January 9, 2017

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Brian O'Byrne**
Tax Registry No. 935415
Military and Extended Leave Desk
Disciplinary Case No. 2010-2016 (86484/10)

The above named member of the service appeared before Assistant Deputy Commissioner Robert W. Vinal on December 16, 2011, and on January 3, January 11, January 23 and January 27, 2012, charged with the following:

DISCIPLINARY CASE NO. 2010-2016 (86484/10)

1. Said Police Officer Brian O'Byrne, while assigned to the 81st Precinct, on or about August 8, 2009, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that said Police Officer possessed an unauthorized duplicate copy of Department property, to wit: said Police Officer was in possession of a duplicate Department shield.

P.G. 203-10, Page 2, Paragraph 18 — **PUBLIC CONTACT – PROHIBITED CONDUCT**

2. Said Police Officer Brian O'Byrne, while assigned to the 81st Precinct, on or about and between August 8, 2008 and August 8, 2009, failed to notify the Department of damage to his protective vest, to wit: said Police Officer inadvertently cut his protective vest while off-duty, and failed to notify his supervisor, as required.

P.G. 204-19, Page 1, Note — **PROTECTIVE VEST – USE/MAINTENANCE AND RESERVE SUPPLY**

3. Said Police Officer Brian O'Byrne, while assigned to the 81st Precinct, on or about August 11, 2009, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, to wit: said Police Officer impeded an official Department interview in that he provided incomplete and evasive answers during the aforementioned interview regarding an incident alleged to have taken place while said Police Officer was on-duty.

P.G. 203-10, Page 1, Paragraph 5 — **PUBLIC CONTACT – PROHIBITED CONDUCT**

4. Said Police Officer Brian O'Byrne, while assigned to the Bronx Court Section, on or about May 3, 2010, failed to comply with a lawful order, to wit: said Police Officer refused to provide a medical release to obtain records regarding an emergency room visit that occurred while on-duty as a result of a claim that said Police Officer was injured while on-duty.

P.G. 203-03, Page 1, Paragraph 2 **COMPLIANCE WITH ORDERS**

In a Memorandum dated July 6, 2012, Assistant Deputy Commissioner Robert W. Vinal found Police Officer Brian O'Byrne Guilty of Specification Nos. 1 and 4 and Not Guilty of Specification Nos. 2 and 3, in Disciplinary Case No. 2010-2016. Having read the Memorandum and analyzed the facts of this matter, I approve the findings but disapprove the penalty for Police Officer O'Byrne.

I have considered the totality of the issues and circumstances in this matter, and deem that a lesser penalty is warranted. Therefore, Police Officer O'Byrne is to forfeit thirty (30) suspension days, already served, as a disciplinary penalty.

James P. O'Neill
Police Commissioner

The City of New York

POLICE DEPARTMENT

July 6, 2012

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Brian O'Byrne
Tax Registry No. 935415
Military and Extended Leave Desk
Disciplinary Case No. 2010-2016 (86484/10)

The above-named member of the Department appeared before me on December 16, 2011, and on January 3, January 11, January 23 and January 27, 2012, charged with the following:

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P.G. 204-19, Page 1, Note – PROTECTIVE VEST – USE/MAINTENANCE AND RESERVE SUPPLY

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interview regarding an incident alleged to have taken place while said Police Officer was on-duty.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

4. Said Police Officer Brian O'Byrne, while assigned to the Bronx Court Section, on or about May 3, 2010, failed to comply with a lawful order; to wit: said Police Officer refused to provide a medical release to obtain records regarding an emergency room visit that occurred while on-duty as a result of a claim that said Police Officer was injured while on-duty.

P.G. 203-03, Page 1, Paragraph 2 – COMPLIANCE WITH ORDERS

The Department was represented by Vivian Joo, Esq., Department Advocate's Office, and Respondent was represented by Roger Blank, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty of Specification Nos. 1 and 4. Respondent is found Not Guilty of Specification Nos. 2 and 3.

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is not disputed that at about 3:30 a.m. on August 8, 2009, while he was on duty, in uniform, assigned to the 81 Precinct, Respondent entered the stationhouse, approached the front desk and reported to the Desk Officer that he had just been struck on the chest by a projectile while he was sitting on a chair in the precinct parking lot.

The Department's Case

The Department called Detective Vincent Bellizzi, Detective Carlos Pantoja, Sergeant Francesco Frangella, Detective Salvatore Lacova, Detective John Kraljic, Detective Michael Paul Greenwood, Sergeant Daniel Brennan, Deputy Inspector Philip Romanzi, Captain James Donnelly and Lieutenant Brian Jackson as witnesses.

Detective Vincent Bellizzi

Bellizzi, a 27-year member of the service (MOS), is assigned to the Internal Affairs Bureau (IAB) Group 9. At about 6:30 a.m. on August 8, 2009, he responded to the 81 Precinct regarding Respondent's report. Bellizzi ascertained that there were no witnesses to the incident and no video camera had recorded what occurred in the parking lot. Four or five IAB Groups responded to the 81 Precinct. Bellizzi explained that this was not unusual since "in a case like that you really don't know what type of work you are going to have." IAB Group 31 was ultimately assigned the investigation.

At 9:15 a.m., Bellizzi spoke to Respondent who "appeared shaken up but fairly normal." During their conversation, Respondent told Bellizzi that when he was 12 years old he was shot in the back by Person A, that when he was 13 years old he accidentally shot himself in the foot; and that when he was 17 years old he was shot in the knee inside a Tennessee nightclub. Respondent told Bellizzi that all three of these shootings resulted only in minor graze wounds that did not require any major medical attention. Bellizzi ascertained that none of these shooting incidents had ever been reported to the Department.

On cross-examination, Bellizzi testified that although IAB mainly investigates police misconduct and corruption allegations, IAB personnel also respond to the scenes of police shootings. Bellizzi confirmed that each borough has a team to handle shooting incidents, but Bellizzi could not recall if a shooting team had responded to the 81 Precinct. Bellizzi had never met Respondent before. Bellizzi agreed that Respondent was very forthcoming during their conversation and that he had volunteered the information that he had been shot three times before he was 18 years old.

Detective Carlos Pantoja

Pantoja, a 16-year MOS, is assigned to the Crime Scene Unit (CSU). At about 3:30 a.m. on August 8, 2009, he responded to a notification that a shooting had occurred in the parking lot of the 81 Precinct. Pantoja canvassed the parking lot of the 81 Precinct. No ballistic or forensic evidence was found. Respondent's uniform shirt and his protective vest both exhibited ballistic damage. A discharged shell casing was recovered from the left pocket of Respondent's uniform shirt, and a "deformed copper jacketing," which Pantoja explained was a bullet fragment, was recovered from Respondent's vest pocket by Sergeant Michael Lennihan. Pantoja recalled that the shell casing found in Respondent's shirt came from a Rimfire Super X bullet, which is "equivalent to a .22 caliber shell casing." This is not a firearm that is issued to MOS and .22 caliber ammunition is not Department authorized. Pantoja notified his supervisors about the shell casing. In addition to the ballistic damage to Respondent's protective vest, there was also a cut on the vest.

On cross-examination, Pantoja testified that Respondent's shirt pocket had a Velcro closure. The shell casing found in the shirt pocket was intact. Pantoja stated that because he is not a ballistics expert, he could not explain the difference between a rimfire and a centerfire .22 caliber weapon.

Sergeant Francesco Frangella

Frangella, an 18-year MOS, is assigned to IAB Group 31. On the day of the incident, he was assigned to secure Respondent's locker inside the 81 Precinct. A search warrant was obtained which authorized him to search Respondent's locker. Inside the locker, Frangella found two spent .380 caliber shells, one .380 caliber live cartridge, and four spent 9 millimeter (mm) shells. Frangella explained that only undercover officers are authorized to carry .380 caliber firearms while on duty and .380 caliber ammunition is not authorized by the Department.

On cross-examination, Frangella could not recall exactly what time he was called to the scene. He confirmed that he did not find a box of 9 mm ammunition inside Respondent's locker. He could not recall whether he saw any knives or hunting magazines inside Respondent's locker. Frangella confirmed that the purpose of the search was to find shell casings.

Detective Salvatore Lacova

Lacova, an 18-year MOS who has been assigned to the Police Laboratory's Firearms Analysis Section since July 2006, testified that his duties include examining firearms and ammunition for operability and identification and performing microscopy.

He completed a seven-month training course regarding firearms identification which was administered by a forensic consultant and was based on a course developed by the Association of Firearm and Tool Mark Examiners which is an international organization comprised of 1100 members with chapters in over 40 countries. He has also received training from firearms manufacturers and from the federal Bureau of Alcohol, Tobacco and Firearms and completed an 18-month training program in microscopy. He has tested more than 500 firearms for operability and he has been qualified as an expert in the field of firearms identification on about 25 occasions. Based on his training, he was qualified to offer opinions at this trial as an expert in the area of firearms identification.

Lacova identified a semi-automatic .22 caliber rifle as the same rifle that he had examined in 2009. [Respondent stipulated that this rifle is owned his father, [redacted] Lacova explained that this Glenfield model rifle uses rimfire ammunition and that this rifle showed damage to the crown and bore area. Lacova tested the rifle for operability by firing four .22 caliber cartridges. The test, which showed that the firearm was operable, resulted in the collection of four spent bullets and four cartridge casings. Detective John Kraljic conducted microscopic testing on the bullets and casings. Lacova explained that cartridge casings are the metal containers that hold bullets in the case mounts. Unfired casings contain gun powder and a priming compound.

Lacova is familiar with the process of reloading shell casings. He explained that reloading involves packing the proper amount of gun powder and priming compound into an empty, previously fired casing and reseating a bullet onto the case mount. To the best of his knowledge, shell casings for the Glenfield .22 caliber rifle cannot be reloaded. [Department's Exhibit (DX) 1 is a photograph of the Glenfield rifle. DX 2 consists of the

four spent bullets and shell casings that were ejected from the Glenfield rifle during Lacova's testing.]

On cross-examination, Lacova testified that he was not present when the Glenfield rifle was taken into custody. There is no test to determine how or when the marks that he observed on the gun's barrel were made, nor are there any tests that can associate a particular fired bullet with a particular empty cartridge case. Lacova could not recall how much of his training was dedicated to the topic of reloading.

Lacova watched a video recording of Respondent reloading a .22 caliber cartridge case. While Respondent stated in the video that he removed the dent in the firing pin, there was not any close-up footage of that process and Lacova could not see the dent in the firing pin being removed. In the video, Respondent used two different firearms, one semi-automatic pistol and one revolver. Respondent fired the cartridge that he reloaded and stated that it is possible to purchase .22 caliber cartridge casings for reloading. To Lacova's knowledge, .22 caliber cartridge casings cannot be purchased. Respondent also stated in the video that he used black powder. Lacova explained that black powder usually creates a very large smoke bloom and that such a bloom was not seen in the video. Lacova noted that there was starting and stopping during the video recording. The first time that Respondent fired the cartridge it did not work. It worked on a second attempt. One other thing that struck Lacova was that, according to the manufacturer, the cartridge case needs to be spun approximately 10,000 rotations per minute in order to get the priming compound inside. He did not know if this could be done by hand and he stated that watching the video did not change his belief that .22 caliber cartridge casings cannot be reloaded. Lacova stated that the video left too much to the imagination.

Detective John Kraljic

Kraljic, an 18-year MOS who has been assigned to the Firearms Analysis Section for ten years, testified that he is responsible for identifying and testing firearms and ammunition for operability, restoring serial numbers on the faces of firearms, and conducting microscopic examinations of fired and unfired ballistic evidence. He has received about 18 months of training, the first six of which involved firearm and ammunition identification and operability. Upon completion of this training he earned perfect scores on three competency tests. He then received 12 months of training using a comparison microscope and again earned perfect scores on his competency tests. During the course of his career he has tested over 2,500 firearms for operability and has conducted microscopy examinations on thousands of pieces of evidence. He has been qualified as an expert in the field of firearms identification over 175 times, and he was deemed an expert in firearms identification at this trial.

Upon examining the Glenfield rifle, Kraljic observed what appeared to be scraping or gouging damage to the bore or muzzle. He had seen similar damage only a handful of times before and on those occasions the damage had been intentionally caused. This damage could have interfered with the examination of the ballistic evidence. Kraljic was not able to determine when the damage occurred.

Using microscopic examination, Kraljic compared the bullets and casings that were ejected from the Glenfield rifle during Lacova's testing with four pieces of copper-coated lead that were recovered from Respondent's protective vest and the .22 caliber shell casing that was recovered from Respondent's shirt pocket. Kraljic explained that copper-coated lead is commonly used in the manufacturing of .22 caliber projectiles and

that he received these pieces of lead and the shell casing from Sergeant Liguori. His examination of the lead resulted in a conclusion of "unsuitable," meaning there were not any marks present on them that would allow Kraljic to compare them to the test fires performed by Lacova. Examination of the shell casing recovered from Respondent's uniform pocket confirmed that it had been fired from the Glenfield rifle. [DX 3 consists of the lead and shell casing that Kraljic received from Liguori.]

Criminalist Upton, who is assigned to the Forensic Investigations Division, provided Kraljic with two additional pieces of copper-coated lead that were recovered from Respondent's protective vest. Microscopic examination of one piece came back with a result of "unsuitable" and examination of the other came back with a result of "inconclusive." Kraljic explained that there are grooves inside the barrels of guns to make bullets spin as they travel out of firearms and that what he was looking for in his examinations were the markings that are pressed onto the bullets during that process. [DX 4 consists of the lead Kraljic received from Upton.]

On cross-examination, Kraljic confirmed that there is no way to associate a particular fired bullet with a particular shell casing. He conducted his examination of the rifle on August 11, 2009. He conceded that his opinion that the damage to the rifle was intentionally caused was entirely speculative. He would not say that the ballistics analysis was inconclusive due to the damage in the rifle's bore since there would be no way to know that was true unless a bullet fired before the damage could be compared with a bullet fired after the damage. He agreed that there are thousands of firearms that could have fired the lead that resulted in the inconclusive test results.

Detective Michael Paul Greenwood

Greenwood, a nine-year MOS who is assigned to IAB Group 31, recalled that on August 11, 2009, he and Sergeant Robert Frost retrieved the Glenfield rifle from Respondent's father, [redacted], at his [redacted]me.

On cross-examination, Greenwood confirmed that he did not know the rifle existed until Respondent told him about it. He agreed that [redacted] could have refused to hand over the rifle since Greenwood did not have a warrant to seize the rifle. Greenwood confirmed that although [redacted] would not allow Greenwood and Frost to enter his home, Respondent came out of the house and handed over the rifle to Greenwood and Frost. Greenwood vouchered the rifle and sent it to the laboratory.

Sergeant Daniel Brennan

Brennan, a 12-year MOS who is currently assigned to the 79 Precinct Detective Squad, recalled that he was assigned to IAB Group 31 on August 18, 2009. On that day, he brought Respondent's shield, an unofficial duplicate shield, and Respondent's Department identification card to the Employee Management Division. All of these items had been recovered from Respondent on August 8, 2009.

On cross-examination, Brennan confirmed that on May 3, 2010 he requested Respondent to voluntarily sign a Health Insurance Portability and Accountability Act (HIPAA) release form which would have allowed the Department to obtain his medical records. Under the advice of counsel Respondent declined to sign the form, and then-Captain Philip Romanzi subsequently ordered him to sign it. Although an Assistant Department Advocate advised Brennan that an order to sign the form was permissible

and that a failure to sign the form would be grounds for suspension, Respondent's attorney sent a letter indicating that such an order would be unlawful. [Respondent's Exhibit (RX) A is the letter, dated May 3, 2010. It notes that "a waiver executed under threat of suspension is neither voluntary nor a waiver. Rather, any waiver under such a threat is done under coercion and is not valid."]

Brennan stated that the Department had a right to view Respondent's medical records since Respondent had claimed a line-of-duty injury. Respondent's attorney later affirmatively withdrew any line-of-duty claim on Respondent's behalf. Brennan did not know the status of the claim as of May 3, 2010. When he was asked if Respondent had the right not to sign the HIPAA release form once the line-of-duty injury claim was withdrawn, Brennan stated that any injury Respondent suffered was still considered to be a line-of-duty injury since it occurred while Respondent was on duty and in uniform.

Brennan confirmed that before an official Department interview is commenced, the subject officer is advised that he is entitled to all the rights and privileges guaranteed by the laws of the State of New York, the New York Constitution, and the Constitution of the United States. At the May 3, 2010 official Department interview, Respondent respectfully refused Brennan's request to sign the HIPAA form. After a break, Romanzi gave Respondent another opportunity to sign the form. Romanzi did not specifically use the words, "I am ordering you to sign." Respondent was again respectful in his refusal, under the advice of counsel, to sign. The alleged line-of-duty injury at issue was the abrasion and/or bruising to Respondent's chest that was caused by the projectile that struck him on August 8, 2009.

Brennan investigated this case under the supervision of Romanzi. Romanzi never directed Brennan to look into Respondent's claims that: there were three firemen in the parking lot at the time of the shooting; that a gang had threatened to shoot a cop in each precinct; that Respondent had been threatened by the son of a Department of Corrections officer he had recently arrested; or that Respondent had recently arrested a gang member.

On redirect examination, Brennan testified that it was explained to Respondent at the May 3, 2010 interview that the medical records being requested only pertained to the August 9, 2009 incident.

On re-cross-examination, Brennan confirmed that Respondent was suspended after he refused to sign the medical records release form. Brennan confirmed that Respondent did sign the form after he was restored from suspension. The medical records showed that Respondent [redacted]

Deputy Inspector Philip Romanzi

Romanzi, a 26-year MOS, is currently assigned as the commanding officer of Brooklyn-Staten Island Internal Affairs. He was the commanding officer, IAB Group 31 during August, 2009. He explained that during the hours after Respondent's report, questions arose concerning the validity of Respondent's claim. These doubts stemmed from the following facts: that Respondent's injuries were inconsistent with the kinds of injuries one would expect to find on a shooting victim; that the shell casing found in Respondent's shirt pocket was consistent with the bullet fragments recovered from his vest; that the bullet fragments were consistent with the Glenfield rifle that Respondent

had listed on his Department record; and there were no witnesses who heard a gunshot or who saw Respondent at the time of the shooting.

IAB conducted official Department interviews of Respondent on August 11 and August 18, 2009. [DX 5 and 6 are the interview transcripts.] Since Respondent had told initial responders that he had been shot in the past, at the August 11 interview, Romanzi asked Respondent about these pre-employment-with-the-Department shooting incidents. Respondent stated that he was shot when he was 12 years old and was shooting plates with [redacted] Person A in Kentucky. When he went downrange to reset the plates, Person A discharged a round that grazed him across the back. Respondent did not obtain any medical attention. Respondent told Romanzi that the second time he was shot was when he was 13 years old. He was cleaning a .22 caliber rifle which discharged. The bullet struck him in the outer part of his left foot. His mother, who was a nurse, treated the injury. He did not receive any further medical attention. Respondent went on to describe how when he was 17 years old he had been shot in the knee.

A review of Respondent's application folder showed that Respondent did not mention any of the pre-employment shootings when he applied to become a police officer. Furthermore, Respondent did not indicate that [redacted] Person A in the application section where he was supposed to list all of his immediate relatives. When Romanzi specifically asked Respondent about Person A at the August 18 official Department interview, Respondent explained that [redacted]

[redacted]. Respondent stated that he and Person A no longer speak with each other. He provided Romanzi with general information as to where Person A could be contacted.

Respondent stated during the interview that he did not know why there was a spent .22 caliber shell casing inside his pocket on August 9, 2009. He said it was possible that he was holding onto the shell casing so that he could reload it at a later time. When he was asked how Respondent's responses to the questions regarding the shell casing impeded the investigation, Romanzi explained that an explanation for why the shell casing was in his pocket would have been important to the investigation since the casing was consistent with the bullet fragments recovered from the vest. Respondent was unable to provide an explanation for how the casing wound up in his pocket.

Based on Respondent's statement that he regularly hunted with a .22 caliber rifle, Romanzi asked Respondent to produce his Glenfield rifle. Respondent, who had used the rifle several months earlier for rabbit hunting, stored the firearm at his father's [redacted] residence. The rifle was turned over to the Firearms Analysis Section for ballistics testing. When Romanzi informed Respondent in the second official Department interview about the ballistic match between the shell casing found in the pocket and the Glenfield rifle, Respondent could not offer an explanation.

Romanzi testified that when Respondent was asked at the August 11 interview about the shell casing found in his uniform pocket, Respondent's counsel explained that Respondent was an avid hunter and a reloader of ammunition. Respondent then stated that a .22 caliber long rifle shell could be reloaded. Romanzi testified that he believed that this was not true because he had never heard of anyone who had reloaded that particular type of round. At the August 18 interview, after being confronted with his interrogators' position that .22 caliber shell casing could not be reloaded, Respondent agreed that his original statement that it could be reloaded must have been a mistake.

Romanzi explained that Respondent's original claim about reloading the shell casing impeded the investigation because it "set [the investigators] off in a direction that [they] knew was not plausible."

Respondent also stated in his interview that he could reload a 9 mm shell casing with 40 to 50 grains of powder. To the best of Romanzi's knowledge, however, that amount of powder would not fit in a 9 mm casing. When Romanzi pointed out to Respondent that the recommended amount of powder to be used was just four grains, Respondent had no real explanation and conceded that he did not really know too much about reloading and that his father was more knowledgeable on the matter. When he was asked how Respondent's claim about reloading the 9 mm casing impeded the investigation, Romanzi answered that one 9 mm shell casing was found in Respondent's personal auto and "I believe there was a couple more nine-millimeter shell casings found in his Department locker" so "we were trying to determine why those shell casings were where they were and see if" Respondent "could offer an explanation as to why he had these shell casings."

Respondent could not offer an explanation when Romanzi asked him why there were .380 caliber rounds and shell casings in his locker. Respondent did state that his father owned a firearm of that caliber and that he had fired it at some point.

Analysis of Respondent's protective vest showed a slice in the cover of the trauma plate and ballistic cover. When asked about this damage during the interview, Respondent stated that he accidentally sliced his vest with a razor blade two years earlier. Respondent conceded that he never notified the Department about the damage. Romanzi testified that Respondent should have notified a supervisor about the cut on his vest.

When Romanzi asked Respondent in the August 18 interview about a duplicate shield, Respondent stated that he had purchased the shield for ceremonial purposes.

On May 3, 2010, Romanzi directed Respondent to sign a release form for medical records that pertained to the August 8, 2009 line-of-duty injury suffered as a result of a purported gun shot. Romanzi instructed Respondent that a failure to sign the release would result in suspension. Respondent declined to sign the release form, and Romanzi suspended him from duty. Respondent's attorney was present at the time. That day was not the first time that Respondent was asked to sign the form.

On cross-examination, Romanzi confirmed that Respondent was suspended because he did not voluntarily sign a HIPAA release form. Romanzi phrased his directive to Respondent as, "I am giving you another opportunity to sign the form." Respondent elected not to take the opportunity but remained respectful. Respondent had already refused to sign the form earlier in the interview. After that initial refusal, Romanzi took a break from the interview and called the Department Advocate's Office to ask about the legality of the directive. Romanzi agreed that he did not have the authority to order an MOS to waive rights that have been established by state and federal laws and constitutions. Romanzi was not aware that with sufficient reason the Department can get a member's medical records without a HIPAA release via court order. Respondent's medical condition was not a consideration at the time that he was being asked to sign the release form.

Respondent signed the release form after a month on suspension. Once the Department received the medical records, investigators looked for any diagnosis that would show indications of a bullet impact. No such indication was found, adding to the

investigators' suspicion as to the validity of Respondent's claim of being shot. Romanzi conceded, however, that the records did note [redacted] and the investigation could not conclusively prove that Respondent was not shot. Laboratory results confirmed that a bullet traveled through Respondent's shirt and struck the trauma plate of the protective vest.

The Department obtained a search warrant for Respondent's lockers, and IAB personnel conducted searches of two of Respondent's lockers and his personal vehicle. Romanzi was not present at the searches. The Department did not obtain a search warrant to take possession of the Glenfield rifle from Respondent's father's home. While Respondent and his father would have been within their legal rights to deny the Department's request for the rifle, Respondent turned the rifle over to the Department voluntarily. Respondent also voluntarily surrendered to the Department rifles that he lawfully kept at hi [redacted] home. It was Respondent who informed investigators of the Glenfield rifle's existence during the August 11 interview. Romanzi confirmed that Respondent initially described the August 8, 2009 incident as feeling like a hammer or someone had punched him in the chest. He did not specifically indicate at first that he had been shot.

Romanzi agreed that he has had no official training and very little personal experience regarding reloading ammunition. When asked his opinion on reloading .22 caliber ammunition, Romanzi replied, "It's my position that it can't be reloaded. If it was done so it would be done against all common sense, it would be unsafe, the tools don't exist." The bullet that impacted Respondent's protective vest was consistent with a .22 caliber bullet. The investigation never established that 9 mm or .380 caliber ammunition

had anything to do with the August 8, 2009 shooting. The cut on Respondent's vest was not on the ballistic part of the vest but rather on the cosmetic sleeve or carrier into which the protective component was inserted. The vest passed inspection twice after the cut occurred. [RX B is a Department printout showing that Respondent's vest was inspected in July 2008 and May 2009.]

IAB never investigated Respondent's claim that he was threatened by the son of a corrections officer he had recently arrested. According to Romanzi, a member of the Detective Bureau was present when Respondent made that claim and that aspect would have been investigated by the Detective Bureau. Romanzi did not recall ever seeing any investigative paperwork that indicated that the claim was followed up on. Similarly, IAB did not investigate Respondent's claim that he was threatened as a result of a recent arrest involving a gang member, nor did Romanzi receive investigative paperwork to indicate that any other unit followed up on it.

To the best of Romanzi's knowledge, the August 8, 2009, incident was categorized by the 81 Precinct "as a shooting, as an assault, which would be an indexed crime, which would go on the precinct's stats." He was not aware of the incident ever being downgraded to a lesser crime. Although Police Officer James McSherry gave a statement that he heard a loud bang, at the end of the investigation IAB had no solid proof of whether or not a shooting actually occurred. Romanzi conceded that it was possible that Respondent, as the subject of the investigation, was nervous during his official Department interview and mistakenly mentioned 40 or 50 grains of gun powder when he in fact meant four or five grains.

On redirect examination, Romanzi confirmed that he was giving an order when he told Respondent on May 3, 2010 that he was "giving [him] an opportunity" to sign the medical release form. Romanzi did not believe the order violated Respondent's rights. When an officer claims a line-of-duty injury, any and all documentation has to be made available to the Department so that a Department surgeon can determine the officer's injuries and fitness for duty.

Romanzi specifically wanted to obtain Respondent's medical records so that the investigators could gather the evidence to either support or refute Respondent's claim that he had been shot on August 8, 2009. Romanzi first became aware of the Glenfield rifle after he reviewed Respondent's personnel and applicant folder. He spoke with Lieutenant Brian Jackson of the Firearms and Tactics Section to get more information regarding reloading shell casings. When an MOS passes vest inspection, that member still has a duty to notify a supervisor of any damage to the vest.

On re-cross-examination, Romanzi testified that to the best of his knowledge Respondent never filed any line-of-duty injury claim. Romanzi at one point conferred with the Deputy Commissioner, Department Advocate's Office about this case. It was concluded that suspension was warranted because Respondent had failed to comply with a lawful order to sign a HIPAA form. Respondent was informed of the reason for his suspension.

Captain James Donnelly

Donnelly, an 18-year MOS, is currently assigned as the commanding officer of the Medical Section. He explained that the Medical Section requires MOS with line-of-

duty injuries to submit medical records so that the Department can determine the member's fitness for duty. Members who refuse to provide their records are ordered to do so, and those who fail to comply with the order are suspended. Donnelly has personally had occasion to suspend members who refuse to provide medical records. The Department also obtains the medical records for non line-of-duty injury cases for the purpose of determining fitness for duty.

On cross-examination, Donnelly confirmed that he is not aware of the specific facts underlying Respondent's case. Nor is he aware that Respondent's legal representation withdrew any line-of-duty claim before the Department requested Respondent's medical records. He has not received any training in HIPAA regulations and compliance. He has no opinion on what Respondent's rights may or may not be under the HIPAA law, but he acknowledged that all MOS do have rights under that law. He explained that a line-of-duty injury report is automatically generated by a command whenever an officer assigned to the command is injured while on duty. In the more than four years that he has been in his current assignment he has never seen a line-of-duty report withdrawn. While not every line-of-duty claim is approved, the Department pays the medical bills for any officer injured while on duty up until the time that the officer is admitted to the hospital. Donnelly confirmed that the Medical Division would not seek the medical records of an officer who has not filed for a line-of-duty injury, has been found to be fit for duty after an injury, and has been performing at full duty for months. Once it is determined that an officer is fit for duty, there is no reason for the Medical Division to seek records.

On redirect examination, Donnelly reiterated that in his experience at the Medical Section he has not had any line-of-duty designations withdrawn. Even in cases of withdrawal, however, the Medical Section could still require medical records from an MOS, and refusal to provide the records could result in the member's suspension.

On re-cross-examination, Donnelly confirmed that he has never seen Respondent's medical records. To his knowledge, nobody in the Medical Division ever requested Respondent's records.

Lieutenant Brian Jackson

Jackson, a 22-year MOS, has been assigned to the Firearms and Tactics Section for approximately five years. He is a graduate of both the Department's and the Federal Bureau of Investigation's Firearms and Tactics Instructor School. In addition, he has attended numerous armor certification schools. He is captain of the Department's pistol team. He has been a competitive shooter for ten years and has competed in national championship matches. He has practiced reloading, which he defined as utilizing used components to make a cartridge, for approximately nine years. During that period, he has reloaded over 50,000 rounds. At one point, Jackson spoke with Romanzi about reloading a .22 caliber rimfire long rifle shell casing. He told Romanzi that he never met anybody who reloaded such a shell casing and that, as far as he understands, it is illegal to do so. He explained that to his understanding reloading that type of ammunition would require the creation of a primer material, which is an explosive, and a federal license is required to make explosives. When Jackson reloads 9 mm ammunition he uses approximately four grains of powder. While that amount may vary depending on the manufacturer of

the powder, he does not believe 50 to 60 grains of powder could even fit in a 9 mm shell casing.

On cross-examination, Jackson testified that he has not had any formal training in reloading. Jackson reloads 9 mm and .45 caliber ammunition. When doing so, he uses a primer explosive component, and he is not in violation of the law. The components he uses are principally the same as those one would use to reload .22 caliber ammunition.

On redirect examination, Jackson explained that what makes it illegal to reload a .22 caliber rimfire long rifle shell casing is the fact that the primer material is not commercially available and must be made from scratch. In contrast, the ammunition that Jackson regularly reloads is centerfire, and primer for centerfire ammunition can be bought in bulk.

On re-cross-examination, Jackson confirmed that there is a difference between flammable and explosive mixtures, and it would not be in violation of the law to make a primer using a flammable mixture. Match heads would be classified as flammable, not explosive.

Respondent's Case

Respondent called Police Officer Kenric Tam, Gerard Petillo, Peter Diaczuk, Erika O'Byrne, Police Officer James Slavin, Police Officer James McSherry, Sergeant Michael Lennihan, and Police Officer Vaughan Etienne as witnesses. Respondent also testified in his own behalf.

Police Officer Kenric Tam

Tam, who is currently assigned to the 81 Precinct, recalled that he and Respondent had been assigned to the same command and he knew Respondent to hunt and reload ammunition. Respondent has made dummy 9 mm rounds for him. Respondent was known to go for long periods of time without doing laundry and would sometimes be a little messy. Deputy Inspector Mauriello used to be the commanding officer of the precinct, but he was transferred for downgrading criminal activity.

On cross-examination, Tam confirmed that he was not present when Respondent reloaded ammunition for him. Tam never personally observed Respondent reload. The first time that they met, Respondent told Tam that he had been involved in three shootings when he was younger.

On redirect examination, Tam confirmed that Respondent made no effort to hide the shooting incidents of his youth.

Gerard Petillo

Petillo is an independent forensic firearms examiner. He explained that he tests firearms to ensure that they work and he also examines bullets and cartridges for identification purposes. He is a lifelong recreational competition shooter and hunter, who worked at the Police Laboratory's Firearms Analysis Section between 2001 and 2005. In 2005, he was hired by the Connecticut State Police to work at the forensic laboratory at their Firearms Tool Mark Section. He received much forensic training during his time with this Department and in Connecticut. He has received training by the Federal Bureau of Investigations; the Bureau of Alcohol, Tobacco and Firearms; the Firearm and Tool

Mark Examiners; and the New York Microscopial Society. He has been certified as an armor to repair firearms for eight different manufacturers, has lectured many times on firearms and shooting incident reconstruction, and has conducted scientific research and presented his findings at the annual meeting of the Association of Firearms and Tool Mark Examiners and the Northeast Association for Forensic Scientists, both organizations of which he is a member. He has been permitted to give opinion testimony approximately 36 times. He has testified in three different states and in federal court. He has testified on behalf of both prosecution and defense.

On *voir dire*, Petillo testified that he twice took a four-day course at the New York Microscopial Society. He received additional microscopy training while a member of this Department and while working in Connecticut. After completion of this training he passed three competency examinations. In addition, between 2006 and 2010, he passed two tests a year in the field of microscopy analysis. His microscopy training with this Department and the Connecticut State Police was not a formal course but rather mentorship-type programs. Petillo was qualified as an expert in the field of firearms testing and ballistics. [RX C is Petillo's curriculum vitae.]

Petillo examined the evidence that was produced by the Department in this case, and he produced a report on it. He noted that the Glenfield rifle had "non-manufacturing marks" on its muzzle and crown area. He explained that there are times when an examiner can look at the microscopic marks on a bullet to determine if it came from a particular firearm. While non-manufacturing marks have the potential to interfere with how a firearm marks a bullet, Petillo was not able to conclusively determine whether or not the non-manufacturing marks on the Glenfield rifle would have interfered with any

bullets that were discharged from it. This is because he did not have the opportunity to compare a bullet that was discharged before the marks were made with a bullet that was discharged afterward. There was no way for Petillo to determine how or when the marks in the Glenfield rifle were made.

Petillo testified that although a conclusive determination on the subject could not be reached, it was his hypothesis that the damage to the inside of the rifle's muzzle was not severe enough to significantly interfere with the barrel. In other words, a bullet discharged from the weapon would be able to be identified. He based this hypothesis on his examination of the bullets that were discharged during Lacova's test fire of the rifle and also bullets that were discharged during his own test fire. According to Petillo, the discharged bullets looked like other bullets that he had fired from similar firearms in the past.

Petillo testified that by microscopically comparing the shell casing that was recovered from Respondent's shirt pocket with test fires that he produced from the Glenfield rifle, he came to the opinion that the shell casing (DX 3) was in fact fired from the rifle. He based this opinion on an agreement of all discernable class characteristics and sufficient agreement of individual characteristics in the firing pit and pressure. He explained that class characteristics are measurable features of a specimen that indicate a restricted group force. They are produced as the result of the manufacturing process, which means that they can identify an item as being part of a certain group and exclude them from other groups. Individual characteristics, in contrast, are characteristics that are unique to a particular item.

In Petillo's examination of the bullet fragments that were recovered from Respondent's protective vest, he was unable to find any measurable features, as they had no discernable class characteristics. According to Petillo, any testimony that these lead pieces (DX 4) came from a copper jacket bullet would be incorrect. If anything, it is a copper washed bullet. He explained that while copper jacket bullets have lead cores and solid copper coverings, copper washed bullets are lead bullets that have been painted over with a copper-type material. In any case, Petillo did not believe there was enough information on the pieces to indicate that they came from the Glenfield rifle or any other rifling source. Petillo found a small hole in Respondent's shirt. He did not test the shirt for gun shot powder residue.

Petillo was present in his laboratory with Respondent on January 9, 2012. Lacova and Kraljic were also present that day to observe Respondent as he reloaded a spent .22 caliber cartridge case by replacing the priming component. After Respondent attached a new bullet to the reloaded casing, it was successfully fired from a handgun. The ammunition was provided by the Department, and Respondent used his own reloading tools and matchstick heads for primer material. Matchstick heads are not considered an explosive. The January 9, 2012 reloading session was recorded on video.

On *voir dire*, Petillo testified that even though he used to be an avid reloader, he did not believe reloading a .22 caliber rimfire shell casing was possible until he saw Respondent do it. The January 9, 2012 reloading was not the first time that Respondent reloaded such a shell casing in Petillo's laboratory using matchstick heads. He did the same thing in July 2011.

On continued direct examination, Petillo confirmed that after examining all of the Department's evidence he did not find anything to substantiate an allegation that any of the ballistic evidence that was recovered from Respondent's protective vest came from the Glenfield rifle. Nor did he find any evidence that either supported or refuted a claim that the damage to the rifle's bore was recent and intentional.

On cross-examination, Petillo confirmed that the crown on a rifle is designed to prevent internal damage to the firearm. The report that Petillo prepared was reviewed by Peter Diaczuk. Copper washed lead bullets are manufactured for .22 caliber firearms.

On redirect examination, Petillo testified that many thousands of firearms could have fired the bullet fragments that were recovered from Respondent's protective vest. Members of the Department were present whenever Petillo reviewed the evidence. [RX D is Petillo's report.]

Peter Diaczuk

Diaczuk teaches criminalistics at John Jay College of Criminal Justice, which is also the school where he earned his degree. He is the former president of the Northeastern Association of Forensic Scientists, a fellow of the American Academy of Forensic Sciences, and a member of the American Society of Testing and Materials. He has previously been certified as an expert and offered opinion evidence in court.

On *voir dire*, he testified that he has been to many crime scenes even though he has never worked in a police department. He has reviewed evidence of shooting incident reconstruction, bloodstain pattern analysis, and projectory analysis. He was hired to do this work by corporation counsel of New York City in one instance but was usually hired

by private attorneys representing defendants. He has taken microscopy courses at John Jay College, the New York Microscopial Society, and the McCrone Research Institute in Chicago. In addition, he got hands-on training in microscopy while he worked as an assistant for his criminalistics professor. While an assistant, he made approximately 50 microscopic comparisons of ammunition components. He has known Gerard Petillo since 2003, and they have worked together for a year and a half. He conceded that Petillo has more experience than him in the area of comparison microscopy using incident light. He has been qualified before as an expert witness with regard to microscopy, and he was qualified as an expert in the fields of firearms, crime scene reconstruction, microscopy, and trace evidence at this trial. [RX E is Diaczuk's curriculum vitae.]

On continued direct examination, Diaczuk testified that he has received training in the field of bullet ricochet examination. He had the opportunity to review the breast plate that Respondent wore in his protective vest on August 8, 2009, and he produced a report about his examination. He explained that a titanium breast plate or trauma plate is an optional component that is inserted in the center of a Kevlar vest to distribute kinetic energy of a high energy projectile. The plate, which was produced by the Department, measured approximately five inches by eight inches and fit in a sleeve at the front of the vest.

Upon his examination, Diaczuk noted impact damage to the Kevlar enclosure and the plate that was inside. Because the impact from the projectile was not perpendicular to the surface of the plate, Diaczuk could tell that the projectile impacted at a compound angle from left to right and from bottom to top. Respondent informed Diaczuk that he had been in a sitting position and leaning rearward at the time of the shooting. While the

damage to the plate could not confirm whether or not Respondent was sitting, the damage was consistent with his claim that he was leaning backward. Diaczuk confirmed his hypothesis that Respondent was in a reclining position when he was impacted by firing .22 caliber ammunition from a couple of different firearms at trauma plates of the same make and model as the one Respondent wore. Other than the impact damage already noted, Diaczuk found no visible damage to the Kevlar fibers of Respondent's vest.

By using a chronograph and firing .22 caliber long rifle ammunition at trauma plates, Diaczuk determined that the damage caused to Respondent's plate was likely caused by a bullet traveling somewhere between 940 and 1140 feet per second. When asked if this velocity allowed him to establish any estimate of distance, Diaczuk replied that the bullet could not have been fired "from incredibly far away because there's a terminal velocity . . . [but] because of the lack of gun shot residue [it] could not [have been fired] up close, [it] had to be some place that exceeded the definition of gun shot residue that was able to maintain approximately 1000 feet per second velocity." He could not tell if the bullet had been fired from a rifle or a handgun. [RX F is Diaczuk's report.]

On cross-examination, Diaczuk testified that he examined the vest for gun shot residue using simple observation with microscopy. He did not swab the vest or test it using chemicals. He tested the vest using .22 caliber ammunition because the paperwork he received from the Department indicated that that was the caliber of ammunition that impacted the vest on August 8, 2009. He conducted his examination indoors under halogen lighting. He never went to the 81 Precinct station house parking lot. While Diaczuk could not say exactly how far away Respondent was from the gun at the time of

the shooting, the lack of gun shot residue meant that the distance was definitely more than two or three feet. When asked if he could rule out the possibility that the vest was shot on a different day by Respondent, Diaczuk replied that none of the tests he conducted involved timeframe.

On redirect examination, he testified that a shooting at very close range would have created greater trauma to the vest. To his knowledge, the Department did not do any of the tests that he conducted.

Erika O'Byrne

Erika has been married to Respondent since July 2008. They have a one-month-old child and live in [redacted], New York. She is employed as a special education teacher. She testified that Respondent [redacted] Person A and Person B, but that he refers to them [redacted]. Erika explained that Person A and Person B's parents died young, [redacted].

Erika does the laundry, and Respondent has a tendency of leaving objects in his pockets. She has found bullets in his pockets. She has also found bullets in Respondent's car, as he tends not to clean up after himself. Respondent uses discarded bullet shells to make figurines for a board game he plays. Because of the charges against him, Respondent has been suspended from duty and unable to earn any overtime since May 2010.

On cross-examination, Erika testified that she learned early in her relationship with Respondent that Person A [redacted]. She does not know the difference between a bullet and a shell casing, nor does she know differences in

caliber of ammunition. When asked if she ever saw Respondent reload a shell casing, she replied, "[Respondent] always plays with bullets . . . it was his thing. So was he actually loading or playing with them, I can't tell you. I never asked because honestly I don't like guns."

Police Officer James Slavin

Slavin, an eight-year MOS, is assigned to the 81 Precinct. He was on patrol with Respondent on August 8, 2009. He described Respondent's demeanor as normal that day. He did not observe a bullet hole in Respondent's shirt. Slavin traveled with Respondent in the ambulance after the shooting. While in the ambulance, Respondent was very upset and frightened. He cried intermittently. Slavin felt that Respondent's reaction was genuine. Slavin and Respondent discussed the shooting, and Respondent never changed his description of the incident. Slavin spent more than ten hours with Respondent at the hospital.

On cross-examination, Slavin confirmed that he and Respondent returned from patrol to the station house between 2:40 and 2:50 a.m. Upon returning to the station house, Slavin went to the restroom and to the Crime Office to deal with property he had recovered. He did not see Respondent again until after the shooting occurred. Respondent told Slavin that he could not believe "this happened again." Slavin assumed that Respondent was referring to a prior shooting incident that had occurred at Patchen Avenue and Bainbridge Street. In that prior shooting, Respondent was shot with a BB gun and sustained minor injuries to his arm.

Slavin did not hear any gunshots on August 8, 2009, and it was rumored around the station house that day that Respondent's version of the incident was not true. Slavin advised Respondent at one point to tell the truth if he was not doing so already.

On redirect examination, Slavin testified that after he advised Respondent to tell the truth, Respondent continued to maintain the same version of the incident.

Police Officer James McSherry

McSherry, a five-year MOS, is currently assigned to the 81 Precinct. At approximately 3:30 a.m. on August 8, 2009, he went outside to the parking lot to smoke a cigarette. At the time, he observed Respondent reclining in a swivel chair. He and Respondent talked, and Respondent seemed normal. Two minutes after going back inside the station house, McSherry heard a bang. When Respondent entered the station house, he seemed frantic and upset. Respondent said something to the effect of, "I felt like I just got hit with a hammer."

On cross-examination, McSherry confirmed that he did not work at all with Respondent on that day. The only contact that he had with Respondent was during the approximately three minutes that he was smoking in the parking lot. Respondent entered the station house two minutes after McSherry. During that two-minute period, McSherry did not hear gunshots or a train pass. Respondent pointed out to McSherry the hole in his shirt.

On redirect examination, McSherry stated that after entering the station house he went to the muster room. The muster room is in the interior of the station house. Trains regularly pass the station house but cannot be heard from inside. McSherry conceded it

was possible that a gunshot was discharged some distance away from the station house that he did not hear from inside. It is not entirely unusual for gunshots to be heard within the confines of the 81 Precinct. Not all gunshots are reported.

Sergeant Michael Lennihan

Lennihan, an 11-year MOS who is currently assigned to the Brooklyn North Gang Squad, recalled that he was assigned to the 81 Precinct during 2009 and that Respondent was a member of his squad on August 8, 2009. He described Respondent's demeanor that day as "fine." He did not observe a bullet hole in Respondent's shirt while on patrol. Later in the tour, Respondent entered the station house, claiming to have been shot. Lennihan opened Respondent's shirt and inspected the protective vest underneath. Lennihan noticed a bullet in the vest's shock plate. Lennihan explained that a protective vest consists of a front panel with ballistic material, a rear panel with ballistic material, and a carrier that holds the two panels in place. The carrier itself does not have protective abilities. Respondent's vest had a cut on the carrier. As part of his responsibilities as a sergeant, Lennihan has conducted vest inspections. He stated that the cut in the carrier by itself would not have prevented him from passing Respondent's vest as acceptable during an inspection. [RX G is a photograph of Respondent's protective vest on the day of the incident.]

On cross-examination, Lennihan confirmed that the day of the incident was the first time that he ever worked with Respondent. They returned to the station house at approximately 2:45 a.m. At some point between 3:00 and 3:15 a.m., Respondent went to the Crime Office to give Lennihan paperwork. Lennihan did not see Respondent again

until after the shooting occurred. Lennihan did not hear gunshots or a train pass during that period. After the shooting, he told Respondent to take off his shirt and vest so that he could check for injuries. He noted a quarter-sized red mark on Respondent's chest. It was the kind of mark that could have resulted from a poke to the chest. Lennihan had the officers secure the parking lot. He did not find any shell casings in the parking lot. An officer is supposed to notify a supervisor of any damage to his protective vest. Respondent never notified Lennihan that his vest was damaged.

On redirect examination, Lennihan confirmed that an injury that just occurred can look different an hour later. The Patrol Guide section regarding protective vests states that "any concerns relative to fit or serviceability should be brought to the attention of the member's supervisor." Lennihan agreed that this section leaves a fair amount of discretion to an MOS. While in the Crime Office, Lennihan did not observe any bullet holes in Respondent's shirt. He confirmed that from the office it is not always possible to hear what is going on outside of the station house.

Police Officer Vaughan Ettienne

Ettienne, a ten-year MOS, is currently assigned to the 81 Precinct. He regularly worked with Respondent and worked with him on the day of the incident. He described Respondent's demeanor as jovial that day. He did not notice a bullet hole in Respondent's shirt. He knew Respondent to be an avid hunter and reloader of bullets.

On cross-examination, Ettienne testified that he never personally observed Respondent reload a spent shell casing. Upon returning to the station house, he and Respondent went in different directions. Ettienne would have, therefore, been unaware if

Respondent had changed his uniform. He became aware of the shooting because of a commotion going on in the station house. By the time Ettienne reached the scene, Respondent was no longer there. Ettienne did not hear any gunshots.

Respondent

Respondent, an eight-year MOS, is currently assigned to the Military and Extended Leave Desk. He has been awarded ten medals for Excellent Police Duty and two medals for Meritorious Police Duty. In addition, he received numerous awards from the communities of Bedford-Stuyvesant and East New York for services rendered to them, and he was named the 81 Precinct Cop of the Month five times. He received a commendation when, on his first day assigned to the 81 Precinct, he apprehended and disarmed a perpetrator who had accosted another police officer with a 12-inch knife. He later received praise from the community after he held together the neck of a man who had had his throat slit. He also received from the Brooklyn Borough President several awards for his role in reducing drunk driving incidents.

Respondent was assigned to Lennihan's vertical patrol team on August 8, 2009. Upon returning to the station house, Lennihan told the team to standby for further instruction. Respondent prepared some paperwork and then went outside to the parking lot to relax. While seated in a swivel chair, he had a conversation with McSherry, who had gone outside to smoke. After McSherry went back inside, Respondent remained outside by himself. As he leaned back in his chair, the J train passed by on the elevated track that runs within a hundred yards of the parking lot. While he lifted his head to look at the train, he felt what he described as "either being punched or hit in the chest with a

hammer or something like this." The shock of it caused him to jump up. He did not hear a gunshot or any other noise other than the sound of the passing train. Respondent did not immediately understand what had occurred, and he went inside the station house to see if he was alright. When he looked down he noticed a small hole in his shirt. He proceeded to the desk and told a Lieutenant Anderson that he had been hit by an unknown object. Lennihan approached, and Respondent took off his shirt and vest. He explained to them what had happened in the parking lot, and Anderson called a mobilization. Respondent was upset. An ambulance was called.

While in the ambulance, Respondent told Slavin something to the effect of, "I can't believe this happened again." He explained that he was referring to an October 2007 incident during which he was grazed in the arm while on patrol at the corner of Patchen Avenue and Bainbridge Street. He also told Slavin about what had taken place in the parking lot. He was examined by a doctor at [redacted] Hospital. Detectives who were investigating the shooting were also present at the hospital, and Respondent told them about the times that he was shot as a child. After a full-body examination and X-rays, Respondent was given a prescription for Tylenol and released from the hospital. He returned to the 81 Precinct station house, where photographs were taken of his injury. [RX H is the Emergency Nursing Record from the hospital. It indicates that there was redness on the right side of Respondent's chest. RX I is a photograph of Respondent's chest. It was taken an hour or two after his release from the hospital.]

At the station house, a sergeant and lieutenant from the precinct detective unit asked Respondent why he had a .22 caliber shell casing in his uniform pocket. He was again asked about the shell casing at his official Department interviews on August 11 and

August 18, 2009. Respondent had counsel present at both interviews. Respondent never gave a specific answer to investigators' questions about the shell casing because he had been advised by his attorney to admit that he did not know something when that was the case. Neither during the interviews nor at trial did Respondent know with certainty how the shell casing came to be in his pocket. He explained, "Liking it to the change in your pocket, you can swear that it's your change, but you can't swear where every penny and nickel came from." He regularly wore his uniform to and from work, and it was possible that he at one point picked up the shell casing and forgot that he had placed it in his pocket. He kept shell casings in his pockets, his locker, and his car. At one point, he learned that his personal vehicle had been searched and that firearms-related material was removed from the car but was not vouchered. [RX J is a photograph that was taken by Respondent of firearms-related material that was in his car at the time of the search. The photograph shows three cartridges, a shotgun shell, and a box of ammunition.] Respondent explained that he regularly plays a board game that requires him to make his own board pieces. He routinely uses spent shell casings to construct these pieces.

In his youth, Respondent was shot by [redacted], Person A. Respondent explained that he and Person A [redacted] Person A and Person B's parents died when Respondent was an infant. [redacted] In his application to this Department, however, he did not list them as immediate family members because he believed that the accurate thing to do was limit the list to his

biologically immediate family. While working in the 81 Precinct, he never hid his relationship with Person A and Person B, nor did he ever hide the fact that he had been shot by Person A as a child. He explained that when he and Person A were 12 and living in Kentucky, he got nicked in the right shoulder with a bullet while they were shooting at pie trays.

Respondent discussed his ability to reload .22 caliber shell casings at his official Department interviews. Even though it was a skill that he has had since he was six years old, he wavered in his answers to investigators at his second interview. He explained that he had been informed by his attorney that he was under investigation for Departmental and possibly criminal charges, and the investigators were so ardent in their questioning as to whether the reloading of .22 caliber shell casings was even possible that he basically convinced himself that he must somehow be mistaken. He has never received any formal training in reloading. His experience has been strictly hands-on. He subsequently demonstrated the process for Department ballistics officers using match heads.

Respondent told investigators that 40 or 50 grains of powder would go into a 9 mm shell casing. He knows now that that number was grossly incorrect. He explained that his confusion stemmed from a scale that he has used for reloading that measures materials in the "tenths." When he measured out powder for a 9 mm shell casing, the scale indicated a weight of between four and five. He misspoke when he described four-or-five-tenths as 40 or 50 grains.

About the .380 caliber shell casings that were recovered, Respondent testified that he answered investigators' questions to the best of his knowledge. He could not provide specific information because he did not specifically recall anything about the shell

casings. Respondent did not shoot himself on August 9, 2009, nor did he shoot his vest at another time and then try to create a fictitious account of a shooting.

Twice after the incident the Department sought to decertify Respondent. While the Department did not succeed with the decertification, it became adamantly clear to Respondent that the Department wished to terminate his employment. In November 2009, Respondent's attorney advised him that he was in no way obligated to submit a HIPAA release form. In many conversations about the topic, his attorney advised him that the Department did not have the right to order that the form be signed and that such an order would be a violation of his civil rights. In addition, a union delegate from the Bronx at one point called Respondent and told him that he should not sign the form because signing the form would set a precedent that would allow the Department to force other officers to sign medical waivers and other forms for no purpose.

Prior to a May 3, 2010 meeting with Brennan and Romanzi, Respondent's attorney sent a letter to IAB about the issue of the waiver. At the meeting, Brennan nevertheless asked Respondent to voluntarily sign a HIPAA release form. Respondent did not take Brennan's request as an order. When Respondent declined to sign, a break was taken. Respondent's attorney left during the break, but before leaving he advised Respondent not to change his answer. After the break, Romanzi told Respondent that he was going to give him "another opportunity to sign the form." Respondent considered this to be an extension of Brennan's original request. Romanzi never said that he was issuing Respondent an order. Respondent was suspended from duty after he declined a second time to sign the form. Respondent asked Romanzi why he was being suspended, but Romanzi did not provide an answer. While on suspension, Respondent came to the

realization that since he had nothing to hide, he might as well release his medical records. He signed the release form after being restored from his initial 30-day suspension. [RX K is the transcript of the May 3, 2010 interview.]

About the cut to his protective vest, Respondent explained that the damage occurred when he brought the vest home to clean it. He was cutting through a piece of foam core when he inadvertently sliced the nylon vest carrier. The cut was not deep enough to damage the vest's ballistic properties. Respondent examined the vest and determined that there was nothing wrong with the vest's serviceability, that it could protect him completely even with the small slit in it. The vest passed at least two inspections since that time.

Respondent conceded that he possessed a duplicate shield on August 8, 2009. When asked if he knew that duplicate shields were not allowed, he explained that at the time it was his understanding that as long as he did not present the duplicate shield to identify himself as a police officer there was nothing wrong with having it. He has since learned that he was mistaken and accepts total responsibility for his act of misconduct.

On cross-examination, Respondent testified that he bought the duplicate shield at some point during his first year with the Department. At his August 18, 2009 official Department interview, he stated that he had the duplicate shield for ceremonial purposes. The slice that he made to his protective vest was just in the vest's nylon covering. He did not think it was necessary to notify a supervisor.

In his August 11, 2009 official Department interview, Respondent was asked about three shootings that he was involved in as a teenager. He told investigators that he

was shot by [redacted], Person A when he was 12 years old. He did not tell them that Person A was [redacted].

In the August 11 interview, Respondent was also asked about the .22 caliber shell casing that was found in his pocket. When he was asked why the shell casing was there, Respondent replied that he did not know. While he still did not know for certain why he had the shell casing in his uniform shirt pocket, it is possible that he planned to use it for reloading purposes. Although he had reloaded .22 caliber shell casings hundreds of times prior to the interview, he had not reloaded one in many years. Respondent explained that Romanzi's questioning at the second interview on August 18 confused him and led him to change his position concerning his ability to reload because he "was convinced by Inspector Romanzi because of the terminology that he was using. I testified that my knowledge of reloading is rudimentary at best." Romanzi, during the first official Department interview, kept asking him, "Can it be done? Can it be done?" Respondent felt that "he basically was badgering me at that point."

Respondent agreed that 40 to 50 grains of powder would be excessive for a 9 mm shell casing. The Glenfield rifle that was recovered by the Department belonged to Respondent's father, but Respondent had access to use it whenever he wanted. He used the rifle for rabbit hunting three months prior to his August 11 interview. He was not wearing his uniform at the time. He reiterated that it is habit for him to keep shell casings in his Department locker. It was common knowledge in his command that he was an avid hunter, and he told people at work about his three pre-employment shooting incidents. Respondent agreed that on May 3, 2010, he made the choice not sign the

medical release form and that Romanzi warned him that his refusal could result in his suspension.

On redirect examination, Respondent agreed that he was upset, nervous, and scared at his August 18 official Department interview. Not only had his attorney informed him that he was a criminal suspect, but a search warrant had been executed on his locker and personal vehicle. In light of this, he began to doubt his own abilities and to question the answers he was giving. He explained that he refused to sign the medical release form on May 3, 2010 "primarily because [he] had come to the conclusion that [he] would no longer participate in [his] own lynching." He further explained, "By that point, it was my understanding that I had been attempted to be decertified twice, and at least [redacted] off the job one time, and at least once it was brought" to the Kings County District Attorney's Office "for criminal charges."

The [redacted] Services Section ultimately certified him to be fit for duty, and the District Attorney's Office declined prosecution. When a police officer receives his protective vest, he is provided with two carriers because the carriers fray and tear with use. Respondent further testified that he has used .22 caliber, .380 caliber, and 9mm shell casings to construct pieces for the board game that he plays. The game has a war theme, and he has used the shell casings to create to-scale Howitzers, Basilisk siege cannons, and Griffin mortars.

FINDINGS AND ANALYSIS

Specification No. 1

It is charged that on August 8, 2009, Respondent engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department in that he possessed an unauthorized duplicate copy of a Department shield.

Respondent admitted that on August 8, 2009, he possessed an unauthorized duplicate Department shield. Respondent explained that he had purchased this duplicate shield only for "ceremonial purposes" and that at the time he purchased it he was under the mistaken impression that it did not constitute misconduct to possess an unauthorized duplicate Department shield so long as he did not display it to anyone.

Respondent is found Guilty of Specification No 1.

Specification No. 2

It is charged that between August 8, 2008 and August 8, 2009, Respondent failed to notify his supervisor of damage to his protective vest in that he had inadvertently cut his protective vest while off-duty.

Respondent testified that he had accidentally sliced his vest with a razor blade a year or so prior to August 8, 2009, which resulted in a very small cut on his vest. Respondent offered in evidence a Department record establishing that Respondent's vest was inspected in July, 2008 and in May, 2009 (RX B) and a photograph of Respondent's vest that was taken on August 8, 2009 (RX G).

The Patrol Guide provision governing reporting damage to a protective vest states that "any concerns relative to fit or serviceability should be brought to the attention of the

member's supervisor." Respondent asserted that he never notified the Department about the cut because the damage was so minor that he was not concerned about it.

The question presented is whether the record establishes that Respondent was required to report the cut on his vest.

Although Deputy Inspector Romanzi testified that Respondent should have notified a supervisor about the cut on his vest, Sergeant Lennihan offered contrasting testimony. On August 8, 2009, after Respondent reported that he had been struck in the chest by a projectile, Lennihan opened Respondent's shirt and inspected his protective vest. Although Lennihan noticed that Respondent's vest had a cut, this cut was on the carrier which is not designed for protection but, rather, holds the front protective panel and the rear protective panel in place. Lennihan further testified that as a patrol supervisor he has conducted many vest inspections and he stated that the cut to the carrier by itself would not have prevented him from passing Respondent's vest as acceptable during an inspection. Lennihan also testified that the wording of the Patrol Guide provision leaves a fair amount of discretion to a uniformed MOS as to whether or not to report damage to a vest.

Based on the above, I find that the Department did not meet its burden of establishing that the cut on the carrier of Respondent's vest required him to notify his supervisor of this damage to his vest.

Respondent is found Not Guilty of Specification No. 2.

Specification No. 3

This Specification charges that Respondent engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department by impeding an official Department interview conducted on August 11, 2009, in that he allegedly provided incomplete and evasive answers during this interview regarding an incident that he alleged took place while he was on-duty on August 8, 2009.

In the Department's Bill of Particulars regarding this Specification, the Assistant Department Advocate (the Advocate) wrote that "the Department's position is that on August 8, 2009, Respondent, while on-duty, created a fictitious set of facts and circumstances leading the Department to believe that he was shot while he was sitting on a chair in the parking lot located at the side of the 81st Precinct."

Despite the Advocate's assertion that "on August 8, 2009, Respondent, while on-duty, created a fictitious set of facts and circumstances" it is not charged here that Respondent falsely reported to the Desk Officer on August 8, 2009 that he had been hit in the chest with a projectile while he was sitting on a chair in the parking lot. In fact, this Specification does not charge Respondent with having committed any misconduct on August 8, 2009. Instead, this Specification charges Respondent with having committed misconduct three days later by impeding his official Department interview.

The Department's Bill of Particulars asserts that Respondent impeded this interview by providing incomplete and evasive answers regarding five subjects he was questioned about. However, although this Specification alleges that Respondent provided incomplete and evasive answers regarding the incident he alleges took place while he was on-duty on August 8, 2009, four of the five subjects listed by the Department in its Bill of

Particulars have nothing to do with Respondent's claim that he was hit in the chest with a projectile while he was sitting on a chair in the parking lot of the 81 Precinct.

I will analyze each of these five subjects separately.

1. Respondent's statement that he was shot by [redacted] Person A

The Department asserts that Respondent provided an incomplete and evasive answer when he stated that when he was 12 years old growing up in Kentucky he was accidentally shot in the shoulder with a .22 rifle by [redacted] Person A.

It is not disputed that Respondent was questioned about this incident at his August 11, 2009 official Department interview only because he had mentioned this childhood shooting to Bellizzi during their conversation on August 8, 2009. The Advocate stated that the Department was not asserting that Respondent's statement that he was shot in the shoulder with a .22 rifle when he was 12 years old was an invented event. Rather, the Department asserts that Respondent's statement that he was shot by [redacted] Person A was "incomplete and evasive" because Person A is actually [redacted].

Contrary to the Advocate's claim that Respondent's statement that Person A [redacted] related to the "incident alleged to have taken place while said Police Officer was on-duty," it is clear that this childhood shooting incident in which Respondent was shot in the shoulder bore no relation to the incident reported by Respondent that while he was on-duty on August 8, 2009 he was struck on the chest.

[redacted]

[redacted]

In sum, the Department failed to prove that Respondent's statement that when he was 12 years old he was shot in the shoulder by [redacted] Person A constituted an "incomplete and evasive answer," or that his statement bore any relation to the incident reported by Respondent that while he was on-duty on August 8, 2009 he had been struck on the chest, or how Respondent's reference to Person A as [redacted] impeded the official Department interview.

2. The Department's allegation that Respondent was evasive and would not provide an explanation as to why a .22 caliber shell casing was in his uniform shirt pocket

Respondent was asked more than once at his August 11, 2009 official Department interview, "How is it that this .22 caliber long rifle shell casing is found in your pocket by Crime Scene?" Respondent's attorney, after reminding the interviewers that Respondent had already told them that he did not remember how that had come about, then cautioned Respondent, "Don't guess, don't speculate. If you know, tell them. If you don't know, don't tell them." Since Respondent's attorney had cautioned him that if he was not certain he should state that he was not sure rather than offer a speculative answer based on an assumption, Respondent testified that he offered the answer that "I don't know for sure." (DX 5 p. 78)

With regard to the Department's contention that Respondent was evasive about the .22 caliber shell casing found in his uniform shirt pocket, I find it significant that

Respondent offered an indirect explanation when he volunteered that he had the ability to reload and reuse empty .22 long rifle shell casings. Although Respondent did not specifically claim at the interview that he had placed the .22 caliber shell casing in his uniform shirt pocket so that he could later retrieve it and reload it, his claim that he could reload and reuse empty .22 long rifle shell casings constituted an indirect explanation as to why as to why he would retain an empty .22 caliber shell casing.

I also find it significant that when one of Respondent's interviewers offered him a possible legitimate reason for why he had a .22 caliber shell casing in his uniform shirt pocket, Respondent did not adopt this reason. When one of Respondent's interviewers asked, "Is it possible that you found your shell casings while on patrol and kept them?" Respondent answered, "No sir." (DX 5 p. 79) If Respondent was truly being willfully evasive, it is unlikely that he would have categorically rejected an innocent explanation for why there was a .22 caliber shell casing in his uniform shirt pocket.

Although the fact that the Department's firearms experts had concluded that the bullet fragments recovered from Respondent's vest were consistent with the type of bullet used in a .22 long rifle made the subject of why he had a .22 caliber shell casing in his uniform shirt pocket a relevant area of inquiry, the Department failed to show how the August 11, 2009 official Department interview was impeded by Respondent's answers.

3. The Department's allegation that Respondent falsely stated that a .22 long rifle shell casing can be reloaded

The Department alleges that Respondent made a false statement at his interview when he asserted that he had the ability to reload an empty .22 long rifle shell casing. The Department's Bill of Particulars alleges that Respondent's claim that he knew how to reload an empty .22 long rifle shell casing constituted a false statement because Department firearms experts said this could not be done and because Respondent retracted this claim at his second interview.

With regard to the assertion in the Department's Bill of Particulars that Department firearms experts hold to the position that a .22 long rifle shell casing cannot be reloaded and reused, subsequent events have caused the Department's firearms experts to change their opinion.

Although the Department's firearms experts were not convinced by the video recording Respondent provided which depicts him reloading an empty .22 long rifle shell casing, when a live demonstration was performed by Respondent on January 9, 2012, in the presence of the Department's firearms experts, they conceded that he had indeed demonstrated that he was able to do what they had thought it was not possible to do: reload an empty .22 long rifle shell casing by using match sticks as a primer. Thus, Respondent proved to the satisfaction of the Department's firearms experts that he could reload an empty .22 long rifle shell casing as he had claimed he could do at his first interview.

Despite the fact that Respondent proved to the satisfaction of the Department's experts that he actually could do what he had claimed at his first interview he could do,

the Advocate stated that the Department was not conceding that Respondent had told the truth at his first interview and that it was the Department's position that he had developed the ability to reload an empty .22 long rifle shell casing by practicing doing this while on suspension. I reject the Advocate's argument.

As to Respondent's retraction of his claim at his second interview, it is clear that at his first interview his interrogators reacted to his claim that he had personally reloaded empty .22 long rifle shell casings with skepticism that bordered on incredulity. I credit Respondent's testimony that as a result of their reaction to his claim, at his second interview he retracted it so that he would not appear to be liar and because they were so adamant that .22 long rifle shell casings could not be reloaded that they had raised a doubt in his mind about his ability to this. Finally, the Department did not show how Respondent's statement at his first interview that he was able to reload an empty .22 long rifle shell casing impeded the interview.

4. The Department's allegation that Respondent falsely stated that he utilizes approximately 40 to 50 grains of powder to reload a 9 mm pistol casing

This item in the Department's Bill of Particulars alleges that Respondent made a false statement during his August 11, 2009 interview when he stated that he uses 40 to 50 grains of powder to reload a 9 mm pistol shell casing.

In his testimony at this trial Respondent did not dispute the testimony of the Department's firearms experts that 40 to 50 grains of powder is an excessive amount to utilize in reloading a 9 mm pistol shell casing. Respondent explained that his statement during his August 11, 2009 interview that he uses 40 to 50 grains of powder to reload a

9 mm pistol shell casing was the result of confusion because he uses a scale for reloading shell casings that measures materials in "tenths" and that when he measures out powder for a 9 mm shell casing, the scale indicated a weight of between four and five. I credit his claim that he misspoke at his August 11, 2009 interview when he described four or five tenths as 40 or 50 grains.

The Department's witnesses testified that 40 to 50 grains is such an excessive amount of powder that it could not fit into a 9 mm pistol shell casing. This testimony supports Respondent's contention that his statement at his interview that he uses 40 to 50 grains of powder to reload a 9 mm pistol shell casing was not an intentional false statement but rather the result of confusion over how he measured the amount of powder he placed in 9 mm pistol shell casings.

Moreover, the question of how many grains of powder is the correct amount to use when reloading a 9 mm pistol shell casing appears to be irrelevant to a Specification which charges that Respondent provided "incomplete and evasive" answers regarding "the incident that he alleged took place while he was on-duty on August 8, 2009." Finally, the Department did not show how Respondent's statement that he uses 40 to 50 grains of powder to reload a 9 mm pistol shell casing impeded the interview.

5. The Department's allegation that Respondent was evasive and would not provide an explanation as to why a .380 caliber shell casing was found in his locker

Respondent was asked at his August 11, 2009 official Department interview, ".380 caliber shell cases were found in your locker, where did they come from?" Respondent answered, "I don't know for sure." (DX 5 p. 78-79) This question and

answer took place after Respondent's attorney had cautioned Respondent not to guess or speculate. The record does not support the Department's contention that Respondent provided only incomplete and evasive answers during this interview regarding these .380 caliber shells. When Respondent was asked, "Do you recall them being in your locker? He answered, "Yes," and when he was asked if he had access to a firearm that used .380 caliber ammunition he truthfully responded that his father owned a .380 caliber semi-automatic and that he had personally fired this .380 caliber semi-automatic at a firing range in [redacted] (DX 5 p. 78)

Conclusion

I find that the Department failed to meet its burden of proving that Respondent impeded his August 11, 2009 official Department interview by providing incomplete and evasive answers during this interview regarding an incident that he alleged took place while he was on-duty on August 8, 2009.

Respondent is found Not Guilty of Specification No. 3.

Specification No. 4

It is charged that on May 3, 2010, Respondent failed to comply with a lawful order in that he refused to provide a medical release to obtain records regarding an emergency room visit that occurred while Respondent was on-duty as a result of a claim that Respondent was injured while on-duty.

As noted above, Respondent does not dispute that while he was on duty on August 8, 2009 he entered the 81 Precinct and reported to the Desk Officer that he had

just been struck on the chest by a projectile while he was on duty sitting on a chair in the precinct parking lot. Respondent also does not dispute that as a direct result of his report that he had been struck on the chest by a projectile, he was removed by ambulance directly from the 81 Precinct to the hospital, here he was examined and treated. Finally, Respondent does not dispute that on May 3, 2010, he refused to sign a medical release which he knew would enable Department investigators to obtain his medical records regarding his emergency room visit on August 8, 2009.

A member of the service is required to fully cooperate with Department investigators who are conducting an investigation of an incident, especially where, as here, the reason that the Department investigation was commenced in the first place was because the member had made a complaint to a supervisor that he had been hit with an object while he was on duty.

Respondent offered three reasons for his refusal to provide a medical release: 1) That he had good reason to believe that he had become the subject of the investigation; 2) that he relied on the advice of his then-attorney that he not sign the release; and 3) that he was not required to sign the release because he had not filed a line-of-duty injury claim.

I will analyze each of the Respondent's arguments separately.

Respondent's assertion that his refusal was justified because he had good reason to believe that he had become the subject of the investigation

Respondent testified at this trial that he had refused to sign the medical release form on May 3, 2010 "primarily" because by that point in time it was his understanding

that the Department had attempted to decertify him twice, had attempted to [redacted] him "off the job" once, and had approached the Kings County District Attorney's Office regarding bringing criminal charges against him.

Respondent asserted that he was justified in refusing to sign the medical release form because he had come to the conclusion that he was no longer being viewed by the Department as the victim of a shooting but, rather, had become the target of the Department's investigation and he no longer wanted to actively participate in his "own lynching."

A member of the service is required to fully cooperate with Department investigators who are conducting an investigation of an incident even where the member becomes convinced that Department's investigators do not believe his version of the event.

Respondent's assertion that his refusal was justified because he was relying on his attorney's advice

Respondent testified that his decision that he would not sign a waiver was based in part on legal advice offered by his attorney. In November 2009, Respondent's attorney advised him that he was not obligated to submit a release form and that the Department did not have the right to order that the form be signed because such an order would violate his civil rights. Respondent asserted that a union delegate also told him that he should not sign the form because doing so would set a precedent that would allow the Department to require other officers to sign medical waivers and other forms for no purpose.

Although the Respondent asserted that he was entitled to rely on his attorney's advice, prior disciplinary decisions have consistently held that a member does not receive immunity from being disciplined for an act of misconduct merely because the member has relied on advice offered by his attorney. Thus, members have been disciplined for refusing to attend official Department interviews even where the members had relied on legal advice that the Department could not force them to answer questions while criminal charges were pending against them. See, for example, Case [redacted]

Similarly, it has been held that a member can be disciplined for refusing to answer questions at an official Department interview about a conversation with his spouse even though the member had relied on his attorney's legal advice that his communications with his spouse (regarding a criminal conspiracy) were protected by the marital privilege. See [redacted].

Moreover, Respondent conceded that it ultimately was his choice to sign or not sign the medical release form and that Romanzi had warned him that his refusal could result in his suspension.

Respondent's assertion that his refusal was justified because he had not filed a line-of-duty injury claim

The mere fact that Respondent had not filed a line-of-duty injury claim does not excuse or justify his refusal to sign the form. The medical records sought by the Department were created because Respondent had been transported to the hospital by ambulance after he complained to the Desk Officer at the 81 Precinct on August 8, 2009

that he had just been struck in the chest while on duty. Thus, Respondent was fully aware that the medical examination and treatment he received at the hospital regarding his chest injury was relevant to the Department's investigation of the on duty incident he had self-reported.

Conclusion

I reject the grounds proffered by Respondent to justify his refusal to provide a medical release so that Department investigators could obtain records regarding an emergency room visit that occurred while Respondent was on-duty as a result of a claim made by Respondent that he was struck in the chest and hurt while on-duty on August 8, 2009. As a result, I find the Respondent Guilty of Specification No. 4.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974).

Respondent was appointed to the Department on July 1, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found Guilty of having engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department by possessing an unauthorized duplicate copy of a Department shield and having failed to immediately comply with a lawful order that he sign a medical records release form.

The Advocate recommended that Respondent be dismissed from the Department.

Failing to immediately comply with a lawful order constitutes serious misconduct. However, here Respondent's misconduct of refusing to sign the release form is partially mitigated by the fact that he later agreed to sign the form and by the fact nothing was discovered in his medical records which would indicate that Respondent's initial refusal was based on a desire to hide from the Department information contained in his medical records.

Based on Respondent's lack of a prior disciplinary record in nearly eight years of service, it is recommended that Respondent be DISMISSED from the New York City Police Department, but that the penalty of dismissal be held in abeyance for a period of one year pursuant to section 14-115 (d) of the Administrative Code, during which time he remains on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. It is further recommended that the Respondent forfeit the 30 days he served on pre-trial suspension without pay.

Respectfully submitted,

Robert W. Vinal
Assistant Deputy Commissioner – Trials

DISAPPROVED
JAN 29 2010
POLICE COMMISSIONER
James P. O'Neill

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner - Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER BRIAN O'BYRNE
TAX REGISTRY NO. 935415
DISCIPLINARY CASE NO. 2010-2016 (86484/10)

Respondent received an overall rating of 4.0 on his 2009 performance evaluation, 3.5 on his 2008 evaluation, and 4.0 on his 2007 evaluation. He has been awarded two Meritorious Police Duty medals and nine Excellent Police Duty medals. [redacted] He has no formal disciplinary record and no monitoring records.

For your consideration.

Robert W. Vinal
Assistant Deputy Commissioner – Trials