

SUPREME COURT OF THE STATE OF NEW YORK,
NEW YORK COUNTY

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In the Matter of the Application of SAMY FELIZ,
MERY VERDEJA, ASHLEY VERDEJA, JULIE
AQUINO, and JUSTICE COMMITTEE INC.,

Index No.

Petitioners,

For Judgment and Order pursuant to Article 78
of the Civil Practice Law and Rules

RJI No.

-against-

JESSICA TISCH, in her official capacity as the
Commissioner of the New York City Police
Department, the NEW YORK CITY POLICE
DEPARTMENT, and LIEUTENANT
JONATHAN RIVERA,

Respondents.

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MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION

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INTRODUCTION

In the United States, government officials must follow the law. Regardless of whether it is the President of the United States, a member of a small-town school board, or the Police Commissioner of the City of New York, all are bound by the Constitution, statutes, and regulations that establish and govern each position.

The City of New York provides for a meticulous process to investigate, make findings on, and punish police officers accused of misconduct. Many incidents are investigated by the Civilian Complaint Review Board (“CCRB”). Substantiated cases go back to the New York Police Department (“NYPD”), and officers are entitled to a thorough administrative trial, overseen by a high ranking police department official sitting as an administrative judge.

There are rules governing the findings made at these types of hearings. One of those rules is that the credibility findings of the hearing officer—someone who oversaw live testimony and consequently the witness’s demeanor—are virtually unreviewable by a court later on a cold record.

So when Deputy Commissioner Rosemarie Maldonado ruled, after watching Lieutenant Jonathan Rivera testify live, that he had lied, that should have been the end of it. The administrative trial, and Rivera’s live testimony, was the result of the culmination of five years of investigations into the 2019 killing of Allan Feliz, first by the New York State Office of the Attorney General (“OAG”), then by the NYPD’s Force Investigative Division (“FID”), and then by the CCRB.

Rivera originally told OAG investigators that, after opening the passenger door, climbing over a passenger, and tasing and striking Mr. Feliz, he had shot Mr. Feliz when the car lurched into motion and he lost sight of his partner, whom he believed had fallen under the vehicle. But since then, his story has conveniently and self-servingly changed whenever the available

evidence has. For instance, he told investigators he heard Mr. Feliz ask for a gun, until recordings proved that was not true. And when Rivera was confronted with video evidence showing that his partner was in fact in Rivera's sight line by the door of the vehicle when Rivera shot, he changed his story again. He testified that the six-inch pillar between the front and rear door had completely obstructed his ability to see his partner, a grown man who was standing just a few feet away.

After hearing Rivera's testimony at the administrative hearing, Maldonado ultimately found Rivera obstinate, defensive, and not credible. She explained why in a detailed written decision finding Rivera guilty and recommending that he be fired. Despite these findings, Police Commissioner Jessica Tisch issued a memorandum stating that, based on her review of the record, she believed that the Deputy Commissioner was wrong, and instead deferred to investigators from the OAG's office. In making this determination, she ignored nearly all the evidence that had been gathered since the OAG report and rejected Deputy Commissioner Maldonado's findings.

This was illegal. While the New York City Charter grants the Police Commissioner "cognizance and control" over the discipline process, her discretion is limited. Failing to consider five years of new evidence, including the hearing officer's findings, is textbook arbitrary and capricious agency action. And overturning a hearing officer's credibility findings—which even courts may only do in rare circumstances—is an abuse of her discretion.

Commissioner Tisch's unlawful actions have caused great harm to the Feliz family and the Justice Committee. They come to this court seeking justice for Allan and the rule of law.

FACTUAL BACKGROUND

On October 17, 2019, Police Officer (“PO”) Edward Barrett, Sergeant Jonathan Rivera, and PO Michelle Almanzar pulled over the car Allan Feliz was driving on 211th Street in the Bronx, purportedly because he was not wearing a seatbelt. Within minutes, Rivera had opened the passenger door, climbed over the passenger, and twice tased Mr. Feliz. Mr. Feliz, disoriented from being tased, put the car into gear. Rivera first told Mr. Feliz he was going to shoot him, then punched him, and then, while holding his gun directly against Mr. Feliz’s chest, fired one bullet, killing him. *See* October 15, 2025 Verified Petition (the “Petition”) ¶¶ 50–59.

Allan’s killing caused enormous pain to the Feliz family and set off six years of investigations, interviews, hearings, and demonstrations in search of justice for their family member. Petitioners have, painstakingly, done everything the right way. When the New York State OAG’s Office stated that it would investigate the shooting under its recently-won authority to charge police who shoot unarmed New Yorkers, they waited patiently. And when OAG declined to prosecute Rivera, they understood. After all, as the OAG noted, to prevail, its investigation would have to prove Rivera’s guilt beyond a reasonable doubt. And under the OAG’s legal framework, the jury would only need to find that Rivera’s testimony—that he killed Mr. Feliz to save PO Barrett’s life—was “reasonable.” Indeed, the OAG found that Rivera’s story was “not obviously unreasonable,” based on the available evidence and declined to bring criminal charges. *See* Petition ¶ 60–65; Ex. 6.

Rivera testified to the OAG as follows: when Mr. Feliz refused to exit the car, Rivera first fired his taser through the window, then when that didn’t work, he opened the passenger door and climbed over a passenger. He tased Mr. Feliz again, “grappled for control of the gearshift,” and then struck Mr. Feliz in the head with the taser. The vehicle accelerated forward several feet, then backwards, then suddenly stopped, causing the drivers’ side door to shut. Rivera claimed

that, while straddling the passenger with his gun to Mr. Feliz's chest, he believed that PO Barrett, who had been standing by the door, had fallen to the ground. Rivera told the OAG that he believed he had to shoot Mr. Feliz to keep him from driving over PO Barrett. And while in fact it is understood that PO Barrett had actually stepped away from the moving car and had been in no danger, the OAG's relevant question was whether Rivera actually had believed Barrett was on the ground, and whether that belief was reasonable.

Based on the evidence it reviewed, the OAG found that there was "no obvious reason to doubt that Sergeant Rivera believed what he said he believed." Ex. 6, at 2, 9. Those reasons would come to reveal themselves later in the process.

Despite the OAG's finding, Petitioners—family members and the Justice Committee, a non-profit devoted to supporting families of those killed by police—continued to seek justice. Aware that Rivera would not face criminal charges, they sought to hold him accountable through a complaint to the CCRB, an independent agency that investigates allegations of police misconduct. *See* Petition ¶¶ 36–49. The CCRB obtained documents, video footage, and interview statements. It obtained new evidence beyond what OAG had found.

First, it obtained a new statement from Rivera, who testified to the CCRB that, during the struggle, Mr. Feliz had allegedly said "Coja el nueve," Spanish for "grab the nine," leading Rivera to believe that Mr. Feliz was asking someone to produce a weapon. This statement was not only inconsistent with his FID interview, but careful review of the audio recording of the incident revealed that the statement was altogether untrue. *See* Ex. 7 at 5–6. Second, the CCRB investigator aligned the multiple body-worn camera videos by time to conclude that while Rivera may indeed have lost sight of PO Barrett when the car stopped and the door closed, PO Barrett

had “reached the driver’s side window just as Rivera discharged his firearm,” and therefore would have been visible through the window just before Rivera shot. Ex. 07 at 6.

Finally, the investigators asked Rivera about a statement captured by his body-worn camera only four minutes after the shooting, where he told his partners “the engine was on, man. I was fighting. My hand was getting tired.” Ex. 8 at 19. The OAG Report did not mention this recording and it is not clear that the OAG investigators reviewed it. When asked about this comment during his initial CCRB investigation nearly three years ago, “Sgt. Rivera testified the remark was a reference to his hand getting tired from administering CPR to Mr. Feliz.” Ex. 07 at 2.

Considering the totality of the circumstances under the preponderance of the evidence standard, the CCRB substantiated the allegation that Rivera used excessive force: the evidence suggested that he shot Mr. Feliz because he was tired and frustrated from struggling, and that his post-hoc justifications (*i.e.* Mr. Feliz was calling for a gun, PO Barrett was under the car) were not credible. The case was forwarded to the NYPD for trial. *See* Petition ¶¶ 66–70.

At trial, Rivera (who, since killing Mr. Feliz, had been promoted to Lieutenant) wilted under cross-examination, contradicted himself on the stand, and behaved with such “unabashed obstinacy” that the Deputy Commissioner had no choice but to find that “critical portions of Respondent’s account were self-serving statements fabricated to minimize his culpability.” *See* Ex. 8 at 21. And how could she not? After all, Rivera testified that he shot Mr. Feliz to stop the car, which he claimed was in motion—but when asked whether it was dangerous to shoot the driver of a moving car, he stated that the car had stopped moving when he fired the shot. *See* Ex. 10 at 2 (“By his own testimony, the car was not in motion, thereby alleviating any imminent risk posed to Officer Barrett”). When confronted with video evidence showing that PO Barrett would

have been visible standing by the window before Rivera shot, Rivera swore that Barrett had been completely hidden behind the six-inch pillar between the front and back windows. Ex. 9 at 26.

Most damningly, when Rivera was asked about the audio recording of him stating, just minutes after the shooting, that “the engine was on, man. I was fighting. My hand was getting tired,” Rivera insisted under cross-examination upon the plain lie that he was talking about getting tired from performing CPR, not from struggling with Mr. Feliz. This testimony amounted, according to Maldonado, to a “non-sequitur,” and his explanation “an after the fact fabrication.” But then again, he had to “double down” on this testimony. It was the testimony he had given years before at his CCRB interview. If he changed his story now, they would be able to say he had been lying the whole time. *See* Petition ¶¶ 71–82.

Commissioner Jessica Tisch received Maldonado’s findings and issued a memo rejecting them in favor of the OAG report issued five years earlier. *See* Ex. 9. Commissioner Tisch quoted the OAG Report’s finding that there was “no obvious reason to doubt” Rivera when he had given his first account of the incident. She did not address Maldonado’s comments about Rivera’s antics on the stand other than to say in passing she had given Maldonado’s credibility determinations “due weight.” She did not provide any standard for the weight due to the credibility findings of a hearing officer who observed live testimony subject to cross examination. She did not refute or discuss the fact that Rivera had initially claimed in his CCRB interview that Mr. Feliz had asked for a gun, only to stop telling that part of the story once review of the audio proved it wasn’t true. *See* Petition ¶¶ 83–90.

She did discuss, at length, one significant piece of new evidence: the recording of Rivera telling his partner after the shooting that “The engine was on, man. I was fighting. My hand was getting tired.” As set forth above, Rivera had for years insisted in multiple formal interviews that

he said his hand was tired from performing CPR, which is obviously not true from the context of the video. His defiance under cross-examination—where he never even hinted at any concerns about properly recollecting the incident—was a key reason Maldonado found that he was not credible. Ex. 8 at 6–7.

Commissioner Tisch acknowledged that Rivera was plainly talking about his struggle with Allan Feliz when he said his hand was tired. She excused his obvious lie by saying it is “hardly shocking” that he would misremember such a detail after five years. But that is not correct. Rivera had told the same story years ago to the CCRB, and he has been telling the same story almost since the incident took place. Rivera knew he could not change his testimony without being subject to an even more brutal cross-examination. Commissioner Tisch’s analysis, in light of Rivera’s repeated testimony (and consequent opportunities for correction or amendment) over the years, is plainly wrong. *See* Petition at ¶¶ 83–90.

After Commissioner Tisch issued the Preliminary Order, the CCRB tried to explain to her the mistake she was making—pointing out still more instances of inconsistent testimony from Rivera at the trial Commissioner Tisch did not attend—but it was all for naught. *See* Ex. 10. Whether the reason was to appease political interests, serve her own personal ambition, or pursue some unknown end, Commissioner Tisch dug her heels in and re-issued her order purporting to overrule the Deputy Commissioner. *See* Ex. 11. The decision had already been made and no matter how much evidence she saw, Commissioner Tisch was not going to budge.

Commissioner Tisch’s decision has caused pain, aggravation, loss of appetite, loss of sleep, and financial loss for petitioners. Mr. Feliz’s mother, brother, and sister live in fear of the police. The mother of his child has lost sleep and dreads telling her son about Commissioner Tisch’s decision. Moreover, the Justice Committee, whose resources are always strained, has had to forgo

planned work, including fundraising efforts, to support Mr. Feliz’s family after the news of Commissioner Tisch’s decision spread.

ARGUMENT

I. PETITIONERS HAVE STANDING TO SUE

Standing for Article 78 petitions includes two parts: first, a petitioner must demonstrate first that they have suffered “direct harm ... that is in some way different from that of the public at large.” *Society of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 774 (1999).

Second, a petitioner must show that their injury-in-fact “falls within the ‘zone of interests,’ or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted.” *Id.* at 773. *See also Matter of Stevens v. New York State Div. of Criminal Justice Servs.*, 40 N.Y.3d 505 at 515 (2023).

A. The Individual Petitioners Have Standing to Seek Relief

The Individual Petitioners deserve to live with the peace and relief they felt when they first heard about Deputy Commissioner Maldonado’s decision and to end the suffering they have endured since Commissioner Tisch issued her opinions. As a result of Commissioner Tisch’s decision, each of the Individual Petitioners has suffered harm. Allan’s brother Samy Feliz was crushed by Commissioner Tisch’s decision and lives in fear of retaliation. While nothing will ease the pain of losing his brother, if Tisch’s decision were reversed he would feel relief. *See Ex.*

1. Mr. Rivera’s mother, Mery Verdeja, was left broken-hearted and fearful by Tisch’s decision: her devastation would be relieved, in part, by the annulment of Tisch’s decision. *See Ex.* 2. Mr. Feliz’s sister, Ashley Verdeja, has struggled with disorientation, depression, fatigue, and anxiety as a result of Commissioner Tisch’s decision. She lives in constant fear of police officers—who she cannot believe are held accountable—suffering from physical and emotional reactions when

in their presence. *See* Ex. 3. Julie Aquino, the mother of Allan’s child, has been unable to tell her son about Tisch’s decision; if the decision were reversed she could let her son know that justice had been found for his father. *See* Ex. 4.

Section 434 of the New York City Charter grants the Police Commissioner “cognizance and control of the government, administration, disposition, and discipline of the department and the police force of the department.” New York City Charter § 434(a). Under this provision, the police commissioner is “accountable to the public for the integrity of the Department.” *Lynch v. Giuliani*, 301 A.D.2d 351, 359 (1st Dep’t 2003) (quoting *Matter of Berenhaus v. Ward*, 70 N.Y.2d 436, 445 (1987)). Courts have consistently ruled that the purpose of police disciplinary proceedings is to ensure accountability to the public, and misconduct by officers is a matter of public concern. *Green v. Safir*, 664 N.Y.S.2d 232 (1997); *see also* *Citizen Review Bd. Of City of Syracuse v. Syracuse Police Dep’t*, 150 A.D.3d 121 (4th Dep’t 2017).

As the mother, brother, sister, and significant other of Mr. Feliz, Petitioners have a unique interest in seeing Rivera be held accountable for Mr. Feliz’ death. Commissioner Tisch’s abuse of the powers granted her under this provision directly caused Petitioners’ suffering. Their claims are within the zone of interest of that provision. Proper discipline is not only within the zone of interest of Section 434(a), it is the very purpose of the provision. The New York Administrative Code likewise codifies the Individual Petitioners’ interest. The Code establishes the Commissioner’s power when an officer engages in “conduct injurious to the public peace or welfare, or immoral conduct, or conduct unbecoming an officer or member, or other breach of discipline, to punish the offending party.” N.Y. Admin. Code. § 14-115.

Petitioners relied on the NYPD’s power to discipline officers when they took the time and effort to file a complaint. Disciplining officers for engaging in egregious misconduct such as

Rivera's in this matter is precisely the reason the Commissioner is granted the power to govern and administer discipline over NYPD members. It is integral to the "integrity of the Department" and directly related to Petitioners' injuries. *Lynch v. Giuliani*, 301 A.D.2d 351, 359 (1st Dep't 2003).

Moreover, Petitioners' injuries are "real and different from the injury most members of the public face." *Sierra Club v. Vill. of Painted Post*, 26 N.Y.3d 301, 311 (2015). Petitioners' mental anguish, emotional injuries, and utter distrust in police officers and those who hold them accountable would—and will—be in part relieved by seeing Rivera terminated from his role as a consequence for his wrongdoing in shooting and killing Mr. Feliz.

B. Justice Committee Has Standing to Seek Relief

An organization can have standing "to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Id.*, quoting *Warth v. Seldin*, 422 US 490, 511 (1975). "Under this option, an organization—just like an individual—must show that it has suffered an 'injury in fact' and that its concerns fall within the 'zone of interests' sought to be protected by the statutory provision under which the government agency has acted." *Id.* "It is well recognized that standing rules should not be heavy-handed and the courts have been reluctant to apply standing principles in an overly restrictive manner where the result would be to completely shield a particular action from judicial review." *Matter of Lawyers for Children v NY State Off. of Children & Family Servs.*, 218 A.D.3d 913, 914-915 (3d Dep't 2023 (cleaned up)).

"[F]ederal courts recognize the right of organizations to sue on their own behalf when the injury they allegedly suffered as a result of defendants' actions or inactions is a drain on their resources." *Mixon v. Grinker*, 157 A.D.2d 423, 426 (1st Dep't 1990). And the Second Circuit has recognized that "only a 'perceptible impairment' of an organization's activities is necessary for

there to be an “injury in fact.” *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011). So too have the New York State courts. In *Mixon*, the New York Supreme Court confirmed that a homeless advocacy nonprofit had standing to challenge a law that forced it to reallocate resources. *Mixon*, 157 A.D.2d at 426 (directing funds away from counseling and referral services constitutes a “concrete and demonstrable injury to the organization’s activities”); *see also Younger v. Turnage*, 677 F. Supp. 16 (D.D.C. 1988) (nonprofit organizations had expending resources on behalf of the homeless veterans was sufficient to establish standing to sue in their own right).

Here, Petitioner Justice Committee suffered clear injury-in-fact from Commissioner Tisch’s decision because it has diverted time, money, and attention to this matter that it could have spent on other activities. *See* Ex. 5.

II. COMMISSIONER TISCH’S ACTION WAS ARBITRARY AND CAPRICIOUS

A. The Police Commissioner’s Authority Over Discipline Is Limited

While some refer to the police commissioner as having “final” authority over discipline the Charter only provides the police commissioner “cognizance and control” over the “disposition and discipline of the department.” N.Y. City Charter § 434(a). That phrase first appeared in New York law in 1862 “in an act conferring certain powers upon the Croton aqueduct department.” *Ghee v. N. Union Gas Co.*, 158 N.Y. 510, 523 (1898) citing Laws 1862, c. 361. It was used in the 1897 Charter that consolidated multiple municipalities into what is now known as New York City.¹ For example, the 1897 Charter established that all of the following entities exercised “cognizance and control” over certain operations: a Board of Public Improvements, Sec. 412, the Department of Water Supply, Sec. 469, the Department of

¹ *See generally* Edwin G. Burrows and Mike Wallace, *Gotham: A History of New York City to 1898*, Oxford University Press, 1999, at 1219–36.

Highways, Sec. 524, the Commissioner of Sewers, Sec. 556, the Commissioner of the Department of Public Buildings, Sec. 573, and the Commissioner of Bridges, Sec. 595.

And since then, courts have regularly reviewed the officers exercising cognizance and control: these officers' decisions "may be compelled by mandamus, as, indeed, it has been in a number of cases." *Id.* at 525. *See, e.g., People ex rel. Consolidated Telegraph & Electrical Subway Co. v. Monroe*, 85 A.D. 542, 548 (1st Dep't 1903) (when reviewing a commissioner exercising cognizance and control, the "question is whether the conditions imposed by [the commissioner] **were reasonable**." (emphasis added). The Second Department recognized that the "cognizance and control" exercised by the Commissioner of the Department of Bridges was subject to the limitations the charter imposed "upon all heads of departments of the city of New York with respect to the letting of contracts" *Brooklyn-Manhattan Transit Corp. v. New York*, 221 A.D. 106, 112 (2d Dep't. 1927) *see also People ex rel. Tate v. Dalton*, 41 A.D. 458 (2d Dep't 1899) (comparing "cognizance and control" granted to water commissioners to more specific powers given to other commissioners). Like any other official, therefore, a police commissioner's actions are subject to Article 78 and may be struck down when they are "arbitrary and capricious."

B. The Police Commissioner's Decision Was Arbitrary and Capricious

An administrative decision is "arbitrary and capricious" under Article 78 if it is made "without sound basis in reason...and without regard to the facts." *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974). Agency procedures can be arbitrary and capricious when they allow an agency to act without "objective standards." *Lynch v. New York City Civilian Complaint Rev. Bd.*, 64 Misc. 3d 315 (N.Y. Sup. Ct. 2019). And "[a]n agency's failure to follow its own procedures or rules in rendering a decision is arbitrary and capricious." *D.F. v. Carrion*, 43 Misc. 3d 746, 756 (Sup. Ct. 2014). Courts have struck down agency determinations that relied upon "conclusory

statements” and “common sense” instead of “valid independent evidence.” *Goldsmith v. Bishop*, 264 A.D.2d 775, 776 (2d Dep’t 1999). And even if a municipal agency justifies its decision with a detailed report, if that report “misapprehended or disregarded the facts and was overly speculative,” the decision must be annulled. *Trump on Ocean, LLC v. Cortes-Vasquez*, 76 A.D.3d 1080, 1087 (2d Dep’t 2010)

A wide range of sources can be used to determine whether an agency’s decision is arbitrary and capricious. For example, an agency’s action may be arbitrary and capricious because it misinterprets a statute. *Town of Irondequoit v. Cnty. of Monroe*, 36 N.Y.3d 177, 182 (2020). But it may also be arbitrary because the agency ignored key evidence. *See Metro. Movers Ass’n, Inc. v. Liu*, 95 A.D.3d 596, 599 (1st Dep’t 2012) (Comptroller acted arbitrarily by “ignoring the data from his own survey and instead blindly adopting Local 814’s rates” to determine a prevailing wage); *see also Matter of Louis v NY City Employees’ Retirement Sys.*, 26 Misc 3d 1236[A], 1236A, 2010 NY Slip Op 50426[U], (Sup Ct, Kings County 2010). When an agency backtracks on its own prior decisions or statements, the new conclusion is arbitrary and capricious if the agency “failed to enunciate any basis for deviating from its prior conclusions.” *Rukenstein v. McGowan*, 273 A.D.2d 21, 22 (1st Dep’t 2000). A court reviews agency decision-making based on “the grounds presented by the agency at the time of its determination,” not a justification created after litigation began. *Weill v. New York City Dep’t of Educ.*, 61 A.D.3d 407, 408 (2009).

Commissioner Tisch selectively relied on a five year-old investigation without considering evidence developed in subsequent investigations. While the OAG Report stated in 2020 that the evidence available to it “strongly suggests” that Rivera’s belief was “not unreasonable,” that was not the end of the matter. Since the OAG Report, Rivera has falsely

testified to the CCRB that Allan had asked for a gun, video analysis has demonstrated that PO Barrett would have been visible through the window at the time of the shooting, and Rivera was cross-examined on the stand. Tisch not only ignored all of the evidence collected after the OAG investigation, but she also grossly mischaracterized Rivera's excited utterance that his "hand was getting tired" from struggling with Mr. Feliz. In short, she "considered only those tests and reports that supported [her position] and ignored those tests and reports that contradicted [her position]." *See Matter of Louis*, 26 Misc 3d 1236[A] at *6.²

And while Commissioner Tisch's disregard for the credibility determination of the factfinder renders her decision an abuse of discretion as discussed below, it also contributes to the arbitrary and capricious nature of the decision. The Preliminary Order and the Second Order give no more than a casual nod that the in-court credibility findings were given "due weight." This does not count as analysis, and Commissioner Tisch's "failure to address that mandatory factor" permeates the entire order, rendering it arbitrary and capricious. *People by James v. Schofield*, 199 A.D.3d 5, 14 (N.Y. App. Div. 2021).

Finally, Commissioner Tisch's treatment of Rivera's recorded statement just after the incident that "the engine was on" and "my hand was getting tired" is frankly shocking. Maldonado correctly noted that this statement qualified as an excited utterance and carries "significant indicia of reliability." *See* Ex. 8 at 19, *citing People v. Brown*, 70 N.Y.2d 513 (1987). The probative value is obvious because of the dog that didn't bark: when listing everything going through his head when he shot Mr. Feliz, ***Rivera did not say that he thought***

² Commissioner Tisch barely mentions that the OAG Report was seeking proof beyond a reasonable doubt while the proper standard here is the "much lower" standard of "preponderance of the evidence." Maldonado Decision n.13 (citing *Disciplinary Case No. 2018-19274* (Aug. 19, 2019), citing *Police Dep't. v. Baksh*, OATH Index No. 1471/97 (Oct. 2, 1997); *see also Dep't. of Correction v. Salinas*, OATH Index No. 1375/24 (May 17, 2024), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2024-0308 (Oct. 7, 2024); *Dep't. of Correction v. Blanc*, OATH Index No. 2571/11 at 5 (Feb. 2, 2012); *Dep't. of Correction v. Battle*, OATH Index No. 1052/02 at 7-9 (Nov. 12, 2002), citing *Aronsky v. Bd. of Education*, 75 N.Y.2d 997, 1000 (1990)).

PO Barrett was under the car. That is why Maldonado found the recording to be reliable and Rivera's plainly false statements about it to be a post-hoc rationalization. Rivera (1) first delivered this false testimony to the CCRB nearly three years ago, and (2) emphasized this false statement under cross examination without ever suggesting he was having trouble remembering. To conclude somehow that what actually happened is that Rivera experienced an unspoken memory lapse on the stand is to act "without regard to the facts" as they were found. *GH Ville Inc. v. New York City Env't Control Bd.*, 194 Misc. 2d 503, 505 (N.Y. Cty. Sup. Ct. 2002). And in any case, Commissioner Tisch agrees that regardless of Rivera's testimony, he was in fact talking about the engine running and his hand getting tired in the struggle, and ***not about the life-threatening danger to his partner that he had supposedly just observed.*** How this statement is somehow less damaging for Rivera if he merely forgot it rather than lied about it, Tisch does not say. *See Metro. Movers*, 95 A.D.3d at 599.

III. COMMISSIONER TISCH ABUSED HER DISCRETION WHEN SHE OVERTURNED A FACT-FINDER'S CREDIBILITY DETERMINATION

A. Abuse Of Discretion is a Fact-Specific Inquiry

Whether agency action constitutes an abuse of discretion is a fact-specific inquiry and requires application of the statutory authority granted to the agency to the facts of the matter before it. *See Banker v. Berger*, 86 Misc. 2d 129, 130 (Sup. Ct. Orleans Cty., 1976) (finding that qualifying a tax refund as a "readily available resource" in determining qualification for public assistance to be an abuse of discretion). An arbitrary and capricious agency action is necessarily an abuse of discretion as well. *See D.S. v. Hogan*, 22 Misc. 3d 527, 537 (Sup. Ct. N.Y. Cty. 2008) ("[A]n arbitrary and capricious agency action will also always be an abuse of discretion"). The New York City Administrative Code provides that the police commissioner acts "in his or her discretion" when disciplining or fining officers. N.Y.C. Admin Code § 14-115

Courts may reverse disciplinary decisions when the punishment imposed shocks one's sense of fairness. While this is a holistic test, the Court of Appeals has provided guidelines: a result is "shocking to one's sense of fairness" if it is "disproportionate to the misconduct," or disproportionate "to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals," in addition to other factors. *Pell*, 34 N.Y.2d at 234.

B. Commissioner Tisch Abused Her Discretion When She Overturned Maldonado's Credibility Determination

Deputy Commissioner Maldonado references precisely why she found Rivera to lack credibility on the stand throughout her Decision. For example, when confronted with the fact that video shows PO Barrett standing by the door when Rivera shot Mr. Feliz, Rivera testified under oath that PO Barrett was fully obscured by the pillar between the front and back windows, despite the pillar being only "six to seven inches wide." Generously, Maldonado stated that this statement "lacked the ring of truth." Ex. 8 at 26. But, as discussed *supra*, it was not merely his statements but his demeanor—his "unabashed obstinacy on cross-examination," that led Maldonado to conclude he was not credible. *Id.* at 21. These findings are entitled to great deference and Commissioner Tisch abused her discretion by disregarding them.

Under New York Law, "it is well settled that matters of credibility are reserved for the triers of fact, who have had an opportunity to observe the demeanor of the witnesses and are therefore in the best position to weigh their testimony." *People v. Samba*, 97 A.D.3d 411, 413 (1st Dep't 2012). The New York State Court of Appeals has confirmed that this principle applies when courts hear Article 78 Petitions challenging the decisions of the New York Police Department in disciplinary matters: "It is basic that the decision by an *Administrative Hearing Officer* to credit the testimony of a given witness is *largely unreviewable by the courts*, who are

disadvantaged in such matters because their review is confined to a lifeless record.” *Berenhaus v. Ward*, 70 N.Y.2d 436, 443 (1987) (emphasis added). That principle applies here to Maldonado’s conclusion that Rivera lied on the stand. After all, “[t]he Hearing Officer before whom the witnesses appeared, on the other hand, was able to perceive the inflections, the pauses, the glances and gestures—all the nuances of speech and manner that combine to form an impression of either candor or deception.” *Berenhaus*, 70 N.Y.2d at 443; *See also People v. Martin*, 112 A.D.3d 453, 454 (1st Dep’t 2013) (“[T]he determination of the hearing court, which actually saw and heard the witnesses testify, is entitled to deference, and it is not our practice to substitute our own fact findings for those under review unless the latter are plainly unjustified or clearly erroneous.”).

Once upon a time, the NYPD and the Law Department also respected the credibility determinations of the fact-finder. Just last year, in comments to the federal monitor, the City of New York emphasized that:

The ultimate determination of which account to accept in such cases depends almost solely on *an assessment of witness credibility*. In making such assessment, *the trier of fact* should consider a wide range of factors, including but not limited to, witness demeanor, corroborating evidence, the consistency of a witness’ account both at trial and over time, the degree to which the witness is interested in the outcome of a case, the potential prejudice or bias of the witness, and perhaps most basically the degree to which the witness’ account is logical and comports with common sense and general human experience.³

That is the process that the Deputy Commissioner followed; she did “not take this responsibility lightly.” Ex. 8 at 19.

Because this Court must accept the findings of the hearing officer, it must also conclude that Tisch abused her discretion when she rejected them. Put another way, the Police

³ Comments of Tobias Zimmerman and the New York Law Department to the NYPD Monitor Report on Discipline at 15–16. *Citing Dep’t of Correction v. McNeill*, OATH Index No. 265/22 at 8 (Feb. 22, 2022).

Commissioner cannot possibly have discretion to ignore factual findings by a hearing officer which, in similar circumstances, would be “largely unreviewable” in this Court. *Berenhaus*, 70 N.Y. 2d at 443. This Court should consider whether Commissioner Tisch abused her discretion in issuing a penalty based on the facts as she was bound to find them, not based on how she purported to find them.

“Simply because a challenged act is discretionary does not mean it is unreviewable under CPLR 7803 (3).” *Matter of Anonymous v Commr. of Health*, 21 AD3d 841, 843 (1st Dep’t 2005). While “[d]isciplinary determinations by the Police Commissioner are entitled to substantial deference,” that deference is not plenary. *Trotta v. Ward*, 77 N.Y.2d 827, 828 (1991). A disciplinary decision can be overturned if it “shocks the judicial conscience” so thoroughly as to constitute an “abuse of discretion as a matter of law.” *Matter of Edwards v. City of Middletown, NY*, 191 AD3d 668, 669 (2d Dep’t 2021).

Accepting Deputy Commissioner Maldonado’s credibility findings, this Court is presented with the following: Rivera shot Mr. Feliz during a struggle because the engine was running and because his hand was tired. Realizing afterwards that this would not justify the use of deadly force, he made up one story that Mr. Feliz had demanded a gun, then made up another about thinking Barrett was under the car. He lied on the stand about things both verifiable and subjective. Presented with these facts, Commissioner Tisch decided upon the following punishment:

Nothing.

Letting an officer return to patrol as though nothing had happened under these circumstances is “shocking to one’s sense of fairness” and is therefore “an abuse of discretion as a matter of law.” *Matter of Broadwell v. Ontario County*, 237 A.D. 3d 1578, 1580 (4th Dep’t

2025). Through his improper and sanctionable actions, Rivera caused the most serious harm a police officer can cause in the line of duty: he took the life of a partner, parent, brother, and son. The Commissioner's decision results in absolutely no sanction for Rivera for killing an unarmed civilian and lying about it.

Courts have upheld penalties of termination for much less serious misconduct, including theft of money and false statements (*Matter of Arroyo v. O'Neill*, 175 AD3d 1150, 1155 (1st Dep't 2019)); soliciting money and failing to voucher it (*see Matter of Brovakos v. Bratton*, 254 AD2d 32, 678 NYS2d 21 (1st Dep't 1998)); "sending racially offensive texts to subordinates during a time of social upheaval" (*Bonifacio v. Sewell*, 2022 NYLJ LEXIS 2149); failure to report the discharge of a weapon (*Cerio v. NY City Tr. Auth.*, 228 A.D. 2d 676, 677 (2d Dep't 1996)); and shoplifting the value of \$4.17 (*Alfieri v. Murphy*, 47 A.D. 2d 820, 820 (1st Dep't 1975)). Here, because of Rivera's misconduct, Allan Feliz lost his life. His son lost a father.

Consideration of all the circumstances would include considering Rivera's CCRB history: he was the subject of 39 allegations, five of which were substantiated.⁴ Excusing this conduct, particularly by an officer with a substantial history of bad acts, disregards "the seriousness with which the [New York City] Police Department treats the occurrence of a discharge of an officer's weapon." *Miles v. City of NY*, 251 A.D.2d 667, 668 (2d Dep't 1998).

Likewise, the Commissioner's decision was an abuse of discretion because it is disproportionate to the harm or risk of harm to the agency or institution, as well as harm to the public generally. "A police officer is guilty of serious fault when he does an act even without evil intent which tends to destroy confidence in his integrity and honesty." *Alfieri v. Murphy*, 47 A.D.2d 820, 820 1st Dep't 1975 [internal citation omitted]). Moreover, "[c]onfidence in a police

⁴ See 50a.org, entry for Lieutenant Jonathan Rivera, <https://www.50-a.org/officer/3QNE>.

officer's integrity and honesty patently constitutes a 'supervening public interest' sufficiently compelling . . . to justify [] disciplinary sanction[s]." *Id.*

In the same vein, Commissioner Tisch's decision fails to even remotely deter Rivera or other officers from engaging in similar, improper conduct in the future, increasing the likelihood of recurrence. At the time that he shot Mr. Feliz, Rivera was a Sergeant, meaning he acted as a supervisor of other officers and was thus entrusted with significant power and authority. In other words, Rivera should have been setting an example for officers around him. Since then, Rivera has been promoted to Lieutenant. Having Rivera's actions be an example of proper policing is concerning for the future of the NYPD, especially for the members of the public who will interact with them.

Commissioner Tisch has set a dangerous precedent for the future of policing. Recurrence of the conduct she has permitted—either by Rivera or by other officers similarly employed—does not just mean that officers in the future may use excessive force; it means that more innocent lives may be lost at the hands of officers. As Deputy Commissioner Maldonado stated in her decision, "'there is only one appropriate penalty for the grave misconduct that yielded an equally grave result,' Respondent can no longer serve as a member of the NYPD." Ex. 8 at 31 (citing Disciplinary Case No. 2018-19274 (Aug. 19, 2019); *see also* Disciplinary Case No. 2017-17490 (Sept. 20, 2023); Disciplinary Case No. 2012-7616 (March 28, 2017)). The sanctions imposed by an agency should reflect the standards of society. As our society is one that values human life, Commissioner Tisch's decision should too.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court issue an order:

1. Voiding the July 3, 2025 “Decision of the Police Commissioner” in Disciplinary Case No. 2023-28440;
2. Voiding the August 15, 2025 “Decision of the Police Commissioner” in Disciplinary Case No. 2023-28440;
3. Ordering Respondent Jessica Tisch to terminate Lieutenant Jonathan Rivera, Tax ID No. 949550 from the New York Police Department for the misconduct found in Disciplinary Case No. 2023-28440; and
4. Ordering any and all such other relief as the Court deems necessary and proper.

Dated: October 15, 2025
New York, NY

Respectfully Submitted,

Beldock Levine & Hoffman, LLP

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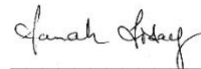
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WORD COUNT CERTIFICATION

According to the word count provided by Microsoft Office Word, the foregoing brief contains **6,803** words, excluding the cover page, table of contents, table of authorities, and signature block, and therefore complies with Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court (at 21 NYCRR 202.8-b).

Dated: New York, New York

October 15, 2025



GIDEON ORION OLIVER