The City of New York

POLICE DEPARTMENT

April 18, 2011

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Emily Harris
Tax Registry No. 941882
81 Precinct
Disciplinary Case No. 86601/10

Police Officer Philip Fioranelli
Tax Registry No. 934865
102 Precinct
Disciplinary Case No. 86603/10

The above-named members of the Department appeared before me on February 1, and March 18, 2011, charged with the following:

Disciplinary Case No. 86601/10

1. Said Police Officer Emily Harris, assigned to the 81 Precinct, while on-duty, on or about December 27, 2009, in front of 25 MacDougal Street, in Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said officer was involved in an on-duty verbal and physical altercation with Police Officer Philip Fioranelli, Tax #934865.

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

2. Said Police Officer Emily Harris, assigned as indicated in Specification #1, while on-duty, on or about December 27, 2009, in front of 25 MacDougal Street, in Kings County, upon observing, having become aware of, or upon receiving an allegation of corruption or serious misconduct involving a member of service, did fail and neglect to notify the Internal Affairs Bureau, as required.

P.G. 207-21, Pages 1 and 2 – ALLEGATIONS OF CORRUPTION AND SERIOUS MISCONDUCT AGAINST MEMBERS OF THE SERVICE

PD 158-151 (Rev. 1-97)-Server

3. Said Police Officer Emily Harris, assigned as indicated in Specification #1, while on-duty, on or about December 27, 2009, at a location known to this Department, in Kings County, did wrongfully and without just cause prevent or interfere with an official Department Investigation, to wit, said officer made misleading statements to Captain Jeffrey Maresca, Duty Captain from the 75 Precinct, when said officer was interviewed regarding an on-duty altercation and falsely stated that it was only a verbal dispute and no one was punched. *(As amended)*

P.G. 203-10, Page 1, Paragraph 2 (d) – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

4. Said Police Officer Emily Harris, assigned as indicated in Specification #1, while on-duty, on or about December 28, 2009, at a location known to this Department, in Kings County, did wrongfully and without just cause prevent or interfere with an official Department investigation, to wit, said officer made misleading statements to Members of the Department during an official Department interview by failing to state that she kneed another Members of Service, Police Officer Philip Fioranelli, about the head area during an on-duty altercation. *(As amended)*

P.G. 203-10, Page 1, Paragraph 2 (d) – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

Disciplinary Case No. 86603/10

1. Said Police Officer Philip Fioranelli, assigned to the 81 Precinct, while on-duty, on or about December 27, 2009, in front of 25 MacDougal Street, in Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that said officer was involved in an on-duty verbal and physical altercation with Police Officer Emily Harris, Tax #941882.

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

2. Said Police Officer Philip Fioranelli, assigned as indicated in Specification #1, while on-duty, on or about December 27, 2009, in front of 25 MacDougal Street, in Kings County, upon observing, having become aware of, or upon receiving an allegation of corruption or serious misconduct involving a member of service, did fail and neglect to notify the Internal Affairs Bureau, as required.

P.G. 207-21, Pages 1 and 2 ALLEGATIONS OF CORRUPTION AND SERIOUS MISCONDUCT AGAINST MEMBERS OF THE SERVICE

3. Said Police Officer Philip Fioranelli, assigned as indicated in Specification #1, while on-duty, on or about December 27, 2009, in front of 25 MacDougal Street in Kings County, was wrongfully in possession of a bogus or counterfeit New York City Police Department shield #13928, without permission or authority to do so.

P.G. 203-10, Page 1, Paragraph 18 – PUBLIC CONTACT – PROHIBITED CONTACT

4. Said Police Officer Philip Fioranelli, assigned as indicated in Specification #1, while on-duty, on or about December 27, 2009, at a location known to this Department, in Kings County, did wrongfully and without just cause prevent or interfere with an official Department investigation, to wit, said officer made misleading statements to Captain Jeffrey Maresca, Duty Captain from the 75 Precinct, when said officer was interviewed regarding an on-duty altercation and falsely stated that it was only a verbal dispute and no one was punched. *(As amended)*

P.G. 203-10, Page 1, Paragraph 2 (d) – PUBLIC CONTACT – PROHIBITED CONDUCT
GENERAL REGULATIONS

The Department was represented by Beth Douglas, Esq., Department Advocate's Office. Respondent Harris was represented by Michael Martinez, Esq., and Respondent Fioranelli was represented by Roger Blank, Esq.

A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

In Disciplinary Case No. 86601/10, Respondent Harris, having pled guilty is found Guilty of Specification Nos. 1, 2 and 3. She is found Not Guilty of Specification No. 4.

In Disciplinary Case No. 86603/10, Respondent Fioranelli, having pled guilty is found Guilty of Specification Nos. 1 and 3. He is found Guilty of Specification Nos. 2 and 4.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Gerald Seabrooks, Sergeant David Gomes and Captain Jeffrey Maresca as witnesses.

Gerald Seabrooks

Seabrooks is Bishop of the Rehoboth Cathedral located at 55 MacDougal Street in Brooklyn. He has been the pastor there for 25 years and the bishop for two years.

At about 8:00 p.m. on December 27, 2009, he learned that there had been an attempted murder at a store on 25 MacDougal Street. Some of his parishioners had told him that someone had tried to kill the proprietor (Person A [redacted] who he knew. As he approached the scene he noticed that there were a number of police officers present. He observed two officers come out of 25 MacDougal Street, later identified to be the Respondents in this case. Respondent Fioranelli, he said, yelled loudly that he was not a racist and that caught his attention. Respondent Fioranelli then punched Respondent Harris in the face with his fist. Seabrooks said he was about 10 to 15 feet away from them at that time.

Seabrooks stated that he saw a sergeant go over and tell the officers to "work this out" themselves. Respondent Fioranelli took some keys, went past the yellow police line, cursing, and drove his car the wrong way up MacDougal Street.

Seabrooks, who works with the 81 Precinct Council and who also works with the Brooklyn Police-Clergy Task Force, attempted to call the commander of the 81 Precinct.

Unable to reach the commander, he called the Internal Affairs Bureau (IAB).

Seabrooks further stated that, at about 4:00 a.m., two IAB officers went to his house. They showed him some pictures and he was able to identify the female officer (Respondent Harris) but was not able to identify the male officer. He did not know either of those two police officers prior to that date.

On cross-examination, Seabrooks agreed that the lighting conditions were that of a typical New York City street at night. Person A was in the ambulance when he arrived. Seabrooks agreed that he was concerned about Person A whose head was wrapped up. Seabrooks did not recall Respondent Fioranelli being accused of being a racist. He stated that the officers were to the right of the ambulance, about 15 feet from him. Seabrooks stated that before he saw anything, he heard the statement about racism and that got his attention. He did not see the officers bent over at any time nor did he see anyone try to pick up anything. He said Respondent Harris screamed after she was hit. He agreed that he did not tell that to IAB. There were two of his parishioners with him at the time and he did not know if they gave a statement to IAB. He did not tell the police to arrest anyone.

On further cross-examination, Seabrooks agreed that he knows Person A who owns the store. He agreed that there were about 15 officers on the scene as well as some civilians and members of the Emergency Medical Service (EMS). He said there was also a sergeant whom he heard tell the officers that they needed to work the problem out. He agreed that others on the scene had to have seen the punch. Seabrooks said that, after the punch, other officers came over and separated the two officers. He did not see Respondent Harris grab Respondent Fioranelli by the shoulders nor did he see her knee

him in the face.

Seabrooks agreed that he did tell IAB that if he had punched a police officer in front of all these people he would have been arrested. He said one of the uniformed officers told him to mind his business. He stated that he called IAB about 15 or 20 minutes after the punch. He agreed that he told IAB he was five feet away but noted that at 4:00 a.m., he might have said that. He said he was actually about five to ten feet away.

Sergeant David Gomes

Gomes has been a member of the service for 14-and-a-half years and was promoted to sergeant in 2005. He is assigned to IAB Group 31. The original investigation was a call out and he was not the original investigator in the case. When he was assigned the case, he reviewed all the prior steps taken. He interviewed the Respondents, Sergeant David Goldstein, Officer Charles Fox, Seabrooks, Person A Person B Person B Person B and Person C

Gomes stated that Respondent Fioranelli acknowledged that he had punched Respondent Harris. He had also said the she had kneed him in the head before that. Respondent Fioranelli had advised him that Person B was a witness.

Gomes interviewed Person B on March 10, 2010 [Department's Exhibit (DX) 1A is the compact disc audio-recording and DX 1B is the corresponding transcript of the interview]. Person B had told him that the two Respondents had been arguing, some papers had fallen to the ground and, as the male officer [Respondent Fioranelli] bent to pick them up, the female officer [Respondent Harris] lifted her knee, striking him in the chest. Person B stated that Respondent Fioranelli then stood up and punched Respondent

Harris. After the incident other officers approached and Respondent Fioranelli was escorted to a police car and driven away.

Gomes stated that, when he was assigned the case, Respondent Harris had already been interviewed by other officers and he only spoke to her to confirm that she was not pressing criminal charges. After interviewing Person B he interviewed Respondent Harris, who denied kneeing Respondent Fioranelli in the face. Gomes noted that Respondent Fioranelli was placed on modified assignment and that, at that time, a duplicate shield was recovered from him.

Gomes testified that other than the call out, neither Respondent notified the IAB Command Center regarding the incident.

Gomes had also interviewed Captain Jeffrey Maresca, who was the duty captain that night, and who had spoken to both Respondents. Maresca reported that both had said the dispute was strictly verbal in nature. Gomes did not believe either Respondent was injured in this incident.

On cross-examination, Gomes agreed that on the night of the incident interviews were conducted of members of the service and civilians. He agreed that Respondent Fioranelli was modified and transferred as a result of the incident and that he was not given an opportunity to tell his side of the story until March 2010. Gomes agreed that Person B stated that after she was punched, Respondent Harris "just stood there." Gomes agreed that Respondent Fioranelli stated that he had swung at Respondent Harris but did not know if he had connected. He stated that, to his knowledge, Respondent Harris was never modified. Gomes agreed that Fox drove Respondent Fioranelli from the scene.

On further cross-examination, Gomes agreed that the first call to IAB came from

Seabrooks and that the essence of his complaint was that a white male officer had punched a black female officer. He agreed that Maresca notified IAB about the incident but reported it as a verbal dispute. Gomes agreed that the duty captain spoke to Respondent Fioranelli on the night of the incident. He agreed that Goldstein told him that, on the night of the incident, he had Respondent Fioranelli driven away from the incident by his driver, Fox. He agreed that there was no need to remove Respondent Harris from the scene. He also agreed that no one other than these two officers were charged with misconduct. Gomes agreed that during her initial interview, Respondent Harris downplayed the incident and said, in essence, it was "water under the bridge." After much questioning, she agreed that she did get hit in the side of the head. He agreed that he interviewed Respondent Fioranelli only after she had indicated that she did not wish to press criminal charges.

Gomes indicated that he had interviewed Person C Person C told him that Respondent Fioranelli was grabbing a piece of paper from Respondent Harris and that he showed his fist and struck her in the head. Person C did not say anything about Respondent Harris kneeing Respondent Fioranelli. Person C Gomes agreed, refused to cooperate after that.

Gomes agreed that he learned of Person B from Respondent Fioranelli. Gomes agreed that Respondent Fioranelli told him that when he returned to the precinct, he went to the locker room where he started to punch a punching bag.

Captain Jeffrey Maresca

Maresca has been a member of the Department for 17-and-a-half years. He is the Executive Officer of the 75 Precinct. On December 27, 2008, he was the duty captain and responded to 25 MacDougal Street because of a shooting there. He later went to the 81 Precinct, where he interviewed both Respondents separately in the presence of Goldstein.

Goldstein had informed him that there was an allegation of a punch thrown by an officer. He believed he had interviewed Respondent Harris first. She stated that she had just had a disagreement with her partner about an arrest. She did not state to him whether or not Respondent Fioranelli had punched her. He then interviewed Respondent Fioranelli, who gave him the same response, that he had just had a disagreement with his partner over an arrest. He said nothing about Respondent Harris having kneed him. The interviews were not recorded. Reports (UF-49s) were prepared regarding the interviews.

On cross-examination by counsel for Respondent Fioranelli, Maresca stated that he was familiar with Patrol Guide section 206-13 regarding representation afforded to members of the service during official investigations. He agreed that the section entitles officers to have legal representation or a delegate present. He agreed that neither respondent had a representative or delegate present. He denied ever being with Respondent Fioranelli alone. He did not recall Respondent Fioranelli stating that he and Respondent Harris had a verbal dispute and then they had gone at it.

Maresca stated that he asked if punches were thrown and Respondent Fioranelli stated, "No, it was just a verbal altercation." He stated that was the entire conversation. Maresca did not recall anyone coming in and interrupting the conversation. He did not

see any injury on Respondent Harris. He did not know how Respondent Fioranelli got from the scene back to the precinct.

On cross-examination by Respondent Harris' counsel, Maresca agreed that he went to MacDougal Street because of the shooting, not because of the allegation involving an incident between officers. He stated that after he left the location, there was an allegation of a punch thrown. He did not recall seeing anything at the scene regarding that alleged incident. Goldstein did not tell him that he had seen anything. Goldstein had told him that a complaint had been made to IAB. He did not recall, but acknowledged that it was possible that Goldstein had done a preliminary investigation. He agreed that his interviews were short, that he saw no injuries and that both Respondents were fit for duty.

The Respondents' Case

The Respondents each testified in their own behalf.

Respondent Emily Harris

Harris had has been a police officer for five years and is currently assigned to the 81 Precinct. She stated that she has over 125 arrests, she has never been on modified assignment, and other than the current charges, she has had no other formal discipline.

On December 27, 2009, she was working in a radio motor patrol car (RMP) with her partner, Respondent Fioranelli. They had been steady partners for about six months but they did not hang out off-duty. They received a radio run of a man with a firearm, which was upgraded to a commercial robbery in progress at 25 MacDougal Street. Upon

arriving at the location, Respondent Harris exited the vehicle and approached the store. She saw a man outside the door who said that people were fighting inside. She entered the store and asked who the owner was. She saw two people engaged in a struggle, there was broken glass on the floor and the store was in disarray. Someone (Person A identified himself as the store owner and she put that person in handcuffs and later handcuffed the perpetrator (Person D who had a cast on one hand. She also retrieved a firearm from the floor.

She later learned from the store owner that Person D had come in, fired a round that missed and when he tried to fire again, apparently the gun had jammed. The store owner then started struggling with Person D to save his life.

Respondent Harris stated that the floor was full of broken glass and both of the individuals were covered in blood. It was difficult to tell what the injuries were until they were in the ambulance. She stated that she secured the gun in the trunk of her car. She could not secure the scene because Person D was not handcuffed and subsequently became unconscious.

During this time, she said, Respondent Fioranelli was outside the store. As she was busy dealing with the situation, she did not know exactly where he was. She did hear him on the radio and a lot of personnel responded because he had stated that everyone was shot inside the store. She agreed that Person D did look like he had been shot because of all the blood.

Members of the detective squad responded because a multiple shooting was reported on the radio. The sergeant and the duty captain also responded. She stated that she believed the detective squad would be handling the case but she studied the scene

because she knew that she would be asked "a million questions" by the assistant district attorney.

Because no one was shot, the detective squad did not take the case and it was determined that a member on patrol would take the arrest. She assumed that she would be assigned the arrest.

Going back to earlier in the day, Respondent Harris noted that she and Respondent Fioranelli had observed several people smoking marijuana cigarettes in the lobby of a building. They made three arrests which had been assigned to her. In that case, although both of them made the arrests, they had been assigned to her because it was "her turn."

She did not exactly recall why she had not processed the arrests at the time but she believed officers were needed on patrol because it was a busy night. Her plan was to process the three arrests at the end of her tour.

Respondent Harris stated that she believed she would be the arresting officer because she had made the identification and the apprehension "and it just would have been easier to have me handle the case instead of having separate officers like come in and the arresting officer did you identify the person who had the firearm, no it's this officer or did you recover the gun, no it's this officer. I mean, it just seemed to me like it would make sense to have me process the case." She added that she had witnessed the case from the very beginning. She asserted that this was different from the earlier marijuana arrests because they had both witnessed that. Further, she noted that there was very little likelihood that any of those cases would be conferenced with an assistant district attorney, whereas this case would clearly be going to the grand jury. She also was

the one who had to get the DNA swabs.

While she was in the store, Respondent Fioranelli was "erratic and upset." He was on the radio a lot. While she was gathering information she was too busy to know where he was. She was taking notes for later reference.

As to the dispute between them, Respondent Harris stated that it started when she had delivered the paper on which she had taken notes to the detective squad. After it was decided that the detective squad was not taking the case, she had a piece of paper in her hand and walked to the front of the store when Respondent Fioranelli announced that he was taking the arrest.

She said she responded by stating that she had not seen him in the store, meaning that he had not entered the store while the "situation" was ongoing, and that she had handled the matter by herself. She said Respondent Fioranelli became irate. He began trying to snatch the paper from her hand. She said she pulled it back and he finally succeeded in pulling it from her hand. It fell to the floor and she put her foot on it to keep it from blowing away and, while she was looking down, he struck her in the face. He had hit her with his closed fist striking her on the right side of her head above her ear. They were then separated by other officers.

Respondent Harris stated that there were a lot of personnel in the area when this happened. The sergeant, duty captain and civilians were in the area.

She did not strike Respondent Fioranelli and she denied ever kneeing him. She believed that Fox was the officer who stepped in between them. They put Respondent Fioranelli in the car and drove him back to the precinct. When Respondent Fioranelli left, she continued to speak with the complainant and do further work on the case.

At some point, the sergeant asked her what had happened and she told him that the incident was just verbal. She did not mention that she had been punched. She stated that there were many officers and civilians in the area and they were in a position to have seen the punch. She said she did not mention it because she did not want anything to happen to her partner and she did not want to go any further with the matter.

She later learned that the arrest had been assigned to Respondent Fioranelli. She did not know who made that decision.

Respondent Harris stated that she was interviewed at the precinct by Maresca. She told him that she and Respondent Fioranelli had a verbal dispute and that they "would handle it." She did not make a complaint about being punched at that time. She did not have representation during the interview. She acknowledged that, at her official Department interview, she did not to say anything about the incident but that as it progressed, she was forthcoming. She told the investigators that she never kneed Respondent Fioranelli because it never happened. She has not worked with him since the incident. She was asked if she wanted to have him arrested and she said she did not.

Respondent Harris said she has learned her lesson from this experience and will always be forthcoming with information and will make appropriate notifications.

On questioning by the Assistant Department Advocate (Advocate), Respondent Harris stated that she had no recollection of Respondent Fioranelli stating that he was not a racist. When told that there were three civilian witnesses who said she kneed Respondent Fioranelli, she stated that she found it hard to believe that anyone could see something that did not happen.[1]

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[1] According to the record in this trial, only one witness, Person B claimed to have seen her knee Respondent Fioranelli.

Respondent Harris agreed that, during her first official Department interview, she was not asked about the alleged kneeing incident. During her second interview, she was. Respondent Harris acknowledged that she and Respondent Fioranelli agreed to say that the incident was only verbal and that they would handle it themselves. She denied that they ever made an agreement to say that the incident was a verbal disagreement.

On cross-examination by counsel for Respondent Fioranelli, she said she did not recall exactly how long they had worked together. She said that she went to the beach, a movie and dinner with Respondent Fioranelli and his family, one time. She agreed that, at the time of the incident, she had three arrests waiting for her at the precinct. She also agreed that she described the contact Respondent Fioranelli had with her as a "nudge." She said he did make contact with her. She agreed he did not curse at her during the incident nor were there any ethnic slurs. She agreed that she never called Respondent Fioranelli a racist.

When she was struck by Respondent Fioranelli, she did not lose her balance but said she was a little wobbly. She did not experience dizziness. She did not sustain bruising or have a laceration. She had no pain. She never had an incident of this sort with Respondent Fioranelli before. She said she had a good relationship with her partner before this incident.

Respondent Harris said she did not rush into the store without knowing what was going on, as someone outside told her what was going on. She agreed that, when she entered, she did not know who the person in the back of the store was but that she later learned that he was an employee.

Respondent Philip Fioranelli

Respondent Fioranelli stated that he served three years of active duty with the US Army as a combat engineer in the Heavy Artillery Division. He served another nine years with the Army Reserves in the Military Police Brigade. He did active duty in the Middle East, having served with the 24 Infantry Division, Third Brigade, 317 Battalion. He also served one year in South Korea. He had been awarded two Army medals, two National Defense medals, a Service medal, a Career Defense Service medal, an Army service ribbon, one Presidential Unit Citation, as well as an award for perfect tank-driving.

He has been trained in basic hand-to-hand combat. He testified that he also received training with this Department. He also testified that he holds an Associate degree in Applied Science from Suffolk County Community College, a Bachelor of Arts degree from the State University of New York at New Paltz, as well as a Master of Professional Study in Human Resource Management and Industrial Labor Relations from the State University of New York at Stony Brook.

On December 27, 2009, he was working in an RMP with his then-partner, Respondent Harris. They had worked together for 14 months. He said they had a social relationship in that she and a girlfriend had gone to the beach with him and his brothers two or three times. They had gone to the movies two or three times and he had dinners with her and his family.

On that day, at about 1830 hours, they arrested three people for smoking marijuana. Those arrests went to Respondent Harris as it was "her turn." The three arrests were not processed at that time. Respondent Fioranelli stated that although the

sergeant wanted her to process the arrests right then and there, Respondent Harris wanted to avoid working a 4:00 p.m. to 12 midnight tour the next day and wanted to do a day tour. She argued with the sergeant and disobeyed his order. Respondent Fioranelli said he told the sergeant to let her go back on patrol, as it was to be the last day they were working together. He said he was going to be assigned to the conditions unit.

They went back out on patrol, got the radio run of a shooting and proceeded to the location of the crime. They observed a male, later identified as Person B at the door. Person B said he had called 911 and that a robbery had just taken place and someone had been shot.

They were peering in the door when, he said, Respondent Harris "pushed me out of the way or nudged me out the way, not enough to knock me off my feet, she got past me [and] ran into the store." He said he followed her into the store several feet behind. He said she recovered a gun, which he took, put it in a bag and put it in the RMP.

He said that they had observed someone in the back of the store, who turned out to be Person C a store employee. He did not know Person C was an employee at the time. He said what he wanted to do was to bring Person C to them and not the other way around. He said that was what his training called for.

Respondent Fioranelli said that when Respondent Harris handed him the firearm she had recovered, he put it in the RMP. Then:

> I believe I did radio for additional units. I didn't know what happened to the guy on the ground, he looked like he was dead, I thought he was shot initially. I am not a doctor. By then, the adrenaline on both of us is probably going because mine is going. She gave me a heart attack running into the store because that is not what I wanted to do.
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> I go over there, she goes over the radio. Blood is pumping

> because that is what happens. I went over to the radio, central two males confirmed shot let me get a bus and additional units. At that point, there is stuff all over the floor. I threw a table out the door. By that time, a couple of other officers started coming out of a van. I believe she is still in the store at that time. EMS eventually arrived on the scene, sergeant arrived.

Respondent Fioranelli said that he always keeps note paper and he wrote down Person B name and information. About 20 minutes later, as he observed the owner of the store, Person A being taken away, Respondent Harris asked him for paper. While talking to the sergeant, he observed Respondent Harris handcuff Person D to the stretcher he was on. Respondent Fioranelli testified that he thought to himself that it was great that she was going to help him (Respondent Fioranelli).

Respondent Fioranelli testified that, as he continued to talk to the sergeant, he observed Respondent Harris go over to the ambulance with one of the detectives inside and gave the identification of the suspect to the detective. Respondent Fioranelli stated that he wondered what was going on. He stated that he said that he was going to "take this collar" and that Respondent Harris said to him that she did not see him in the store.

When asked by his attorney what Respondent Harris' demeanor was, he stated that she was calm and that he did not recall her being excited. He went on: "My adrenaline was still up from her running into the store, driving to the scene and everything else because I got to make sure we don't wreck the car so far that I never really managed to wreck one." Respondent Fioranelli continued:

> At that point where she states that I didn't see you in the store, I walked up to my RMP, which is directly, I guess, south of us. I am looking for another piece of paper. Probably 30 seconds go by, I turned around, I look directly at her. There is no further communication from my mouth

> to her ears or no communication coming from us for the rest of the incident, no more communication between us.
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> I walked up to her. With my right hand, I reach out to snatch the paper, she goes to snatch it back real quick, it falls to the ground. I bend over, with my left hand I pick it up. I got it in my face, as I bent over I felt one hand on my right shoulder -- "

Asked if he thought snatching the paper was the best way to handle the situation, Respondent Fioranelli agreed it was not. He went on with his narrative:

> As I had the paper in my left hand everything went quick. As I am explaining this, keep in mind this is a window of three seconds.
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> I bend over, pick up the paper, get it in my hand. I, at least, felt one hand on me, I believe I felt another. I have a heavy jacket with a quilt lining and my vest on. Split second, I feel a knee hit my face and into my upper chest jamming my neck back up. My initial reaction, without thinking, I stood up and I threw a punch.
>
> All I remember is her hands up like this and her head rocking back when I threw the punch. Next second later, I remember someone grabbing me and whipping me around. When I turned around is when I saw Person B standing about ten feet away shaking his head back and forth in disgust.

Respondent Fioranelli stated that it was not his intention to punch Respondent Harris. He said he was not thinking about anything at that point, it was his reaction. He stated that he was doing what he was trained to do. Respondent Fioranelli stated that he did not know if he "got her" but he did know that she didn't go down. He stated that he first learned that it was alleged that he made contact when he was called to IAB.

After the dispute, he was ordered back to the 81 Precinct by Goldstein. He was driven back by Fox. He said he did not say he was not a racist.

When he got back to the precinct, Respondent Fioranelli said he went downstairs to cool off a little bit. He went over to the punching bag because that is how he "blow[s] off stress, so [he] beat up the punching bag." At some point, another officer came down and told him to get back to the crime scene as he was assigned the arrest.

Respondent Fioranelli recalled speaking with Maresca. Maresca asked him if he recalled if he punched Respondent Harris and, he recounted, "I said no I told him my exact words were it was only a verbal dispute I paused then I said then we went at it." Respondent Fioranelli then testified that he did not get to explain what he meant because someone walked in and told Maresca that IAB was on the way. Respondent Fioranelli stated, "At that point, he stood up, I was there by myself, all questioning ended. I walked out of the duty captain's office, the CO's office, following him."

He explained that he did not mention the kneeing incident because he was not interested in pursuing it. Respondent Fioranelli stated that he was placed on modified assignment for 14 months. He was restored to full duty several weeks ago and now works patrol in the 102 Precinct. During his time on modified assignment, he had been assigned to the Queens Court Section.

Respondent Fioranelli stated that he filed two complaints with the Office of Equal Employment Opportunity (OEEO). He said he attempted to file a complaint in March, but the lieutenant would not take his complaint because it did not involve racial discrimination. He stated:

> On April of 2010, I called them up again in the evening hours, like mid-April. I spoke to someone, I told them how I was modified, how I made -- I spoke to IAB and they wouldn't touch it. They told me it's not their responsibility modify that came from Sergeant Gomes. They took my entire statement for everything I said to them.

> My complaint was against IAB. They took my EEO complaint, refused to do any investigation on it and send it to IAB to be wrapped up with this investigation.
>
> In July 17th, I got a notification to go down to Psych[ological] Services. When I was down at Psych Services, I was grilled about why I was filing EEO complaints, which is a violation of any type of policy and is also retaliation. I was basically, in sum and substance, told to shut my mouth.

Respondent Fioranelli stated that he had been involved in a shooting incident earlier in his career. When asked if he received a medal for this, he stated that the write up was presently "sitting on a table right now waiting to be evaluated." He stated that on July 27, 2008, while on a foot post, he was approached by a kid on a bicycle. When he stepped off the corner, four rounds were fired at him in front of 120 Chauncey Street. He radioed that shots had been fired but he did not return fire himself as there were other kids on bicycles and he did not want to hit the wrong person. He stated, "Basically, I held my fire, sum and substance, he was, now is, doing ten years."

On cross-examination by the Advocate, Respondent Fioranelli acknowledged that the first time he mentioned the kneeing incident was at his official Department interview on March 5, 2010. He agreed that he did not mention it to Goldstein or Maresca, nor did he mention it to anyone at the command. Respondent Fioranelli acknowledged that he "kept [his] mouth shut." He acknowledged that he and Respondent Harris had agreed to keep "[their] mouths shut" regarding the incident with an agreement that consisted of two words, "Not talking," which he testified he said to her at the precinct. He said this occurred before he spoke to the sergeant which was also before he spoke to Maresca. He agreed that when he was questioned by Maresca, it was his intention to keep his mouth

shut regarding what happened.

On cross-examination by counsel for Respondent Harris, Respondent Fioranelli stated that he was kneed in the face and chest with "one shot." He stated that a "split second" later he stood up and swung with a closed fist. He agreed that he was definitely aiming for her but was not sure if he hit her or not. He agreed that, at his official Department interview, he stated that he thought he missed her "unfortunately." He stated that immediately after the punch, he was spun around and pulled away. When asked how long after the punch he was spun around, Respondent Fioranelli replied, "I don't recall the time frame, I did get kicked in the face." He then said that he did not recall but it was less than a minute. When asked if it was less than 30 seconds he stated, "I wasn't looking at my watch."

He did not recall who spun him around but he did remember that he was grabbed on the arm and shoulder and pulled away. He believed it was one person but testified that he did not recall if it was a member of the service. When asked if it was possible that a civilian had pulled him away he stated, "It wasn't Bishop Seabrooks." When admonished by the Court to not be argumentative and answer the question, he recalled that it was, in fact, a member of the service but stated that he did not recall who it was.

Respondent Fioranelli said that he was on the scene for five minutes before being taken back to the precinct. During that time, he said, he was walking around and saw Person B shaking his head in disgust. He agreed that he did not know if the disgust was caused by him being kneed or him punching a female officer in the head. He agreed that he brought Person B name to the attention of IAB and that he had that information at the scene of the shooting. Respondent Fioranelli stated that he had no contact with Person B

between the time of the shooting and Person B interview with IAB. As to contact with others who were at the scene of the shooting, he stated that he, Respondent Harris, Person B Person A and Person C were at the grand jury.

When asked if he spoke to Person B at the grand jury, Respondent Fioranelli stated, "Are you asking me if words out of my mouth went into his ear the answer is no, did any words out of his mouth come into my ears, yes."

Respondent Fioranelli testified that he did not speak to Person B but that he called Craig Hayes.[2] Explaining when he called Hayes, Respondent Fioranelli stated:

> After Person B overheard Person C telling me he was approached, Person C approached me, [redacted] and asked me what happened. I said I can't talk about it. He was like, he told me, I saw something I have to say something. When Person B is sitting on the bench he said to me, well, I saw everything, I saw a knee in the face and I saw you throw the punch. At that time I contacted Craig Hayes immediately and told him what I have.

Respondent Fioranelli agreed that he gave Person B contact information to IAB and that he already had the contact information. He does not have a clue as to where Person B is now.

Respondent Fioranelli agreed that his adrenaline was pumping as he drove to the scene. He said that he was also on the radio. He indicated that he did his memobook entries later. He agreed that when he got to the scene, he wanted to wait outside and that he chose a different tactic from that of Respondent Harris. He agreed that he was not sure if someone inside had a weapon and that he wanted to beckon that person to walk toward him, as that was the safer route. Respondent Fioranelli stated that the struggle

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[2] Craig Hayes is an attorney who represents many police officers in disciplinary matters.

between the two people on the floor was over. Person D the alleged perpetrator, was, he said, unconscious and Person A the owner, was collapsed on the floor. When asked if this could be seen from outside, he stated, "Yes, they were both on the floor, he struggle was over upon [our] arrival. Person C was already in the bathroom, which it turns out, he is flushing drugs down the toilet bowl."

When asked if he had mentioned, in a prior statement, that Person C was flushing drugs down the toilet, Respondent Fioranelli stated that he had never been asked "whether he was or wasn't." Respondent Fioranelli stated that he did not recall if he thought it was relevant to disclose this information during his prior interviews, or if he told the district attorney about one of the victims flushing drugs down the toilet. He said he did not know the status of the person he arrested. When asked if he actually saw Person C Person C flushing drugs, Respondent Fioranelli stated, "No, I did not but there was evidence of bags all over the place." Respondent Fioranelli repeated that there was evidence that drugs were being flushed down the toilet but that he did not recall if he told that to the district attorney.

Respondent Fioranelli asserted that when he got to the scene, he was standing in the doorway when Respondent Harris, "pushed him or nudged him out of the way" and went past him into the store. He said that he was the senior officer and had seniority over her. She was not, to his knowledge, disciplined for employing bad tactics that day. He agreed that Respondent Harris ran inside. When asked where she recovered the gun from, he said he believed she recovered it from the floor. He had not seen the gun. The first time he saw the gun, he said, was when she handed it to him. He said he then put it in the RMP.

Respondent Fioranelli acknowledged that he said that Respondent Harris had mentioned something about not seeing him in the store. He said he did not "interpret" that but it was when they were discussing who would take the arrest. He agreed that he said at that time his adrenaline was still pumping from the driving and from her running into the store. He denied transmitting over the radio that anyone was dead but did agree he said that he had transmitted that there was "confirm[ed] two males shot." He agreed that he believed that two males had been shot and that, in fact, no one was shot. He agreed that he was giving the best information he had at the time.

Regarding the two individuals in the store, Respondent Fioranelli testified that one was unconscious and the other was leaning up against the wall, his legs under him and conscious. He agreed that this could be seen from outside the store. He claimed he was several feet behind Respondent Harris when she went into the store. He agreed that was when she brought him the gun.

He agreed that he brought OEEO actions but asserted they were not against Respondent Harris but against IAB. He then conceded that, "I made three complaints against Officer Harris."

Respondent Fioranelli agreed that, when he got back to the precinct, he took off his "stuff" and starting hitting the punching bag. He said he did this because he was "pissed off about getting punched in the face."[3] He then agreed that he misspoke when he said he had been "punched" in the face, he meant "kneed" in the face. He had no injury and received no medical attention.

On re-direct examination, Respondent Fioranelli stated that while he did not express a desire to speak to IAB on the night of the incident, he did the next day. He said

[3] The Court admonished Respondent Fioranelli about the use of inappropriate language while testifying.

he approached the IAB sergeant who had come to get Respondent Harris. He was told that IAB would get in touch with him. They got in touch with him in March. The questioning related mostly to the incident with Respondent Harris and not with the shooting.

FINDINGS AND ANALYSIS

On December 27, 2009, at about 8:00 p.m. the respondents were partners who responded to a robbery involving a shooting in a store at 25 MacDougal Street in Brooklyn. A suspect was apprehended and, at some point in time after that, the respondents quarreled over who was going to be designated as the arresting officer. There is no question that, after a verbal dispute, Respondent Fioranelli took a swing at Respondent Harris. He denies striking her. She claims that he did strike her in the face. He also claims that his swing was in response to a physical assault by Harris.

Respondent Fioranelli admits that, during the verbal dispute, he attempted to take a piece of paper from Respondent Harris, that the paper fell to the ground and that when he bent down to pick it up, he claims, Respondent Harris kneed him in the face. It was at this point that Respondent Fioranelli took the swing at Respondent Harris. Neither respondent suffered any injury.

The Department offered the testimony of Seabrooks, who said that he saw the Respondents exit the store and that he then heard Respondent Fioranelli state that he was not a racist. Seabrooks said that the Respondent Fioranelli then punched Respondent Harris in the face. He did not see papers fall, he did not see Fioranelli bend down and he did not see Harris knee Fioranelli.

Another witness to the incident between the Respondents was Person B who did not appear at this trial. A statement he made to IAB investigator Gomes was placed in evidence. He did not mention anything about Respondent Fioranelli making a statement about not being a racist but he did claim to see the respondents "snatching a paper back and forth." He said he then saw the paper fall to the ground. Person B further stated that when Respondent Fioranelli bent down to get the paper, he saw Respondent Harris knee him. But Person B in his statement, also indicates that when the paper fell to the ground and before she kneed him, Respondent Fioranelli pushed Respondent Harris with his forearm.

Gomes also interviewed Person C an employee at the store. Person C told him that Respondent Fioranelli was grabbing a piece of paper from Respondent Harris and that Respondent Fioranelli showed his fist and struck Respondent Harris in the head. Person C who declined to cooperate further, did not say anything about her kneeing him.

The only other witnesses to the incident who have come forward with statements are the two Respondents.[4] Respondent Fioranelli claims he was kneed and Respondent Harris denies kneeing him. As will be seen, there are very serious questions about the credibility and reliability of Respondent Fioranelli's testimony, however, in assessing whether the kneeing incident occurred or not, it perhaps best to put aside the competing versions put forth by the respondents and see what the independent evidence shows.

The only independent witness who unequivocally claims that Respondent Harris did not knee Respondent Fioranelli is Seabrooks. Seabrooks is also the only independent witness who testified at this trial. Seabrooks was a credible witness who obviously was

[4] As noted by counsel for Respondent Harris, there were numerous police officers in the vicinity but apparently none of them saw the incident.

correct in reporting that Respondent Fioranelli took a swing at Respondent Harris. But he claimed that the Respondent Fiorenelli left the scene when he took some keys got into a patrol car and drove his car the wrong way up MacDougal Street. This is apparently an error, as there seems to be no question that the Respondent Fioranelli did not drive the car but was driven by someone else, Officer Fox, the sergeant's driver.

It is clear that Seabrooks may not have noticed or recollected all of the details and may have missed what happened before the punch, which is when the alleged kneeing occurred.

Person B who claims to have seen a kneeing incident, did not appear at this trial and was not subject to any cross-examination. His interview was short and friendly and his observations were not challenged in any way during the interview as they might have been had he been subject to cross-examination. For instance, there was no questioning to determine how far Person B was from the scene or whether he heard the statement about racism Seabrooks said Respondent Fioranelli made. There was also no questioning to determine exactly what Person B saw and if he could have been mistaken or if the actions he attributed to Respondent Harris could have been something other than an intentional assault with her knee. Further, in his recount of the incident at this trial, Respondent Fioranelli claimed that Harris put her hands on his shoulders. There is nothing in the statement from Person B about this. There is therefore good reason to be skeptical about taking Person B unsworn and unexamined statement that Respondent Harris kneed Respondent Fioranelli at face value.

Another person who claimed to witness the event was Person C In his statement to Gomes, Person C made no mention of the alleged kneeing incident but did say that he

saw Respondent Fioranelli strike Respondent Harris in the head with his fist.

Respondent Fioranelli admits to have grabbed the paper from Respondent Harris' hand. Respondent Harris admits that she put her foot on the paper. Although she claimed this was to keep it from blowing away, it is possible that she did this to prevent Respondent Fioranelli from getting it. Whatever the reason, Respondent Harris' action in putting her foot on the paper might explain why Person B claimed to have seen Respondent Fioranelli push her.

Given the proximity of Respondent Fioranelli's upper body, as he bent down to get the paper, to the Respondent Harris' knee, as she put her foot on the paper, there is the real possibility that contact, if it occurred, was unintended.

Looking solely at the independent evidence, it is clear that it is insufficient to support a finding that Respondent Harris kneed Respondent Fioranelli.

Looking at the statements of the two respondents, there is good reason to doubt that an intentional kneeing occurred. As noted earlier, this Court has significant concerns about Respondent Fioranelli's credibility, which will be discussed in more detail later in this decision. In assessing his claim that he was kneed, it should be noted that he claimed that in one blow he was struck both in the head and chest. He did not offer an explanation of how this could have occurred. Person B in his statement, said nothing about him being kneed in the face and mentioned only a kneeing in the chest. There is the fact that there was no bruising or any other injury to Respondent Fioranelli from this alleged kneeing.

As to Respondent Harris, nothing occurred during this trial to cause this Court to doubt her credibility. Even her claim to have put her foot on the paper to prevent it from

blowing away, rather than to keep Respondent Fioranelli from getting to it, makes sense. Respondent Harris used that paper to make notes about the shooting incident. It was her work product. This is confirmed by Respondent Fioranelli, who testified in a rather disparaging manner about the fact that she was speaking with detectives and making notes about the shooting.

In the end, there is not only insufficient proof to establish that the kneeing occurred, but good reason to doubt that it occurred.

As to the punch, that is a different matter. Seabrooks, Person B Person C and Respondent Harris all say it happened. Even Respondent Fioranelli admits that he took a swing at Respondent Harris. He only said that he did not believe he made contact.

Counsel for Respondent Fioranelli, noting that Respondent Harris suffered no injury, has argued that had he punched her, she would have suffered some injury or would have been knocked down. This is, of course, conjecture. It is certainly possible, if not likely, that the blow did not land with the full force that was intended. Respondent Fioranelli suggested in his testimony that Respondent Harris moved her head and that is certainly a possibility. However, Respondent Fioranelli's claim that he did not believe the blow landed does not amount to evidence that it did not land. Respondent Harris testified credibly that she was hit. Her claim is corroborated by Seabrooks' testimony and the hearsay statements of two eyewitnesses. It is undisputed that Respondent Fioranelli took a swing at Respondent Harris with his closed fist, intent on harming her and there is substantial evidence that the blow connected with her face although not at the full intended force.

To sum up then, this Court finds that there is sufficient evidence to establish that

Respondent Fioranelli punched Respondent Harris, but insufficient evidence to establish that Respondent Harris kneed Respondent Fioranelli. Further, while it is usually difficult to assess who started a physical conflict of this type, in this case, it is easy. Respondent Fioranelli has admitted that he grabbed a piece of paper on which Respondent Harris had made notes about the shooting, which was the actual business they were there to address, from Respondent Harris' hand.

Disciplinary Case No. 86601/10 - Respondent Harris

Respondent Harris is charged with four specifications. She has pled guilty to three of those specifications and only challenges one, Specification No. 4. That specification alleges that the Respondent Harris "did...prevent or interfere with" an official Department investigation in that she "made misleading statements to members of the Department during an official department interview by failing to state that she kneed another member of the service, Police Officer Phillip Fioranelli, about the head area during an on-duty altercation."

There are several problems with this specification. The first is, as has been noted, the Department did not provide sufficient and substantial evidence that the Respondent Harris kneed Respondent Fioranelli.

Perhaps the most troubling flaw in the specification is that the essence of the charge is not that Respondent Harris kneed Respondent Fioranelli but that she failed to report that she kneed Respondent Fioranelli during her initial interview on December 27, 2009. Respondent Harris has consistently denied and continues to deny that she ever kneed Respondent Fioranelli. She is, therefore, being charged in this specification with

failing to report something she has consistently denied occurred.

At her subsequent official Department interview, Respondent Harris was specifically asked about the alleged kneeing and denied it. She has not been charged with making false statements and cannot be because that is a mere denial. Here, she is being charged with obstructing an investigation for not mentioning something that she denied occurred. Charging the Respondent with failing to volunteer information about something that she denied doing is inconsistent when the denial is not itself actionable. For all of the above reasons the Respondent Harris is found Not Guilty of Specification No. 4.

Disciplinary Case No. 86603/10 - Respondent Fioranelli

Respondent Fioranelli is charged with four specifications. He has pled guilty to Specifications 1 and 3. He challenges Specification Nos. 2 and 4.

Before discussing the specific charges against Respondent Fioranelli, it is, regrettably, necessary to discuss his testimony. In it, there are unprovoked and irrelevant attacks on Respondent Harris. It also contains a number of inconsistencies.

One of the attacks involves the decision to have the two respondents on patrol at the time the call to 25 MacDougal Street came over the radio. The two respondents had arrested three individuals for smoking marijuana earlier in the tour. Ordinarily, they would have processed those arrests immediately. They may or may not have gotten back out on patrol.

Respondent Harris testified that they put off processing those arrests because it was a busy night and there was a shortage of officers to do patrol. Respondent Fioranelli

said that Harris wanted to avoid working a particular tour the next day. How putting off the arrest processing was going to achieve this was unexplained and seemed to make no sense. Nonetheless, Respondent Fioranelli said she insisted on going back on patrol, arguing with the sergeant who wanted her to process the arrests immediately. He testified that she was not following the sergeant's orders.

There are no charges that Respondent Harris ever disobeyed any sergeant's orders. The entire matter is irrelevant to the issues at hand, except to the extent that going back on patrol made them available to respond to this radio run of a robbery in progress and "shots fired."

He stated that while driving to the scene with lights and sirens, he had to not only operate the vehicle but also make transmissions on the radio. (He also said he had to make notes in his memobook, but later conceded he did that after the incident and not while driving.) This, of course, is another gratuitous attack on Respondent Harris, who, as the recorder would ordinarily be expected handle the radio transmissions in the RMP. Again, this is irrelevant to the incident that is the subject of these charges.

Additionally, he claimed that Respondent Harris pushed past him to get into the store. This too is irrelevant to the alleged fight that occurred over 20 minutes later, by his account.

More serious are the inconsistencies. The first of these is related to that entry into the store. He claimed that she did not act responsibly in entering the store. This Court is not prepared to discuss what the appropriate tactics should have been nor is it relevant to the issue before this Court. What is relevant is that Respondent Fioranelli, on the one hand, claimed it was dangerous for her to go into the store and on the other, he said that

they were able to look in the store, see that the struggle was over, that two very bloody men were on the floor, one unconscious and one apparently incapacitated. The first account was given when he was claiming she was reckless and the second when he wanted to diminish the significance of her actions. In short, he adjusted the facts to meet his needs.

As to the third person in the store, Person C Respondent Fioranelli volunteered that he was flushing drugs down the toilet.[5] His claim, therefore, that it was imprudent to enter the store is belied by the very observations he claims to have made from outside the store. Respondent Harris, for her part, said she evaluated the situation before entering the store and the events seem to bear her out.

One particularly disturbing contradiction concerns the interview conducted by Maresca later in the tour on December 27, 2009, after the incident in question. Respondent Fioranelli admitted that, before being interviewed by Maresca, he had agreed with Respondent Harris that they would not tell about the physicality of the incident. He even quoted the words he said to Harris as being: "Not talking." He admitted that when he went into the interview, he intended to keep his mouth shut about what happened and acknowledged that he told Maresca that the dispute had been only verbal in nature. This is consistent with what Maresca testified he said. But then, Respondent Fioranelli claims, he paused and said to Maresca, "and then we went at it."

He claimed that they were interrupted by someone who walked in and told them about a call from IAB. Maresca, he claimed, ended the conversation without giving him

[5] Respondent Fioranelli could not recall if he mentioned this alleged fact to the district attorney. He said he never mentioned it in connection with his interviews in this case because he was never asked. An examination of the minutes reflects that he was not asked about it in this proceeding but raised it on his own.

a chance to explain.

So, Respondent Fioranelli wants to have it both ways. He agreed to tell Maresca it was only verbal, he told Maresca it was only verbal but then he also said it wasn't only verbal. Maresca remembered no such added statement nor did he recall their brief conversation being interrupted. Had Respondent Fioranelli wanted to tell Maresca or Goldstein, for that matter, about what he claimed really happened, he could have. The fact is that he did not and his claim to have attempted to do so is totally unworthy of belief. Indeed, when asked if he told any of his colleagues at the precinct about the alleged kneeing he said he did not, stating, "I kept my mouth shut."

There are other inconsistencies. When asked if he had "contact" with Person B between the date of the incident and the date of his interview at IAB, Respondent Fioranelli said, "No." Only a few minutes later, after some additional questions, he had to admit that, indeed, he had contact with Person B when they both appeared at the grand jury. Although Respondent Fioranelli denied that he spoke to Person B he certainly claimed to have learned at that time that Person B saw the alleged kneeing incident. Clearly he had contact with Person B and his earlier answer was, to put it mildly incorrect.

Specification No. 2 alleges that "on or about December 27, 2009, in front of 25 MacDougal Street, in Kings County, upon observing, having become aware of, or upon receiving an allegation of corruption or serious misconduct involving a member of service, did fail and neglect to notify the Internal Affairs Bureau, as required."

Respondent Fioranelli claims that he was not required to report this incident, this Court disagrees. The seriousness of the incident, a physical altercation between two

uniformed police officers at the scene of a major crime, is self-evident, as has been acknowledged by counsel for both respondent's in their arguments before this Court. The altercation was serious misconduct and a report was required. Respondent Fioranelli is found Guilty of Specification No. 2.[6]

Specification No. 4 alleges that on December 27, 2009, Respondent Fioranelli did "prevent or interfere" with a Departmental investigation in that he "falsely stated" that the dispute with Respondent Harris was only verbal and that "no one was punched." [7]

Fioranelli is charged with claiming that the dispute was purely verbal. The evidence is clear that that is what he told Maresca on December 27, 2009. The evidence overwhelmingly and unquestionably indicates that the dispute was not solely verbal. Respondent Fioranelli admits to throwing a punch at Harris. He claims she kneed him. Even the scrimmage over the papers which he admits to grabbing away from her made this more than a verbal disagreement. Although he tried to tergiversate on this issue, the Court finds that Respondent Fioranelli withheld information and did so purposely, with the intent of trying to stop any further investigation.

The next issue that must be considered is whether his conduct amounted to a mere denial. Maresca testified that he asked each of the respondents if a punch was thrown. Respondent Fioranelli, he reported, stated that it was just a verbal disagreement. In doing so, Respondent Fioranelli did not merely deny throwing a punch but he created a false description of events in which all of the physicality was removed. Respondent Fioranelli is found Guilty of Specification No. 4.

Respondent Fioranelli has also suggested that he was subject to an official

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[6] Respondent Harris pled guilty to a similar specification in her case.
[7] The specification mirrors Specification No. 3 in the case against Respondent Harris. Respondent Harris pled guilty to this charge.

Department interview without benefit of counsel and that, as a result, the charge should be dismissed. He certainly had a right to ask for an opportunity to obtain representation at the time. His decision to go forward and answer questions mandated that he do so truthfully. He did not. His application in this regard is denied.

PENALTY

In order to determine an appropriate penalty, the Respondents' service records were examined, see *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974).

The Respondent Harris was appointed to the Department on July 10, 2006. The Respondent Fioranelli was appointed to the Department on July 1, 2004. Information from their personnel folders that was considered in making the penalty recommendations is contained in attached confidential memoranda.

In addressing the appropriate penalty, it is worth noting that the incident certainly caused embarrassment to the Department. At a time when all attention should have been focused on dealing with the aftermath of a serious crime, that attention was drawn to a dispute between two uniformed police officers. Witnesses who should have only been questioned about a crime had to be interviewed about that dispute. While it appears that one or both of these officers might have been involved in very good police work in apprehending an armed perpetrator, the esteem that might have been garnered by that good work was undermined by the dispute over who was to get credit. Both have pled guilty to engaging in a verbal and physical dispute with each other while on-duty. Both have been found guilty by plea or finding of this Court, of withholding information when interviewed about the incident. Both have been found guilty by plea or finding of this

Court of failing to report the incident on their own. In addition, Respondent Fioranelli has admitted to having a bogus or counterfeit New York City Police Department shield.

In reviewing the evidence and testimony in this case, this Court has determined that the level of culpability of the two respondents is not equal and that the difference is more than sufficient to justify a difference in penalty. In assessing the relative level of responsibility between these two respondents, the Court notes several factors. The first is that the Respondent Fioranelli admits that he began the physical dispute. That is, he acknowledged starting the struggle with Harris over the piece of paper.

Respondent Harris set forth very good reasons for her to be the arresting officer. Both respondents agree that she is the one that went into the store first and dealt with the perpetrator and the victim directly. Both agree that she is the officer that recovered the firearm and Respondent Fioranelli could not even say where she recovered it from. Her claim that she is the one who should have been assigned the arrest because she was in the best position to communicate with the district attorney made eminently good sense. If Respondent Fioranelli believed he should have had the arrest because it was his "turn," he could have gone to a supervisor on the scene (indeed the arrest was subsequently assigned to him). He should not have started struggling over the paper.

Then there is the nature of the paper which was the subject of the struggle. Respondent Harris gave uncontradicted testimony that she used the paper to record details about the arrest so that she would be prepared to answer questions from the assistant district attorney on a case that was very likely to go to a grand jury. Starting a struggle over this piece of paper, which constituted police work product in relation to a serious felony case, was irresponsible and risked harm to the criminal case.

Further, Respondent Fioranelli, by his own admission, was highly emotionally-charged during the incident. While he tried to blame this on Respondent Harris' running into the store, by his own testimony, more than 20 minutes had passed since that event as this dispute did not begin until after the detective squad determined that no one was actually shot and was giving the arrest to patrol. Respondent Fioranelli was so emotional that he had to be taken from the scene and upon returning to the stationhouse he went to hit a punching bag because he was still so angry. Interestingly enough, even he described Respondent Harris as calm. Without a doubt, he is the one who began and then elevated the level of this confrontation.

Respondent Fioranelli also claims that he should be given some kind of penalty credit because he and only he was placed on modified assignment in this incident. A change in assignment is an administrative procedure not a punishment. He was apparently placed on modified assignment because the first official information the Department received about this incident was Seabrooks' complaint that he had punched a female officer.

Considering all of the factors mentioned above, it is recommended that Respondent Harris forfeit 20 vacation days and that Respondent Fioranelli, for his greater role, forfeit 45 vacation days.

APPROVED
MAR 26 2012
RAYMOND W. KELLY
POLICE COMMISSIONER

Respectfully submitted,

Martin G. Karopkin
Deputy Commissioner Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER EMILY HARRIS
TAX REGISTRY NO. 941882
DISCIPLINARY CASE NO. 86601/10

The Respondent received overall ratings of 3.5 "Highly Competent/Competent" and 4.0 "Highly Competent" on her last two annual performance evaluations. She has been awarded five medals for Excellent Police Duty. In her five years of service, [redacted] In November 2010, she was placed on Level-II Discipline Monitoring based on her overall record. The Respondent has no prior formal disciplinary record.

For your consideration.

Martin G. Karopkin
Deputy Commissioner – Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER PHILIP FIORANELLI
TAX REGISTRY NO. 934865
DISCIPLINARY CASE NO. 86603/10

In 2008 and 2009, the Respondent received an overall rating of 4.0 "Highly Competent." He was rated 4.5 "Extremely Competent/Highly Competent" in 2007. He has been awarded 25 medals for Excellent Police Duty and three medals for Meritorious Police Duty. In his seven years of service, [redacted]. The Respondent has no prior formal disciplinary record.

For your consideration.

Martin G. Karopkin
Deputy Commissioner – Trials