been removed from the apartment and was known to be at another location. Person B also informed Person A that he and his partner had been to the location earlier and spoken to the complainant. Person B then relayed what the complainant had stated. Person B specifically returned to the location to explain the incident to Person A because Person B and his partner had handled the job shortly before. They did not tell Person A that the complainant was not credible. Rather, they told him exactly what had happened and how they assessed the situation. Person B did inform Person A that the complainant had not wanted to file a report the first time. Person B also informed the sergeant that property had been removed from the apartment and that the complainant really only wanted his property back.

After leaving the scene, Person B said, a call for a 10 31, or burglary in progress, came over the radio. They were redirected [redacted], where they took a complaint report from another complainant for criminal mischief. There, the complainant's son told them that

someone was banging on the door loud enough to wake her up. Her son went downstairs and opened the door. He saw a man running up the block and subsequently called 911.

Person B believed the damage done to the door was some denting due to the banging. The officers notified Person A, who responded and advised them to write up the incident as criminal mischief. Person B did not recall if the supervisor spoke with the complainant, but he was on the scene. Person B agreed that the decision to call the supervisor was based on the impression that an attempted burglary (a felony) had occurred. Person B indicated on the report that an unknown person had attempted to gain entrance to the home and had damaged the front door in the process, but was unable to enter the premises.

Person B never had felt influenced or pressured into not reporting a crime. He could not recall if there were other instances in which, as with the second incident, he asked a supervisor to respond for one of the seven major crimes and then subsequently was given instructions not to report the incident as such.

* * *

According to Brill's investigation, Person A responded to the apartment as requested. Person A informed Brill that he had interviewed Person C, after which he believed Person C only was complaining about the door. Brill agreed that according to Person A, Person C never mentioned anything regarding a television during the interview. As such, Person A requested that Respondent write up the incident as criminal mischief.

* * *

Person A was served with charges and specifications related to the instant case (see Case No. 2011-3641). He pleaded Guilty on February 7, 2012, but because the matter was before the Police Commissioner at the time of Respondent's trial, and the Deputy Commissioner of Trials

had disapproved the penalty, Person A's official Department interview and plea transcript were admitted in lieu of his testimony.

Official Department Interview of Person A (see DX 6, transcript)

On November 25, 2009, Person A was assigned as patrol supervisor and was working with Respondent. He responded to the location and "assume[d]" he spoke to the complainant, Person C. Person A recalled him being intoxicated and very adamant. Person C informed Person A that a man had broken his door. He had gotten into an argument with individuals he had allowed to stay with him and subsequently had thrown out. Person C believed that one of those individuals might have been responsible for the broken door. Person A believed that Person C moved his sofa against the door after it was broken. Person C did not see anyone break his door, but informed Person A that he knew who had done so.

Person A did not speak with the responding sector, Ida, whom he had met [redacted] Upon his arrival at the scene, a burglary in progress came across the radio and he directed sector Ida to respond while he spoke to Person C. The location of the new job was directly down the street.

Person A was not aware that sector Ida had originally closed the [redacted] incident as 90Y and not taken a report. He directed his driver to prepare a report for criminal mischief because Person C only indicated his door had been broken by an individual that was living or staying with him at the time. Person C never informed Person A that his flat-screen TV had been stolen or showed Person A where it had been located. Additionally, sector Ida never informed Person A that a television had been taken from the premises. Person A observed Person C's sofa against the

door and several markings on the outside of the door, but could not recall the extent of the damage.

Person C's intoxication had no influence on Person A's decision to classify the report as criminal mischief. Person A observed damage to the door, but maintained that he could not charge attempted burglary because he did not know that anyone intended to commit a crime in the apartment. Person A's driver obtained Person C's pedigree information in order to prepare the report.

Person A then explained the next [redacted] incident. Person A and his driver responded to the address. There, the complainant indicated that he had heard a loud banging at the door as if someone had kicked or punched the door. The complainant went outside, put the light on to see what was causing the noise and observed someone running away from the location.

Person A believed the perpetrator had been doing a "knock and run" and simply had run away. Person A observed damage to the door, but did not believe the noise had been from an attempt to gain entry into the residence because there were no pry marks and the perpetrator had run as soon as the complainant turned the light on.

The complainant never informed Person A that someone had opened the door and attempted to enter the residence. Had Person A been told such information, he would have classified the report as an attempted burglary rather than criminal mischief because someone would have been trying to gain access to the house.

Person A did not classify the two reports in question as criminal mischief in an attempt to avoid a seven-major-crimes classification. Nor had he ever felt pressured, influenced or feared repercussions for classifying a report as one. Person A did not know anyone in the command

who felt that way and no officers had approached him indicating that they felt pressured to downgrade the classification of reports.

* * *

Nothing in Brill's investigation indicated that Person A objected to what Respondent wrote in the complaint report.

Upon questioning by the Court, Brill stated that no correlation ever was made between Person C's complaint and the second burglary job [redacted].

On re-direct examination, Brill testified that an officer only was required to follow lawful orders from higher-ranking Department members. Similarly, if an officer were directed to engage in misconduct by a higher ranking member, the lower-ranking member was required to report such orders to IAB.

On re-cross examination, Brill agreed that he never substantiated any charges against Respondent for failing to notify IAB about misconduct. In order to determine whether an order from a higher-ranking officer was unlawful, the lower-ranking officer would have to make that decision based on the available information. Brill agreed that an officer was supposed to do what a sergeant told him to do in the field, and officers had a right to rely on what they were told by a sergeant. If a sergeant made an evaluation after talking to a complainant and instructed his subordinate to write up a complaint report in a particular manner, it would not be an "obvious unlawful" order unless that subordinate had information to contradict his supervisor's information. Brill testified that according to Respondent, Respondent did not have a direct conversation with Person C.

Upon further questioning by the Court, Brill stated that if Person C had told Person A his television was taken, and Person A subsequently told Respondent to write the report up as

criminal mischief, it would be an unlawful order. Person A would have been informed that a crime had taken place and then ordered Respondent to document something other than what had actually occurred. In Brill's opinion, it would have been improper Department procedure "at the very least."

Based on his investigation, Brill instructed the 77 Precinct in late 2010 or early 2011 to upgrade Person C's complaint report to a burglary. After it was upgraded, it likely would have been referred to the detective squad. Brill did not know the final disposition or what further investigations took place.

Sergeant Nicholas Spataro

Sergeant Nicholas Spataro was assigned to QAD as an investigator. He previously was assigned to the 75 Precinct in Brooklyn, where he was a patrol supervisor and squad supervisor. He was appointed to the Department in January 1992.

Spataro interviewed Person C at Person C's residence in April 2010. Person C stated that he had been the victim of a burglary in which his flat screen TV was stolen from his apartment. Person C showed Spataro the damaged door. Spataro observed that at the time, the door had "some sort of makeshift piece of wood . . . supporting the door so it could not be opened." Person C informed Spataro that upon arriving home on the day of the incident, he discovered the damage to the door where he believed the perpetrator had gained entrance.

According to Spataro, the door through which Person C believed the perpetrator entered was located within the same room from which the TV was stolen. Next to the door stood a short television stand that contained a recorded media player with wires hanging unattached to any television.

Person C told Spataro that he called 911 twice to report the incident. Officers arrived after the first call, and Person C attempted to make a report after explaining to the officers that someone had broken into his house and stolen his television. Person C felt, however, that the officers did not believe his story and told him he needed more to prove someone had forcibly entered his residence or property had been removed. As such, Person C "assume[d]" a report would not be generated. Sometime after the officers left his residence, Person C placed the second call to 911 in another attempt to make a report.

Person C told Spataro that he requested a supervisor respond so he could have the incident documented. According to Person C, officers responded to the second call. Person C explained how someone had forcibly entered his apartment through his door and removed his TV, just as he had explained to the first unit. The officers that responded to the second call took a report and his information.

On cross examination, Spataro stated that he prepared Respondent's Exhibit (RX) A, the QAD Interview Sheet. Spataro could not recall whether he took notes during the interview, or how long the interview lasted. He "would assume" he spent 15 to 20 minutes with Person C.

After the interview with Person C, Spataro was under the assumption that Person C spoke with both Person A and Respondent. Thus, Spataro used language such as Person C "told them" and "explained the same thing to the second two officers" in his summary. Person A and Respondent, however, both indicated that only Person A had spoken with Person C was not aware that a supervisor had responded to his second call as requested.

Spataro agreed that in his own experience it was customary for officers to work in pairs and for one officer to take the lead while handling a job. Depending on the job and circumstances, generally one officer interviewed and the other "back[ed] him up." When he was

called to the scene as a sergeant, Spataro would have spoken to the officer who initially conducted the interview and then spoken to the victim.

Upon questioning by the Court, Spataro stated that Person C informed him that he told the officers who responded after his second 911 call that his television had been taken. Person C also told those officers that there was damage around the lock of his door because it had been forced open. According to Spataro, Person C's apartment was not the "best kept," but he could only recall Person C showing him what he did after the damage and not the damage itself.

Person A's Plea (see DX 7, transcript)

After a brief recitation of the facts from the Advocate, the trial commissioner stated that he had "serious questions about the case." He was not convinced that a forfeiture of 20 vacation days was an appropriate penalty for Person A.

Person A's counsel informed the Court that all officers involved felt the complainant was highly intoxicated. The complainant knew who had taken his television and his girlfriend had been present at the time the officers responded and indicated that she would get the television back. Additionally, there were questions as to whether the complainant actually wanted to make a complaint. Counsel further stated that none of the officers involved observed a cable box in the house, which created a suspicion among the officers as to whether a TV had been stolen.

Person A pleaded guilty to misclassification offenses concerning both Person C's complaint and the second complaint [redacted]. As to Person C's complaint, the specifications were (a) that Person A "directed [Respondent] to prepare a Complaint report for Criminal Mischief when in fact [Person C] reported that his apartment, at or near [redacted] was broken into and his television was stolen," and (b) that Person A "failed to properly

investigate an allegation of a residential burglary at or near [redacted]." The trial commissioner took the plea but disapproved the penalty. The Police Commissioner approved the penalty on June 13, 2012.

Respondent's Case

Respondent testified on his own behalf.

Respondent

At the time of trial, Respondent had been a Department member for four and a half years. He had been assigned to the 77 Precinct for his entire career. At the time of trial, he was assigned to the conditions unit. He had applied for this position and received it as a result of his arrest record and the work he had done. At the time of trial, Respondent had 100 arrests in his career.

On November 25, 2009, Respondent was assigned as a sergeant's operator. At the time, Respondent still was an Operation Impact officer and was not Person A's steady driver. He had never been a sergeant's operator prior to that day.

Respondent responded to an apartment with Person A after they were assigned to respond to that job. Person A was on the radio. At some point, Person A directed him to a location. Person B and Mucha, from sector Ida, were present upon their arrival. They left about two to four minutes after Respondent and Person A arrived, but Respondent could not recall whether they spoke with Person A prior to their departure.

Once Respondent and Person A arrived at the location, they went to the second floor, where Person A interviewed the complainant. The complainant was a black male. Respondent

described him as intoxicated with blurry eyes. Respondent never had a conversation with the complainant and did not recall his name.

Respondent testified that the complainant informed Person A that there was damage to the door. The complainant also showed Respondent and Person A where the door was located. At no time did Respondent hear the complainant or anyone else in the apartment mention a stolen television.

While Person A interviewed the complainant, Respondent looked around and completed memo book entries. He did not hear every word spoken between Person A and the complainant during the interview. Respondent and Person A were in the complainant's apartment for approximately 12 to 15 minutes.

During that time, Person A instructed Respondent to write up a '61' for criminal mischief. Respondent never questioned Person A about his reasoning behind the instruction. Prior to this incident, Respondent had written about three or four complaint reports in his career. Respondent showed Person A the completed scratch copy of the '61' for approval, as required, and returned to the command to submit it to the desk officer.

At no point during the tour did Person A tell Respondent that the complainant had alleged his television was stolen from the apartment, nor did Mucha or Person B ever mention it.

It was not Respondent's understanding that an officer must interview a complainant directly in order to write up a '61.'

On cross examination, Respondent admitted that it was possible he did not hear Person C inform Person A someone had broken into his house and stolen his television because Respondent did not hear the entire conversation. Had Respondent heard Person C inform Person A

that his TV was stolen, Respondent would not have prepared a complaint report for criminal mischief.

Respondent had no personal knowledge of whether Person C had been the victim of criminal mischief. While in front of Person C's residence, prior to being dispatched to a burglary in progress, Person B and Mucha handed Respondent a paper containing Person C's pedigree information.

Upon questioning by the Court, Respondent stated that he could not recall whether the description of the suspect as a black male in the complaint report was based off of Person C's statements or if someone else had informed Respondent of this.

FINDINGS AND ANALYSIS

The instant case involves an incident that took place on November 25, 2009, within the confines of the 77 Precinct. A citizen, Person C, called 911. He reported that his apartment door had been damaged and that his flat-screen television was missing. Two officers, Person B and Mucha, responded to Person C's apartment. Person C repeated to them what he told the 911 operator. The officers, however, did not take a report. Person B later admitted to investigators that while Person C said that his door was damaged and his TV was missing, he appeared to be intoxicated. Also, Person C's female friend was present. She said that she knew who had taken the TV and that it would be returned.

Apparently Person C still wanted a report taken because he called 911 again. This time, he complained that the officers had not taken a report, and requested that a supervisor respond. Person A, the patrol supervisor, responded to the scene along with Respondent, his driver. Person A spoke to Person C in the presence of Respondent. Person A instructed Respondent to write a complaint report, or '61,' for criminal mischief based on the damage to the door.

Respondent completed those reports as instructed (see DX 3 4, scratch and computerized copy of complaint report, respectively).

Person A told investigators that Person C told him his door had been damaged, but did not tell him anything about missing property. Person A observed damage to the door, but maintained that he could not charge attempted burglary because he did not know that anyone intended to commit a crime in the apartment. Person A, nevertheless, pleaded Guilty to charges and specifications concerning this incident. He admitted that he directed Respondent to prepare a '61' for criminal mischief, when, in fact, Person C "reported" that his apartment was broken into and his television was stolen.

Person C told a Quality Assurance Division investigator that he had reported to both sets of officers that his door was damaged and that his TV was missing.

Respondent testified that he was present while Person A talked to Person C, but did not himself speak to the complainant. He heard the conversation but was not paying close attention. He did not hear Person C say that his TV was missing.

It is important to note first what Respondent is not charged with. If the Department believed, from all the evidence, including Person C's allegation and the admissions of Person A and Person B, that Respondent heard Person C say that his TV was missing, and then downgraded or underreported the incident from felony burglary to misdemeanor criminal mischief, the Court would expect Respondent to be charged as such. He is not. Nor is Respondent charged with following an ostensibly illegal order from Person A to do so. Rather, Respondent only is charged with preparing a complaint report "without directly speaking" to Person C, "resulting in said report being inaccurate." In a sense, Respondent is charged with not listening closely enough to Person C, because if he had, he would have heard Person C state that his TV was missing.

Respondent argued that there is no requirement that a police officer speak directly to a complainant before preparing the complaint report. The Court agrees; there is no evidence of any such requirement. In a broader sense, the officer must ensure that he is familiar with the facts of the case. Nothing in Person A's instructions contradicted what Respondent knew of the case. Beyond that, Respondent had no reason not to follow Person A's order. Cf. *Case No. 75840/00* (Dec. 28, 2001) (although officer was charged with failing to file reports, he filed one complaint report and one accident report; if there were any more reports that should have been filed, a supervisor could have instructed him to do so).

Any failure in classifying the incident as only criminal mischief and not burglary falls upon the supervisor. He made an incorrect decision to charge only criminal mischief, then told Respondent to carry out that decision. It is not appropriate to hold Respondent responsible for following a facially valid order. For example, in *Case No. 83344/07* (May 23, 2011), a complainant told the two responding police officers that she was mugged and her purse was taken, but she did not want to get into their vehicle to canvass because she did not see the perpetrator's face. The respondent, assigned as the patrol supervisor, interviewed the complainant and told her that she might be able to find her property in the canvass. But she still refused. He decided that she was not credible and ordered the officers to mark job unnecessary. This was improper and the complaint should have been taken. Nevertheless, there is no sign that the two officers were disciplined in any way for following the patrol supervisor's order.

The same reasoning should apply here. Therefore, Respondent is found Not Guilty.

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner Trials

