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August 12, 2016

The Honorable William J. Bratton
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)
Second Quarter 2016**

Dear Commissioner Bratton:

This report will address the following matters: (1) the decision to overturn a guilty verdict issued by an Assistant Deputy Commissioner of Trials; (2) the size of the APU's docket; (3) the retention of cases under Section Two of the April 2, 2012 Memorandum of Understanding ("MOU"); (4) treatment of APU pleas by the Police Commissioner; (5) dismissal of cases by the APU; and (6) length of time to serve respondents.

Reversing the Guilty Verdict Issued By an Assistant Deputy Commissioner of Trials

On March 1, 2016, the Police Commissioner's Office notified the CCRB of his intent to reverse the decision of an Assistant Deputy Commissioner of Trials ("ADCT") and find a respondent not guilty in a case¹ that had gone to trial in April 2015.² On April 15, 2016, the Police Commissioner finalized his decision and officially reversed the draft decision of the ADCT.

The draft decision describes the incident. It began when officers conducting a patrol in a NYCHA building found a firearm in an unlocked closet. One of the officers radioed the Respondent with a description of two men whom the officers had passed when they entered the building but had not seen in control of, or even near, the closet with the firearm. In response, the Respondent, along with his partner, stopped two men fitting the description standing outside of the building. When one member of a separate group of four men began videotaping that

¹ This case involved the Respondent and two co-respondents. The Trial Commissioner found both co-respondents not guilty. The Police Commissioner confirmed one co-respondent's not guilty verdict and changed one co-respondent's verdict to guilty.

² The ADCT issued his draft decision finding the respondent guilty in July 2015.

encounter, the Respondent pointed his weapon at the four individuals, stopped them, frisked one of them, and was discourteous to them.

The ADCT found that the Respondent merely had a sufficient legal basis to conduct a Level II inquiry of the men that the officer inside the building described. The ADCT held that the Respondent “had an insufficient basis to believe that any of the men had placed the gun in the closet or that any of the men were in possession of a weapon at the time he confronted them. Thus, he possessed insufficient legal authority to forcibly stop and frisk any of the men.” The ADCT further held that the Respondent was not authorized to try and force the group of men to comply with his order to get up against the fence by pointing his firearm at them. The ADCT wrote, “[t]he power to carry and use firearms in the course of public service is an awesome responsibility. Respect for human life requires that, in all cases, firearms be used as a last resort, and then only to protect life.”

The letter from the Police Commissioner’s Office indicated that the officer who broadcast the fact that the firearm had been discovered caused the Respondent to stop the Complainants in this case. He also said that the Respondent only went to the location because of the recovering officer’s call and took police action only because the recovering officer asked him to stop individuals that the recovering officer believed were linked to a found firearm. This rationale overlooks the fact that the Respondent pointed his firearm at four individuals that the recovering officer never described.

The Department’s decision to overturn the ADCT’s guilty verdict raises concerns for several reasons: (1) it renders a well-reasoned guilty verdict by a Trial Commissioner meaningless, despite the fact that the Trial Commissioner was in the best position to evaluate the witnesses and the evidence introduced at trial; (2) it sends a message to the Respondent and other members of the Department that they do not have to use their firearms with proper care and only as a last resort; (3) it sends a message to the Trial Commissioners that they should not enforce the Patrol Guide’s mandate that members of the NYPD should not abuse their authority to stop and frisk civilians; and (4) it sends a message to the citizens of the City of New York that the Department will not hold officers accountable for misconduct.

The APU’s Docket

As seen in the following table, the APU’s docket decreased 20.2% during the second quarter of 2016. It is the APU’s lowest docket since the close of the Second Quarter of 2014. The reason for this sharp decline is the drop in the number of cases sent to the APU and an increase in the number of APU cases finalized by the Police Commissioner. During the Second Quarter of 2016, the Board only recommended Charges & Specifications against 16 respondents. This represents the fourth consecutive quarter in which the number of cases referred to the APU has dropped. The Board recommended that 33% fewer respondents face charges in the Second Quarter of 2016 as it did in the First Quarter of 2016. In addition, the APU closed more cases in the Second Quarter of 2016, 85, than it ever had before. This was an almost a 40% increase over the First Quarter of 2016 and the second quarter in a row with an increased number of closures.

Cases in Open Docket³					
Period	Start of Quarter	Received During Quarter	Closed During Quarter	End of Quarter	Growth
4 th Quarter 2014 (4Q14)	352	51	53	350	-0.6%
1 st Quarter 2015 (1Q15)	350	43	53	340	-2.9%
2 nd Quarter 2015 (2Q15)	340	63	53	350	2.9%
3 rd Quarter 2015 (3Q15)	350	52	50	352	0.9%
4 th Quarter 2015 (4Q15)	352	48	30	370	5.1%
1 st Quarter 2016 (1Q16)	370	24	52	342	-7.6%
2 nd Quarter 2016 (2Q16)	342	16	85	273	-20.2%

Retention of Cases Under Section Two of the MOU

The Department retained one case pursuant to Section Two of the MOU in 2Q16. The case was retained, without discipline, pursuant to the Respondent's motion to dismiss.

The case involved the death of one individual and injuries to another after the vehicle operated by the Respondent struck a dirt bike both individuals were riding. The incident began when the Respondent and another officer were conducting patrol in a marked vehicle and observed an individual driving a dirt bike. The individual driving the dirt bike turned down a street, and the Respondent, who was driving, chose not to pursue the dirt bike. Both officers eventually lost sight of the individual. After a short time passed, the officers saw the individual a second time. This time, the Respondent decided to approach the individual. As the Respondent approached in his vehicle, he struck the dirt bike from behind causing the individual to lose control of the dirt bike and drop it on the sidewalk. The individual then started running the opposite direction, and the officer in the passenger seat got out of the vehicle and pursued the individual on foot. The Respondent remained in the vehicle and made a U-turn to also pursue the individual. The individual was then able to jump onto the back of a second dirt bike being driven by another individual. While the Respondent was in the process of making a left hand turn, he struck the dirt bike both individuals were riding. This caused the death of the individual driving the dirt bike and injuries to the passenger.

The Police Commissioner determined that to allow the CCRB to continue its prosecution against the Respondent would be detrimental to the Police Department's disciplinary process because the Bronx County District Attorney did not bring charges against the officer, IAB found that the officer did not commit any misconduct, the Corporation Counsel settled a lawsuit that stemmed from the incident without an admission of fault or liability, and the officer did not have a formal disciplinary history or any prior substantiated CCRB complaints. The Agency disagrees with the Commissioner's decision. The CCRB is an independent agency that determines whether misconduct occurred, which is a different issue as to whether a crime occurred. In addition, the CCRB is an independent civilian agency, while IAB is internal to the Department. As the final arbiter of discipline, the Police Commissioner would have been fully within his rights to find the

³Each APU case involves a single respondent.

officer not guilty of misconduct, but the Agency should have been afforded the opportunity to prove its case.

There are presently two cases in which the Police Commissioner is considering defense requests pursuant to Section Two of the MOU. The Agency hopes the Police Commissioner allows these prosecutions to continue so that he can make a decision on the subject officer's misconduct.

There is an additional case in which the Police Commissioner has informed the Agency of his intent to retain a case pursuant to Section Two of the MOU and not take any disciplinary action against the Respondent. The Police Commissioner's decision is not yet final. The Agency hopes the Police Commissioner allows that prosecution to continue as well.

Treatment of APU Pleas

During 2Q16, the Department finalized 32 pleas. As seen in the chart below, the Police Commissioner imposed a penalty below that which had been agreed to by the CCRB in 14 of those cases. This represents a sharp increase from three cases in the First Quarter of 2016 and one case in the Fourth Quarter of 2015.

Pleas Close At Discipline Level Below Agency Recommendation			
Period	Plea Penalty Reduced	Plea Set Aside, Discipline Imposed	Plea Set Aside, No Discipline Imposed
4Q14	0	2	0
1Q15	0	3	0
2Q15	0	0	0
3Q15	0	0	0
4Q15	0	1	0
1Q16	0	3	0
2Q16	1	12	1
Total	1	21	1

Below are synopsis of the 14 cases where the Police Commissioner imposed a penalty below the agreed upon penalty between the CCRB and the respondent:

Case One

Four sisters were separated from their mother and other siblings outside a restaurant. They were then encountered by the Respondent. The Respondent, with no warning, swung his arm and knocked a cup out of one of the sister's hand. The Respondent gave no commands to put the drink down or throw it out and did nothing to determine whether the cup contained alcohol before he knocked it out of her hands. The Respondent's plea was set aside, and he was given a Schedule "A" Command Discipline.

Case Two

The Complainant called a precinct stationhouse to file a complaint against officers for an earlier incident. The Respondent failed to process the complaint and his failure to do so was recorded by

the Complainant. The Respondent's plea was set aside, and he was given a Schedule "A" Command Discipline.

Case Three

Officers responded to a fight that broke out during a barbeque. Upon arriving on the scene, the Respondent knocked on the Complainant's apartment door. The Complainant answered the door and got into a verbal exchange with the Respondent. The Respondent eventually entered the Complainant's apartment without permission. The Respondent's plea was set aside, and he was given formalized training.

Case Four

The Complainant was walking through the parking lot of his apartment complex to go to a convenience store. On his walk, he observed a young male interacting with two officers. The Complainant continued on his way, walking by himself. A short time later, the same officers he observed earlier pulled over. The Respondent then ordered the Complainant to stop. The Respondent's plea was set aside, and he was given formalized training.

Case Five

Two officers responded to a mental health facility, in regards to a 911 call of a sexual assault at the location. The Respondent told the Complainant that the NYPD would not be handling her sexual assault complaint. The Complainant then got upset and engaged in a verbal exchange with the Respondent. The Respondent during this exchange referred to the Complainant as a "bitch." The Respondent's plea was set aside, and he was given formalized training.

Case Six

The Respondent conducted a car stop alleging that the Complainant failed to signal when turning and had an expired registration. The Respondent directed the Complainant to exit the vehicle and frisked the Complainant because he failed to comply with an order to roll down his windows. The Respondent also searched the Complainant's vehicle. The Respondent did not issue a summons and the Complainant was let go. The Respondent's plea was set aside, and he was given formalized training.

Case Seven⁴

Three respondents were seeking a suspect in connection with a fight but did not have a warrant. The Respondents knocked on the door of the apartment, entered past the threshold of the apartment and announced themselves by stating, "Police, Ma'am, your door was open." No conversation happened at the door and the officers were already inside of the complainant's apartment when she approached them. The pleas for all three respondents were set aside, and all three respondents were given formalized training.

Case Eight

The Complainant was walking through a park when he was approached by four officers. After the Complainant provided his ID when asked, the Respondent instructed him to take his hands out of his pockets. The Complainant complied with this command. The Respondent then, without

⁴ Case Seven actually refers to three separate APU cases.

justification, frisked the Complainant. The Respondent's plea was set aside, and he was given formalized training.

Case Nine

The Complainant had an interaction with three members of the NYPD. None of the officers involved in the incident had any recollection of interacting with the Complainant. The investigation did determine, however, that the Complainant was stopped by the Respondent and his partners. The Respondent could not articulate any facts that led him to stop and frisk the Respondent, so it was deemed misconduct. The Respondent's plea was set aside, and he was given formalized training.

Case Ten

The Complainant and his co-worker were approached by two members of the NYPD after they parked their vehicle. The officers told the Complainant and his co-worker that they parked in a spot that was reserved for police vehicles. The complainant then moved the vehicle into another parking space. After conducting an inspection in a nearby dry cleaner, they returned to their vehicle. The officers pulled the co-worker out of the vehicle, and the Complainant exited the vehicle and walked towards the rear where his co-worker was. The Respondent then threatened to arrest the Complainant. The Respondent's plea was set aside, and he was given formalized training.

Case Eleven

The Complainant stood in front of his mother's building waiting for his daughter and two nieces to come down from his mother's apartment. The Complainant was waiting with his brother and his brother's friend. While waiting outside, two officers approached the Complainant and the other men. The officers eventually asked two other men for identification but never asked the Complainant. The two men provided identification and the officers left. Later, when the Complainant was still outside, now with his daughter and two nieces, the two officers returned. The Complainant alleged that the officers were trying to get into the building and asked him if he had keys. After the Complainant responded that he did not, the officers then asked the daughter and two nieces if they had keys. The Complainant informed the officers that they did not have keys either. One of the officers then asked the Complainant for his identification, which he provided, so the officer could issue him a summons. The Complainant at this point took out his cell phone. Three more officers soon arrived on the scene, including the Respondent. The Respondent then asked the officers if they searched the Complainant, and after they said "no," the Respondent frisked the Complainant. The Respondent's plea was set aside, and he received no discipline.

Case Twelve

The Complainant was driving home with his fiancée, who was in the passenger seat, when a police van pulled them over. The Complainant's fiancée pulled out her phone and began video recording the incident. The Respondent and two other officers got out of the van and began walking towards the Complainant's car. The Respondent went to the driver's side window and asked for the Complainant's license and registration, which he provided. After being informed that he was pulled over for excessively tinted windows, the Complainant began to question the validity of the stop. The Respondent then ordered him to step out of the car. After exiting the

vehicle, the Respondent frisked the Complainant without his consent. Another officer then ordered the Complainant's fiancée out of the car. At this point, the Respondent opened the driver's side door and began searching the front and back of the car with the other officer. After searching the car, the Respondent issued the Complainant two summonses, one for disorderly conduct and one for tinted windows. The Complainant then asked the Respondent for his name and shield number to which he replied, "It's on the ticket." While his name was on the summons, his shield number was not. The Respondent's plea was approved but his penalty was reduced by half.

While it is recognized that the Police Commissioner is the final arbiter regarding disciplinary actions against members of service, it is worth noting that all parties involved in these cases -- the assigned CCRB prosecutors, the Respondents' attorneys, and the Respondents themselves -- had the opportunity to consider the proposed plea agreements, weigh their benefits and disadvantages, and ultimately exercise the right to accept the plea agreements. Rejecting the Charges & Specifications in these cases is highly inappropriate when the Respondents admitted wrongdoing, agreed to accept the Charges & Specifications and penalty, and where similarly-situated respondents specifically received Charges & Specifications and similar penalties. Rejecting these plea agreements and dismissing the Charges & Specifications, as well as the agreed upon penalties, calls into question the legitimacy of the process and the validity of holding members of service accountable for acts of police misconduct.

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 during 2Q16.

Time to Serve Respondents

As can be seen in the following chart, one area that continues to need dramatic improvement is the length of time that NYPD/DAO takes to serve respondents after the APU files charges with the Charges Unit.

Time To Serve Respondents		
Period	Number of Respondent's Served	Average Length of Time to Serve Respondent
1Q15	42	59
2Q15	45	76
3Q15	60	62
4Q15	43	60
1Q16	26	135
2Q16	28	181

As of August 11, 2016, there were 34 respondents who had not yet been served with charges, and the average length of time that those cases had been waiting for service was 110 days. This is an improvement from the last report, in which there were 52 respondents who had not yet been served with charges and the average length of time that those cases had been waiting for service

was 112 days. While the downward trend is welcome, the Agency feels that there is still much room for improvement.

We continue recommend that the Department take immediate action to improve its service-of-charges benchmark to a more reasonable amount of time, especially in light of the ease in which a member of service can be served at her respective command during a regular tour of duty. By improving the average length of time to serve respondents to an average of two weeks, we can ensure that APU prosecutions are being processed in a timelier manner, and by extension, resolved more expeditiously, for both members of the Department and the people of the City of New York.

Thank you for your consideration.

Kind regards,

A handwritten signature in black ink, appearing to read "Mina Malik", enclosed within a large, loopy circular flourish.

Mina Malik, Esq.
Executive Director

Cc: Deputy Commissioner Rosemarie Maldonado
Deputy Commissioner Kevin Richardson