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FREDERICK DAVIE
CHAIR

September 17, 2021

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 2021**

Dear Commissioner Shea:

This report will address the following matters: (i- ii) five (5) finalized verdicts issued by an Assistant Deputy Commissioner of Trials (“ADCT”); (iii) the treatment of Administrative Prosecution Unit (“APU”) pleas by the Police Commissioner; (iv) the retention of cases under Provision Two of the April 2, 2012 Memorandum of Understanding (“MOU”); (v) the dismissal of cases by the APU; (vi) cases administratively closed by the Police Commissioner; (vii) the size of the APU's docket; and (viii) the length of time to serve Respondents. The cases discussed in this report concern incidents and decisions rendered before the implementation of the 2021 NYPD Disciplinary Matrix and the 2021 MOU¹.

I. Guilty Verdicts Upheld by the Police Commissioner

In the first quarter of 2021, five (5) 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.² Of the five (5) cases, four (4) resulted in guilty verdicts that were upheld by the Police Commissioner. The guilty verdicts are discussed further below:

¹ In February 2021, the CCRB and NYPD entered into a Memorandum of Understanding to achieve consistent and fair discipline recommendations. The Discipline Matrix serves as a framework for discipline recommendations. <https://www1.nyc.gov/assets/home/downloads/pdf/office-of-the-mayor/2021/Disciplinary-Matrix-MOU.pdf>

² The APU treats each officer as a separate “case.” As such, 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.”

Cases One and Two, Guilty Verdict, Penalty Downgrade³

In July 2015, at approximately 4:00 p.m. in Brooklyn, the Victim, a Black man in his mid-twenties, attempted to purchase pizza at a restaurant. He was short of money and called his brother to bring him some money to make up the balance. His brother arrived with the money and they took the pizza and left. The Victim and his brother were walking approximately fifty feet apart when the Victim observed a patrol car and saw two police officers exit the vehicle and stop his brother. The Victim immediately went into a deli to make some purchases and to call his mother to inform her of his brother's situation. Shortly thereafter, PO Lenny Lutchman (Respondent 1) entered the deli. The incident was captured by a surveillance camera (with no audio) inside the deli. PO Lutchman approached the Victim with his asp out and started speaking to the Victim asking about a robbery. The Victim denied having any involvement. PO Lutchman grabbed the Victim's wrist. PO Pearce Martinez (Respondent 2) also approached the Victim and punched him in the head, pushing his body into the counter. PO Martinez then pulled him away from the counter and continued to punch him. PO Lutchman used his asp to strike the Victim. The Victim covered his head while his body was still against the counter and PO Lutchman used his asp and elbow to strike the Victim's head and back. Plainclothes officers entered the deli and assisted PO Martinez in handcuffing the Victim. The Victim sustained several injuries, including a cut to his face that required five stitches.

The Board substantiated three (3) total allegations: two (2) Use of Force allegations against PO Lutchman for striking the Victim with his asp and using his elbow to strike the Victim in the head and one (1) Use of Force allegation against PO Martinez for striking the Victim in the head. The APU filed and served Charges and Specifications with a penalty recommendation of twenty (20) days' vacation forfeiture for PO Lutchman and fifteen (15) days' vacation forfeiture for PO Martinez.

ADCT Josh Kleiman found PO Lutchman guilty of striking the Victim in the head with his elbow, and not guilty of striking the Victim with his asp. ADCT Kleiman found that PO Lutchman "was in a close-quarters environment with a noncompliant suspect whom Respondent Lutchman believed was armed with a knife...the level of force employed by Respondent Lutchman's use of his asp was not unreasonable under the circumstances and it was objectively reasonable for Respondent Lutchman to believe that the manner in which he used the asp was necessary to effect [the Victim]'s arrest." ADCT Kleiman found that PO Lutchman's elbow strike was "not objectively reasonable when he knew backup to be on the scene and [the Victim]'s hands were already behind his back."

ADCT Josh Kleiman found PO Martinez guilty of striking the Victim in the head, stating that "given his lack of basic situational awareness in failing to observe the position of [the Victim]'s hands (which were clearly up and visible) and questionable testimony at trial that, at times, strained credibility, I find that Respondent Martinez's proffered belief that rushing in and

³ The ADCT's penalty recommendation and the final penalty imposed by the Police Commissioner was lower than the CCRB's penalty recommendation.

punching [the Victim] three times was then necessary to protect his partner to be objectively unreasonable under the circumstances.”

ADCT Kleiman recommended a penalty of twelve (12) days’ vacation forfeiture for PO Lutchman and ten (10) days’ vacation forfeiture for PO Martinez. Commissioner Shea approved ADCT Kleiman’s recommendations and imposed the recommended penalties.

Cases Three and Four, Guilty Verdict, Penalty Downgrade⁴

In February 2018, at approximately 2:30 pm in the Bronx, the Victim, a Hispanic male in his mid-twenties, was standing outside an apartment building waiting for a delivery when he was approached by an unidentified man who asked him if he had an extra belt. As the Victim responded, they were approached by PO Ahsan Zafar (Respondent 1) and Sgt. Dervent Williams (Respondent 2), both in plain clothes. PO Zafar spoke to the Victim and grabbed and frisked him while Sgt. Williams frisked the unidentified man. The Victim explained that the unidentified man had asked him for a belt, and he responded that he did not have an extra belt. PO Zafar told the Victim that he and Sgt. Williams thought that there had been a drug deal. PO Zafar checked the Victim’s identification and he and Sgt. Williams walked away. Neither the Victim nor the unidentified man were issued a summons or arrested. A surveillance camera (with no audio) captured the entirety of the incident.

The Board substantiated four (4) total allegations: two (2) Abuse of Authority allegations against PO Zafar for stopping and frisking the Victim and two (2) Abuse of Authority allegations against Sgt. Williams for stopping and frisking the unidentified man. The APU filed and served Charges and Specifications with a penalty recommendation of seven (7) days’ vacation forfeiture for PO Zafar and eight (8) days’ vacation forfeiture for Sgt. Williams. ADCT Jeff Adler found both Respondents guilty of all counts. ADCT Adler found that “both sides were essentially in agreement on the details of what transpired... the video footage in evidence...begins with the initial interaction between [the Victim] and [the unidentified man]; although they both gesture toward their waist areas, nothing passes between them, and there is no reasonable indication that a drug transaction is taking place.” ADCT Adler found that “Respondents did not observe money or drugs pass between the two individuals,” and that “Respondents lacked reasonable suspicion to believe that the two individuals had committed, were committing, or were about to commit a drug transaction.” Finally, ADCT Adler found that “the frisks of the two individuals were conducted without reasonable suspicion.” ADCT Adler recommended a penalty of three (3) days’ vacation forfeiture for both PO Zafar and Sgt. Williams. Commissioner Shea approved the guilty verdicts and departed upward from ADCT Adler’s recommendation, imposing a penalty of six (6) days’ vacation forfeiture for PO Zafar and eight (8) days’ vacation forfeiture for Sgt. Williams.

II. Not-Guilty Verdict Upheld by the Police Commissioner

In the first quarter of 2021, five (5) CCRB verdicts for trials conducted before an ADCT were finalized. The APU treats each officer against whom an allegation is substantiated as a

⁴ The final penalty imposed by the Police Commissioner was higher than the ADCT’s penalty recommendation but was lower than the CCRB’s penalty recommendation for PO Zafar and was a concurrence for Sgt. Williams.

separate case.⁵ Of the five (5) cases, one (1) case resulted in a not guilty verdict and was upheld by the Police Commissioner.⁶ The not guilty verdict is discussed further below:

Case One, Not Guilty Verdict Upheld⁷

In March 2018, at approximately 7:20 p.m. in Manhattan, the Victim, a Hispanic man in his late-twenties, was running away from PO Paul Rodriguez (the Respondent) and two other officers. The incident was captured on surveillance video (with no audio). The Victim was trying to climb the fence of a brownstone building when PO Rodriguez caught up with him. PO Rodriguez pulled the Victim down from the fence by his waistband and then wrapped both arms around the Victim’s neck and pulled him down to the ground. Both men fell. The Victim was arrested for assault with intent to cause injury and resisting arrest.

The Board substantiated two (2) total allegations: two (2) Use of Force allegations against PO Rodriguez for using a chokehold⁸ and restricting the Victim’s breathing. The APU filed and served Charges and Specifications with a penalty recommendation of ten (10) days’ vacation forfeiture. ADCT Jeff Adler found PO Rodriguez not guilty on all counts. ADCT Adler found that “a neighbor who was able to partially view some of the incident...heard [the Victim] shouting ‘I can’t breathe’, after [the Victim] was already on the ground...she admitted, however, that she did not see anyone touching [the Victim]’s neck area.” ADCT Adler found that the surveillance video “corroborates Respondent’s testimony that he pulled back on [the Victim’s] head to dislodge him from the gate” and that “due to the vantage point of the camera, from a high-angle above Respondent and [the Victim], if a chokehold had occurred it is more likely than not that some portion of Respondent’s hand or arm would have been blocked from view by [the Victim’s] chin and/or jawline, which they were not.” Commissioner Shea approved the not guilty verdict.

III. Treatment of APU Pleas

In the first quarter of 2021, no pleas were finalized.

Pleas Closed		
		Pleas Closed At Discipline Level Below Agency Recommendations

⁵ The APU treats each officer as a separate “case.” As such, 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.”

⁶ 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; 440; 38 RCNY§ 15-12; 38 RCNY § 15-17; 38 RCNY §1-46.

⁷ This case was previously reported as a retained case in the Fourth Quarter of 2018. Police Commissioner O’Neil originally retained the case but then decided to allow the APU to prosecute the case.

⁸ NYPD Patrol Guide Procedure 221-01 defines a chokehold as including, but not limited to, any pressure to the throat or windpipe, which may prevent or hinder breathing or reduce intake of air.

Period	Plea Approved	Plea Penalty Reduced	Plea Set Aside, Discipline Imposed	Plea Set Aside, No Discipline Imposed
1 st Quarter 2018	6	7	1	0
2 nd Quarter 2018	0	1	0	0
3 rd Quarter 2018	6	0	0	0
4 th Quarter 2018	4	0	0	0
1 st Quarter 2019	1	0	0	0
2 nd Quarter 2019	4	0	0	0
3 rd Quarter 2019	2	1	0	0
4 th Quarter 2019	1	0	0	0
1 st Quarter 2020	1	1	0	0
2 nd Quarter 2020	2	2	0	0
3 rd Quarter 2020	2	2	0	0
4 th Quarter 2020	0	0	0	0
1st Quarter 2021	0	0	0	0

As seen in the chart above, in the first quarter of 2021 there were no cases in which guilty pleas were agreed to by the CCRB.

IV. Cases Retained by the Police Commissioner

In the first quarter of 2021, 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 first quarter of 2021.

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.

V. 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 2021.

VI. Cases Administratively Closed by the Police Commissioner

In the first quarter of 2021, the Police Commissioner administratively closed 3 (three) cases.

Case One, Administratively Closed

In November 2018, at approximately 8:00 p.m. in Brooklyn, the Victim, a Black male in his mid-twenties, shot himself in the leg. After he was handcuffed, PO James Haviland (the Respondent) called him “a fucking nigger,” “fucking moron,” “dumb fucking idiot,” and “dumb fuck.” The statements were captured on body worn camera.

The Board substantiated two (2) total allegations: one (1) Offensive Language allegation against PO Haviland for calling the Victim “a fucking nigger” and one (1) Discourteous allegation for calling the Victim “fucking moron,” “dumb fucking idiot,” and “dumb fuck.” The Internal Affairs Bureau (IAB) filed their own charges against PO Haviland and he pled guilty. He was given a penalty of ten (10) days’ vacation forfeiture.

Cases Two and Three, Administratively Closed

In December 2018, at approximately 12:00 p.m. in Queens, the Victim, a Hispanic male in his early twenties, was driving a vehicle with over 90 percent tints⁹ on the windows. He was making a U-turn when he was struck head on by an unmarked police SUV driven by PO Nicholas Bekas (Respondent 1) and Sergeant Thomas Gagliardi (Respondent 2). The Victim was confused and tried to move his vehicle when PO Bekas used the unmarked vehicle to strike the side panel of the Victim’s car. The Victim’s car started smoking and he drove away from the unmarked vehicle. Sgt. Gagliardi authorized PO Bekas to pursue the Victim. The pursuit ended when the Victim’s vehicle struck a utility pole. The incident was captured on surveillance camera.

The Board substantiated two (2) total allegations: one (1) Use of Force allegation against PO Bekas for striking the Victim’s car and one (1) Abuse of Authority allegation against Sgt. Gagliardi for authorizing the vehicle pursuit of the Victim. The Internal Affairs Bureau (IAB) filed their own charges against PO Bekas and Sgt. Gagliardi. PO Bekas plead guilty and was given a penalty of nineteen (19) days’ vacation forfeiture. Sgt. Gagliardi was found guilty after a trial. He was given a penalty of forty-five (45) days’ vacation forfeiture and one-year dismissal probation.

⁹New York City Department of Motor Vehicles regulations state that window tints cannot block more than 30% of light. See <https://dmv.ny.gov/registration/tinted-windows>

VII. The APU's Docket

As seen in the following table, there was a slight decrease in the APU's in the first quarter of 2020 compared to the first quarter of 2021.

Cases in Open Docket¹⁰					
Period	Start of Quarter	Received During Quarter	Closed During Quarter	End of Quarter	Growth
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%
1 st Quarter 2019	97	28	5	120	23.7%
2 nd Quarter 2019	120	22	20	122	1.7%
3 rd Quarter 2019	122	11	10	123	0.8%
4 th Quarter 2019	123	23	20	126	2.4%
1 st Quarter 2020	122	5	8	119	-2.5%
2 nd Quarter 2020	119	21	23	117	-1.7%
3 rd Quarter 2020	115	3	6	114	-0.9%
4 th Quarter 2020	114	6	3	117	2.6%
1st Quarter 2021	115	4	7	112	-2.6%

VIII. 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 filed charges with the Charges Unit decreased between the fourth quarter of 2020 and first quarter of 2021. As of March 31, 2021, there were nine (9) Respondents who had not been served with Charges. There was a decrease in the average wait time for Respondents to be served charges between the fourth quarter of 2020 at seventy-one (71) days and the first quarter of 2021 at sixty-six (66) days.

Time to Serve Respondents			
Period	Number of Respondents Served	Average Length to Serve Respondents	Average Length to Serve Respondents (Business Days)
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

¹⁰ The number of cases in the open docket were updated to reflect additional data received from the Department with regards to the closure of long-standing cases.

1 st Quarter 2019	24	115	82
2 nd Quarter 2019	11	76	54
3 rd Quarter 2019	17	67	48
4 th Quarter 2019	7	68	48
1 st Quarter 2020	10	129	92
2 nd Quarter 2020	18	62	44
3 rd Quarter 2020	16	88	63
4 th Quarter 2020	6	71	51
1st Quarter 2021	2	66	47

The CCRB looks forward to the new Disciplinary Matrix streamlining disciplinary penalties for instances of police misconduct, which will hopefully lead to an increase in concurrence between the CCRB and the NYPD. Under the Matrix, the APU will no longer be constrained by past precedent in making penalty recommendation. The APU and the DCT both have access to the same penalty guidelines, and prior case precedents that guided the APU penalty recommendations are incorporated into the Matrix under its “effect of precedent” section, so both entities will have a centralized location to assess penalties.

Thank you for your consideration.

Sincerely,



Jonathan Darche
Executive Director

Cc: CCRB Chair Frederick Davie
Deputy Commissioner Rosemarie Maldonado
Department Advocate Chief Amy Litwin