

random bag searches, the lack of diversity in the hierarchy of the NYPD), without repercussions.

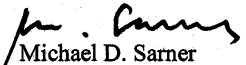
PENALTY

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

The Respondent was appointed on July 18, 1984. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

It is recommended that the Respondent be found Guilty of appearing on a televised news talk show as a representative of the New York City Police Department without permission or authority, and that he forfeit 15 vacation days as a result thereof.

Respectfully submitted,


Michael D. Sarner
Assistant Deputy Commissioner - Trials


APPROVED

MAR 16 2006

RAYMOND W. KELLY
POLICE COMMISSIONER



DISPOSITION OF CHARGES

PD 468-142A (7-93)-h2

CASE NO. 81474/05

BOOK & PAGE NO.
1 of 1

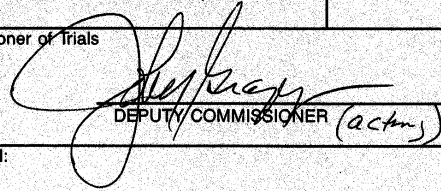
PERSONNEL ORDER NO.

SPECIFICATIONS AGAINST RANK/SURNAME, Captain ADAMS, ERIC		FIRST	M.I.	COMMAND 6 Precinct
SHIELD NO.	TAX REGISTRY NO. 909199	SOCIAL SECURITY NO. 112-52-6976		DATE APPOINTED July 18, 1984
RANK/NAME OF COMPLAINANT Deputy Inspector Thomas Mason			COMMAND TAB Group No. 25	
DATE OF CHARGES December 6, 2005		DATE TRIAL COMMENCED February 21, 2006		DATE TRIAL CONCLUDED March 1, 2006

TRIAL COMMISSIONER
Honorable Michael D. Sarnier

SPECIFICATIONS	DISPOSITION	RECOMMENDED PENALTY PLEA <input type="checkbox"/> TRIAL <input checked="" type="checkbox"/>
1. Said Probationary Captain Eric Adams, assigned to the 6 th Precinct, while off-duty, on or about and between October 14, 2005 and October 16, 2005, did appear on a televised news talk show as a representative of the New York City Police Department without permission or authority. <i>(As amended)</i>	GUILTY	It is recommended that the Respondent forfeit 15 vacation days.
2. Said Probationary Captain Eric Adams, assigned to the 6 th Precinct, while off-duty, on or about and between October 14, 2005 and October 16, 2005, while appearing on a televised news talk show, did wrongfully divulge or discuss official department business without authority or permission to do so. <i>(As amended)</i>	NOT GUILTY	
3. Said Probationary Captain Eric Adams, assigned to the 6 th Precinct, while off-duty, on or about and between October 14, 2005 and October 16, 2005, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Probationary Captain disseminated misinformation to the public regarding a Departmental operation, via a televised news talk show, and did not verify the accuracy of said information. <i>(As amended)</i>	NOT GUILTY	

Reviewed by Deputy Commissioner of Trials


 DEPUTY COMMISSIONER (acting)

3/10/06
DATE

Police Commissioner's Approval:

- Approved
- Disapproved
- Other Action (Describe)


 POLICE COMMISSIONER

3/10/06
DATE

MEMORANDUM FOR: POLICE COMMISSIONER

Re: Captain Eric Adams
Tax Registry No. 909199
6 Precinct
Disciplinary Case No. 81474/05

The above-named member of the Department appeared before me on February 21, 23, and 24, 2006,¹ charged with the following:

1. Said Probationary Captain Eric Adams, assigned to the 6th Precinct, while off-duty, on or about and between October 14, 2005 and October 16, 2005, did appear on a televised news talk show as a representative of the New York City Police Department without permission or authority. (*As amended*)

P.G. 203-10, Page 1, Paragraph 3 – PUBLIC CONDUCT-PROHIBITED CONDUCT
GENERAL REGULATIONS

2. Said Probationary Captain Eric Adams, assigned to the 6th Precinct, while off-duty, on or about and between October 14, 2005 and October 16, 2005, while appearing on a televised news talk show, did wrongfully divulge or discuss official department business without authority or permission to do so. (*As amended*)

P.G. 203-10, Page 1, Paragraph 3 – PUBLIC CONTACT-PROHIBITED CONDUCT
GENERAL REGULATIONS

3. Said Probationary Captain Eric Adams, assigned to the 6th Precinct, while off-duty, on or about and between October 14, 2005 and October 16, 2005, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Probationary Captain disseminated misinformation to the public regarding a Departmental operation, via a televised news talk show, and did not verify the accuracy of said information. (*As amended*)

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

¹ The record was kept open until March 1, 2006 for the submission by both sides of Memoranda of Law.

The Department was represented by Debbie Coleman, Esq. and Daniel Maurer, Esq., Department Advocate's Office, and the Respondent was represented by Norman Siegel, Esq. and Philip Karasyk, Esq.

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

DECISION

It is recommended that the Respondent be found Guilty of Specification No. 1 and Not Guilty of Specification Nos. 2 and 3.

EVIDENCE

The Department's Case

The Department called Inspector Michael Coan, Captain Andrew D'Amora, Deputy Chief Vincent Giordano, and Deputy Inspector Theresa Shortell as witnesses.

Coan, a 24-year member of the Department, has been assigned as the Executive Officer of the Deputy Commissioner of Public Information (DCPI) for the last three years. In that capacity, he oversees the daily operations of the office, which has a staff of about 30 individuals. The purpose of the office, according to Coan, is to respond to inquiries from members of the media and to disseminate newsworthy items to them. He stated that when the media wants to interview a member of the service, it will contact his office or the individual member of the service directly. Coan asserted that if an

individual member of the service is contacted directly, that individual should call DCPI to get proper authorization from himself, Deputy Commissioner Paul Browne, or Chief Michael Collins before discussing any Department business. There is no paperwork that needs to be completed by that particular member of the service in order to obtain the authorization, which is required by the Patrol Guide, Section 203-10, subparagraph 3. Coan denied that a member of the service is required to obtain that authorization if asked to appear as a representative of an outside organization in order to discuss the organization's matters.

Coan, who was working on October 14, 2005, stated that his office did not receive a request from a WCBS news show to interview the Respondent, nor did his office receive a request that day or prior thereto from the Respondent requesting permission to appear on that show to discuss the Department's response to a terrorist threat on October 6, 2005. Coan became aware of an interview given by the Respondent to Marcia Kramer of WCBS-TV through an E-mail from a producer of her show asking if DCPI wanted to respond to the Respondent's allegations that the Department did not deploy resources in the subways as had been stated publicly at a press conference. A response was provided by Deputy Commissioner Browne, but it was not aired because the interview had been pre-taped and was broadcast on Sunday morning, October 16. DCPI made a recording of the interview in the normal course of business because it was deemed a newsworthy item relevant to the Department. [Department's Exhibit (DX) 1 is the videotape of that interview.] Coan opined that given the subject matter of the interview, permission of the Department would have been required. He reiterated that permission for that particular interview was not given.

On cross-examination, Coan stated that a media outlet can submit interview requests to DCPI via telephone, E-mail, fax, or in person. He emphasized that if a member of the service is approached by the media to discuss Departmental business, the member is required to request permission from DCPI before giving the interview. According to Coan, DCPI has a database of such requests, but in his three years at DCPI he could not recall the Respondent requesting permission to give an interview. Coan denied that members of the service are required to obtain permission from DCPI to give interviews in their private capacity. Accordingly, Coan agreed that the Respondent, speaking in his capacity as a member of 100 Blacks in Law Enforcement Who Care (hereinafter, 100 Blacks in Law Enforcement), would not be required to obtain permission in order to give an interview. However, Coan hastened to add that even in his private capacity, the Respondent would need proper authorization before “discussing Departmental business.” When pointedly asked if the Respondent was precluded from opining on any topic or newsworthy event while speaking in his capacity as a member of 100 Blacks in Law Enforcement, Coan replied, “He can do it without our authorization....strictly as a private citizen not identified as a captain in the NYPD, he does not need it, no.” Coan nevertheless cautioned that the Respondent “should stick to the issues of the organization, Department business should be authorized prior.” When pressed further and asked if it was his position that the Respondent was not permitted to speak about Department business, Coan answered, “As a private citizen, he can speak about it,” and he subsequently agreed that when the Respondent is speaking as a member of 100 Blacks in Law Enforcement, he is speaking as a private citizen.

Coan recalled that upon receiving the E-mail from the WCBS producer, he discussed the matter with Deputy Commissioner Browne, to whom he reported. Coan denied that he referred this matter to Internal Affairs Bureau (IAB), or that he knew who did. He surmised that IAB may have seen the broadcast of the interview. Coan also did not recall that there had been a news conference by 100 Blacks in Law Enforcement at City Hall on October 11.

Coan indicated that he is aware that the Respondent has held many prior news conferences, which have been monitored by DCPI. Of the prior news conferences participated in by the Respondent, Coan did not recollect any in which he concluded that the Respondent should have obtained Department permission. Of those prior news conferences, Coan stated that he had never known the Respondent to speak in any capacity other than as a member of 100 Blacks in Law Enforcement.

On redirect examination, Coan stated that the Respondent would not have been required to get permission from the Department to do the interview if he had given his opinions as a member of 100 Blacks in Law Enforcement--even if the topic was the one discussed by the Respondent during the October 14 interview.

On recross examination, Coan acknowledged that during the interview, the caption on the bottom of the tape indicated that the Respondent was President of 100 Blacks in Law Enforcement. Coan did not recall an instance where members of the media called and requested permission to speak with the Respondent in his capacity as a captain in the NYPD.

D'Amora, a 15-year member of the Department, is the Commanding Officer of the Operations Unit. In that capacity, he ensures that the executive members of the Department are given prompt and correct information regarding citywide incidents. On October 6, 2005, he was working a 10:00 a.m. to 6:00 p.m. tour. On that date, in the mid-afternoon, he was informed by Chief Wedin, the Commanding Officer of the Operations Division, that they had to provide additional coverage throughout the subway system during the afternoon rush hour because of a terrorist threat. Consequently, members of the Organized Crime Control Bureau (OCCB) and Detective Bureau were mobilized citywide. In addition, critical response vehicles (described as a police car with two police officers) were increased to 100 from the 76 that were assigned on a daily basis. D'Amora stated that his Operations Unit telephoned each Patrol Borough's Operations Unit to advise them of the plans to implement additional coverage throughout the transit system and to inform them of how much personnel they would be getting. According to D'Amora, there had been an increased presence within the transit system that varied from week to week since the July 7, 2005 London bombings. Prior to that, there was coverage at almost every subway station in the city; specifically, the Transit Bureau covered all 202 underground stations and the Patrol Services Bureau covered 116 of the 191 elevated stations (the covered stations changed weekly). In addition, "Hercules" teams patrolled transit locations citywide, particularly high-density stations mainly in Manhattan. He described the Hercules team as the Department's special operations division which maintained a visible presence on platforms, stairwells, and mezzanines in the transit system. In response to the October 6 threat, bag screenings were doubled throughout the city for the afternoon rush, beginning at 4:00 p.m.

D'Amora approximated that prior to October 6, 2005, 380 police officers were assigned to provide coverage to the transit system on a daily basis. He estimated that on October 6, the total coverage more than doubled to approximately 940 police officers. D'Amora stated that his unit compiled reports of the Department's response to the October 6 terrorist threat, the preparations of which he oversaw. [DX 2 is a three-page report generated by D'Amora's office which documented the coverage provided on October 6, 2005. With respect to that report, D'Amora stated that additional officers were deployed citywide, but a majority of them were probably in Manhattan South because of the large number of people leaving the city from that area during the afternoon rush hour.] During the October 7 morning rush hour, there was increased coverage consisting of police vehicles deployed at each of the stations throughout the city, according to D'Amora. [DX 3 is a three-page document delineating the coverage in the transit system for October 6, 7, and 11, when the coverage reverted back to "a normal heightened alert coverage."]

D'Amora denied that the Respondent, with whom he is familiar, was present at the October 6, 2005 meeting with Chief Wedin, or that the Respondent was contacted by his office regarding that meeting, or that he personally spoke to the Respondent on October 6 or any day thereafter regarding the deployment that took place on October 6. As far as D'Amora knew, no one from his office spoke with the Respondent regarding said deployment.

On cross-examination, D'Amora acknowledged that the threat to the subway system was citywide. He admittedly had no knowledge on that date as to the nature of the threat or what subway stations might be targets of the threat. D'Amora agreed that

there is a distinction between the numbers of officers who were mobilized as a result of the threat and the numbers of officers who were actually deployed. D'Amora acknowledged that with respect to DX 2, deployment (*i.e.*, officers actually going to their assigned locations) was only mentioned with respect to Patrol Borough Manhattan South. He also acknowledged that on Friday, October 7, extra coverage was provided to all 476 stations in the form of a marked police car. In total, on October 7, 800 more police officers were deployed than the previous day (400 police officers for the morning rush hour and 400 more for the evening rush hour.) (D'Amora stated that on October 7, the members of OCCB and the Detective Bureau were no longer deployed as they had been the day before; but the total deployment was increased as a result of the two members deployed in each of the 476 police cars assigned to each station.) On Saturday and Sunday, October 8 and 9, there was "normal Transit Bureau coverage," stated D'Amora, who explained that the coverage was scaled back on the weekends because less people used the subways on those days.

On redirect examination, D'Amora acknowledged that terrorist attacks in New York have taken place in Manhattan South. He defined deployment as "a certain amount of personnel assigned to a certain task, whether it's patrol or anti-terrorism." He contended that on October 6, 2005, the members of the service who were mobilized were all deployed. To his knowledge, the Respondent was not involved in any threat assessment meetings, was not consulted regarding the validity or accuracy concerning terrorist threats, and was not involved in any strategy meetings with respect to the Operations Division.

On recross examination, D'Amora reiterated that he never gave the Respondent any information about the terror threat or about manpower issues. D'Amora acknowledged that the report he prepared dated October 14, 2005 (DX 2), indicated that Manhattan South was the only area where members of the service, who were otherwise listed as reporting to mobilization points, were deployed.

On redirect examination, D'Amora explained that he was certain that all the members of service were deployed because if they were not, the counter-terrorism inspectors would have contacted his unit to ascertain the reason they had not been deployed.

On recross examination, D'Amora agreed that he never received specific notification that all the members of the service who were mobilized were actually deployed.

Giordano, a 26-year member of the Department, is assigned to the Counter Terrorism Bureau as the citywide coordinator. In that capacity, he coordinates the counter terrorism deployment for the counter terrorism coordinators throughout the various boroughs in the city. On October 6, 2005, he was an Inspector assigned as the Manhattan South counter terrorism coordinator. On that date, he became aware of a terrorist threat against the New York City subway system during a teleconference call with the Chief of the Department, Chief of Patrol, and the Deputy Commissioner of Counter Terrorism. Also present at the teleconference meeting were counter terrorism inspectors for the other boroughs. Those who were in attendance, including Giordano, were informed to return to their assigned boroughs and set up command post operations.

They were also told to expect to have “assets” sent to their locations for deployment into the transit facilities. Giordano stated that the Respondent was not present at the October 6 meeting, which was for counter terrorism personnel.

Following the meeting, Giordano proceeded to the Jacob Javits Center at 34th Street and 11th Avenue to set up command post operations from which he notified and conferred with personnel from different boroughs regarding the personnel that would be brought to the location. He enumerated various units, such as those from OCCB and the Detective Bureau that came to the location, as well as critical response vehicles and task force personnel that were mobilized at that post. He asserted that while certain personnel were kept behind to provide security for the command post, “for the most part, most of the assets that did come were deployed into the field.”

He recounted in detail the various deployment of personnel to sites in Manhattan South and the operations they conducted there on October 6, 7, 8, and 9. For example, additional teams of Manhattan South Task Force personnel were assigned to conduct bag checks in the southern end of Manhattan and at the top of the entrances of subway stations.

Atlas units, composed of a sergeant and eight police officers, were kept on tour past 3:00 p.m. until 7:00 p.m. and deployed to Penn Station and Grand Central Station – high profile locations. Critical response vehicles in Manhattan were deployed to specific subway stations (others remained in their own boroughs.) Canine units were sent to the following subway stations: Bowling Green, City Hall, Union Square, Grand Central, Penn Station, Broadway, and Wall Street. The Manhattan South Scooter Task Force was sent to Manhattan Ferry Terminal to conduct bag checks. Essentially, personnel were

deployed to the transportation hubs “for high visibility” because of the large amount of pedestrian traffic during rush hour at those locations, according to Giordano.

With respect to Friday, October 7, Giordano stated that the second platoon, which normally starts its tour at 7:30 a.m., began at 5:30 a.m. and the first platoon was kept past their tour and assigned to cover subway stations throughout Manhattan South. Critical response vehicles were all deployed into Manhattan South that morning, in addition to canine units. He stated that on Saturday and Sunday, critical response vehicles were deployed into Manhattan South. On Monday, Columbus Day, the second platoon again started at 5:30 a.m. and covered the patrol aspects of the borough coverage while the first platoon that had worked that night was kept on and assigned to subway stations throughout Manhattan South, in addition to deployments of canine units and the Manhattan South Task Force. Giordano asserted that “pretty much every subway station in Manhattan” was covered during the Friday and Monday morning rush hours. OCCB and the Detective Bureau, which had been deployed on Thursday, were not used subsequently as other units were mobilized and deployed.

Giordano denied that on October 6, 2005, he personally spoke to the Respondent regarding the terrorist threat on that date or the deployment with respect to that threat. He also denied that he subsequently spoke to the Respondent regarding the threat.

On cross-examination, Giordano acknowledged that there were additional personnel and assets assigned to the Friday morning rush hour than had been assigned to the Thursday afternoon rush hour. In fact, he agreed that there were significantly more assets and personnel assigned for Friday than had been assigned on Thursday. He also agreed that there were less personnel assigned on Saturday and Sunday than on Friday.

Giordano testified that he did not know about the threat to the transit system prior to the teleconference on October 6 and that upon learning of the threat, he and the others in attendance were not told how or where the attack might be executed. He acknowledged “there was . . . no specific instruction with regard to what type of threat it was.” He stated that he was unable to attest to the fact that subway stations other than those in Manhattan South were covered with a police car and two members of the service therein. He denied that he knew about the threat prior to the meeting on October 6 or that he ever learned when the threat was first communicated to the Department. He acknowledged that deployment continued throughout the weekend, but at a much lower level than on Friday.

On redirect examination, Giordano emphasized that upon learning of the threat at approximately 1:00 p.m. on Thursday, October 6, there was very little time to prepare for the afternoon rush hour and it was imperative to immediately deploy assets and personnel in the quickest possible fashion. There was comparatively more time to prepare for the Friday morning rush hour. He also emphasized that the only information divulged during the teleconference was that there was a city-wide threat to the transit system; otherwise, there was no discussion regarding the accuracy or the validity of the alleged threat. He stated that deployment on Monday was similar to Friday’s deployment insofar as critical response vehicles were all deployed, as were Atlas, Canine, and Special Operations Units, and the first and second platoons were held over.

On recross examination, Giordano clarified that he could only account for deployment in Manhattan South, not the rest of the city, although he added that the counter terrorism inspectors that were present at the teleconference received the same instructions as he did.

Shortell, a 22-year member of the Department, is assigned to the 6 Precinct, where she is the Commanding Officer. In that capacity, she is in charge of overall command operations. She is the supervisor of the Respondent, who was assigned to the 6 Precinct in August 2005 and is its Executive Officer. She stated that in her absence, the Executive Officer would take over her duties as Commanding Officer. On October 6, 2005, she began her tour at approximately 8:00 a.m. At approximately 3:00 p.m., she learned from her Administrative Lieutenant that the second platoon was going to be held over until further notice. The Respondent was in his office at the time. Also present at that time was Captain Joseph Panarese, a second Executive Officer, who was assigned to the precinct a month before the Respondent's arrival. Upon receiving the notification, Shortell met with the Respondent and Panarese to inform them of the situation, which she said had something to do with a terrorist alert for the transit system in Brooklyn. "At that point, I didn't have any information in regard to it," stated Shortell, who added that the Respondent told her that he would make a telephone call to try to obtain information.

Shortell thereafter walked back into her office, where she received faxes from Patrol Borough Manhattan South regarding a plan that was to be implemented starting the next morning. The plan consisted of deploying certain squads to cover all the various transit posts starting at 4:25 a.m. With respect to the afternoon rush of Thursday, October 6, instructions included dispatching two officers in the third platoon in a critical response vehicle to the Javits Center. With respect to the second platoon, Shortell stated that one squad was dismissed at approximately 4:50 p.m. and the second squad was dismissed at about 5:45 p.m. Shortell estimated that she left the precinct at approximately 6:50 p.m. In addition, a "house of worship auto" with two officers was dispatched at approximately

6:00 p.m. on October 6. [DX 4 is a photocopy of the roll call for the 6 Precinct dated October 6, 2005.] Shortell testified that she never learned the specific reason for holding over the second platoon. She stated that the Respondent was still working when she left the precinct on October 6. She also stated that the roll call in evidence was accessible to her executive staff, including the Respondent.

Shortell stated that in the days following October 6, 2005, she did not have any conversation with the Respondent regarding the deployment of personnel from the 6 Precinct on October 6. Prior to October 14, 2005, the only conversation she had with him regarding the terrorist threat and the Department's response was their short conversation on October 6 when she instructed him on the holdover for the second platoon. She denied that on that date the Respondent asked her about the Department's response regarding that threat. She also denied that the Respondent informed her prior to October 14 that he was going to be interviewed for a news talk show regarding the threat and the Department's response. Further, Shortell denied that she was ever briefed by her superiors regarding the alleged threat and the Department's response. "I'm just a soldier in the army, I carry out my orders and abide by what they tell me to do," explained Shortell, who was not aware of any meetings the Respondent had with high-level Department personnel regarding the alleged terrorist threat to the city.

On cross-examination, Shortell stated that the Respondent never told her that he obtained any information following their brief conversation on October 6. She acknowledged that she imparted no information to him beyond her belief that there was some terrorist issue concerning Brooklyn transit. She clarified that the faxes she received on October 6 dealt with deployment for the next day. She acknowledged that the 15

police officers in the second platoon held over in the command were not deployed and were released from the command. She did not recall any further conversation with the Respondent regarding the deployment. She stated that on October 7 some police officers were assigned to the entrances and exits of various subway stations, while some were assigned to police cars with turret lights on for greater presence.

The Respondent's Case

The Respondent called Marquez Claxton, Noel Leder, and Sergeant Joseph Clarino as witnesses and testified in his own behalf.

Claxton is a retired NYPD detective and a co-founder of 100 Blacks in Law Enforcement, which he described as a civil rights organization comprised of law enforcement professionals. The main purpose of the organization, according to Claxton, is to advocate on behalf of “communities of color.” In addition to focusing on law enforcement issues that impact those communities, the organization also deals with issues concerning housing, education, and health. Claxton stated that his role in the organization, which was formally founded in 1995, is minister for information and research. In that capacity, he is responsible for obtaining information and data on the issues affecting the communities, sharing that information with the organization, and then promulgating strategies to deal with those issues based on that information. He stated that the organization communicates its position to the community at large by holding press conferences and appearing on news shows in response to media inquiries. He stated that the organization's primary spokesperson is the Respondent.

Claxton reacted skeptically to the mayor's announcement on October 6, 2005 regarding a terrorist threat to the city's transportation system. He explained that prior to this announcement, the mayor had been criticized regarding his refusal to attend a mayoral debate at the Apollo Theater that evening. In response, Claxton spoke to retired NYPD sergeant Noel Leder, another co-founder of the organization, about conducting an informal site survey to ascertain the extent of the Department's mobilization in response to the alleged threat. According to Claxton, "the site survey would be able to verify whether there was some mass deployment of personnel or whether this was just public relations."

Claxton conducted the survey at approximately 5:00 p.m. that day. He rode in his car to the 169th Street and Hillside Avenue stop on the F-line to observe if there was a police presence at that location. He subsequently drove to approximately seven or eight elevated stations along the J-line. Claxton stated that he entered the subway stop at 169th Street and observed no police presence in the area of the token booth or at the entrances to the station. Next, Claxton drove to the elevated station at 121st Street and Jamaica Avenue where he exited his vehicle and observed no police presence at that location. Similarly, he traveled to the stations located at 111th Street, 104th Street, 75th Street, Cypress Hills, Norwood Avenue and Cleveland Street, and observed no police presence at those locations.

On Friday, October 7, Claxton visited those same stations at approximately the same times and observed either police personnel or vehicles posted at each of the locations. On Saturday, October 8, Claxton conducted the same survey at the same locations, at the same times, and noticed no police presence at those stations.

On Monday, October 10, Claxton met with Leder and the Respondent to discuss the results of the site survey and to formulate their organization's position regarding the mayor's and police commissioner's terror alert and the city's response thereto. The organization's position was that the timing of the announcement was "highly suspicious," especially since there had been no full deployment on Thursday, October 6, as had been indicated by the mayor on that date. Their suspicion was heightened by the dissipation of deployment on Saturday following the full deployment on Friday. At that meeting, it was decided that the organization would share the information it had obtained with the public. Consequently, the organization held a press conference at City Hall on Tuesday, October 11, which was attended by Claxton, Leder, the Respondent, and members of the National Latino Officers Association. The Respondent spoke at the press conference and questioned whether the administration should have earlier released information it had about the alleged threat so as to assure public safety. To the best of Claxton's recollection, at least one member of DCPI was present to observe the press conference, as is the norm. Claxton denied that anyone from the Department, including DCPI, contacted the organization after the press conference to comment on it.

On cross-examination, Claxton stated that two other members of the organization conducted site surveys in Brooklyn and Manhattan, where they resided. He did not recall the number of stations visited by each of those individuals. With respect to his site survey, Claxton estimated that he spent a few minutes at each station. He acknowledged that none of the stations he visited is considered a "hub," *i.e.*, a station at which several subway lines converge and where transfers can be made. Claxton acknowledged there

was a political motivation behind the October 11 press conference in addition to concern for the public safety.

On questioning by the Court, Claxton stated that when he was conducting his site surveys, he did not actually go onto any subway platforms.

On redirect examination, Claxton stated that the site survey in Manhattan was conducted in Harlem. The selection of the sites was based on where the surveyors resided, and their location in communities of color. It was Claxton's understanding that the Respondent appeared on WCBS-TV on October 14 as a spokesperson for 100 Blacks in Law Enforcement.

Leder, who, like Claxton, retired from the NYPD after 20 years of service, is also a member of 100 Blacks in Law Enforcement. He stated that the organization has previously spoken out on the Abner Louima and Amadou Diallo cases and has issued report cards rating the police commissioner's performance. He acknowledged that the organization has been critical of the NYPD. As the documentarian of the organization, Leder stated that the organization "very frequently" receives requests from the media, including television, radio, and print, to comment on issues; in addition, it sponsors or participates in press conferences. He emphasized that because the organization is autonomous, members can speak out more candidly on issues in opposition to the Department than can members of the service, who may be reluctant to speak out for fear of retaliation.

Leder stated that on October 6, 2005 his organization became concerned that their community was being protected and secured "just like everyone else's community,"

following the disclosure by the mayor and police commissioner of a terrorist threat against the city's transit system. The organization also wanted to ensure that the rights of individuals were not being violated by officers securing the transit system. As a result, members of the organization, including Leder, conducted site surveys of various subway stations. Leder volunteered to coordinate this effort. He asked Claxton, who lives in Queens, and Kevin Liner, who lives in Manhattan, to conduct a random survey of train stations and to document their observations. In Brooklyn, Leder visited stations along the Rockaway Avenue C-line, including Ralph Avenue, Utica Avenue, Kingston Avenue, Nostrand Avenue, Eastern Parkway and Franklyn Avenue, the latter five of which are on the 2, 3 and 4 lines. He pulled up in his private vehicle to each station, where he looked for police coverage outside before entering the stations, wherein he looked for police coverage in the token booth areas. He testified that on October 6, he did not observe any police coverage at any of the stations he visited. On Friday, October 7, however, he observed police coverage at all of those stations, consisting of uniformed officers located outside as well as inside the stations. Upon revisiting the same stations on Saturday, October 8, Leder did not see any police coverage at any of those stations.

After conferring with Claxton and Liner, whose observations were similar to his, Leder attended the organization's meeting on Monday, October 10 at which they discussed the surveys and, according to Leder, "the lack of deployment in our community." Leder stated that at the organization's press conference at City Hall on Tuesday, October 11, the Respondent spoke about the mayor's delay in deploying police officers until Friday, October 7. He testified that a member of DCPI was present and taking notes during the press conference, but that DCPI (or the NYPD) did not contact

the organization regarding the press conference. Like Claxton, Leder was surprised at the instant charges against the Respondent given the hundreds of times he has previously spoken to the media and at press conferences as a representative of 100 Blacks in Law Enforcement, without the Department taking issue with him or his statements.

On cross-examination, Leder stated that he arrived at the first train station for his site survey at approximately 5:26 p.m. He acknowledged that he did not go onto the platforms of the stations he visited, nor were any of those stations major transit hubs. He also acknowledged that he did not board any trains at the stations he visited to ascertain if there was a police presence on them. He further acknowledged that in his career with the Department, he was never involved in deploying officers in response to alleged threats to the subway system. Like Claxton, Leder acknowledged that their organization did not survey Manhattan South. Leder stated that Liner visited subway stations at 135th Street, 116th Street, 110th Street, 125th Street, and 145th Street and Lenox Avenue, none of which are considered hubs. Liner's observations were conducted in the token booth area of those stations, according to Leder. Like Claxton, Leder did not recall the exact content of the press conference on October 11 and thus was not certain whether the Respondent specifically stated that there was absolutely no deployment on October 6. Also, like Claxton, Leder could not remember who from DCPI was present at that conference, although he saw an individual from DCPI in attendance.

On redirect examination, Leder stated that his organization was concerned with city-wide deployment. He also stated that the Respondent's interview with Marcia Kramer of WCBS-TV took place after the terrorist threat operation had concluded.

On recross examination, Leder acknowledged that the research performed prior to the Respondent's interview with Kramer consisted of the site surveys, as well as the public statements of the mayor and the police commissioner, but did not include conversations with high-ranking members of the Department.

Clarino, an 18-year member of the Department, is assigned to IAB. Clarino testified that in October, 2005 IAB received the tape of the Respondent's interview with Marcia Kramer, which he was given by Chief Campisi. Clarino then logged in the complaint himself. "It was a self-initiated case in the IAB," he stated. Clarino was not certain if Campisi or Lieutenant John Donnelly brought the case to his attention. Clarino reviewed the tape of the interview with other members of the service present. He testified that Campisi decided to make it a misconduct case. Clarino stated that he thought the tape came from DCPI, but he did not know from whom. He denied that he had a conversation with anybody at DCPI regarding the tape or the case. He could not recall ever having a media case, such as this, referred to him before. He also could not recall a case referred to him involving an officer who had spoken to the media. Clarino stated that had he learned whether or not the Respondent had received permission to be interviewed by Kramer, he would have noted that information on a worksheet, which he contended he had in a file. He recalled that at the beginning of the investigation, he was told by Campisi, Donnelly, or Deputy Inspector Mason that the Respondent did not have permission to be interviewed.

On cross-examination, Clarino explained that a complaint that is initially designated “M” for misconduct may not retain that classification by the end of the investigation.

[Respondent’s counsel asked the Court to note its objection regarding their inability to ascertain the actual complainant in this matter, *i.e.*, the person who referred this matter to IAB.]

The Respondent, a 22-year member of the Department, is assigned to the 6 Precinct. As the primary spokesman or “mouthpiece” of 100 Blacks in Law Enforcement, the Respondent articulates the position of the organization to the public. He admitted that some of those positions are critical of the Department, *e.g.*, the Department’s response to the terrorist threat on October 6 and the lack of minority representation in the command staff of the terrorist operation. The Respondent also referred to the organization’s criticism of the Department’s bag search policy, which he addressed during a press conference in front of transit headquarters at 370 Jay Street in Brooklyn in June 2005. At that press conference the Respondent voiced concern that the policy be implemented fairly and that police officers receive training to identify dangerous items.

The Respondent estimated that he has given 200 press conferences as spokesman for 100 Blacks in Law Enforcement. The Respondent stated that when a member of the media contacts the organization in order to arrange an interview with him, he instructs that person to obtain approval from DCPI if he or she wishes to interview him as a

member of the Department; if the member of the media thereafter contacts the Respondent after obtaining approval, he will call DCPI to ensure that it has granted approval to that particular media member. The Respondent emphasized that if he did not get affirmation from DCPI, he would not do the interview. If, however, the media outlet seeks to interview the Respondent as a member of the organization, he will make the determination whether or not to grant an interview, unless the topic deals with an ongoing investigation of highly classified material, in which case he will not participate in the interview. He estimated that 95% of the time the media invites him to speak as the representative of 100 Blacks in Law Enforcement, thereby obviating the need to seek DCPI approval. The Respondent recalled two or three times when the media sought him to speak in his official capacity as a member of the Department. The Respondent instructed those media members to call DCPI for approval; because they did not thereafter contact him, he assumed they did not get approval. The Respondent referred to a recent interview request from a neighborhood paper in his precinct, The Villager, which he learned was denied by DCPI, even though the topic was the Respondent's recent arrival at the precinct as its Executive Officer following his promotion to captain. [Respondent's Exhibit (RX) A is a document from DCPI denying the Respondent permission to speak to The Villager.]

On October 6, 2005, the Respondent arrived at work at 10:30 a.m. and departed at 7:50 p.m. On that day, he had a conversation with Shortell as they both tried to figure out what was taking place with respect to the terrorist threat. Although the Respondent volunteered to make a telephone call to get information, he did not make the call because after leaving Shortell and returning to his office, he saw the televised broadcast of the

mayor's press conference during which he spoke about the threat. He then walked back to Shortell's office and told her what he had heard on the television regarding the threat to the subway system. Later that evening at around 4:30 or 5:00 p.m., the Respondent was informed by Borough Command that he was going to perform a 3:00 p.m. to 11:00 p.m. tour to handle the Department's response to the terrorist threat on Friday, October 7. He denied that he received any directions from Borough Command with respect to his activity on October 6. He stated that when he left the precinct that day, the 15 officers who had been held over were already gone. It is his belief that they never left the stationhouse, *i.e.*, they were mobilized, but not deployed. That evening, he spoke with Leder, who informed him of the site surveys in Manhattan, Brooklyn, and Queens. According to the Respondent, there was skepticism among members of 100 Blacks in Law Enforcement regarding the terrorist threat, which coincided with a mayoral debate scheduled around that time in Harlem. The Respondent spoke to Leder around 8:00 p.m. and again at approximately 9:30 p.m., during which Leder informed him of the results of the site surveys.

On Friday, October 7, the Respondent arrived at work at 2:45 p.m. He thereafter proceeded to Manhattan South Borough Command, where he met with Chief Paragallo, who indicated that he wanted the Respondent to check subway stations in the Manhattan South area below 14th Street to ensure that officers were assigned to all the stations and were in their specific locations. After the meeting with Paragallo, the Respondent returned to the stationhouse and then went on patrol and visited each one of the stations to monitor the deployment. At each location, he observed two officers: one at the top of the stairs leading down to the station and one at the bottom of the stairs. In addition, he

observed a police car with the turret lights on. He estimated he visited 24 or 25 stations in that area. Later that day he spoke with Leder, who informed him of the results of the site surveys conducted that day. On Saturday, October 8, the Respondent again spoke with Leder, who advised him of the results of the site surveys performed that day.

On Monday, October 10, the Respondent met with Leder, Liner, and Claxton and they decided to hold a press conference the next day to express the position of their organization that the Department failed to conduct a city-wide deployment to ensure the safety of the transit system. The Respondent explained that his organization postponed their regular Sunday press conference because they wanted to make sure that the terrorist operation was over before commenting on it. At the press conference on Tuesday, October 11, which was held on the steps of City Hall and attended by members of 100 Blacks in Law Enforcement and Anthony Miranda from the National Latino Officers Association, the Respondent addressed three topics: that there was no city-wide deployment on October 6; that he was the captain in charge of the detail below 14th Street on October 7; and that the threat was not responded to in a timely fashion, thus jeopardizing the riding public and police officers. The Respondent stated that two members of DCPI were present at the press conference during which they took notes. The Respondent denied that he was contacted by DCPI (or by the Department) after the press conference, nor was he subsequently informed by DCPI (or the Department) that he acted improperly at the press conference. The Respondent stated that he did not seek permission from the Department to participate in the October 11 press conference because he was acting as a private citizen representing a private organization.

On Thursday, October 13, the Respondent received a telephone call from Alex Benes, Executive Producer at WCBS-TV, who had seen footage of the press conference and wanted the organization's response to the terrorist alert. The Respondent asked Benes if he wanted him to appear in his capacity as a member of 100 Blacks in Law Enforcement or as the Executive Officer at the 6 Precinct. According to the Respondent, Benes was clear he wanted the Respondent in his position as a member of 100 Blacks in Law Enforcement. The Respondent agreed to appear and told him that he should be identified on the screen as a member of the organization. The Respondent believed that his appearance would entail articulating the position promulgated by his organization on Monday and presented at the press conference on Tuesday. The Respondent asserted that he did not intend to appear as a representative of the Department on Marcia Kramer's Sunday morning show on WCBS-TV.

On the morning of Friday, October 14, the Respondent appeared at WCBS-TV and was interviewed by Kramer, during which he focused on the failures of the mayor and the police commissioner to conduct a city-wide deployment. He contended that he spent most of the six-minute interview talking about the mayor. The Respondent explained that his criticism of the city's response to the threat was based on the organization's site surveys and what had been reported in the newspapers. The Respondent also opined during the interview that the terrorist threat was "politically motivated."

The Respondent subsequently learned that after the taping of the interview, WCBS-TV sent an E-mail to Deputy Commissioner Browne requesting his response to the Respondent's comments made during the interview. The Respondent testified that

Deputy Commissioner Browne responded with derogatory remarks “to the effect that Eric Adams is a liar.” In response, the Respondent drafted a letter to Councilman Hiram Monserrate requesting that the City Council’s Public Safety Committee hold hearings to ascertain what took place in the city on October 3, 2005. The chair of that committee, Councilman Peter Vallone, Jr., refused to hold the hearings, which the Respondent is still actively pursuing.

The Respondent pointed out that in the last year he has appeared on television shows and press conferences to discuss the efficacy and legality of the random bag searches, the lack of diversity in the hierarchy of the NYPD and the Corrections Department, as well as the lack of diversity in City Hall. He asserted that in that time he had not been informed by the Department that his comments were in violation of Department rules. He also denied that he was ever contacted by anyone in the Department and told that he could not speak about a particular subject because it was official Department business. The Respondent estimated that in 90% of the interviews he has conducted he has been identified by his rank at the time, as well as his organizational affiliation. He stated that he was not aware of the wording of the caption that appeared onscreen while he was being interviewed by Kramer. He asserted that during the years he has been the primary spokesman for 100 Blacks in Law Enforcement, the Department has never contacted him about how he was identified.

The Respondent recalled that following a press conference in front of One Police Plaza during which he and Anthony Miranda raised the issue of diversity within the command staff of the Department, Deputy Commissioner Browne allegedly referred to Miranda and the Respondent as “dumb and dumber.” The Respondent stated that Deputy

Commissioner Browne's comment appeared in the print and broadcast media. As a result, the Respondent filed an internal Equal Employment Opportunity complaint, which was later deemed unfounded and a Civilian Complaint Review Board complaint which was handled by Chief Campisi and is still pending. The Respondent contended that the instant disciplinary charges are in retaliation for his complaints. In support of his contention, the Respondent pointed out that he is being charged for the first time for conduct that he has openly engaged in for 15 years; in addition, he has been unable to ascertain who made the initial complaint against him in this matter.

On cross-examination, the Respondent acknowledged that on October 6, 2005, he did not review the roll call for the third platoon, which started at 3:00 p.m. He also acknowledged that the roll call sheets were available, if he wanted to inspect them. The Respondent explained that he did not suggest how officers in the precinct should be deployed that day because neither he nor Shortell knew the nature of the threat. He added that it is the province of the terrorist inspector to communicate the deployment plan for the command. "The problem was not that Inspector Shortell and I failed to deploy (those officers), someone failed to give us the orders to deploy them," Adams declared. The Respondent also stated that he was the third person in command of the precinct, after Shortell and Panarese, and that he would have been superseding Shortell's authority had he communicated with the terrorist inspector. The Respondent stated that he did not know at the time of the threat that two officers from his precinct had been dispatched to the Javits Center. The Respondent further acknowledged that he was not involved in strategy meetings pertaining to where the personnel he observed on October 7 would be assigned, nor was he involved in any high-level meetings within the

Department regarding possible terrorist threats. In addition, he acknowledged that his duties on October 7 did not include deciding where personnel would be deployed. The Respondent emphasized that the site surveys conducted by his organization were unscientific samplings and that he had no role in deciding which areas were sampled. The Respondent stated that had he been representing the Department at the press conference on October 11, he would have contacted someone from Patrol Borough Manhattan South regarding its response to the terrorist threat on October 6, but insofar as he was representing 100 Blacks in Law Enforcement, he only reached out to those people he was representing. The Respondent did not recall if any members of his organization, who were also members of the Department at the time, had been asked prior to the press conference if they were deployed on October 6.

The Respondent stated that he was contacted by WCBS-TV one day before the interview. He denied that prior to the interview he contacted anyone in the Department regarding what, if any, deployment took place on October 6. He also denied that post-October 6 and pre-October 14 he spoke with anyone from the Operations Division regarding what actions had been taken by the Department with respect to the threat on October 6 (nor did he speak with anyone from the Transit or Intelligence Divisions). He acknowledged that during the interview, he did not mention his role in 100 Blacks in Law Enforcement, but explained that he did not need to because he had been introduced as a representative of that organization at the outset. He was not surprised to learn that during the six-minute interview he referred to himself as a captain in the Department three times. "Often when I do interviews, I describe what I do for a living," he stated. He acknowledged that during the interview he stated that there was no deployment, when in

fact he meant to say that there was no city-wide deployment, which was the position he wanted to articulate on behalf of the organization. "I failed to accurately pronounce it (the organization's position) the way I wanted to," the Respondent admitted.

The Respondent agreed that if he was to give an interview as a representative of the Police Department, he would need prior authorization from the Department. He also agreed that the Department's terrorist response (*i.e.*, deployment) plans are classified information. The Respondent reiterated that the organization waited until Tuesday, October 11 to hold its press conference because they "did not want to do anything to jeopardize the safety of the passengers and public." He acknowledged that he received these charges before he filed his retirement papers, although he contended that he made his plans known beforehand to supervisors in the Department and during radio interviews.

On redirect examination, the Respondent recalled that Marcia Kramer introduced him at the beginning of the interview as "Eric Adams, the head of 100 Blacks in Law Enforcement Who Care and himself a captain in the NYPD." He asserted that he was not given an opportunity to review the tape of the interview prior to its broadcast on Sunday, October 9. Based on his experience, he added that it is not the custom or practice of those television shows to provide that kind of opportunity. The Respondent opined that official Department business can be an issue of public concern and that the subject matter of his interview was such an issue.

On recross examination, the Respondent disagreed that there is a distinction between the statements that the NYPD did not deploy on October 6 and that it did not sufficiently deploy city-wide on that date.

[RX B is a disk containing clips of various press conferences and interviews previously given by the Respondent.]

FINDINGS AND ANALYSIS

The Respondent is charged with appearing on a televised news talk show as a representative of the New York City Police Department without permission or authority, during which he wrongfully divulged or discussed official department business without authority or permission to do so, and disseminated misinformation to the public regarding a Departmental operation without verifying the accuracy of said information, all of which are violations of the Patrol Guide. However, a decision in this case cannot be made without analyzing these charges through the prism of the First Amendment, which is clearly implicated here.

It is settled that the First Amendment rights of public employees are different from those of ordinary citizens, see Pickering v. Board of Education, 391 U.S. 563 (1968). Moreover, "[b]ecause police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer." Tindle v. Caudell, 56 F.3d 966, 971 (8th Cir. 1995), *citing* Cain v. Board of Police Commissioners, 920 F.2d 1402, 1409 (8th Cir. 1990). In Pickering, the U.S. Supreme Court established a two-pronged test to determine whether a public employee's speech is constitutionally protected. The Pickering test balances the "interests of the [employee] as a citizen, in commenting upon matters of public concern and the interests

of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," 391 U.S. at 568.

Applying the Pickering analysis to the Respondent's conduct in this case, the threshold inquiry is whether the speech at issue addresses a matter of public concern. This is "determined by the content, form and context of a given statement, as revealed by the record as a whole." Connick v. Meyers, 461 U.S. 138,148 (1983). It is undisputed that the subject matter of the Respondent's interview--the terrorist threat confronting the city at the time--is a matter of public concern. In addition, it is clear from the mission of the organization, on behalf of which the Respondent has spoken over the years, that the ostensible purpose of his comments during the interview was to air an issue of public concern, not to protect or promote a private interest. See Lawrenz v. James, 852 F. Supp. 986 (M.D. Fla. 1994), in which the court observed that "[t]he mere fact that the subject matter of the expression is one in which the public might have a substantial interest -- is not dispositive. A court should consider the employee's motive to determine whether the employee was trying to bring such issues to the public's attention or whether the employee was merely concerned with how such issues affected his or her personal interest.) 852 F. Supp.at 992, citing Morgan v. Ford, 6 F.3d 750, 754 (11th Cir. 1993).

Next, it must be determined whether the Respondent's interest in speaking freely on that issue is outweighed by the government's interest in protecting against disruptions to its operations arising from the Respondent's speech. Indeed, the ultimate concern is "whether the government's provision of services to the public will be jeopardized by the speech." Gordon v. Griffith, 88 F. Supp.2d 38, 55 (E.D.N.Y. 2000) Such an analysis is also pertinent because Specification No. 3 addresses the actual or potential disruption to

the agency's good order, efficiency or discipline as a result of the Respondent's remarks. In Tindle v. Caudell, *supra*, the court stated: "A government employer's reasonable prediction of disruption is entitled to substantial weight. (citation omitted.) The government entity need not allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action (citation omitted)." 56 F.2d at 972. *See also* Jeffries v. Harleston, 52 F.3d 9, 13 (2d Cir. 1995). However, "[t]he closer the employee's speech reflects on matters of public concern, the greater must be the employer's showing that the speech is likely to be disruptive before it may be punished." *Id.* at 13; *see also* Coughlin v. Lee, 946 F.2d 1152, 1157 (5th Cir. 1991) (*quoted in* Thomas v. Whalen, 51 F.3d 1285 (6th Cir. 1995)) ("The more central a matter of the speech at issue, the stronger the employer's showing of counter-balancing governmental interest must be.").

At trial, the Department failed to meet its burden of showing that the purported misinformation conveyed by the Respondent was disruptive to the Department's mission of preserving public safety in the midst of the enunciated terror threat. In fact, that particular threat was no longer in effect at the time that the Respondent was interviewed by Marcia Kramer of WCBS-TV, as manifested by DX 3, the three-page document prepared by Captain D'Amora delineating the coverage in the transit system for October 6, 7, and 11, when the coverage reverted back to "a normal heightened alert coverage." It accounts in part for the Respondent forbearing from holding his organization's press conference on Sunday, October 9, as is its norm, until Tuesday, October 11 because, as he explained, they "did not want to do anything to jeopardize the safety of the passengers and public." Arguably, had the Respondent's comments been made at the height of the

threat, or contained confidential information (which was not alleged here), they might not merit First Amendment protection. *See* Disciplinary Case No. 79421/03 (Respondent dismissed for publishing on the internet the results of his self-initiated test of the Department's security shortcomings.)

Moreover, there was no testimony or evidence adduced that the Respondent's comments potentially encumbered the Department's response to the threat. *See* Waters v. Churchill, 511 U.S. 661, 680 (1994). For example, neither D'Amora, the Commanding Officer of the Operations Unit who was responsible at the time for ensuring that the executive members of the Department were given prompt and correct information regarding city-wide incidents, nor then-Inspector Giordano, assigned as the Manhattan South counter terrorism coordinator, testified as to the disruption caused (or likely to have been caused) to the Department's operations by the Respondent's comments during his WCBS-TV interview. The contention by the Assistant Department Advocate in her Memorandum of Law that "Respondent's comments had a realistic potential to cause community panic, political distrust and public dissent," is not enough to satisfy the second prong of Pickering, nor is it supported by Tindle, which she cites, because nothing in the record suggested the Department's *concern* about disruption, let alone that such concern was reasonable. That the Respondent's comments (which he made earlier at the October 11 press conference) were not perceived with concern was evidenced by Mayor Bloomberg's remark in response (which was aired during the Kramer interview): "Given the source, it shouldn't be given very much credibility."

The information conveyed by the Respondent during his televised interview is also constitutionally protected even if it is mistaken and cannot form the basis for

discipline. In Pickering, which dealt with a public school teacher dismissed for criticizing in a local newspaper the Board of Education's handling of proposals to raise new revenue for schools, the Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

Similarly, Wichert v. Walter, 606 F. Supp. 1516 (D.N.J. 1985) involved a teacher criticizing a local school board, albeit at a political rally. In citing Pickering, the court noted that "even if plaintiff's statements were mistaken, they fell within the purview of the first amendment." *Id.* at 1525. The court further noted that "[e]ven the fact that some of Pickering's specific statements were false as a result of his good faith error did not deter the court from upholding Pickering's right to have made them." *Id.* at 1523.

The Respondent was not charged with making knowingly false or reckless statements. The Respondent acknowledged that during the interview he mistakenly stated that there was no deployment, when in fact he meant to say that there was no city-wide deployment, which was the position he wanted to articulate on behalf of the organization and which he purportedly declared during the October 11 press conference. "I failed to accurately pronounce it (the organization's position) the way I wanted to," the Respondent admitted. At any rate, the Respondent's factual assertion regarding deployment on October 6, 2005, while perhaps mistaken, was ostensibly made in good faith based on multiple site surveys conducted by his organization over a three-day period (the results of which were not disproved) and his own experience and observations on that date, when the 15 police officers in the second platoon held over in his command were not deployed and were released from the command. (I note that had the Respondent

stated during the interview, as he intended, that the deployment on October 6 was not city-wide, that factual assertion, while also perhaps mistaken, would not have been invalidated by Giordano or Shortell, who could only attest to local deployment, or by D'Amora, who acknowledged, along with Giordano, that deployment was substantially greater on October 7 than on October 6.)

Accordingly, based on the foregoing, I recommend that the Respondent be found Not Guilty of Specification No. 3.

Regarding Specifications Nos. 1 and 2, I acknowledge that while the Respondent has a First Amendment right to speak on issues of public concern (subject to the Pickering balancing test), he does not have an unqualified right to do so. Tindel held that members of police departments “may be subject to stringent rules and regulations that could not apply to other government agencies,” and Cain, cited therein, held that “[r]egulations limiting even those rights guaranteed by the explicit language of the Bill of Rights are reviewed more deferentially when applied to certain public employees than when applied to ordinary citizens.”

The Respondent agreed that if he was to give an interview as a representative of the Police Department, he would need prior authorization from the Department. However, he admittedly did not obtain permission because he intended to give the interview as a private citizen expressing the views of the organization he represented. Nevertheless, during his six-minute interview with Marcia Kramer of WCBS TV on October 14, 2005 (which was broadcast on October 16, 2005) he thrice emphatically and primarily referred to himself by his rank and responsibilities, while trumpeting his

official duties and assignments during the period of the terror alert. For example, when asked by Kramer why the mayor and police commissioner were reporting contradictory facts regarding the deployment, the Respondent replied, “I was the captain that was assigned to safeguarding Manhattan subway stations during the evening hours on Friday....The deployment took place on Friday, regardless of what’s been stated. I was the captain who was assigned.” Later in the interview, he stated, “I’m a captain in the New York City Police Department. I have a Master’s in this topic. I was put in charge of the assignment of safeguarding the transit system during those hours, the entire lower Manhattan.” By assuming this posture, the Respondent imbued his claims and comments with the credibility derived from his official position and, in so doing, could have confused, misled, and panicked viewers into believing that he was speaking on behalf of a Department he had criticized and contradicted.

The regulation at issue does not otherwise restrict the Respondent’s speech and activities; it merely prohibits him and other members of the service from doing so in their official capacities without prior authorization. In this case, the Respondent was “advertising and invoking his experience...as a highly ranked member” of the Department in a manner that could engender unreasonable and unfounded fear and distrust in the Department and city government following an existential threat. *See Thomas v. Whalen, supra*, in which a Federal appeals court upheld a police chief’s order that forbade a lieutenant from delivering anti-gun control speeches in uniform. The court stated that the order did not unlawfully restrict the lieutenant’s ability to speak against gun control; rather, it prevented him from “exploiting” his police affiliation to sell his own views on this political issue. The court noted that “the extra margin of credibility

lent his cause by exploiting his affiliation does not outweigh the Cincinnati Police Division's interest in preserving the appearance of impartiality in areas closely related to its core mission."

Accordingly, I recommend that he be found Guilty of Specification No. 1.

As to whether the Respondent divulged or discussed official Department business during the interview, I recommend that he be found Not Guilty. Although I recognize the Department's obvious need to preserve oversight in this area, I make this recommendation because it is unclear from the regulation and the record produced at trial precisely what constitutes "official Department business" (as opposed to the more narrow subcategory, confidential information); indeed, considering the Department's mandate, arguably all issues encompassing public safety come under the rubric of official Department business and thus could be precluded from public comment by members of the service, even in their private capacity.

In fact, Inspector Coan added to the vagueness of the regulation's application when he equivocated that in his private capacity, the Respondent would need proper authorization before "discussing Departmental business," then stated that "[a]s a private citizen, he (the Respondent) can speak about it (Department business)." If, as Coan conceded, a member of the service need not obtain Department authorization to discuss Department business as a private citizen, the regulation offers little guidance because it is silent as to those circumstances, especially here, where the Respondent has heretofore held many news conferences (which Coan acknowledged were monitored by DCPI) on matters which could generally be deemed Department business (*e.g.*, legality of the

random bag searches, the lack of diversity in the hierarchy of the NYPD), without repercussions.

PENALTY

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

The Respondent was appointed on July 18, 1984. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

It is recommended that the Respondent be found Guilty of appearing on a televised news talk show as a representative of the New York City Police Department without permission or authority, and that he forfeit 15 vacation days as a result thereof.

Respectfully submitted,

Michael D. Sarner
Assistant Deputy Commissioner - Trials

Captain ADAMS, ERIC

6 Precinct

909199

112-52-6976

July 18, 1984

Deputy Inspector Thomas Mason

IAB Group No. 25

December 6, 2005

February 21, 2006

March 1, 2006

Honorable Michael D. Sarner

1. Said Probationary Captain Eric Adams, assigned to the 6th Precinct, while off-duty, on or about and between October 14, 2005 and October 16, 2005, did appear on a televised news talk show as a representative of the New York City Police Department without permission or authority. *(As amended)*

GUILTY

It is recommended that the Respondent forfeit 15 vacation days.

2. Said Probationary Captain Eric Adams, assigned to the 6th Precinct, while off-duty, on or about and between October 14, 2005 and October 16, 2005, while appearing on a televised news talk show, did wrongfully divulge or discuss official department business without authority or permission to do so. *(As amended)*

NOT GUILTY

3. Said Probationary Captain Eric Adams, assigned to the 6th Precinct, while off-duty, on or about and between October 14, 2005 and October 16, 2005, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Probationary Captain disseminated misinformation to the public regarding a Departmental operation, via a televised news talk show, and did not verify the accuracy of said information. *(As amended)*

NOT GUILTY