POLICE DEPARTMENT CITY OF NEW YORK

March 28, 2016

Memorandum for: Police Commissioner

Re: Police Officer Jamaal Miller
Tax Registry No. 939039
79 Precinct
Disciplinary Case Nos. 2014-11220, 2015-12930, 2015-12952, 2015-13031, 2015-14367

Police Officer Michael Williams
Tax Registry No. 946396
79 Detective Squad
Disciplinary Case No. 2014-11222

Charges and Specifications:

Disciplinary Case No. 2014-11220

1. Said Police Officer Jamaal Miller, on or about August 3, 2012, at approximately 1350 hours, while assigned to the 79th Precinct and on duty, in the vicinity of [redacted] abused his authority as a member of the New York City Police Department in that he stopped Wade Conley without sufficient legal authority.

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

2. Said Police Officer Jamaal Miller, on or about August 3, 2012, at approximately 1350 hours, while assigned to the 79th Precinct and on duty, in the vicinity of [redacted], spoke discourteously to Wade Conley, in that he stated, in sum and substance: YOU NEED TO STOP LISTENING TO THESE FUCKING STREET LAWYERS.

   P.G. 203-09, Page 1, Paragraph 2 – PUBLIC CONTACT GENERAL

3. Said Police Officer Jamaal Miller, on or about August 3, 2012, at approximately 1350 hours, while assigned to the 79th Precinct and on duty, in the vicinity of [redacted], engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he threatened Wade Conley with the use of force.

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

4. Said Police Officer Jamaal Miller, on or about August 3, 2012, at approximately 1350 hours, while assigned to the 79th Precinct and on duty, in the vicinity of [redacted], abused his authority as a member of the New York City Police Department in that he searched Wade Conley without sufficient legal authority.

   P.G. 212-11, Page 1, Paragraph 3 – STOP AND FRISK

Disciplinary Case No. 2015-12930

1. Said Police Officer Jamaal Miller, on or about August 16, 2013, at approximately 2200 hours, while assigned to the 79th precinct and on duty, in the vicinity of [redacted], was discourteous in that he rudely to Person A by stating in sum and substance: WE ARE NOT HERE TO TALK ABOUT THE FUCKING CONSTITUTION. IF YOU DO ANYTHING FUNNY, I WILL FUCK YOU UP. I'LL CHOKE THE SHIT OUT OF YOU.

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

2. Said Police Officer Jamaal Miller, on or about August 16, 2013, at approximately 2200 hours, while assigned to the 79th Precinct and on duty, in the vicinity of [redacted], engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he threatened Person A with the use of force.

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

Disciplinary Case No. 2015-12952

1. Said Police Officer Jamaal Miller, on or about November 21, 2013, at approximately 2215 hours while assigned to the 79th precinct and on duty en route to the 79th precinct. Kings County, did wrongfully use force against Person C, in that he punched Person C.

   P.G. 203-11, Page 1, Paragraph 2 – USE OF FORCE

2. Said Police Officer Jamaal Miller, on or about November 21, 2013, at approximately 2215 hours while assigned to the 79th precinct and on duty in route to the 79th precinct, Kings County, wrongfully used force against Person C in that he placed his hands around Mr, Burney's neck, thereby causing Person C to be held in a chokehold and to have difficulty breathing.

   P.G 203-11, USE OF FORCE

3. Said Police Officer Jamaal Miller, on or about November 21, 2013, at approximately 2215 hours while assigned to the 79th precinct and on duty en route to the 79th precinct, Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he threatened Person C with the use of force by stating in sum and substance: YOU THINK YOU'RE TOUGH OR SOMETHING? OH YEAH, YOU MUST BE TOUGH. WE'RE GONNA SEE IF YOU'RE TOUGH. WE'RE GONNA SEE IF YOU'RE TOUGH RIGHT NOW. WATCH WHEN WE GET BACK.

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

4. Said Police Officer Jamaal Miller, on or about November 21, 2013, at approximately 2222 hours, while assigned to the 79th precinct and on duty, inside the 79th Precinct Station House, Kings County, abused his authority as a member of the New York City Police Department in that he improperly conducted a strip search of Person C.

   P.G. 208-05, Page 2, Paragraph C – ARRESTS – GENERAL SEARCH GUIDELINES

5. Said Police Officer Jamaal Miller, on or about November 21, 2013, at approximately 2222 hours, while assigned to the 79th precinct and on duty inside of the 79th Precinct Station House, Kings County, spoke discourteously to Person C in that he stated in sum and substance: THIS KID'S A FREAKING PUSSY. [YOU] DON'T GET NO PUSSY. GET THE FUCK OUT OF HERE. THIS KID'S A FUCKING PUSSY.

   P.G. 203-09, Page 1, Paragraph 2 – PUBLIC CONTACT – GENERAL

6. Said Police Officer Jamaal Miller, on or about November 21, 2013, at approximately 2222 hours, while assigned to the 79th precinct and on duty inside of the 79th Precinct Station House, Kings County, acted discourteously to Person C in that he taunted him by stating in sum and substance: WHAT'S UP? WHAT'S UP? WHAT YOU GONNA DO? SWING. DO SOMETHING.

P.G. 203-09, Page 1, Paragraph 2 – PUBLIC CONTACT GENERAL

Disciplinary Case No. 2015-13031

1. Said Police Officer Jamaal Miller, on or about November 6, 2013, at approximately 2015 hours while assigned to the 79th precinct and on duty in the vicinity of [redacted], engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he threatened Idris Applewhite with the use of force, in that he threatened to break Mr. Applewhite's arm.

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

2. Said Police Officer Jamaal Miller, on or about November 6, 2013, at approximately 2030 hours while assigned to the 79th precinct and on duty inside the 79th Precinct Stationhouse, Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he stated to Mr. Applewhite in sum and substance, WE'RE GOING TO TAKE OFF THE HANDCUFFS AND SEE WHAT YOU'RE MADE OF.

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

Disciplinary Case No. 2015-14367

1. Said Police Officer Jamaal Miller, on or about May 13, 2015, at approximately 2115 hours, while assigned to the 79th Precinct and on duty, in the vicinity of 263 Tompkins Avenue (the 79th Precinct Stationhouse), Kings County, spoke discourteously to Person D, in that he stated, in sum and substance: I DON'T GIVE A FUCK ABOUT THAT. SHUT THE FUCK UP.

P.G. 203-09, Page 1, Paragraph 2 – PUBLIC CONTACT GENERAL

2. Said Police Officer Jamaal Miller, on or about May 13, 2015, at approximately 2115 hours, while assigned to the 79th Precinct and on duty, inside of 263 Tompkins Avenue (the 79th Precinct Stationhouse), Kings County, engaged in conduct, prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he threatened Person D with the use of force.

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

Disciplinary Case No. 2014-11222

1. Said Police Officer Michael Williams, on or about August 3, 2012, at approximately 1350 hours, while assigned to the 79th Precinct and on duty, in the vicinity of [redacted], abused his authority as a member of the New York City Police Department in that he stopped Wade Conley without sufficient legal authority.

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

Appearances:
For CCRB-APU: Raasheja N. Page, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, New York 10007

For the Respondents: Craig R. Hayes, Esq.,
Worth, Longworth & London LLP
111 John Street Suite 640
New York, New York 10038

Hearing Dates:
October 22- 23, 27 and December 2, 2015

Decision:
Respondent Miller:

Case No. 2014-11220:	Guilty
Case No. 2015-12930:	Not Guilty
Case No. 2015-12952:	Not Guilty
Case No. 2015-13031:	Guilty
Case No. 2015-14367:	Not Guilty

Respondent Williams:

Case No. 2014-11222:	Guilty

Trial Commissioner:
ADCT David S. Weisel

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before the Court on October 22-23, 27 and December 2, 2015. Respondents, through their counsel, entered a plea of Not Guilty to the subject charges. The CCRB called Al Zeigler, Wade Conley, Idris Applewhite and CCRB Investigator Leanne Fornelli as witnesses. The CCRB also introduced the CCRB statements of Person A, Person B, Person C and Person D. Respondents testified on their own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, the Court finds Respondent Miller Guilty in Case Nos. 2014-11220 and 2015-13031, and Not Guilty in Case Nos. 2015-12930, 2015-12952 and 2015-14367. The Court finds Respondent Williams Guilty.

FINDINGS AND ANALYSIS

Introduction

Respondent Miller was assigned to the 79 Precinct. It was undisputed that he was an active officer with many arrests, often assigned to units akin to anticrime or conditions. The cases against him generally involve arrests in which there allegedly were heated exchanges between Respondent Miller and the arrestees. Respondent Miller allegedly threatened several of the complainants with bodily harm, saying that he was going to break their wrist. He also allegedly goaded and taunted them, urging them to try to hit him, or questioning their manhood. In some cases Respondent Miller is accused of physical force. In one case, both Respondents are charged with an improper stop. The tribunal has analyzed each case separately.

Case Nos. 2014-11220 & -11222

It was undisputed that the complainant in this case, Wade Conley, was arrested at approximately 1350 hours on August 3, 2012. Respondent Miller, who was assigned to the school unit on that date, is charged with wrongfully stopping and searching Conley, threatening him with force, and uttering a discourteous profane remark about "these fucking street lawyers."

It was further undisputed that Conley was employed as an assistant teacher and custodian at a daycare center for both pre-school and school-age children in the summer. On the date in question, Conley and other teachers took the children to the nearby Marcy Playground.

Conley testified that he was standing in the area of the swings and basketball courts, before the area containing the young children's play equipment, or in the middle of these areas. There was a fence or divider between these areas. Conley also was with his cousin, Lamar (Al) Zeigler, who had stopped by to visit. The children, some of whom were on the play equipment, were not wearing specific clothing identifying them as being with the center (Tr. 21-23, 29-32, 43-44, 46-48, 60-61, 70-71; CCRB Ex. 2, Google Street View photo of playground area, area where Zeigler and Conley were standing marked by Zeigler).

Conley said that the officers, who included both Respondents, approached Conley and asked for his identification. Conley asked why they were stopping him, because "it seemed like there was a big issue." As Conley pulled out his wallet, Respondent Miller placed his arm on him, grabbing his wrist. Conley "leaned" away because he could not have been the person that they were looking for. Respondent Miller told him, "I will break your fucking wrist," or "Don't make me break your wrist." Conley told Respondent Miller that he was there with the daycare children, but he responded, "Fuck [your] students" (Tr. 23-27, 34-37, 40, 42, 47-50, 55, 59-63, 68-69).

As Conley was handcuffed and led to the police vehicle, Respondent told him to "stop listening to these fucking street cops." Respondent Miller also went into his pocket and removed his phone, which Conley did not give him permission to do. Although Conley's boss later came to the playground and informed the officers that Conley was there with the children, Conley was later terminated over the incident (Tr. 29, 33, 41, 47-54, 56, 63-66, 73).

Zeigler recorded part of the incident with his phone (CCRB Ex. 1, video; Tr. 27-28). The video began when Conley already was handcuffed. He and the officers were standing in the area of the basketball courts. Behind a short fence were the swings, and then the children's play

equipment. Conley asked why he was being stopped, and the officers said that he had to wait for an explanation until they verified who he was. When Conley asked if they had a description of someone, Respondent told him, "Stop listening to these fucking street lawyers who will get you in trouble."

Respondent Miller noted that he, Respondent Williams, and a sergeant were assigned on the day in question to the school unit in the vehicle. During the summer, that unit focused on conditions that might concern juveniles. One of the things that they were investigating was a robbery pattern concerning a male black with a firearm. They had a wanted flyer with a photograph of the suspect, whose name was known to police (Tr. 79-83, 99-103, 142-43, 151; Respt. Ex. A, flyer).

Respondent Miller stated that the sergeant noticed someone in the park that fit the description. As they entered the park and approached the person – this was Conley – Respondent Miller realized that he was not the robbery suspect. Respondent Miller nevertheless asserted that he asked Conley for identification because he was standing with another adult inside the jungle gym area, past the basketball courts (see Rules of the City of New York, Title 56 [Department of Parks & Recreation], § 1-05 [s][1], adults allowed in playgrounds only when accompanied by a child under the age of 12). Respondent Miller estimated that the men were 10 to 15 feet away from any child or piece of play equipment. Respondent Williams put this at 20 to 30 feet. Respondent Miller conceded that there were 15 to 20 school-age children in the play area. The officers did not ask Conley whether he was there with any of them. Respondent Williams testified that Conley was "closer to the entrance into the second segment of the park," toward the jungle gym. Asked to clarify upon examination by the tribunal, however, Respondent Williams said that Conley was on the side of the children's play equipment, and not the

basketball courts (Tr. 79-80, 83-89, 99-105, 109, 111-12, 128-29, 131, 134-36, 142-45, 148, 151-53, 156-60, 164-65).

On direct examination, Respondent Miller denied telling Conley that he would break his wrist. He admitted, however, that in other arrest situations he had told arrestees that if they resisted against the handcuffs, "you can break your wrist" or sprain something. Respondent Miller conceded on cross examination that he might have told Conley this. He asserted that Conley was not really resisting, he just made "a little movement" when the officer grabbed him. Respondent Miller denied hearing Conley make any statements about why he was there (Tr. 90-92, 119-20, 132-33, 147).

Respondent Miller admitted that he made a bad choice of words in telling Conley to "stop listening to these fucking street lawyers." He insisted that he was not referring to Conley so much as to the bystanders who were talking to Conley and goading him into being more belligerent. Respondent Miller also admitted that he went into Conley's pockets and removed a phone after frisking that pocket (Tr. 88, 93-94, 96, 110, 118, 121, 137-38).

The tribunal finds that the CCRB proved by a preponderance of the credible evidence that Respondents engaged in the alleged misconduct. The first issue to be determined in this case is whether or not Respondents stopped Conley without lawful authority.

Respondent Miller determined even before he arrived at Conley's location that Conley was not the robbery suspect for whom his team had been searching. He nevertheless stopped Conley because, he said, Conley was in a playground unaccompanied by children. Respondent Williams testified that he still thought it might have been the suspect, as "I wasn't quite sure, you know, but it wasn't established that it wasn't him, you know" (Tr. 146). In the Court's view, this

kind of "anything is possible" dodge suggests that Respondent Williams, like his partner, was aware Conley was not the suspect.

The credible evidence suggests that Conley was in the basketball courts area when the officers approached him, as he and Zeigler testified. First, this was Respondent Williams's original answer, in fact, and it matched Zeigler's answer: they were standing outside the boundary lines of the basketball courts themselves, but still next to them and not inside the young children's play area. Second, it would have been more difficult for the officers to have seen Conley in the children's zone than the courts, as the former was further into the park from the street. Third, the video shows Conley well within the basketball court area. The tribunal rejects as not credible Respondent Miller's testimony that the encounter began in the jungle gym area and filming only began once they were in the courts. Fourth, the Court fails to see how Conley could have been 10 to 15 feet away from any child **or** piece of play equipment, and still have remained inside the play area. It just did not appear to be that big. Fifth, Zeigler was just as much an adult as Conley yet the officers ignored him.

Furthermore, the mere presence of an adult in a playground next to many children – which Conley must have been – without any other suggestion that he was not accompanying a child does not give rise to a founded suspicion that a violation of the Parks Department Rule cited above is afoot.

As such, the Court finds Respondents Guilty of stopping Conley without legal authority. This is Specification No. 1 against Respondent Miller and the sole specification against Respondent Williams.

The search conducted by Respondent Miller on Conley was also without sufficient legal authority. If the search was based on the unlawful stop, then it follows that the search was

unlawful as well. There could have been no valid arrest for being in the playground without authorization, and Respondent Miller's claim that Conley committed the offense of disorderly conduct (Tr. 116-17) is not supported by the video. There was no commotion and no real crowd other than people watching. As such, there could be no search incident to lawful arrest. Therefore Respondent Miller is found Guilty of Specification No. 4.

Respondent Miller conceded that he told Conley, in sum and substance, "You need to stop listening to these fucking street lawyers." He claimed, in essence, that he merely was offering some avuncular advice in light of the bystanders goading Conley into belligerence. The video belies that assertion. The officers told Conley that he was stopped because he fit the description of someone. Conley apparently asked the officers if that were so, why they did not go over the radio to confirm the description? It was then that Respondent Miller made the charged comment. It was completely unnecessary and discourteous. Therefore Respondent Miller is found Guilty of Specification No. 2.

Respondent Miller conceded that he might have made a remark to Conley about breaking his wrist. Respondent Miller explained that he commonly told resistant arrestees that if they struggled against the handcuffs, they could break their wrist if, for example, they tried to go in one direction and the officer tried to go in the other. He denied saying it as, "Don't make me break your wrist" or "I will break your fucking wrist."

In light of Respondent Miller's concession that he "could have" warned Conley that he might get his wrist broken, the tribunal finds it more likely than not that he made the statement in question. The tribunal rejects his explanation that it was, once again, a courteous instruction so that the prisoner would not injure himself. If Respondent Miller truly thought that a resistant prisoner could break his own wrist by struggling in handcuffs then the Court has serious

questions about his tactical choices. In whatever way Respondent Miller made the remark to Conley, it was a wrongful threat that force would be used, as no valid police action could have resulted in such an injury. In any event, the tribunal notes Respondent Miller's testimony that Conley was not really resisting arrest. Thus he is found Guilty of the third specification.

Case No. 2015-12930[1]

In this case, the complainant, Person A, claimed that Respondent was discourteous and threatened the use of force during a car stop on August 16, 2013, by stating, in sum and substance, "We are not here to talk about the fucking Constitution. If you do anything funny, I will fuck you up. I'll choke the shit out of you."

Neither Person A nor his girlfriend Person B testified, but their out-of-court statements to the CCRB were taken into evidence. Person A was incarcerated in state prison at the time of trial for a conviction of Assault in the Second Degree, with an earliest possible release date in 2021. Person B told the CCRB prosecutor that she was afraid of retaliation (Tr. 322, 345: CCRB Exs. 4 & 5, transcripts, respectively).

Person A told the CCRB that he was sitting in Person B's car with her. He admitted being in possession of an open container of alcohol. When Person A asked what he was being arrested for, and protested that he had constitutional rights against illegal search and seizure, the officer told him, "[W]e are not here to talk about the fucking [C]onstitution." When one of the officers roughed him up, Person A admitted telling that officer he would respond in kind when they got to the precinct. According to Person A, the officer responded that he would "choke the shit" out of Person A if that commenced. But Person B said that the "threat[]" consisted of the officer saying,

[1] Because the remaining cases involve only Respondent Miller, he will be referred to as "Respondent" in the rest of the Findings section for the sake of simplicity.

"[O]h yeah, we'll see. . . . We'll see how tough you are, once we get these cuffs off" (CCRB Ex. 4, pp. 3-5, 8-9, 11, 14-15, 19-21; Ex. 5, p. 5, 22-23).

Respondent testified at trial that on the night in question, he was assigned to the Strategic Enforcement Team (SET) in the 79 Precinct, with a focus on the social media aspect of gang enforcement, as well as anticrime and street-level narcotics. He stated that he arrived as a backup unit to the area of [redacted] and [redacted] to find two individuals handcuffed, Person A and Person B. Respondent transported them to the 79 Precinct station house. Person A was irate and yelling during the ride, but Respondent asserted that he just ignored it. According to Respondent, Person A continued to be irate at the precinct. Respondent denied telling Person A, "We are not here to talk about the fucking Constitution. If you do anything funny, I will fuck you up. I'll choke the shit out of you" (Tr. 238-39, 330-36, 338-39, 341-43).

In this question of credibility, the Court finds that the CCRB failed to prove by a preponderance of the evidence that Respondent made the remarks in question. Although hearsay is admissible in this forum, see Matter of Ayala v. Ward, 170 A.D.2d 235 (1st Dept. 1991), there are significant reasons for caution in cases like this that present close questions of credibility. The hearsay is central to the CCRB's case, so there is a question of basic fairness in using the hearsay to reach a finding of fact. See *Case No. 77005/01*, p. 6 (May 27, 2002) (hearsay declarations are insufficient to support findings of guilt in cases that pose close questions of credibility).

In light of the failure of Person A or Person B to testify, the Court cannot observe their demeanor, explore possible motives to lie, or assess the credibility of their accounts after the test of cross-examination. This is especially true in light of the fact that Person A has a significant

violent criminal record and admitted threatening the officer with violence during his CCRB interview.

It is more than just credibility as a general matter, however, as Person A's allegation was not substantiated even by the hearsay statement of Person B. In this case, cross examination would have allowed the defense to delve specifically into what Respondent said in response to Person A's taunts. According to Person A, Respondent said that he would "fuck you up" and "choke the shit out of you." But according to Person B, Respondent merely said, "[O]h yeah, we'll see . . . how tough you are, once we get these cuffs off." This is different from the specification and what Person A said had transpired. Because it is uncertain whether Respondent made the remarks in question, he is found Not Guilty.

Case No. 2015-12952

In this case, Respondent is charged with misconduct arising from a street encounter with Person C on November 21, 2013. It is alleged that Respondent, on the way to the 79 Precinct station house, assaulted Person C and placed him in a chokehold. It is further alleged that Respondent threatened Person C by telling him, "You think you're tough or something? Oh yeah, you must be tough. We're gonna see if you're tough. We're gonna see if you're tough right now. Watch when we get back." Then, at the station house, Respondent alleged strip-searched Person C without legal authority, and further taunted him and acted discourteously toward him by stating, in sum and substance, "This kid's a fucking pussy. [You] don't get no pussy. Get the fuck out of here," and "What's up? What's up? What you gonna do? Swing. Do something."

Person C did not appear at trial, claiming fear of retaliation from the 79 Precinct (Tr. 244-45). Person C stated in his CCRB interview (CCRB Ex. 3) that on November 20, 2013, at approximately 2300 hours, he was in the area of [redacted]. He passed a male

acquaintance, and they greeted each other by pounding hands, but did not pass anything between them. Person C then was stopped by officers in a black unmarked vehicle. When Person C uttered that the officers must have been bored for them to stop him, a light-skinned, black, stocky officer took offense. Person C was arrested and placed in the back of the vehicle. The officer punched Person C under his left eye and placed him in a chokehold until he almost passed out. The officer then said, "You must be tough! We're going to see if you're tough right now!" The officer asked Person C about the other male (CCRB Ex. 3, pp. 3-6, 9-10, 14-20, 25, 28-33, 36-39, 56).

At the precinct, Person C asserted, the officer said, "[W]hat's up?" and challenged him to "swing," saying, "Do something!" He also called Person C a "freakin' pussy." A fellow prisoner commended Person C for not giving into the taunts. The officer also strip-searched Person C (CCRB Ex. 3, pp. 6-9, 44-54).

Person C admitted that he harbored thoughts of finding out where the officer lived and retaliating, including shooting him. The CCRB forwarded this threat to the Department. The Threat Assessment Unit (presently known as the Threat Assessment and Protection Unit) contacted Respondent and made security arrangements with him, including a police radio to keep at home and a police vehicle parked outside his residence (Tr. 283-85, 314-15; CCRB Ex. 3, pp. 34-36).

Leanne Fornelli, the CCRB investigator, testified that she contacted Person E, who was identified from the prisoner log as being present at the station house that evening. Person E then called Fornelli's direct office line. Person E told Fornelli that he observed two officers at an adjacent cell, which Person E could not observe because his cell and the other were side-by-side. He described the officers as trying to "hype up" the other prisoner, whom Fornelli identified as Person C. Person E overheard the words motherfucker, pussy, and possibly bitch

being used by one of the officers. Fornelli agreed that Person E identified one of the officers as black and the other as white or white Hispanic (Respondent is African-American), but he could not state which officer was making the offensive remarks. Fornelli spoke to four other prisoners but none of them could recall any incident (Tr. 259-62, 264-65, 267-70).

Respondent testified that on the evening in question, he was assigned to SET with another officer in a vehicle. Respondent observed a hand-to-hand drug transaction at the area of Tompkins and Vernon Avenues (a block away from Marcy). Respondent asserted that Person C handed United States currency to another male in exchange for a small ziplock bag, perhaps two by two inches, containing some kind of substance. Respondent arrested Person C, who was irate. Respondent admitted that he frisked Person C at the scene but did not find drugs. He did not attempt to apprehend the purported seller or radio the rest of the SET team to do so. Person C was placed in the vehicle, as a crowd was gathering and Respondent wanted to continue the investigation at the precinct (Tr. 272-78, 286-94, 296, 304-08).

Respondent testified that Person C was squirming around in the back seat, which Respondent interpreted as a possible attempt to hide contraband, although he admitted that turned out not to be the case and no marijuana was ever found on Person C. Respondent indicated that he sat in the back seat to maintain safe control over the prisoner. He held Burney's handcuffs with one hand and the shoulder closest to him with his other hand. Respondent's hands were never on Burney's neck or around his shoulders. He denied placing Person C in a chokehold or punching him (Tr. 278-80, 286, 292-93, 310-11).

At the precinct, a supervisor directed Respondent and his partner to cease dealing with Person C because he was acting in such an irate manner. Respondent had no further dealings with Person C and denied making the statements in question. He had no knowledge of Person C being

strip-searched, although he admitted telling the supervisor behind the desk that no contraband was found in the vehicle (Tr. 280-83, 285-86, 300-03, 311-12).

As to the alleged assault, chokehold, and threat of force on the way to the station house, the hearsay considerations delineated above apply equally here. There is no evidence, other than Burney's unvarnished statements, to support these assertions. There were no other witnesses to this and no medical records. There was not even evidence that medical attention was summoned to the precinct or subsequently sought by Person C. Moreover, Person C's threats against Respondent, threats so serious that the CCRB commendably referred them to the Department, detract mightily from Person C's credibility. Therefore, the CCRB failed to prove by a preponderance of the evidence that Respondent committed these acts, and he is found Not Guilty of Specification Nos. 1-3.

The alleged discourteous and taunting statements at the station house, however, have somewhat different considerations due to the asserted corroborating statements of Person E, a fellow prisoner who responded to the CCRB's call for any information he might have had about the incident. Person E stated that he saw two officers, one black and one white or white Hispanic. Person E could not see which one was speaking, but overheard one of the officers try to "hype up" another prisoner, whom Person E could not see either. Person E heard words like motherfucker, pussy and bitch.

There are several problems with this evidence. One is that Person E did not know who was speaking and who was being taunted. The second is that all the words recalled by Person E do not match the specifications. In fact, the allegations only mention one of these words. Specification No. 5 alleges that Respondent said, "This kid's a freakin g pussy. [You] don't get no pussy. Get the fuck out of here. This kid's a fucking pussy." Person E, however, could only

recall that "pussy" was mentioned. Although we do not require that proof of a discourteous statement match the specification verbatim, here the CCRB charged in detail what Respondent supposedly said to Person C and the use of that one word would not support a Guilty in Part finding. Absent being fleshed out at trial, Person E's statements to the investigator do not support a finding that Respondent made the remarks. As such, Respondent is found Not Guilty of Specification Nos. 5 and 6.

Finally, the hearsay considerations apply to Person C's claim that he was strip-searched. The CCRB asserted that Respondent removed Person C to the precinct in order to conduct a strip search. Otherwise, Respondent could have searched him at the scene, something Respondent said he did not do because a crowd was gathering (Tr. 433).

It is true that strip searches may be conducted to find contraband potentially concealed on the arrestee's person, Patrol Guide § 208-05 (1)(C)(1). It is a leap, however, to conclude that this is what Respondent must have done simply because no contraband had yet been found. Part of the CCRB's argument was that Respondent asserted that the crowd arrived before he even could search Person C. The CCRB implied that Respondent really did search Person C at the scene, failed to find anything, and took him back to the precinct to strip-search him. This was related to the CCRB's claim that Respondent could not have seen such a detailed hand-to-hand transaction in the dark (Tr. 428-30).

Person C, however, did not describe a field search either. He said that he was handcuffed and placed in the vehicle immediately after he remarked how bored the officers must have been in order to bother him. Both Respondent's and Person C's testimony are thus consistent with the first search being done at the station house. The scenario does not lead the Court to conclude that Respondent must have brought Person C back in order to strip-search him. In light of

Person C's credibility problems, the CCRB did not prove by a preponderance of the evidence that a strip search occurred, and Respondent is found Not Guilty.

Case No. 2015-13031

This case involves similar allegations of threats of force and discourteous statements. It is alleged that Respondent threatened to break the arm of an arrestee, Idris Applewhite. Respondent further allegedly told Applewhite, at the station house, "We're going to take off the handcuffs and see what you're made of."

Idris Applewhite testified that on November 6, 2013, around 2015 hours, he was the passenger in a vehicle driven by his cousin in the vicinity of [redacted]. Applewhite previously had injured his hand and it was in a cast. He stated that the vehicle was stopped by officers, including Respondent. One of the officers searched Applewhite and handed him to Respondent. When Applewhite protested, Respondent told him, "[S]hut the fuck up or I will break your other arm." Applewhite denied possessing heroin and said that any heroin found in the vehicle was planted there by the officers. He also accused the officers of stealing his phone and $40 (Tr. 179-87, 196, 202, 212).

Applewhite was taken to the precinct. There, he testified, as he was being placed in a cell, Respondent told him, in sum and substance, "[N]ow we're going to take the cuffs off and see what you're made of" (Tr. 184-90).

Applewhite admitted that in 1999 he was convicted after a trial of first degree assault and criminal possession of a weapon, and was sentenced to 7 to 14 years in prison. According to Applewhite, however, the prosecution witnesses, including the police, gave false testimony against him (Tr. 203-05, 207, 211).

Respondent testified that he was assigned to SET on the evening in question. They stopped Applewhite's vehicle because it was being driven recklessly, swerving in and out of traffic. When they approached the vehicle, Respondent saw the driver throw a very small white glassine envelope, perhaps one by one inch, and he signaled the other officers (Tr. 215-19, 227-29, 238-40).

According to Respondent, when Applewhite got out of the car, he was irate. The sergeant brought him to Respondent. Heroin was recovered from the vehicle and both the driver and Applewhite were arrested. Applewhite was not fighting with Respondent, but he was not following directions to keep still. Because of the cast, he could not be handcuffed, and Respondent "was physically holding him in that direction not to hurt him, himself, or others." He had a hard time getting Applewhite in the car. Respondent also had to hold him in the back seat for vehicular safety during the ride back to the station house. One of Applewhite's arms was handcuffed to a belt loop while Respondent held him. He denied threatening to break Applewhite's other arm (Tr. 218-24, 229-33).

Respondent said that Applewhite still was loud and belligerent at the precinct. Respondent escorted him to a cell, an action with which Applewhite did not want to cooperate. Respondent denied saying the alleged remark about taking off the handcuffs (Tr. 225-26, 235-37).

The tribunal finds that the CCRB proved by a preponderance of the credible evidence that Respondent engaged in the alleged misconduct. The Court credits Applewhite on the issue of whether he was threatened with force and whether Respondent uttered the remark about taking the handcuffs off and seeing what Applewhite was made of. There were several key factors that convinced this tribunal that Applewhite was telling the truth. First, at trial Applewhite gave a

straightforward, unembellished account of Respondent doing these actions. He gave no indication that he was actually assaulted by Respondent, for example. These were mere threats, inappropriate as that was.

Second, the evidence revealed no compelling motive for Applewhite to fabricate an accusation of serious misconduct against Respondent. There was no lawsuit, nor was there evidence that they had a prior acrimonious relationship (Tr. 210-11).

Respondent's counsel argued that Applewhite had "one of the most extreme biases against police officers." Applewhite, who was African-American, had testified about seeing the same officers pull someone over a little while before he was pulled over. Counsel characterized Applewhite as, "in his mind, an African-American male on the side of the road . . . standing outside the car with police equals harassment." Counsel also pointed to the fact that Applewhite blamed the police for framing him in his first-degree assault conviction and plantingw the heroin in his cousin's vehicle. "So basically in Mr. Applewhite's mind police officers are nothing more than a group of thugs that lie and harass people" (Tr. 187-90, 397, 405-06).

Counsel's characterization of Applewhite is not supported by the evidence. Applewhite felt in this particular instance, based on the other African-American male's expression, that the police were harassing him. He did not say it always occurred, he said that "I do know it occurs." He denied that he hated the police and said that he had friends that were officers. In his view, some police officers were guilty of corruption and framing people, but not all. He was not constantly harassed by them, only "[o]nce in a while . . . . Wrong place at the wrong time" (Tr. 199, 203, 208-10). A disinterested reader of this tribunal's decisions could come away with the same conclusions. Applewhite's testimony was honest, not biased. As the prosecutor pointed out, Applewhite's frank assessment lent credibility to his testimony (Tr. 441).

There is further reason to credit Applewhite as to the threat that Respondent would break his other arm. Although Respondent denied making the comment to Applewhite, he earlier testified, in the Wade Conley case, that he commonly told resistant arrestees that if they struggled against the handcuffs, they could break their wrists if, for example, they tried to go in one direction and the officer tried to go in the other. As to Applewhite, Respondent testified the arrestee was not fighting but neither was he following directions to keep still. Respondent "was physically holding him in that direction not to hurt him, himself, or others," and he could not be handcuffed. Respondent admitted that he had a hard time getting Applewhite in the car. Further, the fact Respondent felt it possible that his handling of prisoners could lead to him inadvertently breaking their wrists decreases his credibility in general.

Counsel argued that there was an issue of identification as to which officer, Respondent or the sergeant, allegedly made the remark about breaking his arm. The basis of this was Applewhite's testimony that the sergeant used racial slurs against him. Applewhite indicated that the sergeant dealt with him on the side of the car, and then Respondent brought him to the back. Counsel confronted Applewhite with his CCRB interview, in which he was asked, "Do you specifically recall what threats he made towards you while you were at the side of the vehicle?," and answered, "We're still at the side. The one that stood out was trying to break my other arm if I won't shut the F up." The investigator followed, "And now, I know he called you the N word. In what context did he call you the N word?" Applewhite answered, "When he was stopping me from being a f'ing N word" (Tr. 183, 193-95).

Applewhite did not recall this exchange. He also pointed out that both officers could have threatened to break his arm. More importantly, however, the questioning at the CCRB interview, and its rendition on cross examination, was confusing. From the transcript excerpt

posed on cross examination, it would not have been very clear to a reasonable witness that the investigator was asking only about the sergeant and not at all about Respondent. Its impeachment value was very low.

In contrast, after observing Respondent's testimony, this tribunal was convinced not to credit much of it concerning this particular incident. Respondent asserted that Applewhite was irate pretty much the entire time, and yet Respondent essentially had nothing to say in response. To this tribunal, his testimony seemed carefully crafted to bolster the defense by creating a set of facts in which Applewhite could not be credited due to his outrageous demeanor. Applewhite's demeanor on the stand, however, contradicted Respondent's account.

Therefore, the Court holds that the CCRB proved by a preponderance of the evidence that Respondent made the remarks in question. As such, Respondent is found Guilty.

Case No. 2015-14367

The final case relates to an off-duty incident in which Respondent took police action against the prisoner and CCRB complainant Person D. Allegedly, Respondent told Person D, "I don't give a fuck about that. Shut the fuck up," in the context of Person D's request to secure his property. Respondent also allegedly threatened Person D with the use of force by taunting him to "make a move."

Person D did not testify and in this case no reason was given. He stated in his CCRB interview that on May 13, 2015, around 2115 hours, he was in a Chinese restaurant across the street from the 79 Precinct station house, charging his cell phone. Person D indicated that he was trying to scrape together some money for a meal by panhandling, and walked across the street to the station house. He approached an officer in regular clothes, but the man responded aggressively. Person D told him, "I'm sorry because you are having a bad day," and the officer

skulked off. Person D called after him, however, that he was just trying to get something to eat. In response, the officer turned around and pointed his weapon at Person D (CCRB Ex. 6, pp. 3-5, 18-25).

Person D stated that he walked into the precinct to complain. The desk officer came out with him to look for the officer in question, but when Respondent saw them, Respondent forcibly brought Person D back inside and placed him under arrest. Respondent aggressively searched Person D and took his property. He told Person D, "[Y]eah, go ahead make a move, I want you to make a move, go ahead, go ahead." Person D told Respondent that he did not have a problem and only wanted to know why Respondent was doing this. Person D admitted in his interview that he was in possession of marijuana, but denied having just smoked it outside (Tr. 5-7, 25-41, 52, 62).

Respondent indicated that at the time in question, he was off duty and had just left the 79 Precinct. He was wearing business attire because he had been applying for warrants before a judge earlier that day. As Respondent was walking to his car, he testified, Person D approached him and demanded money, saying, "[Y]ou got money on you, I need money." Respondent identified himself as a police officer, but the individual kept asking for money. Respondent told him to remove his hands from his pockets, but he refused. Respondent admitted that he removed his firearm from his holster, although he denied pointing it "directly" at Person D. He then grabbed Person D and escorted him into the precinct, along with several officers who had come outside to help. Something fell from Person D's hand and it appeared to be lit. The arrest, however, was because in Respondent's view, Person D had committed the offense of harassment, although he conceded that Person D was not charged with this (Tr. 366-72, 377-86, 389-90).

On the way and inside the precinct, Respondent testified, Person D kept yelling and saying that all he wanted was money but Respondent had pulled a gun on him. Respondent testified that

it got to a point where the desk officer instructed Respondent to step aside and assigned another officer to handle it. Respondent remained the arresting officer, but did not have any further interactions with Person D. He did not threaten him with the use of force or utter the remark in question. Respondent testified that he went out to the street and recovered a marijuana cigar or cigarette. It no longer was burning but it still felt hot (Tr. 372-76, 387 92).

The first issue to be decided in this case is whether Respondent told Person D, "I don't give a fuck about that. Shut the fuck up," after Person D asked about the cell phone he had left behind in the Chinese restaurant. The tribunal finds that the CCRB failed to put forth evidence supporting the specification as explained in its opening statement.

Person D stated in his interview that many items of property were taken from him and he was concerned about them. One of these was his Islamic religious oils. Person D asserted that Respondent said, "I don't give a fuck about that" when Person D asked about the oils. Person D also asserted that when he asked, "[W]hat is going on"?, Respondent answered, "[Y]ou will shut the fuck up." The only thing Person D said about getting his cell phone back was that a different officer went to the restaurant to get it for him, after he asked. Person D never said, as the prosecutor alleged in her opening statement, that Respondent said anything in response to Person D asking about his cell phone (Tr. 359-60, 445; CCRB Ex. 6, pp. 6, 8, 38-39, 45). Therefore Respondent is found Not Guilty of Specification No. 1.

The second issue, whether Respondent threatened Person D with the use of force, is again one of credibility. The hearsay considerations delineated above apply equally here. There is no evidence other than Person D's unvarnished statements, to support these assertions. There were no other witnesses to this and no reason was provided for Person D's non-appearance. The credibility issues raised by the CCRB against Respondent, like his resorting to the use of his

firearm, and the allegation that Person D would smoke marijuana in front of not only the station house but a police officer, are not so compelling as to detract from this conclusion (Tr. 445-50). Therefore, the CCRB failed to prove by a preponderance of the evidence that Respondent made the remarks in question and he is found Not Guilty of Specification No. 2.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondents' service records were examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent Miller was appointed to the Department on July 11, 2005, and Respondent Williams on January 7, 2008. Information from their personnel folders that was considered in making these penalty recommendations is contained in the attached confidential memoranda. The Court also is in possession of a letter in support of Respondent Miller from the president of the 79 Precinct Community Council.

The CCRB's recommendation of the forfeiture of 5 vacation days as a penalty for Respondent Williams on the unlawful stop of Wade Conley is too harsh in light of the most recent cases imposing fewer days of forfeiture. Respondent Williams's goal here was to interdict crime, although the way in which he did so was mistaken. He engaged in an analytical process that attached great significance to certain facts and downplayed other relevant facts. The Court accordingly recommends a penalty of the forfeiture of 3 vacation days. See, e.g., *Case No. 2014-12398*, pp. 5, 7 (June 22, 2015) (3 days for frisk with no legal justification offered).

The CCRB recommended a penalty of 45 vacation days and placement on one year of dismissal probation for Respondent Miller. He has been found Not Guilty of many of the specifications, really in three out of the five cases against him. The cases in which he has been found Guilty, however, are serious. Respondent Miller engaged in a pattern of discourteous, threatening and taunting remarks to two separate prisoners. There was absolutely no reason for

this. The Court does not find dismissal probation to be necessary here, as there are other ways of monitoring Respondent Miller's conduct short of that major step, like Force and Disciplinary Monitoring. Nevertheless, his pattern of treating arrestees with insults and taunts was serious and warrants a serious penalty. For this misconduct, as well as for the unlawful stop and search of Conley, the tribunal recommends that Respondent Miller forfeit 25 vacation days as a penalty. See *Case No. 2013-10799*, p. 8 (Oct. 13, 2015) (5 days for officer's "overly aggressive behavior and use of profanity" during traffic encounter); *Case Nos. 2013-11066 & -67* (Sept. 2, 2015) (14-year officer with two prior adjudications forfeited 5 days for searching vehicle without sufficient legal authority, as well as discourteous language).

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED

JUL 28 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JAMAAL MILLER
TAX REGISTRY NO. 939039
DISCIPLINARY CASE NOS. 2014-11220, 2015-12930, 2015-12952, 2015-13031 & 2015-14367

Respondent Miller received an overall rating of 4.5 "Extremely Competent/Highly Competent" on his last three annual performance evaluations. He has been awarded eight medals for Excellent Police Duty and two medals for Meritorious Police Duty. [redacted]

From March 25, 2013 to March 14, 2014, Respondent Miller was on Level 1 Force Monitoring for having three or more CCRB complaints in one year. Beginning March 14, 2014, Respondent Miller was placed on Level 2 Force Monitoring, which remains ongoing.

David S. Weisel
Assistant Deputy Commissioner Trials

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER MICHAEL WILLIAMS
TAX REGISTRY NO. 946396
DISCIPLINARY CASE NO. 2014-11222

On his last three performance evaluations, Respondent Williams once received an overall rating of 3.0 "Competent," and twice received an overall rating of 4.5 "Extremely Competent/Highly Competent." He has been awarded nine medals for Excellent Police Duty. In his eight years of service he has reported sick nine times. He has no prior formal disciplinary history.

David S. Weisel
Assistant Deputy Commissioner Trials