POLICE DEPARTMENT

March 9, 2018

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| In the Matter of Charges and Specifications | : | Case No. |
| - against - | : | 2016-15447 |
| Police Officer Francis Pinales | : | |
| Tax Registry No. 946121 | : | |
| 43rd Precinct | : | |

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Paul M. Gamble
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Jamie Moran, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: Michael Martinez, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

## CHARGES AND SPECIFICATIONS

1. Said Police Officer Francis Pinales, while assigned to the 43rd Precinct, on or about December 11, 2015, while off-duty, did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department to wit: he engaged in a physical altercation with Christina Pinales.
   P.G. 203-10 Page 1 Para. 5 GENERAL REGULATIONS

2. Said Police Officer Francis Pinales, while assigned to the 43rd Precinct, on or about December 11, 2015, while off-duty, did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department to wit: after having been involved in a physical altercation with Christina Pinales failed to call a supervisor to the scene.
   P.G. 212-32 Page 1 Para. 2 & Note COMMAND OPERATIONS

## SUMMARY OF FINDINGS AND RECOMMENDED PENALTY

The above-named member of the Department appeared before me on November 28, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The Department called Christina Marie Pinales as a witness. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. After reviewing the evidence presented at the hearing, assessing the credibility of the witnesses, I find that the Department has failed to meet its burden of proof that Respondent engaged in a physical altercation with Christina Pinales. Similarly, I find that the Department has failed to meet its burden of proof that Respondent failed to call a supervisor to the scene after engaging in a physical altercation with Christina Pinales.

## ANALYSIS

The following is a summary of the undisputed facts of this case.

Respondent and Christina Pinales were married on May 7, 2010 and divorced in August 2015 (T. 14). Respondent and Christina have one child of the marriage, Minor A who was born in [redacted] (T. 15). Respondent and Christina have a custodial agreement which allows Respondent to have physical custody of minor A on his days off which, at the time of the incidents in question, were Friday and Saturday (*Id.*).

On December 11, 2015, Respondent took Minor A. to her pediatrician (Dept. Ex. 3; T. 30, 83). During that visit, Minor A. [redacted] T. 84). Respondent and Minor A. left the pediatrician's office at about 1730 hours, then proceeded to his home (*Id.*). At approximately 2101 hours, a call was placed from Respondent's mobile phone, ([redacted]) [redacted], to Christina's mobile phone, [redacted] (Resp. Ex. 4; T. 67-68). According to telephone records, the call lasted for two minutes (*Id.*). The same telephone records also establish that Christina called Respondent's mobile phone at 2104 hours and 2106 hours, the calls lasting two minutes and one minute, respectively (*Id.*).

At approximately 2130 hours, Christina knocked on the door to Respondent's apartment After Respondent opened the door, he and Christina engaged in a verbal exchange, the substance of which is in dispute. Subsequent to that exchange, Christina entered Respondent's apartment to dress Minor A. and take [redacted]o Rockefeller Center to observe the Christmas tree. While Christina was attempting to prepare Minor A. for the excursion, her mother, Person B, entered the apartment. After approximately 10 minutes, Christina, Person B and Minor A. left Respondent's apartment.

On December 16, 2015, Christina entered the 50th Precinct and attempted to make a complaint against Person C Respondent's [redacted], for an assault which she alleged had occurred earlier that afternoon, in front of Respondent's apartment building. Christina asserted that Person C, who at the time was in her [redacted]s, was upset with her concerning her excursion with Minor A. the week before. Christina further asserted that Person C assaulted her as she was attempting to close the rear passenger door of her car after buckling Minor A. into her car seat. While Christina spoke to the officer taking the complaint, she alleged for the first time that Respondent had assaulted her on December 11th at the front door of his apartment.

Several hours later that evening, two unidentified supervisors appeared at Respondent's apartment and asked him, as well as Person C, to accompany them to the 50th Precinct. Respondent and Person C were interviewed at the precinct. At the conclusion of the investigation, Christina was [redacted] based upon Person C's complaint. At [redacted] an order of protection was issued by the [redacted] Court in favor of Person C. Christina [redacted]

At issue in this case is whether Respondent engaged in a physical altercation with Christina on December 11, 2015. Also at issue is whether Respondent, having engaged in such an altercation, failed to notify a supervisor to the scene. The following is a summary of the disputed facts of this case.

Christina testified that she and Respondent had agreed that on December 11, 2015, she would pick up Minor A. from his apartment and take [redacted] to observe the Rockefeller Center Christmas tree (T. 17). According to Christina, Respondent called her during the evening, as she was *en route* to his apartment, to inform her that he wanted to change the plan (*Id.*, 33). Christina testified that when she arrived at Respondent's apartment building, he granted her access by buzzing her into the lobby (T. 19). Christina knocked on Respondent's door and saw him looking through the peephole. Christina said, "Open the door" (*Id.*). Respondent then opened the door to the apartment halfway and asked her "What are you doing here; I told you let's leave it for another day" (*Id.*, 42-43). Christina responded, "Yeah, but I am already here" to which Respondent replied, "Let's just leave it for tomorrow" (*Id.*). According to Christina, as Respondent continued speaking to her, he reached through the open door and punched her in her left eye (*Id.*).

Christina testified "My first instinct was to -- I have my phone in my back pocket. So I had felt pain so my first reaction was Christina, grab your phone and try to take a picture. So I put my left leg in between the door because he was starting to push the door to close it. So that's the only way that the door ended up staying open was with my left leg, and right away I took a picture. And in the picture, you see him also trying to close the door" (T. 20; Dept. Ex. 1, 2). Christina testified that the photographs in Department Exhibits 1 and 2 show redness on her face where Respondent struck her, as well as showing Respondent behind the apartment door (T. 21). According to Christina, the apartment door eventually closed with her standing outside the apartment. Christina speculated that Minor A. heard noise and that Respondent opened the apartment door again, this time allowing Christina to enter the apartment (T. 22, 49-50).

Once Christina entered Respondent's apartment, she asked where Minor A.'s clothes were

(*Id.*, 50). Respondent replied that Minor A.'s clothes were in the bedroom (T. 23, 50). Christina described Minor A.'s demeanor as excited at the prospect of visiting the Rockefeller Center tree. As Christina walked toward Minor A.'s bedroom with Minor A. walking in front of her, Respondent pulled Christina's hair (*Id.*, 50-51). Christina turned around and said, "Francis, stop. Why are you pulling my hair?" (*Id.*). Christina asserted that as she walked into the bedroom, Respondent shoved her upper shoulder (T. 24).

According to Christina, Respondent was still trying to convince her to reschedule the tree visit but Minor A. expressed [redacted] desire to go, saying, "Daddy, I want to go with mommy" (*Id.*, 51 ). Respondent then placed a telephone call to Christina's mother, Person B (*Id.*, 51, 53). When Person B eventually entered Respondent's apartment, she supposedly asked him for Minor A.'s coat and shoes (T. 24-25). Respondent replied, "Just take [redacted] like that" (*Id.*). Christina responded, "Francis, but it's cold outside; she can get sick and stuff" (T. 25). When Person B

asked Respondent forMinor A.'s coat and shoes again, Respondent retrieved them from the bedroom (*Id.*). Christina dressed Minor A., left the apartment with her mother and traveled to the Christmas tree (*Id.*, 56).

Christina asserted that when Respondent shoved her shoulder, she hit him back near his face, scratching his neck (*Id.*). Christina further asserted that her left eye became swollen and red, although she never sought medical attention (*Id.*, 56). Christina conceded that she did not report the incident until December 16, 2015 (T. 25-26).

Christina testified that on December 16, 2015, she drove to Respondent's apartment to pick up Minor A., double-parking in front of the building (T. 26). Christina called the apartment telephone and spoke with Person C arranging for her to bringMinor A. down to the street where Christina was waiting (T. 26-27). As Christina placed Minor A. into the back seat, Person C told her that she had "disrespected [her] home" and that she was no longer welcome (T. 27). Person C continued to insult Christina, causing Christina to object to the tone of the discussion and to suggest that they resolve the issue another time, out of Minor A's hearing (*Id.*). Christina then supposedly showed Person C the pictures she had taken at the door to Respondent's apartment on the evening of December 11th. When Person C called her a liar, Christina said, "Look, it's clear right there in the picture. You see my face. You see him pushing the door at me" (*Id.*). Person C then attacked Christina and they engaged in a physical altercation in which she claimed to have suffered scratches to her neck (T. 27-28).

Christina testified that a crowd began to gather during the altercation and she began to fear for her life (T. 29). A person Christina identified as a friend of Respondent removed the keys from her car (*Id.*). Christina apparently had the keys returned to her and she left the location with the intention of reporting the incident to the police (*Id.*). After leaving the area of

Respondent's building, Christina picked up her mother and [redacted] (*Id.*). Christina then dropped off Minor A. and her [redacted] at her home, then proceeded to the [redacted] Precinct with her mother (*Id.*).

At the [redacted] Precinct, Christina reported the altercation with Respondent's mother to a police officer (T. 28). When the officer asked her what caused the altercation, Christina responded that it was the incident of December 11th between Christina and Respondent which precipitated the argument between Christina and Person C on December 16th (T. 28-29).

Christina testified that prior to the December 11th incident, she enjoyed a good relationship with Respondent, attending family functions together and even engaging in intimacy after their divorce (T. 34).

On cross-examination, Christina conceded that Minor A.'s normal bedtime was from 2000 to 2100 hours and that in retrospect, 2130 hours was a bit late for Minor A. to be going on an excursion (T. 40-41). Christina conceded further that after being punched, she could have stepped away from the apartment door and taken a picture of her face but that she wanted to make sure Respondent appeared in any photograph she took (T. 46). Christina reasserted that Respondent seemed to have no problem with her taking Minor A. outside wearing only [redacted] shirt and jeans (T. 54). Christina reasserted that Person C attacked her but admitted that she scratched Person C (T. 58-59). Christina testified that she heard someone in the crowd saying "We're calling the police" but no one came to her defense (T. 59). Christina asserted that while Person C pulled on her shirt, she was asking the crowd to get Person C off her (*Id.*). Christina conceded that the members of the crowd were probably trying to keep her on the scene to wait for the arrival of the police but she left because she feared for the safety of [redacted] (T. 60). Christina stated that although Person C started the altercation, she was arrested because Person C's injuries were worse than hers (T. 62).

Christina admitted that there is currently an order of protection against her in favor of [redacted], Respondent's current girlfriend (T. 64).

On re-direct examination, Christina asserted that the reason she did not report the incident on December 11th is that Respondent is in law enforcement and she had no desire to "get him in trouble" (T. 69).

Under examination by the Tribunal, Christina testified that the custody agreement in place at the time of the December 11th incident was an informal one between her and Respondent (T. 71). Christina further asserted that during the December 16th incident, Person C began yelling at her and as she attempted to close the car door with Minor A. inside, began swinging at Christina with open hands (T 72-73).

The Tribunal received the hearsay statement of Person B in evidence without objection (Dept. Ex. 5, 5A). In her interview, Person B asserted that on December 11, 2015, she did not initially enter Respondent's apartment with Christina, instead waiting in the car ([redacted] Transcript [redacted] 4). According to Person B, she received a telephone call from Christina, who was "crying, screaming, saying he hit me, he hit me" (*Id.*). Person B then left the car, entered Respondent's building and eventually his apartment. Person B saw Christina inside the apartment and grabbed her so they could leave (*Id.*). Christina, who was crying, said to her, "He struck me, he struck me" ([redacted] 5). Person B asserted that Christina's face was red but not swollen and that she did not recall which side of her face was discolored ([redacted] 6). Person B further asserted that when they returned to their car, Christina stated, "Mama, he hit me, he hit me" ([redacted] 7). According to Person B, she, Christina and [redacted], who had remained in the car, went home (*Id.*).

Respondent testified that he and Christina had planned to take Minor A. to Rockefeller Center to see the Christmas tree on December 11, 2015, at approximately 1930 hours (T. 83). Respondent testified that he took Minor A. to her pediatrician and was at the doctor's office from approximately 1600 to 1730 hours (T. 84). As Respondent left the doctor's office, he observed that Minor A. was drowsy (*Id.*). Respondent testified that he spoke with Christina to let her know that he and Minor A. had left the doctor's office but suggested that they reschedule the Christmas tree trip for either the following day or another date in the future (*Id.*, 112). According to Respondent, Christina insisted that they adhere to their plans (T. 85). Respondent testified that he called Christina when he left the pediatrician's office but was not sure whether he initiated the call (*Id.*). Respondent asserted that he had several communications with Christina by voice and text throughout the day[2] (T. 86).

Respondent testified that he heard a knock on his apartment door at approximately 2030 hours and looked through his peephole to observe Christina outside (T. 86-87). Respondent conceded that he was somewhat frustrated by her appearance because he believed that he had successfully dissuaded Christina from following through on the Rockefeller Center plans (T. 87). At the time Christina knocked on Respondent's door, Minor A. had been sleeping since 1930 hours

(*Id.*). Respondent opened his apartment door part-way and asked Christina what she was doing there (T. 86-87). Christina responded, "I want my [redacted] now" (T. 88). Respondent opened the door and allowed Christina to enter the apartment, where Minor A. was still sleeping (*Id.*). Respondent had no recollection of Christina taking the picture in evidence as Department Exhibit

[1] Department Exhibit 4 reflects a 2:00 minute call from Christina's mobile telephone top Respondent's mobile telephone at approximately 1743 hours.

[2] Department Exhibit 4 reflects three calls from Christina's mobile telephone to Respondent's mobile phone: a 1:00 minute call at 0818 hours, a 1:00 minute call at 0921 hours and a 3:00 minute call at 1440 hours.

1 (*Id.*). Respondent denied that there had been any physical contact between Christina and himself before she entered his apartment (T. 89). Respondent specifically denied punching Christina or attempting to close the apartment door on her foot (*Id.*).

As Christina continued to ask, "Where is my [redacted]?" Respondent replied that [redacted] was sleeping (*Id.*). Christina walked further into the apartment and entered the bedroom where Minor A. was sleeping, asking Respondent for Minor A.'s clothing (*Id.*). Respondent continued to ask Christina to postpone the Rockefeller Center trip but she insisted on following the original plan (*Id.*). Respondent testified that he called Person B, informed her of Christina's position regarding the trip and invited her to intervene (T. 89-90). Respondent heard the intercom to his building, then shortly thereafter saw Person B accompanied by Christina's [redacted] enter his apartment (T. 90).

As Person B and brother entered the apartment, Christina was still shouting, "Where's my [redacted]?" (T. 91). Respondent again proposed rescheduling the trip but Christina, Person B and her brother were in favor of making the trip that evening (*Id.*, 110). Respondent acquiesced and Minor A. eventually left the apartment with [redacted] mother, grandmother and [redacted] (*Id.*). Respondent estimated the total time Christina was in his apartment to be ten minutes (T. 91-92). Respondent denied that there was any physical contact with Christina (T. 92).

Respondent testified that on December 16, 2015, he was on duty in the 43rd Precinct when he received a telephone call from [redacted] informing him that his relative, Person Cwas being assaulted by "his ex-wife" in front of his building (*Id.*). Respondent informed his supervisor, requested lost time and went home (T. 93). Respondent estimated the travel time from the 43rd Precinct to his home to be approximately 25 minutes (T. 93-94). When Respondent arrived at his address, he observed erson C speaking to two uniformed officers from the [redacted]

Precinct (T. 94). Respondent identified himself, then spoke to Person C (*Id.*). Respondent observed that Person C was crying, with scratches and bruises on her face (*Id.*). Person C, who was [redacted] years old on the date of the incident, told the police officers that Christina had attacked her when she had come to the building to pick up Minor A. (T. 95). After the police officers were provided with Christina's address and telephone number, Respondent took Person C inside his apartment (T. 96).

Approximately two to three hours later, two uniformed supervisors came to Respondent's apartment and asked to speak with Person C to find out if she intended to press charges against Christina (*Id.*). When Person C said that she would, Respondent was informed by the supervisors that he would need to accompany them to the [redacted] Precinct (T. 97). Once Respondent arrived at the [redacted]th Precinct, he was informed that Christina had alleged that had he punched her on December 11th (*Id.*). Respondent was subjected to an official Department interview in the company of a union delegate (T. 98).

Respondent was later informed that Christina had [redacted] (*Id.*). Person C received an order of protection against Christina as a result of the [redacted] proceedings (*Id.*). Respondent asserted that he was currently involved in a romantic relationship with [redacted], who had also received an order of protection against Christina as a result of a separate proceeding (T. 99). Respondent conceded that he never called a supervisor to his apartment on December 11th because his interaction with Christina was limited to a 10-minute discussion of a parenting issue (T. 100).

On cross-examination, Respondent asserted that he sought a divorce from Christina because "things wasn't [sic] working with me and her" (T. 103). Respondent conceded that they maintained a cordial relationship for the sake of Minor A. and communicated with each other on a

regular basis (*Id.*). Respondent reasserted that it was he who placed a call to Person B and not Christina (T. 106, 108). Respondent's [redacted], who was in the apartment at the time of this incident, never came out of [redacted]room (T. 109).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than attempting to reconstruct past events on the basis of opposing accounts. Factors such as corroboration, consistency, bias, logic and the degree to which an account comports with common sense and general human experience must be taken into account (*Maloney v. Suardy*, 202 A.D.2d 297, 609 N.Y.S.2d 179 [1st Dep't 1994]).

In this case, the findings will turn largely on the credibility of witnesses. Respondent and Christina Pinales ("Christina") have been divorced since August 2015 and share custody of their minor child, Minor A. As such, their financial circumstances are intertwined and Respondent's continued employment has an impact upon their child's well-being. Although Christina described her post-divorce relationship with Respondent as "very good," there is some evidence that she has had difficulties with Respondent's current girlfriend. In addition, one of the incidents which is a subject of this hearing concerns Christina's [redacted] for [redacted] Respondent's relative which could be the basis of further friction between Respondent and Christina. Finally, while custody issues are beyond the jurisdiction of this tribunal, the testimony of the parties regarding allegations of spousal physical abuse can affect such issues. As such, each party has an incentive to present their testimony in a manner which may affect their respective interests.

After a careful review of the record in its entirety, I found Respondent's testimony to be logical and forthright. His professed reluctance at Minor A. being taken out for a nighttime excursion in winter after [redacted] earlier in the day seems reasonable and consistent

with concern for his daughter's well-being. Furthermore, his eventual acquiescence to Christina's stubborn refusal to postpone the tree visit seems objectively plausible. While Respondent is an interested witness in this proceeding, his testimony regarding the material events of this case is more credible than the factual assertions made by Christina and I credit his testimony.

I find Christina Pinales to be an unreliable witness based upon: (1) the delay in reporting her claim of assault by Respondent until she was reporting an alleged assault by Respondent's [redacted] five days later; (2) the evidence of her possible bias against Respondent; (3) the discrepancies between her testimony and [redacted] PersonC's, statement; and (4) her demeanor during her in-court testimony.

Christina asserted that Respondent punched in the face on December 11th in an unprovoked attack. It seems highly unlikely that he would punch her in that scenario, given Christina's assertion that they had a good relationship and no evidence of any history of violence between them. Despite Christina's testimony to the contrary, the pictures in Department Exhibits 1 and 2 have limited probative value on the issue of physical injury. It is certainly possible for Respondent to have struck Christina without creating circumstantial evidence of a blow to her eye, yet the pictures do not clearly depict any injuries. At most, Department Exhibits 1 and 2 show possible redness in the area of her left eye. It also seems unlikely that Christina was able to hold the apartment door open with her leg from the position in which she is depicted in Department Exhibits 1 and 2.

Christina's accusation against Respondent was made on December 16th as she attempted to make a complaint at the [redacted] Precinct against Respondent's [redacted] for allegedly assaulting her in the late afternoon. According to Christina's testimony, she made the accusation against

Respondent in response to a question of what precipitated Person C's alleged assault against her. Inasmuch as Christina's own conduct was being scrutinized as she made the aforementioned accusation, it is reasonable to view her accusation against Respondent with caution. In addition, the undisputed fact that Christina was eventually [redacted] Person C, which is unquestionably an adverse outcome, could provide a basis for bias against Respondent and his family.

Second, Christina's mother, in the hearsay statement which came into evidence as Department Exhibit 5-A, described sitting in her car outside of Respondent's apartment on December 11th and receiving a telephone call from Christina, alleging that Respondent had struck her, which prompted her to enter the apartment building and go to Respondent's apartment. Inside the apartment, Person B claimed to have met a hysterical Christina, who was screaming, "He hit me, he hit me." Taken at face value, such statements from Person B could constitute evidence of prompt outcry, which could corroborate Christina's testimony. Person B further stated that she saw redness on Christina's face. Because Person B's testimony was not made available to the tribunal to further explore her observations under oath, the probative value of her statement is limited. More importantly, while Christina testified that her mother entered Respondent's apartment at some point, she did not testify that her mother appeared in response to a telephone call in which she declared that she had been struck by Respondent. This unexplained discrepancy is another factor weighing against Christina's reliability.

Finally, Christina's demeanor on the witness stand appeared self-serving. Her referral to herself in the third person as she explained her decision to take a photograph at the door to Respondent's apartment seemed insincere. In addition, her assertion that Respondent, who

attempted to postpone the Rockefeller Center trip because he felt Minor A. was not up to it physically, would suggest that she take Minor A. outside on a winter night without adequate clothing seemed gratuitous. Finally, Christina's proffer that her post-divorce relationship with Respondent was so amicable that they still engaged in intimate relations was patently self-serving.

Accordingly, I find that the Department has failed to meet its burden of proof by a preponderance of the evidence that Respondent engaged in a physical altercation with Christina on December 11, 2015. I therefore find him Not Guilty of Specification 1. *Ipso facto*, based upon my finding that there is insufficient evidence to establish that there was such a physical altercation between Respondent and Christina on December 11, 2015, it follows that the Department has also failed to meet its burden of proof by a preponderance of the evidence that Respondent failed to call a supervisor to his apartment on December 11, 2015, after engaging in a physical altercation with Christina. I therefore find Respondent Not Guilty of Specification 2.

Respectfully submitted,

Paul M. Gamble
Assistant Deputy Commissioner Trials

**APPROVED**

APR 17 2018

JAMES P. O'NEILL
POLICE COMMISSIONER