



BILL DE BLASIO
MAYOR

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FREDERICK DAVIE
CHAIR

March 12, 2019

The Honorable James P. O'Neill
Police Commissioner of the City of New York
New York City Police Department
One Police Plaza
New York, New York 10038

Re: **Report on the Administrative Prosecution Unit (“APU”) First Quarter of 2018**

Dear Commissioner O'Neill:

This report will address the following matters: (i) guilty verdicts issued by Assistant Deputy Commissioners of Trials (“ADCT(s)”); (ii) the retention of one (1) case under Provision Two of the April 2, 2012 Memorandum of Understanding (“MOU”); (iii) the treatment of APU pleas by the Police Commissioner; (iv) the dismissal of cases by the APU; (v) the size of the APU's docket; and (vi) the length of time to serve Respondents.

i. **Guilty Verdicts Issued by Assistant Deputy Commissioners of Trials**

In the first quarter of 2018, four (4) Civilian Complaint Review Board (“CCRB”) verdicts for trials conducted before Assistant Deputy Commissioners of Trials (“ADCT”) were finalized. The APU treats each officer against whom an allegation is substantiated as a separate case.¹ Four (4) cases resulted in guilty verdicts. Of those cases, the Police Commissioner downgraded the penalty recommended by the ADCTs against two (2) officers and upheld the recommended penalty against two (2) officers. The Police Commissioner did not reverse any guilty verdicts during the first quarter of 2018. As the final arbiter of discipline, the Police Commissioner may accept, reject, or modify any trial verdict or plea.²

¹ Because the APU treats each officer as a separate “case,” all APU data discussed in this Report uses the same terminology. While there may be trials or incidents that involve multiple officers, the word “case” should be interpreted as “case against a single officer.”

² See NY CLS Civ S § 75; N.Y.City Admin. Code 14-115; NY City Charter § 434; NY City Charter § 440; 38 RCNY 15-12; 38 RCNY 15-17; 38 RCNY 1-46.

Case One, Guilty Verdict, Penalty Downgraded

The Complainant was riding his skateboard on the sidewalk to the convenience store when an officer attempted to grab his left arm, but he shrugged the officer off. The Respondent and his partner followed the Complainant as he entered and exited the store and rode back to his apartment. Two other officers assigned to a foot patrol then joined the Respondent and his partner in the building. Inside the lobby, the officers attempted to issue the Complainant a summons. When he backed away, the officers attempted to grab him and a struggle ensued. The Respondent and other officers tried to gain control of the Complainant's hands, to which he resisted. At one point, the Complainant pushed the Respondent causing him to fall on the floor. At another point during the altercation, the Respondent wrapped his forearm around the Complainant's neck and pressed down so that Complainant could not breathe. Backup arrived and the responding Sergeant used a Taser on the Complainant and placed him in hand cuffs. There is video footage of the incident showing the struggle between the Complainant and the officers.

The Board substantiated three (3) allegations against the Respondent for using excessive force against the complainant in attempting to strike him in the face with his knee without sufficient legal authority, for placing the Complainant in a chokehold, and for obstructing the Complainant's breathing. At trial, for all three (3) specifications, the CCRB recommended a penalty of the forfeiture of thirty (30) vacation days and the imposition of a one (1) year dismissal probation. The Respondent was found not guilty of using excessive force in attempting to strike the Complainant, but was found guilty of both placing the Complainant in a chokehold and obstructing his breathing. The ADCT recommended a penalty consisting of the forfeiture of fifteen (15) vacation days. The Police Commissioner reduced the recommendation of the assigned ADCT to five (5) vacation days indicating that, "the extenuating circumstances surrounding the Respondents tactics during the extended violent arrest situation," warranted a reduction of the penalty to the forfeiture of five (5) vacation days.

The CCRB noted that, even with the not guilty finding on one (1) of the specifications, the ADCT should still have recommended a penalty significantly greater than fifteen (15) day vacation forfeiture since the Respondent was found guilty of using a chokehold that was severe enough to restrict the Complainant's breathing. At the time of this incident, chokeholds were prohibited under all circumstances.³ The CCRB further noted that the Respondent did not deserve a reduction in the recommended penalty because using a chokehold to obstruct a person's breathing carries a risk of significant injury or death. Furthermore, the Respondent gave untruthful testimony at trial about the chokehold stating that he grabbed the Complainant about the "upper chest area" although video shows the Complainant using both hands in an attempt to pull the Respondent's arm away from his neck.

³ In June 2014, at the time of this incident, Patrol Guide Section 203-11 stated: "Members of the New York City Police Department will NOT use chokeholds. A chokehold shall include, but is not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air."

Case Two, Guilty Verdict, Penalty Downgraded

The driver was driving with two passengers, one in the passenger seat and one in the back seat, when they were pulled over (The driver and backseat passenger are referred to collectively as “Victims”). The officer who approached the passenger side of the vehicle asked the front passenger to step out of the vehicle and asked what was underneath his sweatshirt. When the passenger indicated that it was marijuana, the officer confiscated the marijuana and handcuffed him. Ultimately, the Victims were asked to step out of the vehicle, placed in handcuffs, and searched. No contraband was discovered on either individual. The officer requested that the Respondent, a Lieutenant, come to the location and verify the three arrests, which he did. The car was driven back to the precinct and all three individuals were transported in handcuffs and placed in holding cells. The driver did not have identification, and there was some confusion regarding his address, so the Respondent opted to go to the address provided to confirm. At the residence, the Respondent spoke with the Complainant—the front passenger’s grandmother—and conducted a search of the apartment. The Complainant signed a consent form for the search after the search was conducted. The ADCT found this search and entry to be lawful. Quantities of marijuana were recovered from the home, and upon returning to the precinct, the Respondent authorized the voiding of the two civilians who were not in possession of marijuana.

The ADCT found that there was no legal justification for arresting the Victims who were not in possession of marijuana and that there was probable cause to indicate the Victims had committed the crime of criminal possession. The ADCT found that while the officer appeared to have acted in good faith, the Respondent was a supervisor with several years of experience who is expected to know the law, particularly a central tenet such as probable cause, and to apply it correctly. The arrests of the Victims, which resulted in their spending hours at the stationhouse, should never have been verified.

The Board substantiated six (6) allegations against the Respondent for arresting the Victims without sufficient legal authority, entering their apartment without sufficient legal authority, searching the apartment without sufficient legal authority, and threatening to arrest them without sufficient legal authority. At trial, the CCRB recommended the forfeiture of thirty (30) vacation days and the imposition of a one (1) year dismissal probation as a penalty for all six (6) specifications. The Respondent was found guilty of two (2) specifications for the wrongful arrest of two (2) separate individuals. The Respondent was found not guilty of the four (4) other specifications. The ADCT recommended a penalty of the forfeiture of eight (8) vacation days.

The CCRB disagreed with the ADCT finding the Respondent not guilty of the specifications related to the search of the home and the threat of arrest to the two individuals in the home and asked the Police Commissioner to consider the Respondent’s own admissions at trial, credible CCRB witness testimonies, and evident violations of relevant sections of the Patrol Guide. The CCRB asked that the Police Commissioner find the Respondent Guilty of those specifications and impose the recommended forfeiture of thirty (30) vacation days and a one (1) year dismissal probation. Finally, the CCRB noted that the Respondent has a disciplinary history involving two previous cases where he negotiated a penalty of forfeiture of thirty (30) vacation days. One of those cases involved the Respondent directing a subordinate to apply for and

execute a search warrant without proper notifications to a duty captain. The Respondent also has monitoring history and had previously been placed on Force Monitoring on four (4) separate occasions for having three (3) or more CCRB complaints in one (1) year. At the time of the trial, the Respondent was on Level 1 Force Monitoring.

The Police Commissioner reduced the recommendation to four (4) vacation days and indicated that, in consideration of the totality of the circumstances, he felt a forfeiture of four (4) vacation days was appropriate.

ii. Cases Retained by the Police Commissioner

The NYPD retained one (1) case pursuant to Provision Two of the MOU in the first quarter of 2018. The case was retained with discipline.

Provision Two of the MOU states:

in those limited circumstances where the Police Commissioner determines that CCRB's prosecution of Charges and Specifications in a substantiated case would be detrimental to the Police Department's disciplinary process, the Police Commissioner shall so notify CCRB. Such instances shall be limited to such cases in which there are parallel or related criminal investigations, or when, in the case of an officer with no disciplinary history or prior substantiated CCRB complaints, based on such officer's record and disciplinary history the interests of justice would not be served.

Case One, Retained with Discipline

The Complainant was walking when another individual began following him. The Complainant became fearful and drew a knife. The Police responded to a 911 call placed by the man following the Complainant. The Complainant was arrested for possession of a knife and taken to the precinct. While at the precinct, the Complainant told the Respondent he had epilepsy and needed to take his medication. The Respondent told him he could not take medication while in police custody. The Complainant suffered a seizure while in the holding cell and an ambulance was called. The Complainant was taken to the hospital, where he was treated for his medical condition.

The Board substantiated one (1) allegation against the Respondent for failing to obtain medical treatment for the Complainant and recommended Charges and Specifications. The Department Advocates Office ("DAO") requested a penalty reconsideration in this case citing the Respondent's lack of prior substantiated CCRB complaints and lack of prior departmental discipline. The DAO drew a distinction between the Complainant requesting to take his medication, and requesting medical attention arguing that Formalized Training from the Police Academy differ on how to handle prisoners who report having medical conditions as opposed to those in need of medical treatment. The Board rejected the request, determining that the DAO did not raise any new issues of fact or law in its request.

The Police Commissioner retained the case and imposed Formalized Training, citing a belief that Charges and Specifications would be detrimental to the Department's disciplinary process.

iii. Treatment of APU Pleas

In the first quarter of 2018, the Department finalized fourteen (14) pleas. The APU makes penalty recommendations for all cases in which allegations are substantiated by the Board and Charges and Specifications are recommended. The APU uses a number of factors to determine its plea recommendations to the Deputy Commissioner of Trials (“DCT”), including, but not limited to the: Member of Service’s (“MOS”) length of service; MOS’ rank; MOS’ disciplinary history; facts of the instant case; strength of the instant case; vulnerability of the victim; extent of injury, if any; the number of Complainants; and DCT precedent of analogous charges. The APU penalty recommendations tend to be consistent for MOS who are similarly situated.

Pleas Closed				
Period	Plea Approved	Pleas Closed at Discipline Level Below Agency Recommendations		
		Plea Penalty Reduced	Plea Set Aside, Discipline Imposed	Plea Set Aside, No Discipline Imposed
1 st Quarter 2015 (1Q15)	11	0	3	0
2 nd Quarter 2015 (2Q15)	8	0	0	0
3 rd Quarter 2015 (3Q15)	10	0	0	0
4 th Quarter 2015 (4Q15)	5	0	1	0
1 st Quarter 2016 (1Q16)	11	0	0	0
2 nd Quarter 2016 (2Q16)	20	2	12	2
3 rd Quarter 2016 (3Q16)	22	0	4	2
4 th Quarter 2016 (4Q16)	17	1	2	0
1 st Quarter 2017 (1Q17)	13	0	1	0
2 nd Quarter 2017 (2Q17)	5	0	0	0
3 rd Quarter 2017 (3Q17)	3	1	1	3
4 th Quarter 2017 (4Q17)	2	5	3	0
1st Quarter 2018 (1Q18)	6	7	1	0

As shown in the chart above, the Police Commissioner imposed a penalty below that agreed to by the CCRB and relevant MOS in eight (8) cases. In seven (7) cases, the Police Commissioner reduced the plea penalty; and in one (1) case the Police Commissioner set the plea aside imposing other discipline. Below are synopses of those eight (8) cases:

Cases One and Two - Plea Penalties Reduced

The Complainant and others were stopped by three (3) plainclothes officers while exiting a bodega. One of the officers and his Sergeant (the Respondents) stopped, frisked, and searched the group of four men. The first Respondent had no individualized suspicion of the individuals

and only stopped them because they were in a “high crime” area and the Sergeant believed one of the other civilians to be a known drug dealer. There were no drugs recovered on the scene and the Respondents observed no exchange during the incident. There is video footage showing the first Respondent searching the Complainant after having stopped him. Both Respondents refused to provide their name and shield when asked by the Complainant.

The Board substantiated four (4) allegations against the first Respondent for abusing his authority in stopping the Complainant without sufficient legal authority, frisking the Complainant without sufficient legal authority, searching the complainant without sufficient legal authority, and refusing to provide his name and shield number. The Board substantiated one (1) allegation against the second Respondent for refusing to provide his name and shield number. Both Respondents pleaded guilty and agreed to the penalty of a forfeiture of three (3) vacation days. The Police Commissioner dismissed the charges for stopping, frisking, and searching an individual against the first Respondent and imposed training, and imposed the forfeiture of one (1) vacation day for refusal to provide his name and shield. The Police Commissioner also reduced the penalty to a forfeiture of one (1) vacation day for the second Respondent. The Police Commissioner noted that both Respondents were highly rated and found his penalty to be more consistent with prior penalties.

Case Three - Plea Penalty Reduced

The Complainant was at work when he heard loud commotion from the entrance of the building. He turned around to find three men in the facility who were the source of the commotion. The Respondent, a plainclothes anti-crime officer assigned to an unmarked police vehicle, was screaming in the direction of the Complainant yelling, “What now? What now?” and using the words “punk,” “pussy,” and “prick.”

The Complainant asked the Respondent who he was and told the Respondent he did not know what he was talking about and had never met him before. A crowd of employees and supervisors gathered, and the Complainant’s supervisor attempted to insert himself into the altercation to diffuse the situation. The Respondent then pulled out his shield and shoved it into the supervisor’s face. At this point, the Complainant realized that the three men in the facility were plainclothes officers. The Respondent then told the supervisor, “I’m a cop. Step the fuck back.” The supervisor backed away and the Respondent continued to curse at the Complainant, eventually shoving him in the chest with two open palms, causing him to fly backwards, land on a steel flatbed, and injure his back. During his CCRB interview, the Respondent denied ever walking into the facility; additionally, when confronted with video surveillance footage, he denied recognizing anyone.

The Board substantiated three (3) allegations against the Respondent for the wrongful use of force in pushing the Complainant in the chest, and two (2) allegations for being discourteous. The Respondent pleaded *nolo contendere* and agreed to the penalty of a forfeiture of twelve (12) vacation days.⁴ The Police Commissioner reduced the penalty to a forfeiture of five (5) vacation

⁴ A plea of “nolo contendere” or “no contest” is permitted in certain limited circumstances when a respondent is also facing civil litigation. It remains on the respondent’s Central Personnel Index and has the same effect a guilty plea for disciplinary purposes.

days, because he believed the negotiated settlement was, “excessive in addressing the cited incidents of misconduct.” The Police Commissioner also noted that five (5) vacation days was more consistent with the penalties for prior, similar misconduct and that the officer was highly rated.

Cases Four and Five - Plea Penalties Reduced

The Complainant’s property manager called 911 to report the Complainant causing a disturbance in her office. The Complainant and his friends went back to his apartment. The two Respondents arrived at the Complainant’s apartment. The Complainant started filming as soon as he opened the door, and both Respondents are seen entering his apartment without consent. The Complainant, with the intent of ending the conversation, attempted to close the apartment door before the officers were finished speaking with him. At this time, the second Respondent placed his foot against the base of the door preventing it from closing, and the first Respondent used his hand to push the door open again. Both Respondents subsequently proceeded to enter the Complainant’s apartment. The Complainant verbally protested their entry and demanded they leave. During the initial conversation between the first Respondent and the Complainant, the Complainant referred to the first Respondent as “Sparky” and “Junior.” The first Respondent in turn addressed the Complainant as “Mr. Sparky.” The Complainant stated that when he protested the officers standing in the doorway the first Respondent repeatedly pushed the Complainant addressing him as “Sparky.” The first Respondent acknowledged making physical contact with the Complainant by pushing him.

The Board substantiated three (3) allegations against the first Respondent for abusing his authority in entering the apartment without sufficient legal authority, being discourteous to the Complainant, and wrongfully using force without police necessity. The Board substantiated one (1) allegation against the second Respondent for abusing his authority in entering the apartment without sufficient legal authority.

The first Respondent pleaded guilty and agreed to the forfeiture of eighteen (18) vacation days. The second Respondent pleaded guilty and agreed to the forfeiture of seven (7) vacation days. The Police Commissioner reduced the first Respondent’s penalty to a forfeiture of five (5) vacation days and reduced the second Respondent’s penalty to a forfeiture of three (3) vacation days in the interest of justice and based on the totality of circumstances.

Cases Six and Seven - Plea Penalties Reduced

The Complainant was driving when he was stopped by two plainclothes Respondents assigned to the anti-crime unit in an unmarked police vehicle for having illegal tints on his car. Upon reaching the car, the first Respondent realized the tints were not illegal but still asked the Complainant for his identification to check for outstanding warrants. The first Respondent asked the Complainant to get out of his car and frisked him. The second Respondent then asked the Complainant several questions about why he was in the area while the first Respondent searched the inside of the Complainant’s car. There was no contraband removed from the vehicle and the Respondents did not issue the Complainant a summons. Both Respondents had no recollection of this incident or memo book entries regarding this incident.

The Board substantiated four (4) allegations against the first Respondent for abusing his authority in stopping the vehicle without sufficient legal authority, frisking the Complainant without sufficient legal authority, searching the Complainant without sufficient legal authority, and searching the car without sufficient legal authority. The Board substantiated two (2) allegations against the second Respondent for abusing his authority in stopping the vehicle without sufficient legal authority and for questioning the Complainant without sufficient legal authority.

Both Respondents pleaded guilty and agreed to a forfeiture of twelve (12) vacation days and ten (10) vacation days respectively. The Police Commissioner reduced both plea penalties to a forfeiture of eight (8) vacation days for the first Respondent, and a forfeiture of five (5) vacation days for the second Respondent, citing their lack of disciplinary history, their high ratings, and the interests of justice.

Case Eight – Plea Set Aside, Discipline Imposed

The Complainant and his son (“Victim”) were coming back from a movie theater when they parked in front of a bakery to get some food. The Victim walked inside the bakery and was standing in line when he was confronted by several plainclothes anti-crime officers. One of the officers escorted the Victim out of the bakery, frisked, and searched him. The Complainant exited his car to ask what was going on. The Respondent told the Complainant that if he did not, “shut the fuck up” he would be issued a summons for double-parking. The Complainant asked the officers for their names and shield numbers, but all refused. Neither the Victim nor the Complainant was issued a summons or arrested. During his interview, the Respondent stated that they received a radio call which provided the description of a perpetrator which included “male with a red sweater and black pants.” The Victim was a skinny, tall, black, 16-year-old, with short hair, and he was wearing a red hooded sweatshirt, a red beanie, and brown sweat pants. During the investigation, the CCRB found that the opening line of the event stated an “Asian male, pulled a gun on him inside of a Chinese restaurant” and that the full description was for an Asian male with a red shirt, heavy set, long hair, and black pants.

The Board substantiated one (1) allegation against the Respondent for abusing his authority by refusing to provide his name and shield number and recommended Charges and Specifications. The Respondent pleaded guilty and agreed to forfeit five (5) vacation days. The Police Commissioner dismissed the Charges and Specifications in consideration of the totality of circumstances and the interests of justice and issued Instructions.

iv. Dismissal of Cases by the APU

When in the course of investigating a case the APU discovers new evidence that makes it improper to continue to prosecute misconduct against a member of the NYPD, the APU dismisses the charges against that Respondent. The APU did not dismiss any cases against an officer in the first quarter of 2018.

v. The APU's Docket

As shown in the following table, following a steady decline into the last quarter of 2017, the APU's docket saw its first quarter of growth in the first quarter of 2018, after a steady decline into the last quarter of 2017. From the fourth quarter of 2017, the APU's docket increased from a total of eighty-four (84) cases to a total of ninety-two (92) cases in the first quarter of 2018. This increase is due to the January 2018 implementation of a Discipline Framework pilot program with the goal of creating more consistent voting recommendations across the various Board Panels. Since the implementation of the program, the Board has recommended Charges and Specifications at a rate just below the statistical average over the past five (5) years, or since the formation of the APU.⁵

Cases in Open Docket					
Period	Start of Quarter	Received During Quarter	Closed During Quarter	End of Quarter	Growth
1 st Quarter 2015 (1Q15)	350	43	55	338	-3.4%
2 nd Quarter 2015 (2Q15)	338	63	53	348	3.0%
3 rd Quarter 2015 (3Q15)	347	52	51	349	0.6%
4 th Quarter 2015 (4Q15)	349	48	31	366	4.9%
1 st Quarter 2016 (1Q16)	366	24	53	337	-7.9%
2 nd Quarter 2016 (2Q16)	337	16	89	264	-21.7%
3 rd Quarter 2016 (3Q16)	264	15	65	211	-20.1%
4 th Quarter 2016 (4Q16)	211	7	53	165	-21.8%
1 st Quarter 2017 (1Q17)	165	5	38	132	-20.0%
2 nd Quarter 2017 (2Q17)	132	11	24	119	-9.8%
3 rd Quarter 2017 (3Q17)	119	14	23	110	-7.6%
4 th Quarter 2017 (4Q17)	110	10	36	84	-23.6%
1st Quarter 2018 (1Q18)	84	28	20	92	9.5%

vi. Time to Serve Respondents

As shown in the following chart, the length of time NYPD/DAO takes to serve Respondents after the APU files charges with the NYPD Charges Unit started to improve in 2017, but increased during the first quarter of 2018.

As of March 31, 2018, there were twenty-eight (28) Respondents who had not been served with Charges. In the first quarter of 2018, the Respondents who were served with Charges waited an average of eighty (80) days. This is an increase from the last report, in which there

⁵ See Civilian Complaint Review Board *Memorandum Accompanying August 8, 2018 Public Presentation of CCRB's Disciplinary Framework* (Aug. 14, 2018, 4:46 PM), https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/board/20180808_disciplinaryframework_memo.pdf.

were seventeen (17) Respondents who had not yet been served with charges and the average length of time of service in the fourth quarter of 2017 was forty-four (44) days.

Time to Serve Respondents			
Period	Number of Respondents Served	Average Time to Serve Respondent	Average Time to Serve Respondents (Business Days)
1 st Quarter 2015 (1Q15)	42	59	43
2 nd Quarter 2015 (2Q15)	41	76	55
3 rd Quarter 2015 (3Q15)	58	62	46
4 th Quarter 2015 (4Q15)	37	58	42
1 st Quarter 2016 (1Q16)	26	135*	97
2 nd Quarter 2016 (2Q16)	27	182*	131
3 rd Quarter 2016 (3Q16)	26	121*	87
4 th Quarter 2016 (4Q16)	15	108*	78
1 st Quarter 2017 (1Q17)	3	42	31
2 nd Quarter 2017 (2Q17)	0	N/A	N/A
3 rd Quarter 2017 (3Q17)	2	37	27
4 th Quarter 2017 (4Q17)	9	44	33
1st Quarter 2018 (1Q18)	7	80	58
* In 2016 there was an increase in the number of cases where the Department requested reconsideration of cases where the Board substantiated Charges and Specifications, which led to an increase the length of time it took the Department to serve Respondents.			

The CCRB strives for efficiency in its disciplinary process. Reducing the average length of time to serve Respondents to thirty (30) days will help to ensure that APU prosecutions are being processed in a timely manner. This ensures that cases are resolved more expeditiously for both members of the Department and the people of the City of New York.

Finally, the cases in this report highlight the need for greater concurrence from the Police Commissioner on plea agreements. During the plea process, officers, accompanied by their legal representatives, meet with an APU prosecutor to negotiate and accept a plea for the substantiated misconduct. That plea agreement is brought before an ADCT for approval and then presented to the Police Commissioner for final approval. In more than half of the pleas agreed to in this quarter, the Police Commissioner deviated from the plea that was agreed upon by the officer who committed the misconduct. Plea agreements warrant deference, and once an officer has pleaded guilty to misconduct, and accepted negotiated discipline, the Police Commissioner should not reverse the plea, or downgrade the penalty.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Darche', is positioned above the printed name.

Jonathan Darche
Executive Director

Cc: CCRB Chair Frederick Davie
Deputy Commissioner Rosemarie Maldonado
Deputy Commissioner Kevin Richardson