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**Decision - Police Department v. Mahadio**

### *Police Department v. Mahadio* →

OATH Index No. 1588/00 (February 22, 2001)

*aff'd*, 2002 WL 31420089 (1<sup>st</sup> Dep't 2002).

*Summary:* Respondent, a police officer, and his two brothers, visited an auto parts discount store while off duty and got embroiled in a dispute with one of the employees over their treatment, which dispute quickly escalated into an exchange of threats of violence and a call to 911 for police to appear. In the course of the dispute, respondent was alleged to have improperly displayed his weapon while uttering a threat, made derogatory racial comments regarding the all African-American employee store, and made discourteous remarks to the employee with whom he and his brothers had the dispute.

1. ALJ sustained charge regarding the improper display of a weapon during the dispute. While it was undisputed that respondent never put his hand on the weapon or withdrew it, ALJ credited testimony of store manager, corroborated by another employee, that respondent intentionally lifted his sweater as he was leaving the store, thereby exposing his weapon in his waistband, while making a threatening remark. Respondent's off duty display of his weapon for purposes of intimidating others in the course of a private dispute was improper. An obvious nexus exists between a police officer's status and his off duty handling of his weapon, the use of which the Department may regulate and the misuse of which the Department may properly sanction.

2. ALJ also credited testimony of two store employees that respondent made a comment to the effect that he "could get better service in a white neighborhood." Such a racially offensive remark is properly sanctioned by the Department even though made in the context of a private off duty dispute in which the

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officer did not identify or interject his status. Police Department has a special accountability to the public for the integrity and efficiency of its operations.

3. Petitioner did not demonstrate a sufficient nexus between respondent's status as a police officer and his alleged mocking use of a profane nickname for a civilian during a private off duty dispute where the officer did not refer to or interject his status, so as to justify imposition of a sanction.

4. ALJ recommends loss of twenty-five vacation days as a penalty, despite respondent's lack of a prior disciplinary history. Review of prior Department penalties for off duty misuse of weapon and use of racially offensive language.

**RAYMOND E. KRAMER** , *Administrative Law Judge*

This disciplinary proceeding was referred to me by petitioner, the Police Department, in accordance with section 14-115 of the Administrative Code.

Respondent, a police officer assigned to the 78<sup>th</sup> precinct, is charged in an off-duty incident with abusing his authority by improperly displaying his weapon while addressing a civilian(s) in a threatening manner, using racially offensive language, and addressing an individual discourteously (ALJ Ex. 1).

At a two-day hearing conducted before me, petitioner presented three witnesses in support of the charges. Respondent testified in his own behalf.

#### **EVIDENCE**

The incident at issue occurred on March 25, 1999, at about 2 p.m., at a Strauss Discount Auto Store located at 183 Empire Boulevard in Brooklyn. Respondent, who was off-duty at the time, entered the store with his two brothers, in search of certain items for his auto, and the three men soon became embroiled in a dispute with one of the store employees, Rohan Frederick. The dispute quickly escalated to threats of violence, at which point Mr. Frederick left the main area of the store, respondent and his brothers exited the store, and the police were called to the scene after at least one of the store employees noticed that respondent had a gun in his waistband. No criminal charges were filed against anyone, but after learning that respondent was a police officer, the store manager, Randall Bailey, filed a civilian complaint against respondent which resulted in the pending charges.

Mr. Bailey, Assistant Manager Lianne Jeffrey and former employee Victor Lewis all testified for petitioner as to their recollections of the incident. Mr. Frederick, however, the central figure in the dispute, left Strauss's employ some time prior to trial without letting petitioner know how to contact him, and thus petitioner was unable to produce him as a witness.

Assistant Manager Jeffrey testified that on the afternoon of March 25, 1999, she was working at the store and was behind the parts counter at the back at one point, when she overheard an exchange of words between three men and her colleague Rohan Frederick. She heard one of the customers threaten to break Rohan's jawbone and to hit him. Rohan and the customers were in one of the aisles, diagonally to her left, and Rohan, upon spotting her at the parts counter, headed towards her as the exchange between the men and him continued. Ms. Jeffrey, thinking at first that it was a customer service dispute, asked Rohan what was going on, to see whether she, as a manager, should intervene. Rohan told her that a customer was threatening him (Tr. 15).

Ms. Jeffrey recalled that various profanities were being yelled back and forth as Rohan came behind the parts counter. She did not notice who was saying what to whom. Eventually, Rohan left the back of the parts counter and headed towards the service area, where the mechanic's bays were, on the right. One of the customers separated himself from the other two men to follow Rohan. He kept making comments to Rohan to the effect of waiting until Rohan finished work and then beating him up. Rohan, who was very angry, responded similarly, saying things like he would be outside and "Let's do it now," "Don't wait," and "We'll see what happens." Ms. Jeffrey had never seen him in such a state. She told him to calm down and warned him not to get into a fight, and she followed him toward the service area to prevent him from doing anything rash (Tr. 16). She reached him before the customer who had threatened him did, and she pushed him into the service area and kept him behind the cars where she tried to calm him down. The customer was still in her periphery to the left but not very close to them.

After a few minutes, the three customers exited the store and walked across the street to a parked car. In the meantime, the store manager, Mr. Bailey, had gotten involved in an effort to find out what was going on and to help calm the situation. He yelled at her to call the police and she did. She then observed the three men go to the trunk of the car, open it, and one after the other reach into the trunk and appear to put something in their waistbands (Tr. 18). She could not see what any of them had, although she claimed that at one point she saw something in one

of the men's hands that looked like a weapon. All three men then crossed back over the street to the store, spread out in front of the entrance door and the front window, and stood with their hands in their pockets, in view of all those inside. They did not re-enter the store (Tr. 18, 23-24). A few moments later the police arrived.

Ms. Jeffrey testified that because the parts counter is elevated, she got a good look at the individual who threatened Rohan while the latter was behind the parts counter and who then followed Rohan from the parts counter to the service area. She described the individual as tall, dark, Indian in race, and wearing a jacket and a dark cap. He was not wearing sunglasses. Ms. Jeffrey identified respondent at trial as that individual (Tr. 17, 24).

Ms. Jeffrey testified that none of the men spoke to her inside the store. All she heard of the exchange between them and Rohan were their various threats to beat each other up and to fight, with respondent being the aggressor. Ms. Jeffrey never saw anyone with a gun and never saw respondent display a weapon. She never heard respondent or anyone else derisively refer to "Roh-ass" or use racial slurs, the word "niggers" or say anything like "I can get better service in a white neighborhood"(Tr. 21).

Victor Lewis, an employee of Auto Zone, testified that he was employed by the Strauss store on Empire Boulevard on March 25, 1999, and he was in charge of the parts counter on that date. At about 2 p.m., there was an argument between some customers and Rohan Frederick (Tr. 27). Mr. Lewis testified that three customers came into the store and walked toward the parts counter in the back. Rohan was behind the counter and Mr. Lewis was in one of the aisles, one aisle over from him, where the tires are located. Two of the individuals approached Rohan and asked him about wiper blades. Rohan tried to explain that he was assisting another customer and that when he was finished he would be able to assist them with whatever they needed. At that, there was an exchange of words between one of the two men and Rohan (Tr. 27).

The third man, who had remained over by the wiper blade section about four to six feet away, moved over to the counter to join the other two and started using profanity toward Rohan. Mr. Lewis then approached the counter and noticed that the other two individuals smelled of alcohol. The third individual, who Mr. Lewis identified as respondent, was wearing sunglasses but no hat, and he made comments like "if he was in a fucking white neighborhood, he would have had better service" (Tr. 28). According to Mr. Lewis, the men, who all appeared to be of Indian descent, had walked in with an attitude and made various

derogatory comments about the fact that the store was an all-black employee store. While Mr. Lewis heard respondent refer to "blacks" and the fact that it was an all black store, he never heard respondent use the word or refer to "niggers" (Tr. 43). Respondent then walked away from the counter toward the wiper blade section again and mumbled a couple of other things that Mr. Lewis could not pick up. Shortly afterwards, respondent and Rohan got into it again and there was another angry exchange of words. Mr. Lewis did not hear what was said but he heard Rohan say at that point that he was going to walk away because he did not want to get involved. According to Mr. Lewis, he and Rohan were the only employees in the immediate vicinity at the time. Rohan then left the parts area and headed to the service area, about fourteen feet away. One of the two intoxicated men followed him. Mr. Lewis recalled that the man was slender, about 5'9 or 5'10", had small features, and was wearing a red hat. Ms. Jeffrey was in the area where Rohan was headed and tried to calm him down about the incident. Mr. Lewis did not hear if that man and Rohan had any exchange. Rather, his attention was focused on respondent, who had walked away from the counter and headed toward the front door. Respondent said something to Rohan about coming back and seeing Rohan after work (Tr. 30). Mr. Lewis followed behind respondent trying to figure out what was going to happen next.

As respondent walked toward the door, he made three attempts at "fixing" his shirt or jacket at his hip area. The third time he did so, Mr. Lewis saw the handle of a gun and felt threatened. Respondent then turned around, looked directly at Mr. Lewis and said something to the effect of "I'm fuckin' tired of you and I just feel like hurtin' someone," or that he was "fuckin' tired and that he wanted to hurt somebody." When he said it, he had his hand near the gun and was only two to four feet from Mr. Lewis (Tr. 30-31, 34, 40). No one else was near them at the time. Nor did anyone know that respondent was a police officer, until police arrived from the 71<sup>st</sup> precinct a few minutes later. Mr. Lewis acknowledged on cross-examination that respondent never affirmatively pulled his jacket back and showed the gun to Mr. Lewis (Tr. 36).

In any event, respondent and the other men then left the store. Mr. Bailey approached Mr. Lewis, who informed Mr. Bailey that respondent had a gun. Mr. Lewis then observed respondent and one of the men, after leaving the store, cross the street and walk toward a parked car, while the other individual, the man with the red hat, used the pay phone outside the store. Mr. Lewis did not see any of the men go into the trunk of the car.

Mr. Lewis was interviewed at the Civilian Complaint Review

Board (CCRB) on April 1, 1999, a week after the incident. The investigator came to the Strauss store and took a statement. Mr. Lewis admitted that he never told the investigator that respondent had threatened to shoot him. He simply stated that he felt threatened when he saw the gun. At trial however, he maintained that the man with the sunglasses, respondent, stated, while looking at Mr. Lewis, that he was going to “shoot someone” (Tr. 37).

Mr. Lewis also recalled that the man with the red hat at one point stated that he wanted the police called because Rohan had threatened to go and get a gun and come back and shoot him (Tr. 38, 40). Mr. Lewis did not hear Rohan make that threat. At that point, the supervisor, Ms. Jeffrey, called the police. Respondent was in the wiper blades section during that part of the exchange saying things that Mr. Lewis did not catch.

Mr. Lewis stated that he left Strauss’s employ about two weeks after the incident.

Randall Bailey, the store manager at the Strauss Discount Auto Store on Empire Boulevard, testified that at about 2 p.m. on the date of the incident, he was at the parts counter assisting another customer, while Rohan and Mr. Lewis and one other employee were also at the parts counter. The parts counter is a long counter in the back of the store where people come for parts and any kind of service they are requesting. There are different computer stations along the counter where several people can work.

Three men came in at one point and were speaking with Rohan. Two of them appeared to be intoxicated. The third, who Mr. Bailey identified as respondent and who turned out to be a police officer, did not appear to be intoxicated. While Mr. Bailey was dealing with another customer, an argument broke out between Rohan and the men. One of the two intoxicated men stated something to the effect that they could not get proper service in a “nigger community.” All three men were arguing with Rohan and calling him “Roh-Ass” (Tr. 50-51). Although he was involved in the arguing and name calling, respondent, according to Mr. Bailey, was the calmest of the three men.

At one point, Rohan turned to Mr. Bailey, as the manager, and stated that he thought Mr. Bailey should take over those customers, so Mr. Bailey intervened. He took the men to the area where the wiper blades were located, which is what they wanted. Rohan told Mr. Bailey that he was going to go for his lunch break. Rohan did not say anything to the three men at that point.

While Mr. Bailey assisted the customers with the wiper blades,

Rohan walked to the front of the store, to the mechanics' area, and entered that area. There is a room there for the employees to relax and watch TV. Then one of the men, not the officer, told Mr. Bailey that Rohan was going for his gun. Mr. Bailey disputed that and stated that he was standing right there and did not hear Rohan say anything of the kind. Mr. Bailey knew Rohan for a year or two and did not know him to own a gun or to be violent. Mr. Bailey testified that Rohan was the last person to get into an argument with a customer, especially while Mr. Bailey, the store manager, was standing right there. After the one individual claimed that Rohan went to get his gun, the men decided that they did not want the wiper blades any longer. The men then went in the same direction as Rohan, which was the way out of the store. Mr. Bailey followed them to the front and was behind respondent (Tr. 55).

As respondent approached the front entrance, he lifted up his shirt in view of everyone, revealing a gun on his left side, and said something to the effect of they could "settle it outside" (Tr. 52-53, 58). Mr. Bailey did not know that respondent was a police officer at the time. Respondent held his shirt up for about five seconds. He did not turn around to face Mr. Bailey, who was still behind him, and did not threaten Mr. Bailey. According to Mr. Bailey, respondent pulled up his shirt on both sides, not just the side with the weapon. Rohan was not in sight at the time (Tr. 63). The three men then left the store.

Mr. Bailey stated that he had been held up in the store at gun point before, and once he saw the gun, he got scared. He told his assistant, Lianne Jeffrey, to call 911 because the man had a gun and was saying things that sounded threatening. Before the police came, Mr. Bailey went outside to take down the license plate number of their car. Respondent, who was in the car at that point, got out of the car along with the other two men, and he and one of the others went to public phones outside the store and made phone calls (Tr. 53, 75). Respondent asked one of the other two men with him to call 911. Mr. Bailey acknowledged telling the CCRB investigator that he felt respondent was trying to set something up. He did not see any of the men go into or retrieve anything from the trunk.

A few minutes later, two or three police cars appeared. Respondent and one of the other men were still on the phone when the police arrived. An officer with gray hair asked Mr. Bailey which man had the gun, and Mr. Bailey pointed out respondent. The officer approached respondent and spoke to him, and respondent showed him what was apparently identification. The officer with gray hair then returned to Mr. Bailey and informed the latter that respondent was a police officer and was

allowed to carry a gun. He then apologized to Mr. Bailey for respondent's conduct. Mr. Bailey asked if they needed a statement, and the officer with gray hair said no, that maybe respondent had just been pulling up his shirt (Tr. 54, 65-66, 75).

Mr. Bailey testified that respondent's shirt was not tucked in when he entered the store. Mr. Bailey thought respondent was wearing a sweatshirt but could no longer recall for sure (Tr. 55).

According to Mr. Bailey, all three men were using the term "Roh-Ass" during the exchange with Mr. Frederick (Tr. 56). The two intoxicated men were acting crazy, but respondent said it in a more jovial tone. Respondent also stated at one point that "you can't get good service in a black neighborhood, you get better service in a white neighborhood." The other two responded by saying that "you can't get good service with nigger service" (Tr. 57). Mr. Bailey was certain that respondent used the term "Roh-ass" and just as certain that he never used the term "niggers," at least in Mr. Bailey's presence (Tr. 59).

After the incident, Mr. Bailey reported it to his director of loss prevention and then to the CCRB. He reported that his chief complaint was that the officer pulled up his shirt showing his gun and never identified himself as a police officer (Tr. 70). He did not report the use of racial epithets or slurs to the CCRB investigator. Mr. Bailey was also upset at the police response because they arrived at the scene but did not take a report or take action.

Mr. Bailey could not recall what any of the men were wearing. At least one of them was wearing sunglasses, but he could not recall which one. He determined that the two men with respondent had been drinking because they smelled of alcohol, were loud, boisterous and aggressive, in contrast to respondent.

According to Mr. Bailey, Rohan left the store's employ after the incident and took a job with Auto Zone.

As for respondent, Police Officer Alexander **←Mahadio→**, he confirmed that on March 25, 1999, at about 2 p.m., he went to the Strauss store at 183 Empire Boulevard with his brothers Keith and David **←Mahadio→**, to buy windshield wiper fluid and blades, and engine and transmission oil for his car (Tr. 83). He drove his own car to the store.

When they arrived, all three of them entered the store and went to the parts counter in the back. There was a guy working back there. One of his brothers approached the man and asked if he could get the parts, the blades they needed, and if they had them in the store. The guy answered that he would look around and



see if he could get them for him. There was another guy standing at a computer behind the elevated parts counter about 15 to 20 feet away. As soon as they entered the store, he looked them over and started saying things like "look at those assholes" (Tr. 84). Respondent looked at the employee and the employee looked back at him and made comments, but respondent ignored him. Keith turned to respondent and asked if he had heard what the employee was saying. Respondent told Keith to ignore him, and to let it go and not respond. Keith, however, after a minute or so, turned to the guy and said, "an asshole like you." At that, the employee who was helping them, Rohan Frederick, got offended because he thought Keith was referring to him. Respondent tried to explain to Mr. Frederick that Keith was not talking to him, but Mr. Frederick flew into a rage nonetheless and did not want to hear respondent's explanation. He walked away and said he was going to his house to get his gun and come back and shoot them (Tr. 85). He went to the back, put on his jacket, then came out and walked straight to the front door and went outside. No one followed him out.

Respondent at that point approached Mr. Bailey and asked for the manager, and Mr. Bailey replied that he was the manager. Respondent questioned why Mr. Bailey had done nothing to stop his employee even though he was there and had heard the employee threaten them and state that he was going to go get his gun and come back and shoot them. Mr. Bailey denied hearing Mr. Frederick say any such thing. Respondent insisted that Mr. Bailey heard him because the statement was loudly made and Mr. Bailey was standing only eight to ten feet away and behind the parts counter. Mr. Bailey said no, Mr. Frederick was just blowing off steam. Respondent complained that he and his brothers were customers and that the store employees should not be treating them in that fashion. Respondent then politely asked Mr. Bailey to call 911 for the police. Mr. Bailey refused. Respondent asked to use the phone and Mr. Bailey again refused (Tr. 86). Respondent's brother David then complained about their treatment and pointed out that he worked in the food industry and that the customer is always supposed to come first and is supposed to be treated with respect.

At that point, respondent told his brothers that he had decided not to spend his money in the store and that they should leave. The three men then walked out of the store. Respondent told his brothers to go wait in the car and he went to the pay phone outside and called 911. He reported what had happened. He did not see Mr. Bailey come out to write down the car's license plate number.

As he was on the phone, police cars pulled up. Respondent

approached a sergeant, showed his ID and explained that he was off duty and what had happened (Tr. 87). The manager came out and approached the sergeant and told his side of the story. The sergeant asked the manager if at any time he had seen respondent pull his weapon out, and the manager told the sergeant no. The manager complained about the men's attitude and respondent complained about his treatment in the store. The sergeant told them that it was over, to let it go, and everyone left and went their own direction (Tr. 88).

Respondent denied that he ever addressed Mr. Frederick as "Roh-ass," denied using the word "niggers," and denied saying that he could get better service in a white neighborhood. Respondent acknowledged that he had his gun with him that day, but insisted that he did not tell or imply to anyone that he had a weapon and never intentionally displayed it (Tr. 88). The gun was on his waist, on the left side in the back.

Respondent stated that he was wearing a waist-length open front sweater that day, which hung loosely over his jeans, as well as sunglasses. He stated that neither of his brothers had been drinking that day. Respondent explained that he had worked a midnight shift the night before and had just arisen. He needed to have his car serviced during his off day, and, since his brothers were also not working at the time, they decided to accompany him. The three men went straight from their house to the Strauss store (Tr. 92).

### ANALYSIS

As a result of this incident, respondent was charged with the improper display of his weapon while making threatening remarks (charge 1), using racially offensive language (charge 2), and treating a civilian, Mr. Frederick, discourteously by profanely mocking his name, *i.e.*, calling him "Roh-ass" (charge 3).

With respect to the first charge, that he improperly displayed his weapon during an off duty incident, the evidence was somewhat conflicting. There was no dispute that respondent was wearing his gun in a holster strapped to his waist. It was also clear that the gun was observed by one or more of the Strauss employees - - both Mr. Bailey and Mr. Lewis claimed to have seen it. Indeed, the observation(s) of the gun prompted the 911 call. The only question was whether respondent intentionally displayed the weapon in some fashion, in an effort to intimidate others during the dispute in the store, a dispute which it appears that respondent and/or his brothers initiated, or whether the gun

simply happened to have been observed by the store employees.

Mr. Lewis and Mr. Bailey gave different but not irreconcilable versions of the alleged display of the weapon. Mr. Lewis claimed that he followed respondent to the door, after the respondent and his brothers got into a verbal dispute with Mr. Frederick, and observed respondent three times “fix” his jacket around his hip area, in the process exposing a gun in his waistband. Respondent then turned around, looked directly at Mr. Lewis, and said something about wanting to hurt or shoot someone, before exiting the store. Mr. Lewis claimed that no other employees were in the immediate vicinity at the time, and that Mr. Bailey came over to him only after respondent left the store. Mr. Lewis recalled that he was the one who advised Mr. Bailey that respondent had a gun.

In contrast, Mr. Bailey claimed that he, not Mr. Lewis, followed respondent toward the front door of the store, and that he was directly behind respondent when the latter, without turning around, pulled up his sweater for a few seconds and displayed his gun. Mr. Bailey made no mention of Mr. Lewis being nearby, nor of hearing respondent utter any threat to shoot anyone. Instead, he recalled respondent saying something about “settling the matter” outside. Both men agreed that respondent did not put his hand on his weapon or remove it from his holster at any time.

Respondent of course, denied that he displayed his weapon or that he made any comments about shooting anyone. Respondent had obvious motives to falsify his testimony, however. Indeed, his version of how this incident was precipitated - - that an unidentified employee started cursing at him and his brothers for no apparent reason as soon as they walked in the store and that Rohan mistakenly assumed a retort made by one of respondent’s brothers to the employee was directed at him, leading Rohan to immediately stalk off in a rage supposedly to go get a gun - - was not at all credible. There was no reason for, nor was it likely that, any of the store employees would verbally insult customers who had done nothing but enter the store, and with at least two supervisors in the immediate vicinity. The more likely scenario, rather, was the one credibly described by all three of petitioner’s witnesses - - that respondent’s brothers were apparently intoxicated and that all three men were rude and impatient when Rohan did not immediately wait on them. Respondent’s unconvincing attempt to sanitize his and his brothers’ role in precipitating this incident strongly suggested that he was not being truthful about other aspects of the incident as well.

While Mr. Bailey’s and Mr. Lewis’s versions of events were somewhat contradictory, they were in sync with respect to the

critical facts at issue: that respondent, as he was exiting the store in the aftermath of a verbal dispute with Mr. Frederick, lifted up his sweater in a manner which exposed his weapon in his waistband and followed that conduct with a threatening remark. Neither Mr. Bailey nor Mr. Lewis had a motive to make false allegations against respondent, since neither was directly involved in the dispute with him or his brothers. Neither of them appeared to exaggerate respondent's display of his weapon. *i.e.*, neither one claimed that respondent put his hand on his gun, drew it or pointed it at anyone. The fact that neither one remembered the other being present when they saw the gun at respondent's waist may simply have been a function of the excitement of the moment.

I did not credit Mr. Lewis's trial recollection that respondent turned and looked directly at him and said something to the effect of wanting to hurt or shoot somebody. Mr. Lewis failed to report that alleged threat to the CCRB investigator who interviewed him only a week after the incident. Mr. Lewis's trial recollection in this regard appeared to be a subsequent distortion or embellishment.

Rather, I found Mr. Bailey to be the more reliable and credible witness as to the details of this incident, and he articulated his recollection of events in a much clearer fashion than Mr. Lewis. I credited Mr. Bailey's recollection that respondent lifted up his sweater by pulling it up with both hands on each side of his hip as he was about to leave the store, thereby exposing his weapon. I further credited his recollection that respondent made a more veiled threatening comment, to the effect of wanting to settle the matter outside.

It was clear from the context that respondent's conduct in exposing his weapon was intentional and not accidental. Respondent chose to "fix" or lift his shirt at a moment just after he and his brothers had argued with a store employee, which argument had included threats to beat one another up and to wait outside for one another to resolve their dispute. Respondent's actions also came just as he was about to exit the store and at a point when he surely realized, after the disruption that had occurred, that all eyes, except Mr. Frederick's who had left the area, were upon him. Respondent clearly intended to display his weapon for the purpose of intimidating the remaining store employees and/or to discourage them from taking any action against him. In the circumstances, respondent's flash of his weapon, when considered along with the threatening remark that he made, was meant to be an aggressive, not a defensive, act. Nor could it properly be considered defensive where, as I find, he and his brothers initiated the dispute in the store.

Moreover, respondent's actions cannot be justified by his police officer status, since he never identified himself as a police officer and was clearly not engaged in taking any official police action at the time he displayed his weapon. Instead, he was embroiled in a private dispute.

It is well settled that civil service employees may be sanctioned for their off duty actions, as long as petitioner makes some showing of a nexus between the employee's conduct and his official position. *See Villanueva v. Simpson* , 69 N.Y.2d 1034, 517 N.Y.S.2d 916 (1987); *Zazycki v. City of Albany* , 94 A.D.2d 925, 463 N.Y.S.2d 614 (3d Dep't), *lv. denied*, 60 N.Y.2d 558, 469 N.Y.S.2d 1026 (1983); *Pollett v. McGourty* , 111 A.D.2d 1023, 490 N.Y.S.2d 337 (3d Dep't 1985); *Department of Correction v. Griffith* , OATH Index No. 925/96 (Dec. 23, 1996), *modified on penalty* , Comm'r Decision (Feb. 18, 1997); *Department of Transportation v. Woods* , OATH Index No. 266/89 (Sept. 22, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 92-33 (Apr. 6, 1992); *Department of Correction v. Johnson* , OATH Index No. 397/81 (July 9, 1982).

Here, the nexus is obvious. Although he never identified himself as a police officer, respondent was in possession of a weapon only because of his status as a police officer. Petitioner allows its members to carry weapons off duty because it expects them to be ready to use those weapons should circumstances present themselves which make it necessary. In the circumstances, petitioner has a compelling interest and even obligation, to regulate the propriety of such off duty use, for the protection of its members as well as the general public.

Respondent's display of his weapon in the circumstances established here was clearly inappropriate and unrelated to his official functions. It was a misuse of his weapon for private purposes which should be sanctioned. Charge 1 is sustained. *See Police Department v. Gonzalez* , OATH Index No. 541/99 (Jan. 20, 1999) (police officer who displayed the handle of a revolver tucked into his waistband while commenting "I've got something for you," following an off duty traffic dispute, properly sanctioned for misconduct).

Charge 2 alleges that respondent made racially and ethnically offensive remarks toward one or more of the store employees during the incident, specifically that he used the word "niggers" and that he made a comment to the effect of "I could get better service in a white neighborhood."

Petitioner's witnesses gave varying testimony with respect to this

charge, in large part based on their individual recollections and where they happened to be during the course of the dispute. Thus, Ms. Jeffrey did not hear respondent or his brothers use any racial epithets or make any racially derogatory remarks. Mr. Lewis, on the other hand, while he did not hear respondent or his brothers use the word “niggers” or other direct racial slurs, did hear respondent make a comment at one point to the effect of “if he was in a fucking white neighborhood, he would have had better service” (Tr. 28). Mr. Bailey recalled that respondent’s brothers, who appeared intoxicated and got very agitated, made comments about not getting proper service in a “nigger” community, but that respondent, who was mostly calm, only said something to the effect of “you can’t get good service in a black neighborhood, you get better service in a white neighborhood” (Tr. 57).

For his part, respondent denied using any racial epithets, slurs or racially demeaning language. He did, however, acknowledge that he complained aloud about his and his brothers’ treatment in the store to Mr. Bailey, the manager, and the fact that they had received poor service, although, according to respondent, without any reference to race.

Since none of petitioner’s witnesses heard or claimed that respondent used the word “niggers,” that portion of the charge alleging as much should be dismissed.

On the other hand, two of the witnesses, Mr. Lewis and Mr. Bailey, clearly recalled respondent complaining during the dispute that he and his brothers “could get better service in a white neighborhood.” The employees at this particular Strauss store were all African-American. Mr. Lewis and Mr. Bailey clearly did not embellish their recollections in this regard, as both candidly acknowledged that they did not hear respondent use the word “niggers” or make other more offensive comments. In addition, Mr. Bailey was quick to acknowledge that respondent alone of the three men, did not appear intoxicated and was the calmest. Nevertheless, Mr. Bailey was certain that respondent made the comment about getting better service in a white neighborhood, a comment insulting enough to stand out in his and Mr. Lewis’s recollections, as opposed to more general profanity. In the circumstances, I credited Mr. Lewis’s and Mr. Bailey’s testimony in this regard, and I find that respondent made the comment and that it was an improper and derogatory reference to the store employees’ race.

Furthermore, the nexus between respondent’s use of derogatory race-based comments while off duty and his position as a police officer, is abundantly clear. Such comments raise significant

concerns about an officer's ability and willingness to impartially apply the law and further impacts negatively on the community's perception of the Department when the employee's occupation is subsequently revealed. *See Fire Department v. Steiner*, OATH Index Nos. 559-60/99 (Oct. 16, 1998) (firefighters disciplined for off duty participation in racist float in public parade); *Police Department v. DiRusso*, OATH Index No. 769/91 (Apr. 26, 1991) (police officer disciplined for off duty use of racial slurs toward traffic agents); *Police Department v. Burns*, OATH Index No. 117/91 (Jan. 2, 1991) (police officer disciplined for off-duty use of ethnic slur ("spic")); *Police Department v. Gantt*, OATH Index No. 284/89 (June 13, 1989), *rev'd*, Comm'r Dec. (June 25, 1989), *aff'd*, 170 A.D.2d 194, 565 N.Y.S.2d 493 (1st Dep't) *app. denied*, 77 N.Y.2d 808, 570 N.Y.S.2d 489 (1991) (police officer sanctioned for referring to co-worker as an "Uncle Tom" in private locker room conversation). Moreover, the courts have long recognized the Police Department's special accountability to the public for the integrity and efficiency of its operations. *See Trotta v. Ward*, 77 N.Y.2d 827, 566 N.Y.S.2d 199 (1991); *Berenhaus v. Ward*, 70 N.Y.2d 436, 445, 522 N.Y.S.2d 478, 483 (1987); *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 235, 356 N.Y.S.2d 833, 842-43 (1974); *Morrow v. Safir*, 242 A.D.2d 217, 660 N.Y.S.2d 582 (1<sup>st</sup> Dep't 1997).

In sum, respondent's off duty racially demeaning comments are properly sanctionable, and charge 2 is sustained.

Finally, charge 3 alleges that respondent spoke discourteously to Mr. Frederick by mockingly referring to him as "Roh-ass." The proof in support of this charge was mixed. Mr. Bailey testified that he was certain that all three men, respondent included, used the term "Roh-ass." Although Ms. Jeffrey heard profanity exchanged by the men and Rohan, she did not recall specifics as to who said what to whom. She also made it clear that Rohan was an equal participant. Mr. Lewis did not hear any of the men make the "Roh-ass" remark, and respondent denied making it.

Even assuming that respondent made the mocking comment to Mr. Frederick, no sanctionable misconduct was established because a nexus between the derisive comment and respondent's duties as a police officer was not properly established. Respondent did not implicate his official position or police officer status during the dispute in the store, and indeed, none of the employees knew at the time that he was a police officer. Respondent only identified himself later when police were called to the scene. Unlike the improper display of a weapon or the use of racial slurs or racially demeaning remarks, which are properly sanctionable actions regardless of whether they occur on or off duty, the making of a discourteous comment, even a somewhat

profane one, during a private off duty dispute where respondent's status as a police officer was not asserted nor injected into the dispute, was not sanctionable in these circumstances. Charge 3 should be dismissed.

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### **FINDINGS AND CONCLUSIONS**

1. On March 25, 1999, respondent, Police Officer Alexander **←Mahadio→**, improperly displayed his weapon while making a threatening remark to a civilian during an off duty dispute in an auto parts store.
2. On that same date, respondent make racially demeaning remarks to individuals in the store, which were sanctionable despite his off duty status at the time.
3. Petitioner failed to prove that during the course of that same incident respondent made sanctionable discourteous remarks.

### **THEREFORE:**

I find that petitioner proved charges 1 and 2 of the charges against respondent denoted as Serial No. 75359/99, but failed to prove charge 3.

### **RECOMMENDATION**

Upon making the foregoing findings, I reviewed an abstract of respondent's personnel file. Respondent was appointed to his position as a police officer on June 30, 1995. He has no prior record of discipline. Additional relevant information contained in his personnel records is memorialized in a confidential memorandum attached to this report. *See* Civil Rights Law § 50-a (McKinney CD-ROM 2000).

In this proceeding, respondent has been found to have improperly displayed his weapon and to have made threatening and racially demeaning remarks during the course of an off duty dispute which he and his brothers initiated with employees in an auto parts store. Although respondent did not draw or point his weapon, his very public display of it in order to intimidate individuals with whom he was embroiled in a private dispute, was a serious abuse of his duties and obligations as a police officer. Respondent has been entrusted with the privilege and responsibility of carrying a weapon off duty for public safety and job-related purposes, not to give him added leverage in private



disputes. Respondent compounded his poor judgment in displaying his weapon by making threatening and racially insulting remarks as well. The use of racially offensive language by officers, on or off duty, serves to undermine the effectiveness and professionalism of the police force and reveals bigotry on the part of those who use such terms.

Petitioner has requested that a penalty of a forfeiture of twenty vacation days be imposed upon respondent for his misconduct in this instance. In the past, the Department has disciplined officers for the improper off duty display of their weapons with penalties ranging from a loss of ten to fifteen vacation days, and with more substantial penalties where the officers actually drew and pointed their weapons. *See Police Department v. Gonzalez*, OATH Index No. 541/99 (Jan. 20, 1999) (loss of fifteen vacation days for police officer who displayed the handle of a revolver tucked into his waistband and commented "I've got something for you," following off duty traffic dispute); *Police Department v. O'Suna*, OATH Index No. 225/90 (Jan. 22, 1990) (loss of fifteen vacation days for police officer who displayed handgun to 15-year old during off duty incident and was found in possession of an unauthorized weapon); *Police Department v. Williams*, OATH Index No. 1234/90 (Nov. 27, 1990) (ten-day suspension for off duty police officer who wrongfully displayed a gun at his mother's landlord after the landlord refused to return her security deposit); *cf. Police Department v. Corr*, OATH Index No. 668/93 (Apr. 1, 1993), *modified on penalty*, Com'r Decision (Apr. 28, 1993) (thirty-day suspension and six months probation for police officer who wrongfully pointed his weapon at a civilian during an off duty traffic dispute, threatened the civilian and uttered a racial slur ("black moron")); *Police Department v. Jacobellis*, OATH Index No. 330/92 (Jan. 21, 1992) (twenty-day suspension for officer who pointed his gun at traffic enforcement agent during off duty dispute); *Police Department v. Rodriguez*, OATH Index No. 609/88 (Mar. 21, 1989), *aff'd*, 169 A.D.2d 484, 564 N.Y.S.2d 356 (1st Dep't 1991) (suspended judgment of termination for officer who pointed a revolver against a civilian's neck and threatened civilian during off duty traffic dispute); *Police Department v. Aziza*, OATH Index No. 527/89 (Nov. 20, 1989) (thirty-day suspension for off duty officer who improperly pointed his gun at a neighbor during a dispute).

The Department has also sternly sanctioned officers for using racially offensive language, with penalties generally ranging from a loss of fifteen to twenty vacation days. *See Police Department v. Sava*, OATH Index No. 2350/00 (Feb. 13, 2001) (fifteen-day suspension for police officer who referred to four teenagers as "niggers"); *Police Department v. Milne*, OATH Index No. 222/00 (Mar. 14, 2000) (loss of fifteen vacation days for officer

who used profanity and a racial epithet (“black wretch”) toward two civilians detained for a traffic summons); *Police Department v. Manceri*, OATH Index No. 578/99 (Jan. 11, 1999), *modified on penalty*, Com’r Decision (Apr. 9, 1999) (loss of twenty days for police officer who made racially threatening comment “In other states we hang mother fuckers like you”); *Police Department v. Horgan*, OATH Index No. 1647/98 (July 20, 1998), *modified on penalty*, Com’r Decision (Oct. 2, 1998), *aff’d*, 273 A.D.2d 135, 710 N.Y.S.2d 892 (1st Dep’t), *lv. denied*, 95 N.Y.2d 765, 716 N.Y.S.2d 39 (2000) (loss of twenty vacation days for police officer who referred to motorist as “nigger” while issuing a summons); *Police Department v. Powers*, OATH Index Nos. 2112 & 2114/96 (Oct. 22, 1996), *modified on penalty*, Com’r Decision (Dec. 6, 1996) (loss of fifteen vacation days for officer who referred to civilian as a “spic,”); *Police Department v. Maiurro*, OATH Index No. 326/92 (Jan. 10, 1992) (loss of fifteen vacation days for officer who told civilian to “shut his black ass up”); *Police Department v. Zabawski*, OATH Index No. 190/92 (Dec. 19, 1991) (loss of fifteen vacation days for officer who called civilian a “black piece of shit”); *Police Department v. Kilroy*, OATH Index No. 1096/91 (July 10, 1991), *aff’d sub. nom. Kilroy v. Brown*, 190 A.D.2d 530, 593 N.Y.S.2d 32 (1st Dep’t 1993) (loss of fifteen vacation days for officer who uttered a racial slur, “dirty nigger,” in presence of an administrative aide at the CCRB); *Police Department v. Berger*, OATH Index No. 402/88 (Mar. 30, 1989), *modified on penalty*, Com’r Decision (May 10, 1989), *aff’d sub. nom. Berger v. Ward*, 170 A.D.2d 294, 565 N.Y.S.2d 1020 (1st Dep’t) *app. denied*, 77 N.Y.2d 809, 571 N.Y.S.2d 912 (1991) (loss of fifteen days for officer who commented “You niggers seem not to know what a red light is” during traffic stop). While the above cases all involved an officer’s use of racially offensive language while in the performance of his official duties, respondent’s off duty use of such language in this instance, during a very public dispute in a store with all African-American employees, was no less inappropriate or offensive. *But see, Police Department v. Burns*, OATH Index No. 117/91 (Jan. 2, 1991) (loss of five vacation days for police officer who threatened, pushed and called a civilian a “spic” during off duty street confrontation).

I have considered respondent’s lack of any prior disciplinary record, the store manager’s description of him as the least agitated and confrontational of the three men, and the fact that he never drew or pointed his weapon during the dispute, as somewhat mitigatory of the penalty to be imposed. Nevertheless, respondent’s misuse of his weapon, accompanied as it was by his utterance of a veiled threat and derogatory racial remark, warrants a significant penalty.

Considering all of the relevant factors, I recommend that respondent forfeit twenty-five vacation days for his actions in this matter.

**P R E S E N T: RAYMOND E. KRAMER** , *Administrative Law Judge*

**T O: BERNARD B. KERIK** , *Commissioner* , Police Department

**A P P E A R A N C E S:**

**ANA I. FLORE** , *Attorney for Petitioner*

**MICHAEL L. GALENO** , *Attorney for Respondent*

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