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FREDERICK DAVIE
CHAIR

February 7, 2020

The Honorable Dermot F. Shea
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 2019**

Dear Commissioner Shea:

This is a quarterly report the CCRB shares with the Commissioner to highlight APU cases where there was a lack of concurrence between the disciplinary recommendation put forward by the CCRB Board, and the discipline that was finally imposed by the Commissioner on the Respondent officer. While this report reflects decisions made by your predecessor, Commissioner O’Neill, we believe it is important for you to be aware of these instances of misconduct and the lack of concurrence between our two agencies. We look forward to working with you in the future to hold officers accountable when they have committed misconduct, and to increasing concurrence between our agencies under your leadership.

This report will address the following matters: (i) two (2) not guilty verdicts issued by Assistant Deputy Commissioners of Trials (“ADCT”); (ii) the retention of cases under Provision Two of the April 2, 2012 Memorandum of Understanding (“MOU”); (iii) the treatment of certain APU pleas by Police Commissioner O’Neill; (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. **Not Guilty Verdicts Upheld by the Police Commissioner**

In the first quarter of 2019, three (3) 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.¹ The three (3) cases resulted in two (2) not guilty verdicts and one (1) guilty verdict. All three (3) verdicts were upheld by Commissioner O’Neill.²

Case One, Not-Guilty

The victim, a fourteen-year-old Black Hispanic male, was with two (2) unidentified individuals when they were approached by three (3) anti-crime officers including the Respondent. As the Respondent approached the victim, the victim ran from the officers into a NYCHA building where his grandmother resided. The Respondent pursued the victim on foot. When the victim stopped, the Respondent told him to remove his hands from his pockets, and the victim complied. The Respondent saw what he believed to be a knife in the victim’s hand and immediately punched him in the face. The victim began bleeding from the mouth and was then handcuffed and brought to a stairwell to wait for the other members of the Respondent’s team to arrive. The victim was taken to the hospital where he received eight (8) stitches to the left side of his upper and lower lip before being released for processing.

The victim was charged with criminal possession of a weapon and released from the precinct stationhouse on a Desk Appearance Ticket. The District Attorney declined to prosecute the victim for the criminal possession of a weapon charge.

Video footage was obtained from the NYCHA building; however, because cameras are located only in the outside and lobby of the building, the incident itself was not captured. Cell phone video footage was obtained from a resident who did not witness the incident but who took the video as the emergency medical technicians were escorting the victim from the building to the ambulance. Although the alleged misconduct was not captured, the victim’s lip injury is visible in the video.

The Board substantiated one allegation against the Respondent for wrongful use of force, in that he punched the victim in the face without police necessity. At trial, the ADCT found the Respondent not guilty because they determined that the unannounced punch to the victim’s face, while clearly constituting a use of force, was an attempt to avoid employing greater—and, more likely than not, lethal—use of force. In its response papers, the CCRB noted that the Respondent conceded under cross-examination that he only gave the victim one command, and the victim complied immediately. The Respondent also stated that the knife the victim was holding was closed and at his side. The Respondent acknowledged that he was the one who stepped towards the victim, and the victim was not approaching him. Lastly, the Respondent agreed that he weighed 170 pounds while the victim only weighed 95 pounds. The video clearly showed that the victim’s injuries were so severe that he had blood all over his face and shirt. Based on the victim’s injury, his size, age, and the fact that at the time that force was used, he was compliant and acting in a non-violent manner, the CCRB requested that Commissioner O’Neill overturn the ADCT’s

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 As the final arbiter of discipline, the Police Commissioner may accept, reject, or modify any trial verdict or plea. *See* NY Civ. Serv. Law § 75; N.Y.C. Admin. Code § 14-115; NY City Charter § 434; NY City Charter § 440; 38 RCNY § 15-12; 38 RCNY § 15-17; 38 RCNY § 1-46.

decision, maintaining that the Respondent's use of force was unnecessary. Commissioner O'Neill approved the not guilty verdict, however, the CCRB stands by its recommendation for a penalty of forfeiture of fifteen (15) vacation days.

Case Two, Not-Guilty

The Respondent and his Sergeant were on patrol in an unmarked van when they heard someone yelling at them. The Respondent exited the unmarked van and asked the victim why he was yelling. The victim accused the police of always looking at him and asked why they were "constantly harassing him." The Respondent asked the victim to leave the scene. When the victim didn't move, the Respondent pulled the victim's arm to place him in handcuffs. As the Respondent did so, a cup of coffee in the victim's hand fell to the ground. The Respondent then grabbed the victim around his neck, and using this hold, lifted the victim into the air and carried him a few feet to the back of the police van where he rear-cuffed him. The Respondent then brought the victim around to the right side of the van and slammed him against the vehicle. He placed the victim into the van, drove him to the precinct, and issued him a summons for disorderly conduct. There was video footage of the incident recorded by a bystander.

The Board substantiated two (2) Force allegations against the Respondent for the wrongful use of force in that he used a chokehold against the complainant, and for the use of physical force in slamming the victim into the van door, while handcuffed, without police necessity. During the trial, the Respondent testified that he grabbed the victim "underneath the left armpit by the chest," however, under cross-examination after review of the video, the Respondent admitted that his right arm did not go under the victim's armpit, but instead above his shoulder and under his chin. Using this hold, the Respondent lifted the victim off his feet and carried him a few feet to the back of the police van. The Respondent testified that he did not put pressure on the victim's throat or apply a chokehold. The ADCT found the Respondent not guilty of the allegations and noted that 1) the victim never made a statement to the CCRB about being choked or being unable to breathe when grabbed by the Respondent; 2) that the Respondent grabbed the victim from behind around his chest; and 3) the Respondent was the only one to testify at trial and the Court credited his account, despite his "imprecise" description of how coffee was "thrown on him."

The Court repeatedly noted that the victim did not appear to testify and there was no opportunity to question him on the alleged chokehold or what occurred by the side of the van. The CCRB, in its response papers, argued that the video showed—and the Respondent admitted on cross-examination—that the Respondent picked the victim up from his neck and chin area, and that the Patrol Guide and case law are clear that *any* pressure to the throat or windpipe that *may* prevent or hinder breathing is prohibited. Furthermore, the CCRB noted that the video showed that the victim did not resist and there was no reason to slam him into the side of the van, as the Respondent admitted on cross-examination. The CCRB requested that Commissioner O'Neill reject the Court's findings and find the Respondent guilty of both allegations with a recommended penalty of forfeiture of twenty (20) vacation days. Commissioner O'Neill approved the not guilty verdict, however, the CCRB stands by its recommendation for a penalty of forfeiture of twenty (20) vacation days.

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 in the first quarter of 2019.

Provision Two of the MOU states:

in those limited instances 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 first quarter of 2019, the Department finalized one (1) plea. 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 its penalty recommendations, including, but not limited to: a member of service’s (“MOS”) length of service, rank, and disciplinary history; the facts of the case; the strength of the case; the vulnerability of the victim; the extent of injury, if any; the number of complainants; and Deputy Commissioner of Trials (“DCT”) precedent of analogous charges. The APU’s 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 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
1 st Quarter 2018 (1Q18)	6	7	1	0
2 nd Quarter 2018 (2Q18)	0	1	0	0
3 rd Quarter 2018 (3Q18)	6	0	0	0

4 th Quarter 2018 (4Q18)	4	0	0	0
1st Quarter 2019 (1Q19)	1	0	0	0

As seen in the chart above, Commissioner O’Neil approved the penalty agreed to by the CCRB in the one (1) plea case.

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 prosecute misconduct against a MOS, the APU dismisses the Charges against that Respondent. The APU did not dismiss any cases in the first quarter of 2019.

v. The APU’s Docket

As seen in the following table, the APU’s docket saw substantial growth in the first quarter of 2019, following a slight increase in the fourth quarter of 2018. The APU’s docket increased from a total of one hundred five (105) cases in the fourth quarter of 2018, to a total of one hundred twenty-five (125) cases in the first quarter of 2019. 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.³

Cases in Open Docket					
Period	Start of Quarter	Received During Quarter	Closed During Quarter	End of Quarter	Growth
1 st Quarter 2016	363	24	53	334	-8.0%
2 nd Quarter 2016	334	16	89	261	-21.9%
3 rd Quarter 2016	261	15	66	207	-20.7%
4 th Quarter 2016	207	7	53	161	-22.2%
1 st Quarter 2017	161	5	37	129	-19.9%
2 nd Quarter 2017	129	11	24	116	-10.1%
3 rd Quarter 2017	116	14	23	106	-8.6%
4 th Quarter 2017	106	11	35	82	-22.6%
1 st Quarter 2018	82	28	22	88	7.3%
2 nd Quarter 2018	88	21	10	99	12.5%
3 rd Quarter 2018	99	11	17	93	-6.1%
4 th Quarter 2018	93	16	12	97	4.3%
1st Quarter 2019	97	28	5	120	23.7%

³ 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

vi. Time to Serve Respondents

As can be seen in the following chart, the length of time the NYPD Department Advocate’s Office (“DAO”) took to serve Respondents after the APU filed Charges with the Charges Unit increased between the fourth quarter of 2018 and first quarter of 2019.

As of March 30, 2019, there were twenty-four (24) Respondents who had not been served with Charges. In the first quarter of 2019, Respondents waited an average of one hundred fifteen (115) days before being served with Charges. This marks an increase from the fourth quarter of 2018, when there were twenty-eight (28) Respondents who had not yet been served with Charges, and the average length of time for service was one hundred five (105) days.

Time to Serve Respondents			
Period	Number of Respondents Served	Average Length to Serve Respondent	Average Length to Serve Respondents (Business Days)
1 st Quarter 2016	26	135*	97
2 nd Quarter 2016	27	182*	131
3 rd Quarter 2016	26	121*	87
4 th Quarter 2016	15	108*	78
1 st Quarter 2017	3	42	31
2 nd Quarter 2017	0	N/A	N/A
3 rd Quarter 2017	2	37	27
4 th Quarter 2017	9	44	33
1 st Quarter 2018	7	80	58
2 nd Quarter 2018	15	132	95
3 rd Quarter 2018	17	89	63
4 th Quarter 2018	15	105*	75
1st Quarter 2019	24	115*	82
* In these quarters 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. The CCRB is discouraged that the length of time the NYPD took to serve Respondents continued to increase into the first quarter of 2019. The steady increase in two (2) consecutive quarters indicates a need for the NYPD to attempt to reduce the average time to serve respondents to thirty (30) days. This will help ensure that APU prosecutions are processed in a timely manner and that cases are resolved more expeditiously for both members of the Department and the people of the City of New York.

As you know, in November, New Yorkers made their support for stronger police oversight clear with their vote in support of Question Two on the ballot. Overall, this is a significant improvement for civilian oversight, and we look forward to working with you to make discipline

more transparent and to continue to bolster public confidence in the integrity of police oversight in this city.

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