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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”)  
Second 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 three (3) cases 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 an Assistant Deputy Commissioner of Trials**

In the second quarter of 2018, one (1) Civilian Complaint Review Board (“CCRB”) verdict for a trial conducted before the Deputy Commissioner of Trials (“DCT”) was finalized. The APU treats each officer against whom an allegation is substantiated as a separate case.<sup>1</sup> That one (1) case resulted in a guilty verdict. The Police Commissioner upheld the guilty verdict. As the final arbiter of discipline, the Police Commissioner may accept, reject, or modify any trial verdict or plea.<sup>2</sup>

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<sup>1</sup> 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.”

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

ii. Cases Retained by the Police Commissioner

The New York City Police Department (“NYPD” or the “Department”) retained three (3) cases pursuant to Provision Two of the April 2, 2012 Memorandum of Understanding (“MOU”) in the second quarter of 2018. Two (2) cases were retained without discipline, and one (1) 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, without Discipline**

During the lunch period in a high school cafeteria, a fight ensued between two (2) male students. A school administrator stepped in and the situation was almost under control when officers—who were responding to a separate incident at another school located inside the same building—entered the cafeteria and got involved. The principal of the school did not request that the police be called and was not consulted prior to their being notified of the incident. The officers grabbed a young Latino student, other students walked toward the scene to say he was not the right person, and asked why he was being grabbed if he was not the person fighting. The Respondent reacted by pointing his Taser at the crowd and specifically in the faces of two (2) Latino students. Video surveillance footage from inside the cafeteria captured the incident.

The Department Advocate’s Office (“DAO”) submitted a request for reconsideration asking that the Respondent be exonerated and receive no disciplinary action for the allegations arguing that one (1) of the students did not, “react [to] or notice the Taser” pointed at him, that it was a chaotic situation and that the students were not immediately dispersing. The DAO also stated that the Respondent feared for his safety and that of his fellow officers because the students that converged were not children, but adults. The Board Panel reconvened to review the case but did not believe there were any new issues of law or fact presented in the request. The Board felt that this case raised an important question about whether Tasers can be used just as all the other force options on the Department’s “wheel of force.” The Board Panel determined that the Respondent’s use of the Taser in this situation was excessive and irresponsible.

The Board substantiated three (3) allegations and recommended Charges and Specifications for abusing his authority in threatening two (2) of the Victims, and use of force for pointing his Taser at the crowd without sufficient legal authority. The Police Commissioner retained the case and imposed no disciplinary action stating that Charges and Specifications would be detrimental to the Police Department’s disciplinary process.

### **Case Two, Retained without Discipline**

The Complainant approached the Respondent, a Detective, and his partner to inform them that the vehicle they were attempting to tow belonged to him, and he could get the key for the car from his apartment that was less than two (2) blocks away. The Complainant began to run towards his apartment to get the key when the Respondent's partner caught up to him, wrestled with him, and pressed his body over the police vehicle. The Respondent exited his vehicle and struck the Complainant with his baton several times, including on his shoulder and calves. Video of the incident shows that the Respondent makes no attempt to grab the Complainant's hands or secure voluntary compliance. The Complainant's legs are largely still and at no point was he attempting to flee. The Complainant was taken to the hospital and was charged with unauthorized use of an automobile. In his CCRB interview, the Respondent stated that he believed an impact weapon, of some sort, was necessary to combat the Complainant's resistance.

The Board substantiated one (1) allegation against the Respondent for wrongful use of force, in that he struck the Complainant with a baton without police necessity. The DAO submitted a request for reconsideration asking that Respondent be exonerated and that no disciplinary action be taken. The DAO stated that both the officer that apprehended the owner and the Respondent articulated facts establishing that the owner was actively resisting their attempts to take him into custody. The CCRB declined to reconsider the case as there was no new issue of law or new fact presented, and the reconsideration request was received outside of the 90-day window required by the Agency for reconsiderations.

The Police Commissioner retained the case and imposed no disciplinary action stating that Charges would be detrimental to the Department's disciplinary process and he believed the Respondent's actions were proper and reasonable given the circumstances.

### **Case Three, Retained with Discipline**

An 11-year-old boy and a 13-year-old girl were playing basketball in a park (the "Victims") when the Respondent and his partner approached. The Victims began walking away, when they realized the officers were following them, the Victims attempted to run towards their apartment building, which was less than a block away and where the girl's godfather was sitting. The Respondent and his partner pursued the children, and while chasing them the Respondent removed his gun from its holster and pointed it at the Victims. The officers caught up to the Victims and stopped them. In his interview, the Respondent asserted that he was responding to a 911 call regarding someone in the park with a gun. The Respondent was given a description of two (2) black males with dark complexions, both wearing black hooded sweatshirts and one (1) wearing black jeans with their hands in their pockets.

The Board substantiated four (4) allegations against the Respondent for abusing his authority in stopping the Victims without sufficient legal authority and for wrongfully using force in pointing his gun at the Victims without police necessity. The DAO submitted a request for reconsideration, asking that Respondent be exonerated and that no disciplinary action be taken. The DAO argued that a sworn statement from the 11-year-old boy and the girl's godfather were not enough to pursue a complaint against the officers for their actions toward the girl.

Furthermore, the DAO argued that the 13-year-old girl matched the description of, “two [2] black males with dark complexions, one [1] wearing a black hoodie, black jeans, and the other with a black hoody [sic] with their hands in their pockets.” The DAO argued that the fact that one (1) victim turned out to be female was, “not as significant [a] distinction as the CCRB investigator would have one believe.” Finally, the DAO argued that the Respondent did not use physical force in the traditional sense in their pursuit of the children. Instead, the DAO argued that a police officer’s firearm is, “designed not only to apply deadly physical force when the trigger is pulled, but to intimidate and coerce an individual in order to effect [sic] compliance.” The DAO stated affirmatively that, “the Department does not consider the act of an officer merely pointing his firearm to be a Use of Force.”

The CCRB reconvened to review the case and voted to maintain its substantiation, explaining that the main issue raised in DAO’s memo—whether the Respondent had reasonable suspicion to chase the children—was a question of law that would be best resolved at trial. The Police Commissioner retained the case and imposed Formalized Training to address the substantiated allegations, maintaining that it would be detrimental to the Department’s disciplinary process to pursue Charges.

iii. Treatment of APU Pleas

In the second quarter of 2018, the Department finalized one (1) plea. 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 many 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; number of Complainants; and DCT precedent of analogous charges. The APU penalty recommendations tend to be consistent for MOS who are similarly situated.

<b>Pleas Closed</b>				
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
2 <sup>nd</sup> Quarter 2015 (2Q15)	8	0	0	0
3 <sup>rd</sup> Quarter 2015 (3Q15)	10	0	0	0
4 <sup>th</sup> Quarter 2015 (4Q15)	5	0	1	0
1 <sup>st</sup> Quarter 2016 (1Q16)	11	0	0	0
2 <sup>nd</sup> Quarter 2016 (2Q16)	20	2	12	2
3 <sup>rd</sup> Quarter 2016 (3Q16)	22	0	4	2
4 <sup>th</sup> Quarter 2016 (4Q16)	17	1	2	0
1 <sup>st</sup> Quarter 2017 (1Q17)	13	0	1	0

2 <sup>nd</sup> Quarter 2017 (2Q17)	5	0	0	0
3 <sup>rd</sup> Quarter 2017 (3Q17)	3	1	1	3
4 <sup>th</sup> Quarter 2017 (4Q17)	2	5	3	0
1 <sup>st</sup> Quarter 2018 (1Q18)	6	7	1	0
<b>2<sup>nd</sup> Quarter 2018 (2Q18)</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>0</b>

As shown in the chart above, the Police Commissioner imposed a penalty below that agreed to by the CCRB and relevant MOS in one (1) case. Below is a synopsis of that case:

**Case One, Penalty Downgrade**

The Victim, a 17-year-old boy, was standing on the street speaking to the Complainant when the Respondent, an anti-crime officer in plainclothes, approached the Victim and asked for his identification. Video footage then shows the Respondent frisking the Victim and entering his pant pockets, removing his keys and money. The Respondent stated that he stopped the Victim due to a bulge that Respondent saw in the Victim’s pocket. The Respondent failed to prepare a stop and frisk report as required by the Department, and there was evidence to suggest that the Respondent provided a false official statement to the CCRB as he denied stopping, frisking, and searching the Victim. When provided with video evidence of his actions, the Respondent denied being able to identify himself on footage.

The Board substantiated three (3) allegations against the Respondent for abusing his authority in stopping, frisking, and searching the Victim without sufficient legal authority. The Respondent pleaded guilty and agreed to a forfeiture of twelve (12) vacation days. The Police Commissioner disapproved the penalty and imposed a forfeiture of five (5) vacation days due to the Respondent’s lack of prior disciplinary history and to be more consistent with prior precedent.

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 MOS, 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 second consecutive quarter of growth in 2018. From the first quarter of 2018, the APU’s docket increased from a total of ninety-two (92) cases to a total of one-hundred and seven (107) cases in the second 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 those since the formation of the APU.<sup>3</sup>

<b>Cases in Open Docket</b>					
Period	Start of Quarter	Received During Quarter	Closed During Quarter	End of Quarter	Growth
2 <sup>nd</sup> Quarter 2015 (2Q15)	338	63	53	348	3.0%
3 <sup>rd</sup> Quarter 2015 (3Q15)	347	52	51	349	0.6%
4 <sup>th</sup> Quarter 2015 (4Q15)	349	48	31	366	4.9%
1 <sup>st</sup> Quarter 2016 (1Q16)	366	24	53	337	-7.9%
2 <sup>nd</sup> Quarter 2016 (2Q16)	337	16	89	264	-21.7%
3 <sup>rd</sup> Quarter 2016 (3Q16)	264	15	65	211	-20.1%
4 <sup>th</sup> Quarter 2016 (4Q16)	211	7	53	165	-21.8%
1 <sup>st</sup> Quarter 2017 (1Q17)	165	5	38	132	-20.0%
2 <sup>nd</sup> Quarter 2017 (2Q17)	132	11	24	119	-9.8%
3 <sup>rd</sup> Quarter 2017 (3Q17)	119	14	23	110	-7.6%
4 <sup>th</sup> Quarter 2017 (4Q17)	110	10	36	84	-23.6%
1 <sup>st</sup> Quarter 2018 (1Q18)	84	28	20	92	9.5%
<b>2<sup>nd</sup> Quarter 2018 (2Q18)</b>	<b>92</b>	<b>21</b>	<b>6</b>	<b>107</b>	<b>16.3%</b>

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 continued to increase into the second quarter of 2018.

As of June 30, 2018, there were forty-one (41) Respondents who had not been served with Charges. In the second quarter of 2018, the Respondents who were served with Charges, waited an average of one-hundred and thirty-two (132) days. This is, again, an increase from the last report, in which there were twenty-eight (28) Respondents who had not yet been served with Charges, and the average length of time of service in the first quarter of 2018 was eighty (80) days.

<sup>3</sup> 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](https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/board/20180808_disciplinaryframework_memo.pdf).

<b>Time to Serve Respondents</b>			
Period	Number of Respondents Served	Average Length to Serve Respondent	Average Length to Serve Respondents (Business Days)
1 <sup>st</sup> Quarter 2015 (1Q15)	42	59	43
2 <sup>nd</sup> Quarter 2015 (2Q15)	41	76	55
3 <sup>rd</sup> Quarter 2015 (3Q15)	58	62	46
4 <sup>th</sup> Quarter 2015 (4Q15)	37	58	42
1 <sup>st</sup> Quarter 2016 (1Q16)	26	135*	97
2 <sup>nd</sup> Quarter 2016 (2Q16)	27	182*	131
3 <sup>rd</sup> Quarter 2016 (3Q16)	26	121*	87
4 <sup>th</sup> Quarter 2016 (4Q16)	15	108*	78
1 <sup>st</sup> Quarter 2017 (1Q17)	3	42	31
2 <sup>nd</sup> Quarter 2017 (2Q17)	0	N/A	N/A
3 <sup>rd</sup> Quarter 2017 (3Q17)	2	37	27
4 <sup>th</sup> Quarter 2017 (4Q17)	9	44	33
1 <sup>st</sup> Quarter 2018 (1Q18)	7	80	58
<b>2<sup>nd</sup> Quarter 2018</b>	<b>15</b>	<b>132</b>	<b>95</b>
* In 2016 there was an increase in the number of cases where the Department requested reconsiderations 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 Department's decision to retain three (3) cases under Provision Two of the MOU, two of which involve minors, raises concerns for several reasons:

First, the Board believes that there are extremely limited instances in which cases should be retained after the reconsideration process. When the DAO writes a letter providing the Board with new information that was unavailable to the CCRB at the time of the original investigation or presents differing views between the CCRB and the NYPD with respect to legal standards, civilian credibility, or appropriate discipline the Board will reconsider its findings or discipline recommendations for a previously-substantiated allegation. The Board takes reconsideration requests very seriously and believes that the retention of a case after the Board has substantiated an allegation and recommended Charges for a second time should be rare, and done only in limited circumstances with sufficient additional explanation from the Police Commissioner.

Second, in the first case that was retained without discipline, it is particularly concerning to the Board that the Department would exonerate a case where an officer drew his Taser on

bystanders at close range, especially in a school. The Department's argument that the civilians did not notice the weapon pointed at them is irrelevant and deeply concerning.

Third, the Board disagrees with the Department imposing Formalized Training on an officer who chased an 11-year-old and 13-year-old with his gun drawn when following up on a 911 call for two (2) armed black males in hoodies, and believes that this behavior should receive the strictest form of punishment.

Finally, the CCRB has strong objection to the DAO's assertion that the pointing of a firearm is not a Use of Force. In fact, the Department has held officers accountable for improperly using force by pointing their firearms at civilians in the past. The actions of the Respondent in pointing his gun at two (2) children created a dangerous situation that could have resulted in death or serious physical injuries to the children involved and the surrounding members of the public. The Respondent did not have reasonable suspicion that either minor was armed or dangerous and should have not pointed his weapon. Pointing a gun without police necessity is in direct violation of the guidelines set forth in the NYPD's Patrol Guide. NYPD Patrol Guide Section 221-01 states that "the decision to display or draw a firearm should be based on an articulable belief that the potential for serious physical injury is present."

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Darche', written in a cursive style.

Jonathan Darche  
Executive Director

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