The City of New York

POLICE DEPARTMENT

May 19, 2021

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| In the Matter of the Charges and Specifications<br>- against - | : | Case Nos. |
| | : | 2019-21164 |
| Police Officer Ernesto Bautista<br>Tax Registry No. 953671<br>40th Precinct | : | 2019-21165 |
| Police Officer Malik McCloud<br>Tax Registry No. 954114<br>40th Precinct | : | |

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Samuel Yee, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

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

To:
HONORABLE DERMOT F. SHEA
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

# CHARGES AND SPECIFICATIONS

Disciplinary Case No. 2019-21164

1. Said Police Officer Ernesto Bautista, while on-duty and assigned to the 40th Precinct, on or about September 15, 2019, wrongfully failed to take proper police action regarding the handling and investigation of an assignment involving an alleged forcible touching including failing to prepare a Complaint Report, failing to prepare an Aided Report, failing to arrest a suspect after having probable cause of an offense, failing to properly investigate the allegation of a forcible touching, failing to request the response of a Patrol Supervisor, and/or failing to notify the Desk Officer.

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| P.G. 202-21 | POLICE OFFICER<br>DUTIES AND RESPONSIBILITIES |
| P.G. 207-07, Pages 1-2, Paragraphs 4 & 5, and/or Page 3, Paragraph 10(d) | PRELIMINARY INVESTIGATION OF COMPLAINTS (OTHER THAN VICE RELATED OR NARCOTICS COMPLAINTS) -- COMPLAINTS |
| P.G. 208-01 | LAW OF ARREST -- ARRESTS |
| P.G. 216-02 | PREPARATION OF AIDED REPORT<br>AIDED CASES |
| P.G. 207-38, Page 1, Paragraphs 4 and/or 5 | COMPLAINTS INVOLVING SEX CRIMES -- COMPLAINTS |

2. Said Police Officer Ernesto Bautista, while on-duty and assigned to the 40th Precinct, on or about September 15, 2019, after having received direction or instruction on proper preliminary investigation, the preparation of reports, and/or the making of required notifications, wrongfully failed to follow said direction or instruction.

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| P.G. 203-03, Page 1, Paragraph 2 | COMPLIANCE WITH ORDERS<br>GENERAL REGULATIONS |
| P.G. 203-05, Page 1, Paragraph 1 | PERFORMANCE ON DUTY -- GENERAL<br>GENERAL REGULATIONS |

3. Said Police Officer Ernesto Bautista, while on-duty and assigned to the 40th Precinct, on or about September 15, 2019, wrongfully failed to activate his body-worn camera during an assignment involving an Emotionally Disturbed Person or a person suspected of criminal activity.

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| P.G. 212-123, Page 2, Paragraphs 4(d) and/or 4(e) | USE OF BODY-WORN CAMERAS<br>COMMAND OPERATIONS |

Disciplinary Case No. 2019-21165

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## REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on April 21, 2021. Respondents, through their counsel, entered pleas of Guilty to the subject charges and testified in mitigation of the penalty. On the basis of their pleas, I find Respondents Guilty of Specifications 1 and 3 in their respective cases; I find both Respondents Not Guilty of Specification 2. 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 recommend that each Respondent forfeit 5 suspension days and 30 vacation days.

## SUMMARY OF EVIDENCE IN MITIGATION

Respondents each testified during the hearing; their respective testimonies were consistent with each other and are summarized below.

On September 15, 2019, Respondents were performing patrol duty in the 40th Precinct when they received a radio call summoning them to 700 Westchester Avenue, near St. Mary's Public Housing, where they had a complaint of forcible touching. When they arrived at the location, they saw a woman, whom they later leaned was a complainant, and an older male, who was a suspect. According to Respondent Bautista, the woman appeared to be ready to accost the male, so both Respondents separated them (T. 20-21, 42).

Respondent Bautista spoke with the woman, who informed him that she had been in a nearby supermarket when the suspect walked past her and touched her breast without permission. According to Bautista, the woman did not want to make a complaint and even refused to provide identification. Respondents observed that the suspect was an older man who appeared to be drunk. They elected to transport him to a hospital for treatment. (T. 22-25, 29, 38-39, 44).

Respondents admitted that neither of them activated their Body Worn Cameras (BWCs), but that they should have done so. They did not take a complaint report and did not go to the supermarket where the woman asserted that she had been assaulted. They admitted that they were later shown a video recording, which they learned had been obtained from the supermarket, and that the video showed the suspect touching the woman's breast. Respondents further admitted that they did not complete an Aided Form for the suspect they transported to the hospital. Finally, Respondents admitted that they had been previously instructed by a Traffic Enforcement lieutenant on the proper manner to conduct a preliminary investigation after they had responded to a 911 call and failed to follow established procedures (T. 23-26, 30-35, 45-55).

Based upon the testimony offered by each Respondent, I find a sufficient factual and legal basis for findings of Guilty of Specifications 1 and 3. I find both Respondents Not Guilty of Specification 2, because the Specification, as pled, fails to state an offense. In order to meet their burden of proof, the Department must establish that: (1) an order was communicated to Respondent; (2) the order was clear and unambiguous; and (3) that Respondent failed to obey it (*see Disciplinary Case No.* 2016-15664 [May 18, 2016]). Specification 2 appears to conflate instruction with an order, an interpretation which is unsupported in our jurisprudence.

## 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. Respondents' employment histories were also examined (*See* 38 RCNY § 15-07). Respondents were both appointed to the Department on January 9, 2013; information from their personnel

records that was considered in making this penalty recommendation is contained in attached memoranda.

The Department Advocate recommended a penalty of 30 penalty days, although a strict application of the Disciplinary Guidelines, as he interpreted them, suggested a penalty of 48 days. Counsel for Respondents argued that the application of the Disciplinary Guidelines to this case would be fundamentally unfair, since the Department precedent for this type of misconduct at the time the offenses were committed in 2019 called for a penalty of 5 to 10 days[1]. I do not concur with the Department's analysis of the Disciplinary Guidelines; similarly, I reject Counsel for Respondents' argument. I recommend a penalty of 5 suspension days and 30 penalty days for each Respondent.

I do find that the imposition of a presumptive penalty of 20 days for failure to comply with orders, even assuming that the Department had met their burden of proof with respect to Specification 2, in addition to the penalty for Specification 1, would be an unreasonable multiplication of charges. Similarly, the failure to take a complaint report and failure to complete an Aided Form are subsumed in the misconduct charged in Specification 1; I therefore find that the imposition of separate penalties for those professional failures would be multiplicious.

The presumptive penalty for failure to take police action is 20 penalty days. The presumptive penalty for failure to activate a Body Worn Camera varies, depending on whether the failure was unintentional, negligent or reckless. As set forth below, I find Respondents'

[1] The Charges and Specifications in this case were served upon Respondents on February 20 and 27, 2020. The matter was conferenced on August 18, 2020 and trial was scheduled for October 26, 2020. Respondents entered into a negotiated settlement on October 26, 2020, which provided for the forfeiture of 15 vacation days. The settlement agreement was ultimately disapproved.

failure to activate their BWCs was reckless, the presumptive penalty for which is 20 penalty days.

Respondents took a professionally inexcusable posture in investigating a sex offense: they interviewed a purported victim, who made a claim that a suspect had forcibly touched her breast inside a supermarket. Had they conducted a proper investigation at that time, they would have discovered that security cameras inside the supermarket documented the forcible touching, thereby corroborating the victim's statement. When they arrived on scene, other police officers were already detaining the suspect. By any reasonable evidentiary analysis, this incident should have resulted in a summary arrest.

Instead, Respondents claimed that the victim did not want to file a complaint report and refused to provide identification, none of which was documented, because neither Respondent activated his BWC. They further claimed that the victim wanted the suspect to get help at a hospital. Respondents then took the suspect to a hospital but neglected to complete an Aided Report. Finally, as stated above, since neither Respondent activated his BWC, any incriminating statements made by the suspect while being transported to the hospital were not preserved.

This episode represents a monumental failure in basic policing. In addition to failing to execute their duties as patrol officers in a competent manner, their inaction denied the investigative assets of this Department the opportunity to bring their expertise to bear. In addition, their failure to complete an Aided Report left the Department exposed to potential civil liability for any injuries the suspect may have sustained while being transported without proper documentation of the basis for him being in police custody.

Based upon the record before me, I find no evidence of mitigation other than Respondents' acceptance of responsibility, represented by their pleas of Guilty. I find whatever

mitigating effect those pleas have to be outweighed by the aggravating factor of professional incompetence after being instructed regarding a similar shortcoming.

A strict application of the Disciplinary Guidelines would call for a penalty of 40 penalty days; I acknowledge that this suggested punishment is a significant upward departure from previous precedent. I find the change in the Department's policy, as represented in the Guidelines, to be consistent with law, fundamental fairness and the discretion traditionally afforded the Police Commissioner in maintaining the discipline of the force. I do, however, find that a 40 day penalty is too severe, based upon the facts of this case. Accordingly, I recommend a penalty of 5 suspension days and 30 vacation days for each Respondent.

Respectfully submitted,

Paul M. Gamble
(by JSJ)

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED
AUG 18 2021
DERMOT SHEA
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER ERNESTO BAUTISTA
TAX REGISTRY NO. 953671
DISCIPLINARY CASE NO. 2019-21164

Respondent was appointed to the Department on January 9, 2013. On his three most recent annual performance evaluations, Respondent received ratings of "Exceeds Expectations" for 2018, 2019 and 2020. He has been awarded two medals for Meritorious Police Duty.

Respondent has no disciplinary record. He was placed on Level 1 Force Monitoring on March 7, 2019; monitoring remains ongoing.

For your consideration.

Paul M. Gamble
(by JJA)

Paul M. Gamble
Assistant Deputy Commissioner Trials

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
POLICE OFFICER MALIK MCCLOUD
TAX REGISTRY NO. 954114
DISCIPLINARY CASE NO. 2019-21165

Respondent was appointed to the Department on January 9, 2013. On his three most recent annual performance evaluations, Respondent received ratings of "Exceeds Expectations" for 2018, 2019 and 2020. He has been awarded one medal for Meritorious Police Duty and one medal for Excellent Police Duty.

Respondent has no disciplinary record.

For your consideration.

Paul M Gamble
(by SSA)

Paul M. Gamble
Assistant Deputy Commissioner Trials