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MAYOR

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FREDERICK DAVIE  
CHAIR

August 9, 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”) Third Quarter of 2018**

Dear Commissioner O’Neill:

This report will address the following matters: (i) the reversal of one guilty verdict issued by an Assistant Deputy Commissioner of Trials (“ADCT”); (ii) the retention of 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) cases administratively closed by the Police Commissioner; (vi) the size of the APU’s docket; and (vii) the length of time to serve Respondents.

i. **Guilty Verdict Reversed by the Police Commissioner**

In the third quarter of 2018, four (4) CCRB verdicts for trials conducted before an ADCT were finalized. The APU treats each officer against whom an allegation is substantiated as a separate case.<sup>1</sup> Three (3) cases resulted in guilty verdicts and one (1) case resulted in a not guilty verdict. Of the guilty verdicts, one (1) was reversed by the Police Commissioner.<sup>2</sup>

**Case One, Guilty Verdict Reversed**

The Complainant, a Black male, parked his car in a “no standing” zone and exited his vehicle. He placed his car keys in his back pants pocket, which was otherwise empty. As he walked across the street, toward a store, he observed a black unmarked car drive past him, make

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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> As the final arbiter of discipline, the Police Commissioner may accept, reject, or modify any trial verdict or plea. 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.

a U-turn, and stop next to him. The Respondent, a plain-clothes anti-crime Lieutenant, rolled down his window and instructed the Complainant, twice, to go back to his car. When the Complainant inquired as to why he should return to his vehicle, the Respondent exited the vehicle and approached the Complainant. The Respondent grabbed a belt-loop on the Complainant's pants, forced the Complainant against the back of the Complainant's car, and frisked the Complainant from his chest to his legs. The Respondent then grabbed the Complainant's keys, unlocked the car, and searched the front, back seat, and trunk without consent. The Complainant subsequently was issued a summons for public urination and parking in a "no standing" zone. The Respondent's explanation for frisking the Complainant was a knowledge of his previous arrest history. The Respondent further asserted that issuing the Complainant a summons for public urination in lieu of making an arrest meant the same standards applied and the Complainant could be frisked. This assertion is legally incorrect. The Respondent acknowledged that he could see the Complainant's hands prior to the frisk, did not see a bulge on his person, and did not suspect the Complainant of being in possession of any weapons.

The Board substantiated two (2) allegations against the Respondent for abusing his authority by conducting an unlawful frisk and an unlawful vehicular search. At trial, the Respondent was found guilty of the unlawful frisk, and not guilty of the unlawful vehicular search. The ADCT, finding that the Respondent had no sufficient justification for a frisk, recommended a forfeiture of two (2) vacation days.

The Police Commissioner reversed the guilty verdict, stating that because the Complainant was frisked in connection with the issuance of a Criminal Court summons and after the Respondent became aware of the Complainant's prior arrest for possession of a firearm, the Respondent's actions were reasonable under the totality of the circumstances. No discipline was imposed due to the reversal of the verdict on the Respondent.

ii. Cases Retained by the Police Commissioner

The New York City Police Department ("NYPD" or the "Department") did not retain any cases pursuant to Provision Two of the MOU between the CCRB and NYPD in the third quarter of 2018.

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.

iii. Treatment of APU Pleas

In the third quarter of 2018, the Department finalized six (6) pleas. The APU makes penalty recommendations for all cases in which Charges and Specifications are substantiated by the Board. The APU uses a number of factors to determine these recommendations to the Deputy Commissioner of Trials (“DCT”), including, but not limited to: a member of service’s (“MOS”) length of service; MOS rank; MOS disciplinary history; the facts of the instant case; the strength of the instant case; the vulnerability of the victim; the 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.

<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
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
2 <sup>nd</sup> Quarter 2018 (2Q18)	0	1	0	0
<b>3<sup>rd</sup> Quarter 2018 (3Q18)</b>	<b>6</b>	<b>0</b>	<b>0</b>	<b>0</b>

As seen in the chart above, for all six (6) cases, the Police Commissioner approved the penalty agreed to by the CCRB.

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 third quarter of 2018.

v. Cases Administratively Closed by the Police Commissioner

**Case One, Administratively Closed**

The Victim filmed the Respondent approach and immediately search an individual. When the Respondent noticed the Victim, he approached him, and with the help of two other officers handcuffed the Victim in order to physically prevent him from recording the incident. The officers then placed the Victim into the back of the Respondent's police vehicle. Before reaching the station house, one of the officers threw the Victim's cell phone out of the police vehicle's window. The Victim was charged with obstructing governmental administration, disorderly conduct, and resisting arrest. The charges eventually were dropped and the arrest was sealed.

The Board substantiated two (2) allegations against the Respondent for abusing his authority by conducting an unlawful search of the individual and interfering with the Victim's making a video recording of an incident without police necessity.

The case was put on hold by the District Attorney's Office, and the Respondent was indicted on two counts of Offering a False Instrument for Filing in the First Degree, two counts of Official Misconduct, and one count of Making a False Written Statement. He was tried at a jury trial and found guilty on all counts. He was terminated from his employment at the NYPD and the CCRB Charges were administratively closed by the Department Advocate's Office ("DAO").

**Cases Two and Three, Administratively Closed**

The Complainant called 911 to complain that she had been assaulted by a tenant in her apartment complex and that graffiti had been spray-painted on her apartment door. Over the subsequent two (2) hours, the two (2) Respondents responded to her apartment three (3) times. The Complainant and her boyfriend called 911 a total of nine (9) times. The Respondents responded to the scene and spoke to the Complainant for about ten (10) minutes inside of her apartment then pulled her into the hallway, handcuffed her, and transported her to the hospital. The Complainant was released from the hospital, she was not arrested or summonsed, and the officers did not fill out an AIDED report for her forcible removal to the hospital. The incident was caught on cell phone camera by another civilian. In their interviews, the Respondents noted that the Complainant appeared to be "highly intoxicated" and was "incoherent," leading them to determine that the Complainant was an "emotionally disturbed person" and that she would be a threat to herself because of "the things she was saying," and "knocking on doors." However, the investigation found—through listening to the 911 calls and watching civilian video—that although the complainant was upset and at times belligerent, she was coherent, and that she had called the police with tangible complaints that she requested be addressed by the Respondents. In the calls and the video, she was speaking clearly and was removed from her apartment against her will. While the investigation found that she was intoxicated, she was in her own apartment, did not lose consciousness, fall to the ground, or demonstrate any behavior that would make someone reasonably believe she was likely to cause serious injury to herself or others.

The Board substantiated two (2) allegations against the Respondents for abusing their authority in forcibly removing the Complainant to the hospital. The DAO sent a reconsideration

request that the allegations should be exonerated, arguing that the allegations in the case are outside of CCRB’s jurisdiction and thus, should have never been substantiated. DAO argued that the officers’ determination that the Complainant needed medical treatment, whether correct or not, is not one of the defined FADO categories and does not fall under the CCRB’s jurisdiction. DAO noted that “Whether she was mentally ill, emotionally disturbed or intoxicated is seemingly irrelevant given the language of Patrol Guide Procedure No. 221-13 (Tactical Operations, Mentally Ill or Emotionally Disturbed Persons).” The Panel reconvened to review the case and voted to maintain its substantiations and recommendation of Charges and Specifications. The Panel considered that the allegations shared similarities with other FADO allegations, such as stops, detentions, and ejections from the transit systems. In all of those circumstances, officers are provided legal and departmental guidance surrounding the officer’s authority to detain or remove a civilian against their will. Finally, the Panel believed that since the Police Commissioner has imposed discipline for this misconduct in past cases, there was no question that this allegation is within the Agency’s jurisdiction. The Police Commissioner determined that the CCRB did not have jurisdiction over the matter and that NYPD would not serve Charges and Specifications, and administratively closed the matter and issued instructions to the Respondents from their Commanding Officers.

The NYPD reasoned that Patrol Guide Procedure No. 221-12 (Mentally Ill or Emotionally Disturbed Persons), part of the Tactical Operations section of the Patrol Guide, was outside of CCRB’s jurisdiction, as police tactical operations are not among the enumerated allegations in Chapter 18-A of the City Charter. The CCRB responded citing other cases in which it had pleaded the allegation of improper forcible removal to the hospital. In doing so, the CCRB noted that the NYPD previously had imposed discipline in substantiated cases involving improper forcible removal to the hospital. The Agency also underscored the fact that several other allegations that clearly are within the CCRB’s jurisdiction—such as the use of excessive force without sufficient legal authority, the improper use of a Taser, and the use of a prohibited chokehold—are also police tactical operations.

vi. The APU’s Docket

As seen in the following table, the APU’s docket saw a decline in the third quarter of 2018 after two quarters of growth. From the second quarter of 2018, the APU’s docket decreased from a total of one hundred seven (107) cases to a total of one hundred four (104) cases in the third quarter of 2018.

<b>Cases in Open Docket</b>					
Period	Start of Quarter	Received During Quarter	Closed During Quarter	End of Quarter	Growth
3 <sup>rd</sup> Quarter 2015	347	52	51	349	0.6%
4 <sup>th</sup> Quarter 2015	349	48	31	366	4.9%
1 <sup>st</sup> Quarter 2016	366	24	53	337	-7.9%
2 <sup>nd</sup> Quarter 2016	337	16	89	264	-21.7%
3 <sup>rd</sup> Quarter 2016	264	15	65	211	-20.1%
4 <sup>th</sup> Quarter 2016	211	7	53	165	-21.8%

1 <sup>st</sup> Quarter 2017	165	5	38	132	-20.0%
2 <sup>nd</sup> Quarter 2017	132	11	24	119	-9.8%
3 <sup>rd</sup> Quarter 2017	119	14	23	110	-7.6%
4 <sup>th</sup> Quarter 2017	110	10	36	84	-23.6%
1 <sup>st</sup> Quarter 2018	84	28	20	92	9.5%
2 <sup>nd</sup> Quarter 2018	92	21	6	107	16.3%
<b>3<sup>rd</sup> Quarter 2018</b>	<b>106</b>	<b>11</b>	<b>13</b>	<b>104</b>	<b>-1.9%</b>

vii. Time to Serve Respondents

As can be seen in the following chart, the length of time the Department took to serve Respondents after the APU files charges with the Charges Unit decreased between the second and third quarter of 2018.

As of September 30, 2018, there were thirty-nine (39) Respondents who had not been served with Charges. In the third quarter of 2018, the Respondents who were served with Charges waited an average of ninety (90) days. This marks a decrease from the last report, in which there were forty-one (41) Respondents who had not yet been served with charges and the average length of time for service in the second quarter of 2018 was one hundred thirty-two (132) days.

<b>Time to Serve Respondents</b>			
Period	Number of Respondents Served	Average Length to Serve Respondent	Average Length to Serve Respondents (Business Days)
3 <sup>rd</sup> Quarter 2015	58	62	46
4 <sup>th</sup> Quarter 2015	37	58	42
1 <sup>st</sup> Quarter 2016	26	135*	97
2 <sup>nd</sup> Quarter 2016	27	182*	131
3 <sup>rd</sup> Quarter 2016	26	121*	87
4 <sup>th</sup> Quarter 2016	15	108*	78
1 <sup>st</sup> Quarter 2017	3	42	31
2 <sup>nd</sup> Quarter 2017	0	N/A	N/A
3 <sup>rd</sup> Quarter 2017	2	37	27
4 <sup>th</sup> Quarter 2017	9	44	33
1 <sup>st</sup> Quarter 2018	7	80	58
2 <sup>nd</sup> Quarter 2018	15	132	95
<b>3<sup>rd</sup> Quarter 2018</b>	<b>17</b>	<b>89</b>	<b>63</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 in the length of time it took the Department to serve Respondents.			

The CCRB strives for efficiency in the disciplinary process. While the CCRB is encouraged by the decrease in the time it takes the Department to serve Respondents, further efforts

to reduce the average service time to thirty (30) days will help ensure that APU prosecutions are 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 CCRB disagrees with the Department's decision to administratively close two cases where the Board substantiated misconduct for abuse of authority by forcibly removing a complainant to the hospital. When the City Council empowered the CCRB to investigate misconduct involving "excessive use of force, abuse of authority, discourtesy, or use of offensive language" (collectively referred to as "FADO" jurisdiction) in Charter § 440(c)(1) instead of defining each FADO category, it authorized the CCRB to define the types of allegations that fall within each of those categories. As confirmed by Judge Crane's decision in Lynch v. CCRB<sup>3</sup>, the CCRB's interpretation of its jurisdiction "is entitled to great weight and judicial deference." The CCRB has been pleading forcible removal to the hospital as an abuse of authority allegation since 1999, as it is a significant infringement on the individual's freedom on par with detainment. The CCRB will continue to investigate, and when appropriate substantiate, allegations against officers who abuse their authority by improperly forcibly removing individuals to the hospital.

Thank you for your consideration.

Sincerely,



Matthew Kadushin  
Acting Executive Director

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

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<sup>3</sup> Lynch v. N.Y.C. Civilian Complaint Review Bd., 2019 NY Slip Op 29089, ¶ 7 (Sup. Ct.)