THE CITY OF NEW YORK
OFFICE OF THE ADMINISTRATION
TRIALS AND HEARINGS

PRESENT: ALESSANDRA ZORGNIOTTI
ADMINISTRATIVE LAW JUDGE

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In the Matter of:

FIRE DEPARTMENT,
Petitioner,

Index No.: 14-2430

-against-

THOMAS BUTTARO,
Respondent.

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RESPONDENT'S BRIEF IN RESPONSE TO ALJ'S REPORT AND RECOMMENDATION IN SUPPORT OF HIS POST-TRIAL MOTION TO DISMISS ALL CHARGES

Dated: January 22, 2015
New York, New York

ELLENOFF GROSSMAN & SCHOLE LLP
Attorneys for Respondent
1345 Avenue of the Americas, 11th Floor
New York, NY 10105
(516) 723-2611

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PRELIMINARY STATEMENT

This Brief is submitted by Respondent, Firefighter Thomas Buttaro, in response to the Report and Recommendation (the "Report and Recommendation") issued by Administrative Law Judge Alessandra F. Zorgniotti, dated January 13, 2015, and in support of his post-trial motion to dismiss all the instant Charges pursuant to § 1-52 of the Rules of Practice of the Office of Administrative Trials and Hearings. For the reasons set forth herein, Respondent respectfully submits that the Report and Recommendation should not be adopted by the Fire Commissioner and the Charges dismissed with prejudice. In the alternative, Respondent submits that the recommendation of termination should not be approved and that a lesser penalty, if any, should be imposed.

Mayor Bill de Blasio recently said "The things that I have said that I believe are what I believe, and you can't apologize for your fundamental beliefs." Here, the ALJ recommends termination because Firefighter Buttaro would not apologize for his fundamental beliefs. Firefighter Buttaro fundamentally believes that the FDNY should uphold a rigorous set of testing standards and base hiring and promotion decisions of firefighters solely on merit without providing any preferences to any particular group. He believes that the harder the test, the better the firefighters will be, and the public safety will be protected with the best and brightest. In response, Judge Zorgniotti recommends the termination of this firefighter with over 16 years of impeccable service solely because he was wearing t-shirts supporting his fundamental beliefs and one African-American firefighter complained about them.

Based on these facts, one could only imagine that the shirts must have depicted a noose or burning cross or even a phrase containing the "N" word, but that is not the case. Actually, one of these shirts depicted an excerpt of the FDNY EEO Statement on the back of it. The other shirt

was worn by the firefighter in question in solidarity with minority firefighters who wanted to uphold vigorous hiring and promotion standards and had the motto "getting it the old fashioned way – earning it" on the back.

So, the question becomes, why Judge Zorgniotti recommending the termination of this exemplary employee who proudly stands up for his beliefs? The answer is simple. The ALJ severely misapplied the applicable legal standards and overlooked critical facts in rendering the recommendation. Indeed, Respondent's First Amendment right to be associated with Merit Matters was supposed to have been a privilege of Respondent as an American Citizen and New York City Firefighter.

Termination under the real facts of this case (not those cherry-picked and distorted in the Report and Recommendation) does not withstand the judicial scrutiny required when a public employee (such as Firefighter Buttaro) exercises his rights of free speech and association. Indeed, it would be unconstitutional for the FDNY to terminate Firefighter Buttaro's employment (or impose any discipline against him whatsoever) for asserting these Constitutionally-protected rights upon which this nation was founded since its birth over 200 years ago.

As set forth herein, under the applicable standard and based on the actual facts as presented at trial, Firefighter Buttaro's right to speak out on issues of public concern (the safety of the public with respect to emergency and fire preventative services) well exceeds the Petitioner's assertion of potential disruption. It was not even a close call and, with all due respect, the Judge simply blew it. Indeed, the evidence at trial established that Firefighter Thomas only witnessed Firefighter Buttaro wearing a Merit Matters or MADD shirt three times after Firefighter Thomas informed him that he did not like the shirt. Moreover, all three times

that Firefighter Buttaro wore the shirt Petitioner conceded that Firefighter Buttaro was off duty. These facts are undisputed. Let me say that again. The ALJ is recommending the termination of an employee whose greatest sin was wearing Merit Matters/MADD shirts three times off duty. It is fair to say that far more is required to warrant termination under any standard, particularly in light of Firefighter Buttaro's First Amendment rights.

Based on the First Amendment, all Charges should have been dismissed. Nonetheless, as set forth herein, even assuming *arguendo* that the First Amendment defense does not dispose of the claims (even though it does), Petitioner fared no better in meeting its burden of persuasion with respect to the individual charges: insubordination, harassment/hostile work environment, retaliation, conduct unbecoming and oath of office.

The ALJ found Firefighter Buttaro guilty of insubordination for failing abide by Department Orders concerning the dress code and his supervisor's statement that he could not wear a Merit Matters shirt. The ALJ, however, overlooked a critical distinction between dress on duty and off duty. The FDNY can regulate dress on duty, but cannot regulate dress off duty. As such, Firefighter Buttaro was not in violation of any Department or supervisor's orders when he wore Merit Matters or MADD shirts to and from work, off duty, or in the firehouse when he was off duty because there is no valid or lawful Order or Regulation, which required him to be in uniform when he was off duty, even if he was in the firehouse. Indeed, if the Fire Commissioner cannot regulate off duty dress, then surely Captain Washington, well below the Commissioner in the FDNY hierarchy, cannot do so. In addition, to the extent that he wore Merit Matters or MADD shirts on duty under his work/golf shirt, there was no lawful Order or Regulation, which forbid him from doing so. Finally, it would be a violation of his First Amendment rights to punish him for wearing Merit Matters-related shirts on duty prior to May 2012 where the

Department failed to prosecute other firefighters for the same offense (wearing non-Departmental shirts on duty) – clearly, in this case, it was the message of the shirt (implicating his constitutional rights) which formed the basis of the recommended discipline, which is unconstitutional in the first instance.

The ALJ found Firefighter Buttaro guilty of the harassment charges for allegedly intentionally creating a hostile work environment for Firefighter Thomas. The evidence at trial again fell way short of the heightened standard required to show that certain speech is actionable harassment. Here, the ALJ hung her hat on three to five trivial incidents in the Record (which lasted no more than 15 minutes combined over an eight-year work history between the two firefighters in question and contained no racial slurs or physical confrontations of any kind). Two incidents occurred during lunch at the firehouse and one incident occurred at an EEO training session where Firefighter Buttaro appropriately sought to get clarification on an EEO issue, but was unable to do so due to Firefighter Thomas' presence in the room as an EEO instructor. Moreover, there was no evidence submitted (and Firefighter Thomas conceded that no such evidence existed) that firehouse operations were ever disrupted as a result of the two firefighter's relationship.

Accordingly, all the instant Charges should have been dismissed and the Report and Recommendation should not be adopted by the Commissioner.

SUMMARY OF THE HEARING EVIDENCE

Background

Firefighter Buttaro has been an exemplary firefighter for the Fire Department, City of New York City ("FDNY") for over 16 years (Tr. 41, 511). He has received a number of citations and commendations over his career including, but not limited to, a World Trade Center Rescuer Ribbon, a Sandy Campaign Service Ribbon, and a Prehospital Save Commendation for

successfully resuscitating a patient in cardiac arrest following a FDNY response in 2008. None of these facts were recognized or given any weight by the ALJ. Indeed, prior to the instant changes being brought against Firefighter Buttaro, he had never been accused of discrimination, never had a prior EEO complaint issued against him, never had any prior complaint of retaliatory conduct, and never has been charged with violating any Department Rules or Regulations (Tr. 521-22). Before being hired by the FDNY, he was a police officer for the New York City Police Department ("NYPD") for approximately two years (Tr. 511). Similarly, during his employment with the NYPD, Firefighter Buttaro had no disciplinary record (Tr. 159).

In November 1998, Firefighter Buttaro started with the FDNY and between that time and April 2003, he worked in three different firehouses: Engine 242 in Bay Ridge, Brooklyn, Engine 234, Ladder 123 in Crown Heights, Brooklyn, and one in downtown Manhattan (TR. 514). He was first assigned to Ladder 123 as of October 1999 and then permanently in Engine 234 as of April 2003 (Tr. 43, 513). From October 1999 until January 2001, he worked with minority firefighters in the quarters of Engine 234, Ladder 123 and in or about 2002, he requested a permanent assignment to that firehouse even though he knew he would be working with minorities (Tr. 516). This is again an important fact overlooked by the ALJ. Significantly, Firefighter Thomas testified that Engine 234 had a reputation for having the largest number of Black firefighters (Tr. 265). In 2012, there were roughly 6-7 Black firefighters assigned to the firehouse (Tr. 706). Firefighter Buttaro stated that he, obviously, had no problem working with minorities and has no preconceived notions about race (Tr. 516).

As of May 2012, Firefighter Buttaro had three supervising Lieutenants, including Lieutenant Tom Zuhlke. Lieutenant Zuhlke called Firefighter Buttaro an "excellent" firefighter, said he has been his supervisor since at least 2003 and has never seen him fail to perform or

refuse an order (Tr. 823-24). Firefighter Wheeler has also worked with Firefighter Buttaro for more than 10 years and echoed this sentiment that Firefighter Buttaro is a good and honest firefighter who has never been disruptive of operations in any way (Tr. 890). Finally, Lieutenant Dombrowsky, who worked closely with Firefighter Buttaro for about 12 years, said Firefighter Buttaro was a good honest firefighter and never witnessed Firefighter Buttaro disobeying an order (TR. 943).[1]

FDNY Union Grievances

The terms and conditions of Firefighter Buttaro's employment are set forth in the Collective Bargaining Agreement ("CBA") between the UFA and the FDNY (ALJ Ex. 7). Article XVII (Individual Rights) of the CBA sets limits on the FDNY's ability to question firefighter's concerning off duty conduct (ALJ Ex. 7). Article XVIII (Grievance Procedure) of the CBA provides for the methodology whereby firefighters may grieve work-related complaints (ALJ Ex. 7).

Among the critical errors perpetrated by the ALJ in this case, the Court permitted this trial to go forward while Firefighter Buttaro still has three pending grievances relating to the underlying pre-trial procedures under the CBA, which have been alleged to have been violated. Two complaints relate to procedural violations by the FDNY in connection with Firefighter Buttaro's January 2013 interview and one relates to procedural irregularities in connection with the Step 1 grievance (Tr. 539-40). Although the ALJ claims in a footnote that the January 2013 interview was not considered in the decision, the ALJ permitted extensive cross-examination of Firefighter Buttaro against the transcript of the January 2013 interview, admitted the January 2013 interview into evidence (Pet. Ex. 5), and cited testimony from that transcript in the Report

[1] Additional letters of reference and good character have been submitted concurrently with this Brief.

and Recommendation.

For example, on page11, sixth paragraph of the Report and Recommendation, the trial transcript refers to the MEO-16 transcript multiple times (Tr. 126-129). In addition, page 15, second paragraph of the Report and Recommendation both refer to the MEO-16 transcript (Tr. 60-61). Last but not least, page 15, second paragraph of the Report and Recommendation refers back to trial transcript page 718, which refers to the MEO-16 transcript (Tr. 718).

In sum, although footnote 2 of the ALJ decision states that the MEO-16 was not considered in this decision, it is referred extensively in cited transcripts tainting the proceedings. Importantly, although that the ALJ stated in footnote 2 that the procedures under MEO-16 were followed, Respondent is grieving the fact that the CBA was not followed in regards to the MEO-16 interview. Respondent asserts that he was not provided with a written notification prior to MEO-16 preceding (Section 2, of Article XVII of the CBA) as well as the fact that the petitioner failed to notify respondent of his right to union representation during the interview (Section 5, of Article XVII of the CBA).

In sum, it was serious error for ALJ to consider, admit into evidence and cite to the January 2013 in the Report and Recommendation.

The Crown Heights Firehouse

FDNY Ladder 123 and Engine 234 work together in the Crown Heights firehouse (Tr. 821). The ALJ's Report and Recommendation fails to acknowledge the realities of firehouse life. There are about 50-60 firefighters in the Crown Heights Firehouse for Engine 234 and Ladder 123 combined (Tr. 437, 516). Firefighters often discuss legal issues, current events and political issues in the firehouse (Tr. 554-55). From time to time, there is friction between firefighters in the Firehouse, they sometimes use profanity and bust each other's chops, but overall it is a good work environment where the firefighters care about each other (Tr. 173, 997-

98). Disagreements sometimes happen in the firehouse, but it has never affected operations (Tr. 881, 894).

Firefighter Thomas and Firefighter Buttaro's relationship

The ALJ's decision is almost solely based on testimony of Firefighter Thomas, who has been with the FDNY for about 12 years. (Tr. 201). Reading the Report and Recommendation, one would have thought that the two were constantly fighting with each other and affecting firehouse morale, but the facts at trial do not bore that out in the slightest. Indeed, Firefighter Thomas and Firefighter Buttaro worked in the Crown Heights Firehouse together between 2005 and 2013 and had a good relationship when they first started working together (Tr. 176, 519). This good relationship continued from 2005 to at least the end of 2007 and Firefighter Buttaro stated that there were no disruptions to department operations at any time in this period (Tr. 523-25). It is worth noting that between 2005 and late 2012, Firefighter Buttaro's tours consistently overlapped with Firefighter Thomas approximately 50% of the time (Tr. 518-19). Throughout their entire time working together (over eight years), Firefighter Buttaro never viewed Firefighter Thomas in a racist way and Firefighter Buttaro never used a racial slur in Firefighter Thomas' presence (or even outside Firefighter Thomas' presence) (Tr. 181, 317, 527). Indeed, Firefighter Buttaro denies that he ever made a verbal statement that unreasonably interfered with Firefighter Thomas' work environment, made any racial remark or slur and has never harassed or retaliated against to any firefighter throughout his tenure (Tr. 541, 621). Both firefighters had a reputation in the firehouse for being opinionated and speaking out on issues of concern (Tr. 944-45).

Both firefighters always maintained a professional relationship with each other in operations, at meals and at fire scenes through the balance of 2008, through 2009, through 2010, and through at least 2011 (Tr. 211-12, 275, 277, 527-28). The two firefighters worked plenty of

tours together between 2005 and 2012 and although Firefighter Thomas did not like the way Firefighter Buttaro spoke to him, at times, Firefighter Thomas conceded that Firefighter Buttaro did not create a hostile work environment (Tr. 267-68). In fact, Firefighter Thomas reiterated at the end of his testimony that teamwork and job performance were not affected by their relationship, or lack thereof (Tr. 392, 394). Firefighter Buttaro agreed that although they never shared information about their personal lives, they did converse about work issues, duty-related stuff and were always civil to each other in group conversations (Tr. 698, 810). Firefighter Dombrowsky agreed (Tr. 846-48). Firefighter Buttaro maintained that he respects Firefighter Thomas as both a firefighter even where they may have a difference of opinion (Tr. 702-03).

In or about 2012, Firefighter Thomas requested a transfer to Ladder 123 from Engine 234 and was given detail in Ladder 123 no later than November 2012 (Tr. 203, 935, Pet. Ex. 7). As a result, as of November 2012, Firefighter Thomas began working with Firefighter Buttaro more than 50% of the time (Tr. 521). Lieutenant Dombrowsky agreed that the two began to work closer together after the transfer and added that when he made a similar transfer in or about 2009, he worked closer with the guys in Ladder 123 (Tr. 942, 948). The FDNY permanently assigned Firefighter Thomas to Ladder 123 as of November, 2012 (Tr. 203, 256). Despite the incidents described in the Report and Recommendation, which all occurred in 2012, during the entire year 2012 there was no disruption to operations inside or outside the firehouse, and even more significantly after November of 2012 (and 2013) when they started working even closer together (Tr. 529-30, 529-30, 621, 795, 825-26). No witness testified that there were any complaints by any supervisors that the relationship between the two firefighter affected or disrupted operations to the public at any time throughout their tenure working together (Tr. 530). Indeed, Lieutenant Zuhlke testified that he has seen Firefighters Buttaro and Thomas working together on many

occasions, whether fighting fires, doing building inspections or otherwise in the field, and he has never witnessed any friction between the two whereby operations of the firehouse were disrupted in any way (Tr. 825).

Firefighter Buttaro did not know Firefighter Thomas was a Vulcan

Among the most glaring errors in the Report and Recommendation is the assertion that Firefighter Buttaro knew Firefighter Thomas was a member of the Vulcan Society. The ALJ jumps to this conclusion despite the fact that Firefighter Buttaro denied that he knew Firefighter Thomas was a Vulcan (Tr. 184-85). Lending even more credence to this fact is that Firefighter Thomas admitted that he never told Firefighter Buttaro that he was in the Vulcan Society and, in fact, Firefighter Thomas never informed any of his co-workers in Engine 234 that he was a Vulcan Society member (Tr. 282). Lieutenant Dombrowsky did not know Firefighter Thomas was in the Vulcan Society either (973). Captain Washington testified that he never saw Firefighter Thomas wearing such a shirt identifying himself as a member of the Vulcan Society (Tr. 497-98). Lastly, there were no flyers in the Firehouse distributed by the Vulcan Society that published the names of its members (Tr. 283). As such, the ALJ's conclusion is totally speculative and not supported by the Record.

Merit Matters

It is also clear from the Report and Recommendation that for some unknown reason, the ALJ has a biased opinion of Merit Matters. The ALJ goes so far as to suggest that Merit Matters is a racist organization that opposes integration of the FDNY. Nothing could be further from the truth. Merit Matters is an organization made up almost entirely of firefighters that requests equality for all on the job, across the board, and one set of standards to apply to everyone (Tr. 59, 560, 811). On its website, the mission statement of Merit Matters is clearly posted and describes the purpose of the organization to:

- Work within the FDNY on issues of mutual concern
- Counter false claims and information disseminated by others
- Seek relief from outside agencies when necessary
- Educate and engage the public through use of media
- Demand equal treatment for all, which means special treatment for none.

Further, the mission statement says:

> We believe in equal opportunity, not guaranteed results. We want standards to be high, meaningful, equally applied and blind to race, gender or ethnicity. Written and physical exams should ensure that the MOST QUALIFIED applicants are chosen; they should NOT be designed to have as many applicants as possible pass.
>
> (Resp. Ex. I).

Merit Matters believes that the testing procedures should be based on merit and equally applied without any special treatment to any group, whether it be residency bonus points (geographic discrimination) or providing additional training based on race or gender (Tr. 557-59, 757, 806-07). To this aim, Firefighter Buttaro noted that giving preferential treatment to one group discriminates against everyone else (Tr. 767). Merit Matters has a very diverse membership base (among the most diverse of all firefighter organizations) comprised of White, Hispanic and Black members, male and female members and members with various religious backgrounds (Tr. 494-95, 560, 617). In fact, one of the executive board members of Merit Matters is Hispanic (Tr. 563). Also, the Crown Heights firehouse had at least one Black firefighter who was pro-Merit Matters (Tr. 707, 713). Firefighter Buttaro strongly denied that Merit Matters supports preferential treatment for White people (Tr. 813).

Firefighter Buttaro testified that Merit Matters is not anti-diversity; it is pro-equality (Tr. 59, 186). Merit Matters believes that the harder the FDNY entrance exam is, the better qualified candidates will for be hired for the job; Merit Matters is not against diversifying the Department,

but for the proposition that a watered down physical standard was not in the public's interest or a good idea (Tr. 68, 187-88). Indeed, as a member of Merit Matters, Firefighter Buttaro strongly believes that it is in the public's best interest to have the strongest and best, most agile members in emergency services (Tr. 187-88). Merit Matters is for preserving a merit based testing system, both physical and written (Tr. 186-87, 867-70). Even Chief Kelty and Firefighter Wheeler (both of whom are not a Merit Matters members) testified that they are familiar with Merit Matters and finds that it only stands for fairness and is not racist or anti-diversity or an offensive organization in any way (Tr. 642-44, 907-08).

The Disputed Shirts

The Report and Recommendation severely misinterpreted the messages of the Merit Matters-related shirts. Merit Matters t-shirts, like many organizational t-shirts worn in firehouses, is dark blue and has the FDNY's Maltese cross insignia on the front of it. An excerpt of the FDNY EEO statement is on the back of them (Tr. 568-69, 778, 999; Resp. Ex. A-B). The only witness at trial who claimed to find the shirt to be offensive was Firefighter Thomas. It is submitted that no reasonable person, no reasonable member of the public and no reasonable firefighter could find a shirt offense that bears the FDNY EEO statement on it. When asked about the shirts, Chief Kelty said that he does not find them offensive and it would be permissible to wear them to and from work, before roll call in the firehouse off duty and in the firehouse off duty after being properly relieved at the end of a tour without being in violation of the dress code (Tr. 645-48). Lieutenant Zuhlke also did not find the Merit Matters shirts to be offensive and noted that the shirts display the EEO policy on the back, which stands for equal protection (Tr. 829). Based on his knowledge of the community (he worked in Brooklyn for over 36 years), Lieutenant Zuhlke did not believe that the public would be offended by the shirt and does not believe that it ever lead to a disruption of operations in the field (Tr. 830).

The Minorities against Dumbing down the Fire Department ("MADD") shirt is no more offensive that the above. MADD is not an organization or advocacy group as cited in the Report and Recommendation. The MADD shirts were designed by a minority firefighter who wanted to let people know that there were minorities who are also opposed to the Vulcan's position in the lawsuit (Tr. 64). The concept is that there exists Hispanics and Blacks, among others, who do not have the same viewpoint as that which was taken by the Vulcan Society in their lawsuit (Tr. 618). Again, the MADD shirt is dark blue and says "getting it the old fashioned way – earning it" on the back (Tr. 67, 985; Pet. Ex. 2). A number of witnesses testified that they saw the shirts being worn in the firehouse and understood the MADD shirt to stand for the position that the FDNY entrance examination being watered down was a bad thing for the public (Tr. 67-68, 673, 789, 791, 951). Lieutenant Zuhlke's position was that the MADD shirt was also not offensive, it did not represent an offensive message to the community and it was not disruptive of operations (Tr. 831). Even Captain Washington admitted that one could interpret the MADD shirt as that some minorities are against the position taken by the Vulcan Society in the lawsuit (Tr. 499). Firefighter Buttaro got the MADD shirt from a minority firefighter and wore it to show solidarity with minority firefighters who shared his viewpoint on merit-based testing (Tr.72, 782).

It is submitted that Firefighter Thomas never found the actual shirts to be offensive. Firefighter Thomas merely did not like Merit Matters because they expressed a different opinion than the Vulcan Society (Tr.295). However, this implicates freedom of speech and association and should not be the basis of punishment. Rather, they could simply have "agreed to disagree." Instead, the ALJ bases a decision to terminate on differing political viewpoints.

It is worth noting that the Petitioner never offered any evidence that the FDNY, through EEO or otherwise, ever came down with a ruling that Merit Matters shirts or MADD shirts were

offensive or otherwise a violation of the FDNY EEO/Discrimination Policies. Indeed, Mr. Acholonu stated that he did not believe that EEO made any decision that specifically deemed either shirt to be offensive (Tr. 413).

Finally, although Captain Washington stated that he was concerned that the wearing of the shirts could affect morale or unit cohesion, he was unable to identify even one example of an incident that he witnessed or was reported to him that cohesion was affected by the shirts in any firehouse operations, including firefighting, building inspections and responses to accidents, or even the cleanliness of the firehouse or preparation of meals (Tr. 472, 508).

The Crown Heights Firehouse's lax enforcement of the FDNY dress code

The ALJ also misapplies the Uniform Regulations and Department orders as regulating off duty dress when they only pertain to on duty dress. It is undisputed that the FDNY Uniform Policy is set forth in Chapter 29 of the FDNY's Regulations (ALJ Ex. 3). Numerous witnesses, including Captain Washington, agreed that Chapter 29 does not regulate off duty attire and is beyond the Fire Commissioner's authority. (Tr. 162, 479, 884, 955, 998). He also conceded that a supervisor (meaning even himself) could not change the directive that comes out of a departmental order and that firefighters would have to follow that direction as written (Tr. 448).

Section 29.6.3 of the FDNY's Regulations has a carve out from the dress code which states, in pertinent part, that "T-shirts shall have no lettering, logos or graphics visible through the uniform shirt" and "[t]he job shirt may be worn over the work/duty shirt" (ALJ Ex. 3). The sentence does not make reference to it applying only to officers and chiefs (Tr. 487). Many witnesses testified that a firefighter is not out of uniform as per the Regulations if they are wearing a non-department issued t-shirt underneath a department issued golf shirt. (Tr. 165-68, 690, 881). Indeed, Firefighter Buttaro has never been advised or instructed by any chief or company officer that he could not wear a non-departmental issued shirt underneath the

department-issued clothes (Tr.170, 571-72). In fact, even Petitioner's witnesses, the chief complainant, Firefighter Thomas, and Captain Washington both agreed that it okay to wear a non-department issued shirt underneath the department-issued golf shirt (Tr. 334, 484). In addition, at Firefighter Buttaro's Step 1 meeting, Deputy Assistant Chief James Leonard also shared the interpretation that wearing a non-work-issued shirt under a work shirt was okay (TR. 624).[2] Firefighter Buttaro stated that neither shirt (Merit Matters or MADD) would be visible under a department-issued golf shirt (Tr. 568-69). Even Captain Washington could not confirm that a MADD shirt would be visible under the FDNY golf shirt (Tr. 483).

On or about May 30, 2012, a Department Order was issued that reiterated Chapter 29 of the FDNY's Regulations (ALJ Ex. 4). It did not require firefighters to do anything beyond what is already stated in Chapter 29 of the Regulations and it only applies to "on duty" dress (Tr. 125-26, 488, 834, 998).

On or about June 14, 2012, a Department Order was issued reiterating the FDNY EEO Anti-Retaliation Policy (Pet. Ex. 5). This Department Order does not make any mention of the FDNY dress code/uniform policy. (Pet. Ex. 5). The Order provides protection to not only those who were involved in the Vulcan lawsuit on the side of the Vulcan Society, but also Merit Matters as well by virtue of their participation in the lawsuit by filing an amicus brief (Tr. 392, 417, 567). Despite the nature of the instant proceedings, the Order, interestingly, also states that the department is committed to encouraging a work environment that is appreciated and respects differences in opinion among employees (Tr. 489; ALJ Ex. 5).

On or about June 28, 2012, a Department Order was issued that provided an update on

[2] Deputy Assistant Chief Leonard was one of the five Borough Chiefs, in charge of the Borough of Brooklyn, a position certainly higher than Captain Washington or even Chief Kelty (Tr. 625).

the recent firefighter exam, lawsuit and other issues, and stated that: "We recently reinforced the importance of strictly complying with Department rules and regulations pertaining to wearing only Department-issued clothing in the firehouse" (ALJ Ex. 6). Although the Petitioner argued that the June 28, 2012 Order extended the uniform regulations beyond just "on duty," the Petitioner failed to introduce any other Order dealing with uniforms/dress code, which had "recently" been issued concerning "off duty" dress in the firehouse. (Tr. 140). Indeed, the only "recent" reinforced Order concerning dress was the June 14, 2012 Order, which specifically only dealt with the proper uniform to wear while "on duty" (ALJ Ex. 4, 6). As such, Lieutenant Zuhlke (among others) interpreted the June 28, 2012 Order to simply be another reinforcement of the same regulations that only apply to "on duty" dress (Tr. 861, 884). It has never been FDNY policy to require firefighters to report to work in uniform (Tr. 861).

Nonetheless, despite the above, the ALJ recommended termination based on Firefighter Buttaro's wearing Merit Matters-related shirts while he was off duty in the firehouse.

The 5/6/12 "Kitchen" Incident

Among the controversial incidents underlying the Charges herein is an incident, which occurred in the firehouse kitchen on May 6, 2012. The ALJ found that Firefighter Buttaro's conduct that day created a hostile work environment for Firefighter Thomas. However, the over looked facts below show that in no way could Firefighter Buttaro's conduct be considered harassment under any objective standard.

At roll call on May 6, 2012, Firefighter Buttaro was wearing the MADD shirt on duty and he continued to wear it all morning without incident (Tr. 71-72). At roll call and all morning, nobody told Firefighter Buttaro that the shirt offended them and nobody asked him to take the shirt off even though Captain Washington presided and Firefighter Thomas was present (Tr. 71-

72, 307, 716).

Around noon time, in the kitchen, the firefighters, including Firefighter Dombrowsky, Firefighter Buttaro and Firefighter Thomas, were preparing lunch (Tr. 74, 949). Firefighter Thomas stated that the FDNY did not want "people like him" in the FDNY's Special Operations Command ("SOC") and repeated the statement several times (Tr. 73-74, 949).[3] Both, Firefighter Buttaro and Firefighter Dombrowsky (who was also present at the time) found that Firefighter Thomas' complaint was clearly racial in nature (Tr. 574, 949). In response, Firefighter Dombrowsky said that there were lots of minorities in SOC; upon hearing this, Firefighter Thomas slammed down his knife and said "I know that is what you people think of me…I baited you" (Tr. 74, 721, 725). In response, Firefighter Buttaro found Firefighter Thomas' statement very inflammatory and outlandish, particularly because Firefighter Thomas was an EEO instructor, so he called him a whiney cunt (Tr. 74, 721). Firefighter Dombrowsky did not find the profane comment to be out of line under the circumstances (TR. 950). It is also worth noting that Firefighter Dombrowsky denies that Firefighter Buttaro said to Firefighter Thomas "Fuck you" or "Fuck the Vulcan Society" (Tr. 993).

Firefighter Thomas conceded at trial that he was aware, at the time, of complaint procedures for perceived EEO violations (Tr.291). Indeed, SOC has its own procedures (in addition to the standard EEO complaint protocol) if one believes that they did not get into SOC

[3] Contrary to the Report and Recommendation, Firefighter Thomas actually stated in his testimony that he was not talking about a Vulcan tutorial prior to the statement about SOC, but rather about a YouTube clip posted online; in addition, he conceded that Firefighter Buttaro made no comment about a Vulcan tutorial and that Firefighter Thomas has no knowledge whether Firefighter Buttaro overheard the conversation about the YouTube clip as Firefighter Buttaro was not even part of that conversation (Tr. 301, 310, 320-21). Moreover, Firefighter Thomas testified consistently with Firefighters Dombrowsky and Buttaro and agreed that he was complaining about the SOC application process at the time (Tr. 317).

because of race discrimination (Tr. 574). Firefighter Buttaro thought it was inappropriate for an EEO instructor to initiate a race-baiting conversation in the kitchen insinuating that race was why he did not get into SOC (Tr. 721).

Firefighter Thomas then told Firefighter Buttaro that he did not like Firefighter Buttaro's shirt, said for all intents and purposes that the shirt was offensive to Firefighter Thomas, and Firefighter Thomas left the room (Tr.76, 81, 121, 576, 950). At no time during this whole incident did was there any physical contact between the two firefighters even though they were in close proximity and at no time did Firefighter Thomas tell Firefighter Buttaro that he should take the shirt off (Tr.76, 81, 322, 328, 621). Instead, Firefighter Thomas spoke to Lieutenant Zuhlke and told Lieutenant Zuhlke that he did not like the MADD shirt Firefighter Buttaro was wearing (Tr. 230, 326). In speaking to Lieutenant Zuhlke, Firefighter Thomas made no mention to Firefighter Buttaro's alleged use of the term "whiney cunt" and did not complain that Firefighter Buttaro's conduct constituted harassment or retaliation (Tr. 835). The evidence does not suggest that Firefighter Thomas sought to elevate the complaint at all because he did not speak to Captain Washington about the incident at the time (Tr. 329).

Lieutenant Zuhlke came into the kitchen shortly thereafter and told Firefighter Buttaro that someone complained about the shirt Firefighter Buttaro was wearing, so Firefighter Buttaro apologized to Lieutenant Zuhlke that he had to get involved and offered to take the shirt off, which he did (Tr. 83, 576, 836). Lieutenant Zuhlke stated that during the whole conversation with Firefighter Buttaro, that Firefighter Buttaro was cooperative, did not raise his voice and did not disobey an order (Tr. 826). Even Firefighter Thomas admits that Firefighter Buttaro indeed took off the shirt (Tr. 230, 328). Then Firefighter Buttaro went upstairs to the locker room and took the MADD shirt off and put on a Merit Matters shirt (Tr. 84). Firefighter Buttaro changed

his shirt to the Merit Matters shirt to appease Firefighter Thomas not to antagonize, harass or retaliate against him (Tr. 579, 952). In fact, Lieutenant Zuhlke agreed that he does not believe that Firefighter Buttaro's choice to don the Merit Matters shirt after this episode with the MADD shirt could be construed as harassing or retaliatory (Tr. 836). Also, after this incident, Lieutenant Zuhlke was never contacted by Firefighter Thomas whereby Firefighter Thomas made any allegations of harassing or retaliatory conduct by Firefighter Buttaro (Tr. 838). Lieutenant Zuhlke was never concerned after this incident that operations would be affected (Tr. 882). Indeed, the entire incident lasted no more than 10 minutes (Tr. 803). Firefighter Thomas participated in the lunch after the kitchen exchange and there was no further issue that day (Tr. 803-04, 954).

The ALJ ignores Firefighter Thomas's lack of credibility

The ALJ cited extensively to Firefighter Thomas' testimony that the following day, on May 7, 2012, the day following the kitchen incident, that the firehouse was abuzz with gossip about the previous day's events (Tr. 231-32, 588-90). The ALJ refused to acknowledge that Firefighter Thomas' testimony simply lacks credibility because he and the individuals to which Firefighter Thomas claims he spoke did not even work on that date. For example, Ricardo Clarke worked the 6X tour on May 6, 2012 and did not work the 9X tour on May 7, 2012 (Resp. Ex. L). George Murphy, Brian Stack and Chris Rogers all did not work in the firehouse any of the four tours between May 6, 2012 and May 7, 2012 (Resp. Ex. L). Brian Newbery only worked the 6X tour on May 7, 2012 (Resp. Ex. L). Finally, Firefighter Thomas himself worked a 24-hour tour from 9:00 hrs. May 6, 2012 to 9:45 hrs. May 7, 2012 (Resp. Ex. L). He did not work the 6X tour on May 7th or either tour in the firehouse on May 8, 2012 (Resp. Ex. L). In any event, whether or not these persons spoke about the prior day's events is irrelevant to the claims that Firefighter Buttaro was insubordinate or harassing of his co-worker (the Charges he was

found guilty of) because he was not even present for any of these alleged exchanges on May 7, 2012.

The 5/16/12 "Civilian" Incident

The next controversial incident underlying the Charges herein is an incident, which occurred in the firehouse on May 16, 2012. The ALJ again found that Firefighter Buttaro's conduct that day created a hostile work environment for Firefighter Thomas. However, the overlooked facts below again show that in no way could Firefighter Buttaro's conduct be considered harassment under any objective standard.

On May 16, 2012, a civilian was visiting the firehouse and when Firefighter Buttaro heard that the firefighter had just taken the firefighter exam, Firefighter Buttaro began asking him about it and, given the topic, the discussion moved to Merit Matters (Tr. 88). At the time, Firefighter Buttaro was wearing his standard quartermaster issued uniform (Tr. 581). The civilian told Firefighter Buttaro that he was having trouble gaining entrance to the FDNY because several tests had been thrown out (Tr. 97, 583). Firefighter Buttaro was particularly intrigued that the exam requested that the applicant identify his/her race and gender and Firefighter Buttaro had never heard of that question being asked before and wanted to get clarification on the issue (Tr. 90). The civilian was not a friend of Firefighter Buttaro's but a friend of another firefighter (Tr. 346).

After the civilian expressed interest in Merit Matters, Firefighter Buttaro went up to the locker room and got a Merit Matters shirt from another firefighter's locker, and brought it down and gave it to the civilian (Tr. 585). The civilian voluntarily put on the Merit Matters shirt after Firefighter Buttaro gave it to him and asked him if he wanted to try it on for size (Tr. 94, 805). At lunch, when Firefighter Thomas saw the civilian wearing the Merit Matters shirt, Firefighter

Thomas objected to the shirt and told him to take it off (Tr. 94, 231-32, 236, 585). Unlike the conclusion of the ALJ's Report and Recommendation, Firefighter Buttaro did not tell or force the civilian to keep the shirt on after he tried it on for size, the civilian merely did it on his own (Tr. 805). Even Firefighter Thomas stated that he had no idea what transpired between the civilian and Firefighter Buttaro leading up to the civilian donning the t-shirt (Tr. 350). Nonetheless, the civilian took the shirt off (Tr. 97, 586). Firefighter Thomas stayed for the balance of the lunch and the rest of the meal went forward without incident (Tr. 804).

Although Captain Washington heard second-hand about this incident, he was unaware of any disruption of the normal firehouse routine that was caused by the incident and nobody ever asked him to intercede (Tr. 459, 500). This incident, thus, had no effect on the operations of the Department whatsoever and lasted no more than a minute (Tr. 98, 459, 803). Even Firefighter Thomas agreed that after this short exchange that there was nothing else made of the situation (Tr. 231-36).

The 5/21/12 "EEO Training" Incident

The third and final controversial incident underlying the Charges herein is an incident, which occurred at Headquarters on May 21, 2012. The ALJ again found that Firefighter Buttaro's conduct that day created a hostile work environment for Firefighter Thomas. However, the overlooked facts below again show that in no way could Firefighter Buttaro's conduct be considered harassment under any objective standard.

May 21, 2012 was the day on which Firefighter Buttaro's EEO training is administered as part of the annual event which all firefighters attend – their annual medical day (TR. 531, 532). It is typically scheduled three to six months in advance and posted in FD PA/IDs as well as on an interior firehouse door in a well-traveled area so everyone knows when everyone has to go for

medicals (Tr. 592, 596-97, 895-96; Resp. Ex. N). Typically the last class of the medical day is an EEO training class and about 30-40 firefighters were present that day (Tr. 106, 897). Questions were and still are encouraged to address problems and clarify issues (Tr. 410, 600, 637). Patrick Damas, an EEO lawyer was one of the instructors, was about to start teaching the class when Firefighter Thomas (an EEO instructor since 2008) entered the room (Tr. 107, 205, 600, 914).

Firefighter Wheeler was sitting next to Firefighter Buttaro that day (Tr. 898). Firefighters Buttaro and Wheeler both testified that Firefighter Thomas scanned the audience of the class when he entered and zeroed in on Firefighter Buttaro and smirked at him (Tr. 107, 900, 913). Firefighter Wheeler found the smirk to be meant to provoke Firefighter Buttaro whereby Firefighter Thomas was letting Firefighter Buttaro know that he was in "his house" or on "his turf" (TR. 900, 902, 912). Firefighter Buttaro also testified that Firefighter Thomas made juvenile mouth gestures at Firefighter Buttaro behind Mr. Damas's back like a child would do to antagonize a brother or sister behind the back of a parent (Tr. 107, 602).

Firefighter Buttaro raised his hand and said that there was a conflict of interest (Tr. 108-09, 639-40, 901). Specifically, Firefighter Buttaro wanted to get clarification from EEO regarding the t-shirt questions stemming from the May 6th and May 16th incidents and felt that the EEO training was an appropriate place to get such clarification (Tr. 108-09, 598). Although the ALJ indicated that this "goal" was somehow nefarious in some way, anyone attending an EEO lecture understands that questions regarding EEO issues are actually encouraged. Even Firefighter Thomas indicated in his testimony that he knew that there could be an issue with him being the instructor in a class where Firefighter Buttaro would be the student (Tr. 240). Firefighter Wheeler stated that he would not have put himself in the position that Firefighter

Thomas did, given the history between the two firefighters (Tr. 904).

Mr. Damas (a witness promised by the Petitioner in its opening statement who was never called by the Petitioner) then asked Firefighter Buttaro to step out into the hallway, Firefighter Buttaro complied, and the class started (Tr. 113, 605, 917). Even Firefighter Thomas agreed that when directed by Mr. Damas to step outside, that Firefighter Buttaro complied (Tr. 241). After they stepped outside, Firefighter Buttaro explained the nature of the conflict to Mr. Damas and nothing significant came of the incident (Tr. 607). In the end, Mr. Damas told Firefighter Buttaro that he could rejoin the class, which Firefighter Buttaro did, and the class was not disrupted for more than five minutes by all personal witnesses' accounts (Tr. 113, 607, 905). Even Firefighter Thomas agreed that, after a period of time, Firefighter Buttaro rejoined the class and it ended without any further incident (Tr. 117, 362, 804). Chief Kelty agreed that there was no disruption of services as a result of this incident (TR. 641-42).

Captain Washington was not present, but was never asked to intercede or take any action with respect to this incident (Tr. 460, 500). In addition, Chief Kelty testified at trial that although he was one of the highest ranking officers in the room at the time that he was not asked to assist in any way (Tr. 641). Chief Kelty was surprised that after Firefighter Buttaro raised the issue with the conflict of interest that Mr. Damas did not have both involved firefighters step out of the class (TR. 641-42, 658). Both Chief Kelty and Firefighter Wheeler stressed that Firefighter Buttaro did not raise his voice, did not cause any commotion, and did not use profanity or vulgar language and that he was cooperative with Mr. Damas (Tr. 64, 902-03). Petitioner called no witnesses to contradict Chief Kelty or Firefighter Wheeler.

Throughout the incident, Firefighter Buttaro was wearing his standard quartermaster-issued uniform and was not wearing a MADD or Merit Matters shirt (Tr. 608). The whole

incident lasted no more than four or five minutes (Tr. 803, 915-16).

The ALJ overlooked critical admissions in Firefighter Thomas' EEO Complaint

The day after the EEO Training incident, Firefighter Thomas filed a complaint against Firefighter Buttaro with the FDNY EEO Office (Tr. 244, Pet. Ex. 7). Of particular note in the Complaint: (1) Firefighter Thomas admits that he saw Firefighter Buttaro wearing the MADD shirt at roll call on May 6th and said nothing; (2) there is no mention of Firefighter Buttaro saying "fuck you" or "fuck the Vulcan Society" on May 6th and only "you're full of shit" and "EEO is full of shit;" (3) Firefighter Thomas only mentions that Firefighter Buttaro wore Merit Matters shirts while off duty at the firehouse, not on duty; (4) Firefighter Thomas knew that Firefighter Buttaro was attending the EEO training on May 21st and knew an issue could arise; (5) Firefighter Thomas did not want to be retaliated for filing the complaint by being prevented from being allowed to transfer into Ladder 123 (Firefighter Buttaro's ladder company); (6) that Firefighter Thomas did not want to go forward with the complaint altogether; and (7) Firefighter Thomas did not say in his complaint that he felt threatened or that Firefighter Buttaro was screaming at him, but rather that he was simply having a conversation with Firefighter Buttaro (Tr. 338; Pet. Ex. 7). Firefighter Thomas reiterated in his trial testimony that even after making the complaint, he did not want to go through with it, but rather was complaining for the purposes of "protecting" himself because Firefighter Buttaro had "let the cat out of the bag" (Tr. 336, 366). At the hearing, Firefighter Thomas admitted that all the above facts were accurately noted and reflected in his statement to the EEO on May 22, 2012 (Tr. 245, Pet. Ex. 7). These statements are also consistent with the recounting thereof in the City's Answer to Firefighter Buttaro's EEO Complaint (Pet. Ex. 12, at para. 31). However, none of these facts were included in the ALJ's decision.

Lieutenant Zuhlke obtains an Opinion from EEO

Among the list of critical mischaracterizations in the Report and Recommendation must be the ALJ's conclusions regarding Lieutenant Zuhlke's testimony regarding his call to the FDNY EEO. Despite 36 years on the job, no motive for lying, and corroborating admissions on the part of the FDNY, Judge Zorgniotti basically discounted Lieutenant Zuhlke's testimony as a complete fabrication.

Lieutenant Zuhlke had also been present for yearly EEO training sessions and was aware of the procedure for obtaining opinions from EEO on EEO issues (Tr. 837). EEO has an attorney on intake 24 hours a day and seven days a week to take calls in the EEO Office (Tr. 424). Captain Washington agreed that for clarification on EEO issues, he could directly contact the EEO Office (Tr. 441). Captain Washington, Lieutenant Zuhlke and Lieutenant Dombrowsky all agreed that if an order from a supervisor touches on issues of EEO concern, then the person affected may obtain an opinion from EEO, which could override the supervisor's order (Tr. 477, 841, 856, 1000). Contrary to the ALJ's conclusion, Lieutenant Zuhlke did not state that the EEO overrode all Commissioner's Orders, but merely that an EEO opinion could take precedence over Fire Commissioner Orders when they touched on matters of EEO concern (Tr. 853).

In or about August 2012, Lieutenant Zuhlke contacted EEO via phone to get an opinion on Merit Matters shirts (Tr. 837; Pet. Ex. 12). Although the ALJ challenges the credibility of Lieutenant Zuhlke's even making the call, the City's Answer to Firefighter Buttaro's EEO Complaint confirmed that an anonymous call was indeed made on August 23, 2012 from a Lieutenant from Ladder 123 to obtain an opinion on Merit Matters shirts (Pet. Ex. 12, at para. 36). The EEO attorney informed Lieutenant Zuhlke that it was okay to wear the Merit Matters shirt to/from work or off duty in the firehouse because off duty dress in and out of the firehouse

is not regulated (Tr. 99-100, 534, 839, 842). As with other orders, Lieutenant Zuhlke did not have to obtain this opinion in writing for it to be enforceable (Tr. 840). Lieutenant Zuhlke informed Firefighter Buttaro of this EEO opinion (Tr. 879).

Contrary to the ALJ's suggestion that Firefighter Buttaro brazenly continued to wear Merit Matters shirts even after being told by Firefighter Thomas that they offended him, after getting this instruction from Lieutenant Zuhlke, Firefighter Buttaro actually discontinued wearing Merit Matters and MADD shirts open and notoriously on duty and only wore them to and from work or otherwise when he was off duty (Tr. 544, 570, 577-78, 806, 809, 811, 885).[4] Even though others in the firehouse continued wearing non-departmental issued shirts at roll call and on duty, after speaking to Lieutenant Zuhlke, Firefighter Buttaro never was present at a roll call without his proper uniform on (Tr. 544). The only time that Firefighter Buttaro wore the Merit Matters shirt on duty was under the Department-issued golf shirt (Tr. 99-100, 149, 542). If he was wearing the Merit Matters shirt on duty, it could not and did not show through his golf shirt (Tr. 149, 571).

The opinion obtained by Lieutenant Zuhlke is also consistent with the opinion given by Mr. Acholonu who, when asked by Firefighter Buttaro at his 2014 medical day whether Merit Matters shirts could be worn off duty in the firehouse and to and from work, said "yes" (Tr. 411-12, 533). Moreover, Chief Kelty said that if EEO says it is okay to wear a Merit Matters shirt to/from work, then it would not be in violation of the FDNY dress policy to do so (Tr. 649, 693). Chief Kelty also said it would not constitute harassment to continue to wear the shirt even if objected to by another firefighter if a ruling is made that it is appropriate to wear the shirt; at that

[4] Firefighter Buttaro actually discontinued wearing the MADD shirt on duty immediately after the 5/6 Kitchen Incident (Tr. 730, 863). Firefighter Wheeler said that he never even saw anyone wearing a MADD shirt (Tr. 918, 927).

point, Chief Kelty stated that "it's his privilege to wear the shirt" (Tr. 651). Finally, Chief Kelty stated that it would be within the EEO's jurisdiction to rule on whether Merit Matters shirts could be worn (Tr. 668, 682).

The above demonstrates blatant error in the ALJ's Report and Recommendation. How could Firefighter Buttaro be terminated from his employment when he changed his *modus operandi* after August 2012 and only wore Merit Matters shirts to and from work and off duty?

The "Red Sauce" Incident

Firefighter Thomas alleged at the hearing that Firefighter Buttaro wore a Merit Matters shirt off-duty and cooked pork in the firehouse on one date to harass and intimidate him. The ALJ agreed, but overlooked the relevant facts below.

On or about September 9, 2012, Firefighter Buttaro came in early and was cooking red sauce before his shift and wearing the Merit Matters shirt while he was off duty (Tr. 147, 373, 739). He did not know that Firefighter Thomas was working that day and even when Firefighter Thomas appeared he never said anything to Firefighter Buttaro to express any alleged displeasure (Tr. 147, 373, 739).[5] Pork had been cooked in the firehouse before (Tr. 370).[6] In any event, there is no evidence in the Record that Firefighter Buttaro was in charge of the menu that day so that he could have had any influence over what was being cooked.

[5] It is worth noting that although Firefighter Thomas testified that this incident was "retaliatory" in nature, it predated the time whereby Firefighter Buttaro was put on notice of Firefighter Thomas' EEO complaint against him (October, 2012) (Tr. 370).

[6] Although Firefighter Thomas seemed to insinuate that by cooking pork the firehouse was engaging in some kind of retaliatory or harassing conduct, Firefighter Wheeler said that he does not eat fish and it is often served despite people knowing he does not eat fish and he has never found that to be harassment or retaliatory (Tr. 933-34).

The Pictures of Firefighter Buttaro

The ALJ also erred in allowing the admission of two pictures taken by Firefighter Thomas in the firehouse, which were taken in violation of firehouse policy against taking pictures without the subject's permission.

On or about September 21, 2012, Firefighter Thomas took a picture of Firefighter Buttaro wearing what appears to be a Merit Matters shirt (Tr. 147-48; Pet. Ex. 3). It is undisputed by Firefighter Thomas (and conceded by Petitioner) that Firefighter Buttaro was off duty at the time the picture was taken (Tr. 147-48, 250, 378, 545, 552). As alluded to above, Firefighter Thomas violated department rules by taking this picture without proper consent (Tr. 377).

On or about October 8, 2012, Firefighter Thomas took another picture of Firefighter Buttaro wearing what appears to be a MADD shirt (Tr. 150, Pet. Ex. 4). It is undisputed by Firefighter Thomas (and conceded by Petitioner) that Firefighter Buttaro was off duty at the time the picture was taken. (Tr. 156, 254-55, 546, 552). Firefighter Wheeler was present and was surprised and agitated that Firefighter Thomas was taking pictures in the firehouse because it is against the rules (Tr. 905-07).

Captain Washington's "stray" remark

The ALJ found that Firefighter Buttaro disobeyed Captain Washington's "orders" by wearing Merit Matters shirts after the spring 2012. However, the facts at trial (and even the City's admission of the timing of events) differ greatly from the ALJ's "factual" conclusions.

As alluded to above, in or about October 2012, after Firefighter Buttaro had already received guidance from Lieutenant Zuhlke that he could wear the Merit Matters shirt off duty in the firehouse, Firefighter Buttaro was walking on the firehouse stairs while he was off duty and passed Captain Washington (Tr. 102, 104, 129). Captain Washington stated in passing, with no

eye contact and no confirmation that Firefighter Buttaro "can't wear [the Merit Matters] shirt" (Tr. 102, 104, 133, 457). Prior to this incident in the stairwell, Captain Washington had never told Firefighter Buttaro that he couldn't wear the Merit Matters shirts (Tr. 132-33, 457). In any event, Firefighter Buttaro was off duty and the EEO opinion that he could wear the shirts off duty would supersede the Captain's Order in direct contrast (Tr. 134, 649, 955).

After seeing Firefighter Buttaro wearing the Merit Matters shirt in the stairwell, Captain Washington claimed that he stated at roll call several times that Merit Matters or MADD shirts could not be worn in the firehouse, but he did not distinguish between wearing the shirts on duty in the firehouse or off duty in the firehouse (Tr. 458, 476, 501). Firefighter Buttaro (along with the three other firefighters who testified) all denied being present for any such roll call announcement (TR. 545, 832, 891, 932, 945).[7] And, in fact, no witness corroborated Captain Washington's testimony on this point. Again, Chapter 29 of the FDNY Regulations and the 5/30/12 Department Order only apply to "on duty" attire, so to the extent that Captain Washington's purported order conflicted with the higher orders, it would be null and void (Tr. 439; ALJ Ex. 3-4). In addition, Captain Washington conceded that Chapter 29 of the Regulations does not distinguish between off duty attire in the firehouse as opposed to off duty attire outside the firehouse (Tr. 507).

After the stairwell incident, as far as Captain Washington was concerned, he believed that Firefighter Buttaro complied with his purported order because he never saw Firefighter Buttaro wearing the Merit Matters shirt again (Tr. 457). Despite claims by the Petitioner that Firefighter Buttaro's wearing of unauthorized shirts was so pervasive, Captain Washington only saw

[7] Even Captain Washington admitted that he has no recollection of Firefighter Buttaro being present for any of these roll call announcements (Tr. 482).

Firefighter Buttaro wearing the MADD shirt once (at roll call on May 6, 2012 – and said nothing) and only saw Firefighter Buttaro wearing a Merit Matters shirt once (in the stairwell in October) (Tr. 456-57, 467-68). In addition, Captain Washington testified that at some point in 2012, Firefighter Thomas came to talk to him about Firefighter Buttaro and the shirts (Tr. 456, 467). However, in the end, Firefighter Thomas told Captain Washington that he could "handle it himself" and did not ask for any further involvement by Captain Washington (Tr. 467).

Nonetheless, on or about October 8, 2012, Captain Washington attempted to contact EEO regarding guidance on the Merit Matters shirts issue (Tr. 461; Pet. Ex. 8). In response, EEO told Captain Washington the same thing that Mr. Acholonu testified to and that EEO told Lieutenant Zuhlke, that Merit Matters shirts could be worn to and from work, off duty, but not on duty (Tr. 474). As such, the ALJ erred in finding that Firefighter Buttaro disobeyed Captain Washington's "order."

Firefighter Buttaro becomes aware of Thomas' EEO Complaint

In October, 2012, Firefighter Buttaro first was made of aware of an EEO investigation against him, but he was not told who initiated the complaint (Tr. 44, 136, 523, 738; Resp. Ex. O). At that time, the only dates of incident that were being investigated by EEO were May 6th, May 16th, Sept 9th and October 8th (Resp. Ex. O).[8]

Firefighter Buttaro did not know that Firefighter Thomas had filed the EEO Complaint against him until Firefighter Buttaro was interviewed on January 29, 2013 (Tr. 46, 522, 622). At the same interview was the first time that Firefighter Buttaro discovered that Firefighter Thomas was a member of the Vulcan Society (Tr. 54-55, 57, 556, 622). Until that time, Firefighter

[8] Casting doubt on their legitimacy, and clearly added only later on in an attempt to "beef up" the weak claims asserted herein, the Petitioner added incidents from May 21st, Sept 21st and an unidentified date in October, 2012 at trial.

Buttaro did not know that Firefighter Thomas was a participant in the Vulcan lawsuit (Tr. 57, 622). Firefighter Buttaro had no knowledge of Firefighter Thomas previously speaking of a Vulcan tutorial video (Tr. 75). Even Captain Washington, former Vulcan President, was unaware that Firefighter Thomas had been captured on a Vulcan tutorial (Tr. 451). Finally, even Firefighter Thomas admitted that he could not recall one instance where Firefighter Buttaro was in Firefighter Thomas' presence from May 6, 2012 to October, 2012, while discussing Firefighter Thomas' part in the Vulcan society or the ongoing lawsuit (Tr. 255). Captain Washington was the only firefighter in the firehouse who was widely known to be a Vulcan member (Tr. 708).

Firefighter Buttaro files his own EEO Complaint

On or about May 21, 2013, Firefighter Buttaro filed his own EEO complaint against the FDNY, alleging that he had been discriminated against because of his creed and because he belonged to an advocacy group that opposed bias/discrimination on the Fire Department's exam (Tr. 537; Pet. Ex. 10). On or about August 20, 2013, the FDNY filed an Answer to Firefighter Buttaro's complaint (Pet. Ex. 12). On or about October 8, 2013, filed an Amended Complaint against the FDNY for discrimination and retaliation (Pet. Ex. 9). On or about November 18, 2013, the New York State Division of Human Rights dismissed Firefighter Buttaro's EEO complaint. There was no finding that he engaged in any inappropriate conduct (as alleged by the ALJ), but rather, the Complaint was dismissed it was not yet ripe because he had not suffered any adverse employment action as of the date of the decision (Pet. Ex. 11).

Based on all the above evidentiary and factual errors by the ALJ, the Report and Recommendation should not be adopted or approved.

ARGUMENT

The Report and Recommendation should also not be adopted or approved because the

ALJ misapplied the legal standards applicable to the instant Charges. Here, Petitioner has failed to sustain its burden as to all Charges. Therefore, every Charge must be dismissed in its entirety.

POINT I

RESPONDENT'S SPEECH IS PROTECTED UNDER THE FIRST AMENDMENT UNDER THE PICKERING TEST FOR PUBLIC EMPLOYEES' SPEECH

It is well-established that speech by citizens on matters of public concern lies at the heart of the First Amendment, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth* v. *United States*, 354 U. S. 476, 484 (1957). This remains true here when speech concerns information related to or learned through public employment. After all, courts have consistently held that public employees do not renounce their citizenship when they accept employment, and the U.S. Supreme Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights. *See e.g., Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 605 (1967); *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968); *Connick* v. *Myers*, 461 U.S. 138, 142 (1983). The rationale for these general propositions is simple. There is considerable value in encouraging, rather than inhibiting, speech by public employees for "[g]overnment employees are often in the best position to know what ails the agencies for which they work." *Waters* v. *Churchill*, 511 U. S. 661, 674 (1994). "The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *San Diego* v. *Roe*, 543 U. S. 77, 82 (2004).

Nonetheless, it is acknowledged that the above principles do have limits (even though those limits to not apply to the instant case). In *Pickering* and its progeny, the Court held that "the State has interests as an employer in regulating the speech of its employees that differ

significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S., at 568. Thus, the government may impose certain restraints on the First Amendment activities of its employees that are job-related. *See United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995).

Under what is now called the Pickering balancing test, public employees, like Respondent Firefighter Thomas Buttaro, still do not leave their First Amendment rights at the firehouse door, even though those rights are somewhat diminished in public employment. The test requires a court to consider the most appropriate possible "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. The aim of the test is to allow the government a degree of control over its employees to permit it to provide services to the public efficiently and effectively. *See Connick*, 461 U.S., at 150-51; *see also Waters v. Churchill*, 511 U.S., at 675. However, the Supreme Court has cautioned that public employers do not use their authority to silence discourse "not because it hampers public functions but simply because superiors disagree with the content of [the] employees' speech." *Rankin v. McPherson*, 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).

Interestingly, the most recent Supreme Court decision on these issues actually upheld and broadened public employees' free speech rights. *See Lane v. Franks*, 523 Fed. Appx. 709 (June 19, 2014). Justice Sotomayor delivered the opinion for the unanimous Court holding that the plaintiff's speech clearly constituted citizen speech on a public matter. In addition, the Court found the employer's side of the scale entirely empty because the employer could not

demonstrate, any government interest that tipped the balance in their favor—for instance, evidence that Lane's speech was false or erroneous or that Lane unnecessarily disclosed sensitive, confidential, or privileged information.

A. Pickering's Two-Step Approach

The Pickering test involves a two-step inquiry: first, a court must determine whether the speech relates to a matter of public concern; and, second, if so, the balance between free speech concerns is weighed against efficient public service to ascertain to which the scale tips. *See Rankin*, 483 U.S. at 384, 388. The first part of the inquiry, commonly referred to as the public concern test, serves a gatekeeping function for employee speech claims in courts. The First Amendment protects an employee only when he is speaking "as a citizen upon matters of public concern" as opposed to when he speaks only on matters of personal concern. *Connick*, 461 U.S. at 147, 103 S.Ct. 1684. If the speech that led to an employee's discipline was on a personal matter-for example, a complaint about a change in an employee's duties-the government is granted wide latitude to deal with the employee without any special burden of justification. *Treasury Union*, 513 U.S. at 466, 115 S.Ct. 1003; *Connick*, 461 U.S. at 148-49, 103 S.Ct. 1684. The ALJ found that Firefighter Buttaro's speech was a matter of public concern, so we shall limit the balance of this discussion to the disruption (second) prong.

When it is shown that the employee's speech was on a matter of public concern, the second step, or balancing portion of the test, comes into play. Under it the government has the burden of showing that despite First Amendment rights the employee's speech so threatens the government's effective operation that discipline of the employee is justified. *See Treasury Union*, 513 U.S. at 466, 115 S.Ct. 1003. For an employee to prevail he or she must also demonstrate that the speech was the motivating factor causing the public employer to take adverse action. *Heil v. Santoro*, 147 F.3d 103, 109 (2d Cir.1998). Even when the government

prevails in the balancing test, the employee may still carry the day if he can show that the employer's motivation for the discipline was retaliation for the speech itself, rather than for any resulting disruption. *See Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir.1996).

B. Applicability of Pickering to Hybrid Speech/Associational Activities

It is submitted that not only is Petitioner attempting to limit Respondent's speech in the form of wearing Merit Matters-related shirts, but also is retaliating against Respondent's membership in the Merit Matters organization altogether. Therefore, Respondent asserts that the ALJ's recommended penalty of termination would be Unconstitutional in two ways. One is that Firefighter Buttaro's termination (or any penalty handed down by this Court) would stem from exercising his free speech rights on a matter of public concern, but also second, such a penalty would also stem from First Amendment activities occurring outside the workplace, *to wit*: his association with the Merit Matters organization.

C. Application of Pickering

As alluded to above, it is further submitted that the ALJ's bias against Merit Matters appears to be among the roots of her decision. Indeed, it is submitted that in this case, Respondent cannot be identified discretely as either Buttaro's associational activities or the attendant speech, for the two are dependent on one another. Membership in Merit Matters is, surely, an associational activity. However, Merit Matters' purpose is advocacy, and Firefighter Buttaro, by his active participation and his role as Battalion Representative of Merit Matters, furthered this advocacy. Thus, interconnecting associational and speech rights are in play.

There are several points in the Report and Recommendation where Judge Zorgniotti imputes knowledge or even guilt solely based on his membership in Merit Matters. For example, even though Firefighter Buttaro denied knowing that Firefighter Thomas was a Vulcan (and Firefighter Thomas admitted he never told Firefighter Buttaro he was a Vulcan), the ALJ

concludes that Firefighter Buttaro knew Firefighter Thomas was a Vulcan because Firefighter Thomas assumed that Merit Matters was responsible for some people showing up for the tutorial that did not fit the description of what the Vulcans desired (Tr. 218-19). The ALJ mistakenly stated that Merit Matters held a protest where Firefighter Thomas was holding a tutorial. Importantly, there is no allegation or evidence that Firefighter Buttaro attended this tutorial.

Several circuits, including our own, have labeled claims involving multiple First Amendment rights "hybrid" claims. *See e.g., Knight Conn. Dep't of Pub. Health*, 275 F.3d 156 (2d. Cir.2001); *Balton v. City of Milwaukee*, 133 F.3d 1036, 1041 (7th Cir.1998); *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 539 (1st Cir.1995). Thus, Firefighter Buttaro's interests must be examined for both speech and association. Firefighter Buttaro's right to speech is undoubtedly amply protected by the Pickering test. *See Treasury Union*, 513 U.S. at 466, 115 S.Ct. 1003. Associational rights, when exercised in conjunction with speech, are also sufficiently protected by Pickering. In fact, in some public employment contexts the right of association is given heightened protection, such as when low-level public employees engage in partisan political activities in opposition to their bosses' own political party. *See Elrod v. Burns*, 427 U.S. 347, 360-64, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 518-20, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) (noting the importance of balancing government and employee interests, but finding employee interests protected when partisan political affiliation among low-level employees is involved); *Regan v. Boogertman*, 984 F.2d 577, 581 (2d Cir. 1993) (same).

Here, it is submitted that the heightened protection under *Elrod* and *Branti* is applicable for several reasons. First, it cannot be disputed that Firefighter Buttaro is a low-level employee of the FDNY. Indeed, his rank has no supervisory responsibilities whatsoever and is the first

grade that is awarded upon hiring and assignment after passing the FDNY's entrance exam. Second, the activities of Merit Matters were in support of the FDNY in connection with a lawsuit bought by the Vulcan Society. Again, it is undisputed that Firefighter Buttaro's supervisor/boss is an active member of the Vulcan Society and even a past President of that organization. As such, it is necessarily true that Firefighter Buttaro's activities with Merit Matters, both in wearing Merit Matters-related shirts or advocacy on behalf of Merit Matters is in opposition to the Vulcan Society lawsuit.

As such, the "hybrid" speech and associational elements are easily found in the present case. Accordingly, Respondent asserts that not only does Pickering protect Firefighter Buttaro's speech and associational rights in the instant case, but Firefighter Buttaro's associational rights deserve heightened protection. Despite raising these issues at trial, the ALJ ignored them in the Report and Recommendation.

D. <u>The Balancing Test Applied to Petitioner's Claim</u>

1. <u>Government's Burden</u>

Having satisfied the "public concern" prong of the Pickering test, the analysis turns to the second prong. The ALJ found that the Petitioner amply demonstrated disruption. However, it is submitted that the legal analysis was severely flowed.

To satisfy Pickering and justify adverse action arising out of an employee's protected activity, the government has the burden to show that the employee's activity is disruptive to the internal operations of the governmental unit in question. *See Connick*, 461 U.S. at 150, 103 S.Ct. 1684; *see also Knight*, 275 F.3d at 164; *Lewis v. Cowen*, 165 F.3d 154 (2d Cir, 1999). The disruption must be significant enough so that it "impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."

Rankin, 483 U.S. at 388, 107 S.Ct. 2891 ("The risk that a single, offhand comment directed to only one other worker will lower morale, disrupt the work force or otherwise undermine the mission of the office borders on the fanciful.").

In balancing protected First Amendment activity against governmental disruption the Court must take into account the "manner, time, and place" in which speech or activity occurred, *see Connick*, 461 U.S. at 152, 103 S.Ct. 1684; *Lewis*, 165 F.3d at 162, keeping in mind that the government has a slightly lower burden to the extent that an employee's activity occurs in the workplace rather than when the equivalent activity occurs on an employee's own time. *See Connick*, 461 U.S. at 152-53 & n. 13, 103 S.Ct. 1684. The content of the disruptive speech must also be considered. The more speech touches on matters of public concern, the greater the level of disruption the government must show. *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir.1995). Extending this notion to hybrid speech/associational activities, the more the association in question centers on expressive activities relating to matters of public concern, the greater the government's burden to show disruption.

An important consideration in the balancing test is the nature of the employee's responsibilities. The level of protection afforded to an employee's activities will vary with the amount of authority and public accountability the employee's position entails. *See Rankin*, 483 U.S. at 390-91, 107 S.Ct. 2891. A position requiring confidentiality, policymaking, or significant public contact lessens the public employer's burden in firing an employee for expression that offends the employer. *See McEvoy c. Spence*, 124 F.3d (2d Cir. 1997). In conducting the balancing test, the Court should not assign a certain value to Firefighter Buttaro's activities because to do so invites devaluation of that speech with which one personally disagrees. *See e.g., Melzer v. Board of Education*, 336 F.3d 185, 245-46 (2d Cir. 2001)

(membership in NAMBLA even considered to be a public concern).

At the outset, in examining this prong of the Pickering test, it is important to note that it is always unconstitutional to punish a government employee for on-the-job speech where the speech itself was the basis of the punishment (as opposed to the potential disruptive effects of the speech itself). *See Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996). The reasonableness of the determination that the speech activity could result in disruption to the employer's operations is "based upon whether the government employer undertook an investigation with the degree of care of a private sector manager would exercise under similar circumstances." *Pappas v. Giuliani*, 118 F.Supp.2d 433, 446 (SDNY 2000), *aff'd* 290 F.3d 143 (2d Cir. 2002), *citing Waters v. Churchill*, 511 U.S. 661, 677-78 (1994).

Even a cursory examination of the relevant factors as applied to the relevant facts shows that the petitioner cannot meet its burden. First, there is no evidence in the Record that Firefighter Buttaro's activities impaired discipline by superiors. Second, there is only scant evidence of disharmony among Firefighters Thomas and Buttaro as co-workers. Indeed, the two firefighters worked together approximately 50% of the time from 2005 to November 2012 and then even closer from November 2012 to July 2013 and the petitioner only raised less than 15 minutes of disharmony over the course of 9600 hours working together (100 hours per month times eight years) and no physical altercations of any kind. Third, there is no evidence submitted that Firefighter Buttaro's activities had a detrimental impact on close working relationships or interfered with the regular operation of the enterprise. Both Firefighters Thomas and Buttaro agreed that they always worked professionally together in the field, whether fighting fires, doing building inspections or other tasks. Similarly, Captain Washington was unable to identify even one example of an incident that he witnessed or was reported to him that cohesion was affected

by the shirts in any firehouse operations, including firefighting, building inspections and responses to accidents, or even the cleanliness of the firehouse or preparation of meals (Tr. 472, 508). Fourth, Firefighter Buttaro's job title is the lowest in the FDNY hierarchy and there was no evidence that the position requires confidentiality, policymaking, or significant public contact in such a capacity. Fifth, and finally, there was no evidence submitted whatsoever on the Petitioner's part as to what, if any investigation was undertaken in this case so as to determine with the degree of care a private sector manager would exercise under similar circumstances. Petitioner did not call any witness from the FDNY's management or EEO who was involved in conducting the underlying investigation. Indeed, Firefighter Buttaro strongly disputes that the underlying investigation was conducted in a reasonable and diligent manner, which is evidenced by the fact that three grievances remain pending concerning the lack of procedural due process and adherence to proper departmental procedure in connection with that investigation.

Accordingly, as further set forth below, the ALJ erred in finding that Firefighter Buttaro's activities were disruptive to the internal operations of the governmental unit in question.

2. <u>Disruption</u>

(a) <u>Reported.</u> Here, Petitioner's claim of reported disruption consists of six incidents: May 6, 2012, May 16, 2012, May 21, 2012, September 9, 2012, September 21, 2012, and October 8, 2012. A review of each one, in turn, will demonstrate how insignificant the threat of disruption is in this case.

At roll call on May 6, 2012, Firefighter Buttaro was wearing the MADD shirt on duty and nobody told Firefighter Buttaro that the shirt offended them and nobody asked him to take the shirt off even though Captain Washington presided and Firefighter Thomas was present (Tr. 71-72, 307, 716). Around noon time, in the kitchen, the firefighters, including Firefighter Dombrowsky, Firefighter Buttaro and Firefighter Thomas, were preparing lunch (Tr. 74, 949). It

is undisputed that only after Firefighter Thomas initiated a conversation implicating race, Firefighter Buttaro cursed at him and only then did Firefighter Thomas raise the issue with Firefighter Buttaro's shirt. (Tr.76, 81, 121, 576, 950). Lieutenant Zuhlke came into the kitchen shortly thereafter and Firefighter Buttaro apologized to Lieutenant Zuhlke that he had to get involved and offered to take the shirt off, which he did (Tr. 83, 576, 836). Lieutenant Zuhlke stated that during the whole conversation with Firefighter Buttaro, that Firefighter Buttaro was cooperative, did not raise his voice and did not disobey an order (Tr. 826). Even Firefighter Thomas admits that Firefighter Buttaro indeed took off the shirt (Tr. 230, 328). This incident had no effect on the job at hand and the operations of the Department going forward whatsoever (Tr. 98). Indeed, the entire incident lasted no more than 10 minutes (Tr. 803). Firefighter Thomas participated in the lunch after the kitchen exchange and there was no further issue that day (Tr. 803-04, 954).

On May 16, 2012, a civilian was visiting the firehouse and when Firefighter Buttaro heard that the firefighter had just taken the firefighter exam, Firefighter Buttaro began asking him about it and, given the topic, the discussion moved to Merit Matters (Tr. 88). At the time, Firefighter Buttaro was wearing his standard quartermaster issued uniform (Tr. 581). After the civilian expressed interest in Merit Matters, Firefighter Buttaro went up to the locker room and got a Merit Matters shirt from another firefighter's locker, and brought it down and gave it to the civilian (Tr. 585). At lunch, when Firefighter Thomas saw the civilian wearing the Merit Matters shirt, Firefighter Thomas objected to the shirt and told him to take it off (Tr. 94, 231-32, 236, 585). Firefighter Buttaro did not tell or force the civilian to keep the shirt on after he tried it on for size, the civilian merely did it on his own (Tr. 805). Nonetheless, the civilian took the shirt off (Tr. 97, 586). Firefighter Thomas stayed for the balance of the lunch and the rest of the

meal went forward without incident (Tr. 804). This incident, thus, had no effect on the operations of the Department whatsoever and lasted no more than a minute (Tr. 98, 459, 803). Even Firefighter Thomas agreed that after this short exchange that there was nothing else made of the situation (Tr. 231-36).

On May 21, 2012, EEO training is administered on an annual basis to all firefighters as the final session of their annual medical day (TR. 531, 532). Patrick Damas, an EEO lawyer was one of the instructors, was about to start teaching the class when Firefighter Thomas (an EEO instructor since 2008) entered the room (Tr. 107, 205, 600, 914). Firefighters Buttaro and Wheeler both testified that Firefighter Thomas scanned the audience of the class when he entered and zeroed in on Firefighter Buttaro and smirked at him (Tr. 107, 900, 913). Firefighter Wheeler found the smirk to be meant to provoke Firefighter Buttaro whereby Firefighter Thomas was letting Firefighter Buttaro know that he was in "his house" or on "his turf" (TR. 900, 902, 912). Firefighter Buttaro also testified that Firefighter Thomas made juvenile mouth gestures at Firefighter Buttaro behind Mr. Damas's back like a child would do to antagonize a brother or sister behind the back of a parent (Tr. 107, 602). Firefighter Buttaro raised his hand and said that there was a conflict of interest (Tr. 108-09, 639-40, 901).

Mr. Damas (a witness promised by the Petitioner in its opening statement who was never called by the Petitioner) then asked Firefighter Buttaro to step out into the hallway, Firefighter Buttaro complied, and the class started (Tr. 113, 605, 917). Even Firefighter Thomas agreed that when directed by Mr. Damas to step outside, that Firefighter Buttaro complied (Tr. 241). After they stepped outside, Firefighter Buttaro explained to Mr. Damus that Firefighter Buttaro felt it was not appropriate for him to get an EEO opinion on the circumstances that occurred on May 6th and May 16th with Firefighter Thomas present in the room. After this explanation, Mr.

Damus took no further action with respect to Firefighter Buttaro or Firefighter Thomas even though it is submitted that the only appropriate step that should have been taken would have been to recuse Firefighter Thomas from teaching the class because Firefighter Buttaro was mandated to attend and was entitled to get guidance on this important EEO issue (Tr. 607). It is further submitted that the FDNY missed a critical opportunity to resolve this issue early on and only contributed to confusion on Firefighter Buttaro's part as to what was and was not appropriate conduct in balancing his First Amendment rights against another firefighter's objection to the shirts.

In the end, all Mr. Damus told Firefighter Buttaro was that he could rejoin the class, which Firefighter Buttaro did, and the class was not disrupted for more than five minutes by all personal witnesses' accounts (Tr. 113, 607, 905). Even Firefighter Thomas agreed that, after a period of time, Firefighter Buttaro rejoined the class and it ended without any further incident (Tr. 117, 362, 804). Both Chief Kelty and Firefighter Wheeler stressed that Firefighter Buttaro did not raise his voice, did not cause any commotion, and did not use profanity or vulgar language and that he was cooperative with Mr. Damas (Tr. 64, 902-03). Petitioner called no witnesses to contradict Chief Kelty or Firefighter Wheeler. Throughout the incident, Firefighter Buttaro was wearing his standard quartermaster-issued uniform and was not wearing a MADD or Merit Matters shirt (Tr. 608). The whole incident inside the classroom lasted no more than four or five minutes (Tr. 803, 915-16).

On or about September 9, 2012, Firefighter Buttaro came in early and was cooking red sauce before his shift and wearing the Merit Matters shirt while he was off duty (Tr. 147, 373, 739). He did not know that Firefighter Thomas was working that day and even when Firefighter Thomas appeared he never said anything to Firefighter Buttaro to express any alleged

displeasure (Tr. 147, 373, 739).

On or about September 21, 2012, Firefighter Thomas took a picture of Firefighter Buttaro wearing what appears to be a Merit Matters shirt (Tr. 147-48; Pet. Ex. 3). It is undisputed by Firefighter Thomas (and conceded by Petitioner) that Firefighter Buttaro was off duty at the time the picture was taken (Tr. 147-48, 250, 378, 545, 552).

On or about October 8, 2012, Firefighter Thomas took a picture of Firefighter Buttaro wearing what appears to be a MADD shirt (Tr. 150, Pet. Ex. 4). It is undisputed by Firefighter Thomas (and conceded by Petitioner) that Firefighter Buttaro was off duty at the time the picture was taken. (Tr. 156, 254-55, 546, 552).

Clearly, none of the above incidents comes even close to seriously disrupting the FDNY's operations. Even Firefighter Thomas agreed that the two firefighters always maintained a professional relationship with each other in operations, at meals and at fire scenes through the balance of 2008, through 2009, through 2010, and through at least 2011 (Tr. 211-12, 275, 277, 527-28). Indeed, the two firefighters worked plenty of tours together between 2005 and 2012 and although Firefighter Thomas did not like the way Firefighter Buttaro spoke to him, at times, Firefighter Thomas conceded that Firefighter Buttaro did not create a hostile work environment (Tr. 267-68). In fact, Firefighter Thomas reiterated at the end of his testimony that teamwork and job performance were not affected by their relationship, or lack thereof (Tr. 392, 394). Firefighter Buttaro agreed that although they never shared information about their personal lives, they did converse about work issues, duty-related stuff and were always civil to each other in group conversations (Tr. 698, 810).

Despite the incidents described above, which all occurred in 2012, Firefighter Buttaro maintains that during the entire year 2012 there was no disruption to operations inside or outside

the firehouse, and even more significantly after November of 2012 (and 2013) when they started working even closer together (Tr. 529-30, 529-30, 621, 795, 825-26). No witness testified that there were any complaints by any supervisors that the relationship between the two firefighter affected or disrupted operations to the public at any time throughout their tenure working together (Tr. 530). Indeed, Lieutenant Zuhlke testified that he has seen Firefighters Buttaro and Thomas working together on many occasions, whether fighting fires, doing building inspections or otherwise in the field, and he has never witnessed any friction between the two whereby operations of the firehouse were disrupted in any way (Tr. 825).

Accordingly, Petitioner cannot meet its heavy burden that actual disruption outweighs Firefighter Buttaro's First Amendment right to raise issues of public concern.

(b) Predicted. Respondent contends that significant disruption cannot be predicted from the record before us. It is important to note that when the t-shirt was worn by Firefighter Buttaro when he was *inside* the firehouse, it is akin to certain union activities which are protected by the First Amendment. *See e.g., Donovan v. Incorporated Village of Malverne*, 547 F.Supp.2d 210, 218 (E.D.N.Y. 2008) (activities constituted protected First Amendment activity, which was not sufficiently disruptive even though they expose members of the same firehouse to deep political divisions).

Another analogous case is the Supreme Court's decision in *Rankin v. McPherson*, 483 U.S. 378, 390 (1987). There, the Court expressed skepticism that the employee's discharge over a "political remark" that the employer considered evidence of her unfitness for the job was a valid exercise of the employer's interest in maintaining efficiency and minimizing disruption – noting that "we cannot believe that every employee…is equally required on pain of discharge, to avoid any statement susceptible of being interpreted…as an indication that the employee may be

unworthy of employment…" This comports with the idea that the Petitioner's judgment is absurd in this case; the potential "divisiveness" of the speech Firefighter Buttaro was making was no greater than any issue on which the Department personnel had not achieved perfect unanimity, so the suppression of his free speech rights is unwarranted. Moreover, the content of the speech was no different than the same position taken by the FDNY in the defending against the Vulcan lawsuit. As such, the Merit Matters stance was no more "divisive" than the FDNY's position.

In another instructive case, *Shanks v. Village of Catskill Bd. Of Trustees*, 653 F.Supp.2d 158, 169 (N.D.N.Y. 2009), the court found that a firefighter's complaints to OSHA regarding the adequacy of training, even when traced back to the firefighter, were of great public concern because they touched on the fire department's ability to effectively and safely perform its public function – accordingly, the firefighter's free speech rights outweighed the department's interest in maintaining order and avoiding disruption.

Here, similarly to *Shanks*, Firefighter Buttaro's position on the fire department entrance exam implicated on the fire department's ability to effectively and safely perform its public functions. Indeed, when a system provides assistance to one group of people in a manner which puts any other group at a disadvantage, there is the potential for less qualified persons obtaining jobs over more qualified ones. As a result, the public may not have the most able firefighters on the job and it could easily place business owners, home owners, and insurance companies at risk.

In *Love-Lane v. Martin*, 355 F.3d 766, 779 (4th Cir. 2004) the court was faced with a speaker whose speech was arguably *much* more disruptive to the operation of the governmental employer than Firefighter Buttaro's, and the court found that the adverse employment outcome was not justified. Specifically, the plaintiff (Love-Lane) was a school administrator who had

repeatedly raised concerns about the disproportionate discipline meted out to African-American schoolchildren, despite official instruction that she raise such concerns only with her superior and in private. After a discussion of the balancing test for determining whether the employer's interest or the employee's free speech rights should prevail, the court noted that "In sum, the evidence, especially when viewed in Love–Lane's favor, shows that her speech did not affect the ability of administrators and teachers at Lewisville to deliver their educational services; nor did her speech diminish the quality of education being provided. But even if Love–Lane's speech—exposing and opposing race discrimination—caused some disharmony at the Lewisville school, we must remember that her speech dealt with a substantial issue of public concern that was of special interest to the larger Lewisville community. In all events, the interests of Love–Lane and the community in her speech are sufficiently substantial to outweigh the efficiency concerns expressed by the defendants." *Love-Lane v. Martin*, 355 F.3d 766, 779 (4th Cir. 2004).

The ALJ seems to argue that any position that is contrary to the Vulcan Society's position in the lawsuit must be racist by definition. However, this ignores the fact that the City of New York took the identical position to that taken by Merit Matters. It is readily apparent that the Petitioner seeks to take disciplinary action against Firefighter Buttaro simply for the purpose of appearing "tough" against discrimination or retaliation. However, the issue of merit-based testing in Firefighter Buttaro's speech deals with a substantial issue of public concern that is clearly of special interest at this time in New York City politics. Now that the FDNY appears to be reversing their position on these issues does not justify taking disciplinary action against those who voice their disagreement.

One final case, which is of particular relevance herein is *Monsanto v. Quinn*, 674 F.2d 990 (3d Cir. 1982). In *Monsanto*, the court noted that the government's claim that an

employee's writing of letters (and the disclosure of those letters' contents to the media) was not sufficiently disruptive to quash the employee's free-speech interest in writing the letters. In fact, the court noted that "while there was ample testimony establishing disharmony and discontent among the employees of [unit], there is only meager evidence establishing that this disharmony and discontent was specifically caused by Monsanto's letter writing activities." *Id.*, at 999.

As alluded to above, The Vulcan Society lawsuit started in the summer of 2002 when Captain Washington filed an EEOC Charge alleging that the FDNY had hiring practices that discriminated against Blacks and other minorities (TR. 491). In 2007, the Department of Justice ("DOJ") filed an action in Federal Court after the EEOC found probable cause that discrimination occurred (Tr. 491). By 2012, the lawsuit was still ongoing (Tr. 492). Both Captain Washington and Firefighter Buttaro agreed that by this time the sides had been drawn; some people agreed with the Vulcan position and others agreed with the FDNY's position (Tr. 496, 566-67).

It is obvious from the long duration of the civil suit and the fact that by 2012, all the various sides were drawn and whetted to their positions, that both sides had high levels of support in various levels of the FDNY and that there were clear divisions between supporters and opponents of merit-only promotion throughout the firehouses, including the one in Crown Heights. Firefighter Buttaro's endorsement of Merit Matters and the donning of Merit Matters-related shirts did not cause the divisions, and to the extent such divisions lead to a reasonable fear that the department's operations will be disrupted, that is simply not imputable to Firefighter Buttaro's speech.

Accordingly, for all the foregoing reasons, it would be a violation of Firefighter Buttaro's First Amendment rights to terminate his employment (or discipline him in any way) because of

his advocacy for merit-based hiring and promotion practices whether that was by wearing Merit Matters-related shirts on or off duty, or due to his association with the Merit Matters organization altogether. As such, the instant charges must be dismissed.

POINT II

PETITIONER HAS FAILED TO PROVE THAT FIREFIGHTER BUTTARO WAS INSUBORDINATE FOR A PREPONDENCE OF THE EVIDENCE

The ALJ found that Respondent failed to abide by Department Regulations and Commissioner Orders and, thus, was insubordinate by wearing non-departmental issued clothing in the firehouse.

An employer must prove three elements to establish a charge of insubordination: (1) that an order was communicated to the employee and the employee heard and understood the order; (2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey the order. *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007).

At issue in the case at bar are four different sets of orders relating to the wearing of department-issued clothing: (1) Department Regulations 29.1.2 and 29.6.3 (ALJ Ex. 3); (2) May 30, 2012 Order (ALJ Ex. 4); (3) June 28, 2012 Order (ALJ Ex. 6); and (4) Captain Washington's "purported" order delivered in the firehouse stairwell in or about October, 2012. I will address the Department issued orders first under the applicable standard, followed by Captain Washington's purported order.

A. The Department Orders

1. Off Duty in the Firehouse

A critical distinction that appears nowhere in the ALJ's Report and Recommendation is that none of the Department Orders at issue regulate off duty conduct, whether in the firehouse

or outside the firehouse. As such, Firefighter Buttaro should not be disciplined for any incident where he was wearing Merit Matters or MADD shirts outside the firehouse off duty or inside the firehouse off duty.

It is well-established that the Fire Commissioner, who issues department regulations, is at the top of the command chain (Tr. 445). The FDNY Uniform Policy is set forth in Chapter 29 of the FDNY's Regulations (ALJ Ex. 3). Numerous witnesses, including Captain Washington, agreed that the Fire Commissioner and Chapter 29 do not regulate off duty attire. (Tr. 162, 479, 884, 955, 998). In addition, as also set forth below, to the extent that Captain Washington claims that he issued an Order that Firefighter Buttaro (or anyone) cannot wear Merit Matters-related shirts in the firehouse while off duty is beyond his authority because even the Fire Commissioner does not regulate off duty dress.

On or about May 30, 2012, a Department Order was issued that reiterated Chapter 29 of the FDNY's Regulations (ALJ Ex. 4). It did not require firefighters to do anything beyond what is already stated in Chapter 29 of the Regulations and it only applies to "on duty" dress (Tr. 125-26, 488, 834, 998). Captain Washington was again powerless to issue an Order which extends the Department's dress policy beyond the Commissioner's express authority.

On or about June 28, 2012, a Department Order was issued that provided an update on the recent firefighter exam, lawsuit and other issues, and stated that: "We recently reinforced the importance of strictly complying with Department rules and regulations pertaining to wearing on Department-issued clothing in the firehouse" (ALJ Ex. 6). Although the Petitioner argued that the June 28, 2012 Order extended the uniform regulations beyond just "on duty," the Petitioner failed to introduce any other Order dealing with uniforms/dress code, which had "recently" been issued concerning "off duty" dress in the firehouse. (Tr. 140). Indeed, the only "recent"

reinforced Order concerning dress was the June 14, 2012 Order, which specifically only dealt with the proper uniform to wear while "on duty" (ALJ Ex. 4, 6). As such, Lieutenant Zuhlke (among others) interpreted the June 28, 2012 Order to simply be another reinforcement of the same regulations that only apply to "on duty" dress (Tr. 861, 884). It has never been FDNY policy to require firefighters to report to work in uniform (Tr. 861).

Therefore, it is clear that none of the three Orders at issue regulate off duty conduct or distinguish between off duty conduct that occurs in the firehouse as opposed to outside the firehouse. As such, to the extent that the ALJ seeks to terminate Firefighter Buttaro for insubordination for disobeying an Order from Captain Washington or a Department Order or Regulation by wearing Merit Matters or MADD shirts off duty while in the firehouse, those Charges should have been dismissed.

2. <u>On Duty in the Firehouse</u>

It is undisputed that prior to August 2012, when Firefighter Buttaro spoke to Lieutenant Zuhlke concerning whether it was appropriate to wear Merit Matters shirts inside the firehouse off duty and to and from work, Firefighter Buttaro did indeed wear Merit Matters shirts on duty while at work. However, after receiving clarity from Lieutenant Zuhlke concerning this directive, that Merit Matters shirts could only be worn off duty in the firehouse and to/from work, Firefighter Buttaro never wore Merit Matters shirts open and notoriously in the firehouse while on duty. In fact, the Record is devoid of any evidence that Firefighter Buttaro wore any non-departmental shirts open and notoriously after speaking to Lieutenant Zuhlke in August 2012.

Therefore, the next question is whether Firefighter Buttaro was in violation of any orders by wearing Merit Matters or MADD shirts prior to August 2012. It is submitted that to discipline him for such a violation would violate his First Amendment rights.

Every witness at trial (and even Petitioner's witnesses) agreed that non-departmental-issued t-shirts were worn in the Crown Heights firehouse on duty all the time (before and after May 2012) because the firehouse had a very relaxed dress policy (Tr. 102, 331, 444, 480, 536, 544, 826-27, 893, and 970). All agreed that the standard policy is that at roll call, a firefighter has to be in proper uniform, but that has never been enforced in Firefighter's entire career in the Crown Heights firehouse (Tr. 104, 123, 307, 332, 826-27, 856-57, 893, and 970). In fact, Lieutenant Zuhlke testified that Chief Bienenstein of the 38th Battalion had issued a directive on departmental letterhead that stated that non-departmental t-shirts could be worn during the summer months and, as far as Lieutenant Zuhlke was concerned, that directive was still in effect as of May 2012 (Tr. 832-33). Lieutenant Zuhlke stated that he believed that the practice of wearing non-departmental shirts on duty was an accepted practice throughout the FDNY for years (Tr. 859).

For example, wearing sneakers on duty is not allowed as per Chapter 29, but Firefighter Thomas is known to have worn sneakers on duty (Tr. 480, 536-37). Also Captain Washington himself admitted that he has been guilty of wearing a quilt vest in the winter, which is in violation of the uniform policy, but Captain Washington has never been disciplined for it (Tr. 481). In addition, firefighters commonly wear organizational t-shirts that are not department issued in the firehouse, off duty and on duty (Tr. 827-28, 892-93). Merit Matters (and other organizational shirts) often depict the Maltese cross (Tr. 828, 892).

It was the consensus that uniform regulations are not enforced except when the firefighters are in the field or on official Department business, at which time the proper uniform is worn (Tr. 122). Typically, the shirts worn by firefighters are related to something that has to do with the fire department (Tr. 444).

In addition, all witnesses, including Captain Washington, had never heard of any firefighter being brought up on charges for not being in uniform (Tr. 480, 883, 908). Lieutenant Zuhlke and Lieutenant Dombrowsky agreed that at least 50% of the firefighters have worn non-departmental issued clothing on duty in violation of the regulations and they have never heard of anyone being brought up on charges for it (Tr. 883, 999). Firefighter Wheeler stated that if the FDNY disciplined every firefighter who was on duty out of uniform then there would not be many left (Tr. 908).

In light of the above, the only basis that the Petitioner would have to discipline Firefighter Buttaro for violation of the uniform regulations is based on the message of the disputed shirts. Because this would infringe upon Firefighter Buttaro's First Amendment rights as set forth in Point I above, it is necessarily unconstitutional. Therefore, to the extent that Petitioner bases its insubordination Charges on the fact that Firefighter Buttaro wore Merit Matters or MADD shirts prior to August 2012, those charges should have been dismissed.

3. <u>On Duty under Departmental-issued Attire</u>

The only remaining scenario whereby Firefighter Buttaro was wearing Merit Matters or MADD shirts in the firehouse (other than off duty and on duty) is the hybrid situation whereby Firefighter Buttaro was wearing a Merit Matters shirt on duty but underneath his standard issued golf or other work shirt. Respondent asserts that this practice is not in violation of the Department Regulations and, as such, the insubordination Charges relating to this scenario must be dismissed.

Section 29.6.3 of the FDNY's Regulations has a carve out from the dress code which states, in pertinent part, that "T-shirts shall have no lettering, logos or graphics visible through the uniform shirt" and "[t]he job shirt may be worn over the work/duty shirt" (ALJ Ex. 3). Although the Petitioner has argued that this sentence only applies to officer and chiefs, the plain

reading of the sentence proves otherwise. Indeed, the sentence does not make reference to it applying only to officers and chiefs (Tr. 487). In addition, no witness supported the Petitioner's argument on this point.

To the contrary, and in support of Respondent's position, many witnesses testified that a firefighter is not out of uniform as per the Regulations if they are wearing a non-department issued t-shirt underneath a department issued golf shirt. (Tr. 165-68, 690, 881). Indeed, Firefighter Buttaro has never been advised or instructed by any chief or company officer that he could not wear a non-departmental issued shirt underneath the department-issued clothes (Tr.170, 571-72). In fact, even Petitioner's witnesses, the chief complainant, Firefighter Thomas, and Captain Washington both agreed that it okay to wear a non-department issued shirt underneath the department-issued golf shirt (Tr. 334, 484). In addition, at Firefighter Buttaro's Step 1 meeting, Deputy Assistant Chief James Leonard also shared the interpretation that wearing a non-work-issued shirt under a work shirt was okay (TR. 624).[9] Firefighter Buttaro stated that neither shirt (Merit Matters or MADD) would be visible under a department-issued golf shirt (Tr. 568-69). Even Captain Washington could not confirm that a MADD shirt would be visible under the FDNY golf shirt (Tr. 483).

Therefore, to the extent that Petitioner bases its insubordination Charges on the fact that Firefighter Buttaro wore Merit Matters or MADD shirts under his golf shirts, those charges must be dismissed.

B. <u>Captain Washington's Stairwell/Roll Call Orders</u>

Having disposed of all other orders relating to the wearing of department-issued clothing, the remaining order to which the Petitioner claims Firefighter Buttaro was insubordinate relates

[9] Deputy Assistant Chief Leonard was one of the five Borough Chiefs, in charge of the Borough of Brooklyn, a position certainly higher than Captain Washington or even Chief Kelty (Tr. 625).

to a statement Captain Washington made to him in the stairwell in or about October 2012.

In or about October 2012, after Firefighter Buttaro had already received guidance from Lieutenant Zuhlke that he could wear the Merit Matters shirt off duty in the firehouse, Firefighter Buttaro was walking on the firehouse stairs while he was off duty and passed Captain Washington (Tr. 102, 104, 129). Captain Washington stated in passing, with no eye contact and no confirmation that Firefighter Buttaro "can't wear [the Merit Matters] shirt" (Tr. 102, 104, 133, 457).

As stated above, an order must be clear and unambiguous in its context, and respondent must have willfully refused to obey. *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Muniz*, OATH Index No. 1666/05 at 8 (Oct. 17, 2005) *Dep't of Transportation v. Abad*, OATH Index No. 242/12 at 4 (Mar. 12, 2012) (finding witness's subjective assessment that respondent used "inappropriate and foul language" insufficient to establish misconduct); *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Meyers***,** OATH Index No. 1182/11 at 5 (Mar. 28, 2011) (a single subjective opinion was insufficient to prove misconduct when other testimony cast the opinion into doubt).

Here, Firefighter Buttaro did not consider the comment "in passing" to be an order from Captain Washington (Tr. 105). In fact, prior to this incident in the stairwell, Captain Washington had never told Firefighter Buttaro that he couldn't wear the Merit Matters shirts (Tr. 132-33, 457). Therefore, it is submitted that the purported order was not "clear and unambiguous." *See Transit Authority v. Wong*, OATH Index No. 1866/08 at 17 (Aug. 28, 2008) (where an employee "reasonably believed" that he was not given an order, he was not insubordinate, "because he lacked the intent necessary to disobey an order.").

Even assuming *arguendo* that the statement constituted a clear and unambiguous order

(which it was not), Firefighter Buttaro still was not required to follow that directive. The general rule is that once a directive has been given, an employee must abide by the principle of "obey now, grieve later." *See Ferreri v. New York State Thruway Auth.*, 62 N.Y.2d 855 (1984); *Health & Hospitals Corp. (Queens Health Network) v. Smith*, OATH Index No. 2019/08 (Oct. 17, 2008). However, there are few exceptions to the "obey now, grieve later" principle, including orders: (1) that are clearly in excess of the agency's authority under the collective bargaining agreement; (2) that are unlawful; and (3) that would threaten the health or safety of any person if followed. *Smith*, OATH Index No. 2019/08 at 4.

Here, the first exception applies. Captain Washington had no authority to instruct Firefighter Buttaro not to wear Merit Matters shirts in the firehouse when he was off duty. Firefighter Buttaro believed that Captain Washington mistakenly believed that Firefighter Buttaro was on duty at the time of this incident (Tr. 132-33). However, Firefighter Buttaro testified that he was off duty at the time (Tr. 132-33).

Here, Captain Washington exceeded his authority because the FDNY Regulations and Commissioner's Orders cannot regulate off duty attire. Indeed, even Captain Washington agreed that the FDNY Regulations and Commissioner's Orders would all supersede a Captain's Order if it is in direct contrast (Tr. 134, 649, 955). Therefore, the purported order was not a lawful one.

In further support of this position, Chief Kelty and Lieutenant Dombrowsky testified that a Captain would not have the authority to tell a firefighter that they could not wear a non-authorized shirt if the firefighter is wearing it off duty – it would not be a lawful order to do so (Tr. 686, 999). Chief Kelty also confirmed that a Captain has no right to tell a firefighter he could not wear a Merit Matters shirt to and from work or off duty in the firehouse (TR. 687-88).

Therefore, to the extent that Petitioner bases its insubordination Charges on the fact that

Firefighter Buttaro wore Merit Matters or MADD shirts off duty in the firehouse after Captain Washington told him in the stairwell that he could not wear the Merit Matters shirt, those charges must be dismissed.

Last but not least, after seeing Firefighter Buttaro wearing the Merit Matters shirt in the stairwell, Captain Washington claimed that he stated at roll call several times that Merit Matters or MADD shirts could not be worn in the firehouse, but he did not distinguish between wearing the shirts on duty in the firehouse or off duty in the firehouse (Tr. 458, 476, 501). Again, to the extent that this order goes beyond the FDNY Regulations or Commissioner's Orders, it is null and void. However, additionally Firefighter Buttaro (along with the three other firefighters who testified) all denied being present for any such roll call announcement (TR. 545, 832, 891, 932, 945). And, in fact, no witness corroborated Captain Washington's testimony on this point. Even Captain Washington admitted that he has no recollection of Firefighter Buttaro being present for any of these roll call announcements (Tr. 482). It is submitted that when policy is changed in the firehouse that it is typically reduced to writing and, at the very least, announced by the officer on duty a set amount of consecutive roll calls to make sure that it is disseminated to all the members of the firehouse. Captain Washington did not do either.

Under the insubordination standard, the employee in question must be present for when an order was communicated to the employee and the employee has to have heard and understood the order. *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007). Here, the Petitioner cannot meet its burden. Accordingly, Firefighter Buttaro cannot be disciplined for insubordination for violating an unlawful order purportedly issued by Captain Washington at roll call that he did not hear.

Therefore, all insubordination Charges relating to not wearing departmental issued t-

shirts must be dismissed.

POINT III

PETITIONER HAS FAILED TO PROVE THAT FIREFIGHTER BUTTARO WAS GUILTY OF CREATING A HOSTILE WORK ENVIRONMENT/HARASSMENT BY A PREPONDENCE OF THE EVIDENCE

The ALJ incorrectly found that Firefighter Buttaro was guilty of creating a hostile work environment/harassment. Even under the standard articulated in *Williams v. New York City Housing Authority*, 61 A.D.2d 62 (1st Dep't 2009), Petitioner's claims should fail.

In *Williams*, cited by the ALJ, the Court actually held that the "harassment" alleged was not actionable. As one can easily see, the details of the sexual harassment paled into comparison to anything alleged by Firefighter Thomas and were still not actionable. Indeed, the details included: (1) plaintiff's supervisor made sexual advances towards the plaintiff including telling her that she could shower at his house, (2) the plaintiff was denied two training opportunities after turning down her supervisor's sexual advances, and (3) after complaining, the plaintiff was required to strip and wax the boiler room floor. *Williams*, 61 A.D.2d, at 64. Importantly, the Court distinguished between situations that truly constitute actionable harassment and those that are more akin to "petty slights" and "trivial inconveniences." *See Id.*, at 80.

It is submitted that the Record here does not contain any of the lewd behavior that courts find actionable and is much more analogous to the "petty slights" and "trivial inconveniences" that the Court alluded to in *Williams*. First, amidst Firefighter Thomas' claim that he was being harassed by Firefighter Buttaro, Firefighter Thomas actually requested and received a transfer into Firefighter Buttaro's Ladder Company, where he would be working closer with Firefighter Buttaro. It simply makes no sense that an employee who was being so terribly harassed as

petitioner asserts would actually want to work closer with the subject who was acting as the harasser.

Second, Firefighter Thomas admitted that the reason that he filed an EEO complaint against Firefighter Buttaro was not because he felt he was being harassed, that even after making the complaint, he did not want to go through with it, but rather he was complaining for the purposes of "protecting" himself because Firefighter Buttaro had "let the cat out of the bag" (Tr. 336, 366).

Third, as alluded to earlier, the complained-of incidents amount to nothing more than a short delay in making lunch (5/6), a quick exchange during lunch (5/16), and a brief conversation during an EEO class (5/21). Under any reasonable interpretation, these can be easily characterized as "petty slights" and "trivial inconveniences," at worst.[10]

There is absolutely no evidence in the Record that Firefighter Buttaro harbored any kind of animus against Firefighter Thomas on account of his race. Indeed, it is not alleged, and Firefighter Buttaro denies, that he ever made a verbal statement that unreasonably interfered with Firefighter Thomas' work environment, made any racial remark or slur and has never harassed or retaliated against to any firefighter throughout his tenure (Tr. 541, 621). Even Firefighter Thomas agreed that the two firefighters always maintained a professional relationship with each other in operations and that teamwork and job performance were not affected by their relationship, or lack thereof (Tr. 392, 394).

The ALJ's decision attempts to lend credence to the position that Firefighter Thomas

[10] An analogous case is *Fruchtman v. City of New York*, 2014 WL 1234146, 2014 N.Y. Slip Op. 30703, at *9 (Sup. Ct. N.Y. County March 20, 2014) (dismissing plaintiff's harassment claims under NYC law because plaintiff's claims of being treated "less favorably" in the form of a few arguments and being ignored by her co-workers amounted to "petty slights.").

"suffered in silence." It simply makes no sense that a person like Firefighter Thomas, as an EEO instructor and someone known for speaking out on issues, would sit silent for over a year while seeing Firefighter Buttaro (and other firefighters in Ladder 123 and Engine 234) wearing Merit Matters and MADD shirts inside and outside the firehouse (Tr. 216, 228-29, 291-92). Rather, the more likely story is that Firefighter Thomas only made the complaint in May 2012 because Firefighter Buttaro called him out after making inappropriate comments in the kitchen about not getting into SOC when Firefighter Thomas should have known the proper channel to make such complaints.

Despite the ALJ's recommended findings that Firefighter Buttaro's wearing of unauthorized shirts was so pervasive, Petitioner's two witnesses on this point fail to account for any pervasive wearing of the shirts. Indeed, Captain Washington only saw Firefighter Buttaro wearing the MADD shirt once (at roll call on May 6, 2012 – and said nothing, did nothing, and let Firefighter Thomas handle this himself at Firefighter Thomas's request) and only saw Firefighter Buttaro wearing a Merit Matters shirt once (in the stairwell in October) (Tr. 456-57, 467-68). Firefighter Thomas only pointed to three days after May 6, 2012 that Firefighter Buttaro wore a Merit Matters or MADD short at the firehouse and all three times, Firefighter Buttaro was off duty: (1) September 9, 2012 (while cooking red sauce before his shift); (2) September 21, 2012 (when Firefighter Thomas took a picture of Firefighter Buttaro wearing what appears to be a Merit Matters shirt); and (3) October 8, 2012 (Firefighter Thomas took a picture of Firefighter Buttaro wearing what appears to be a MADD shirt) (Tr. 150, Pet. Ex. 4, Tr. 147-48; Pet. Ex. 3).

Therefore, in sum, and despite Petitioner's assertion that Firefighter Buttaro was so threatening to Firefighter Thomas that he could barely take the Merit Matters shirts off his body,

Petitioner only can account for three times that Firefighter Buttaro was wearing a Merit Matters shirt and only one time that he was wearing a MADD shirt after May 6, 2012.

As such, the claims of hostile work environment/harassment based on race, should have been dismissed in their entirety.

POINT IV

THE ALJ'S RECOMMENDED PENALTY OF TERMINATION IS TOO SEVERE

The Report and Recommendation pays only lip service to the concept that an employee should receive a lesser penalty, particularly on the first occasion that misconduct occurs. *Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990) ("employees should have the benefit of progressive discipline whenever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it."). In addition, a fair penalty must take into account the particular circumstances of the incident and individual mitigating factors, as appropriate. *Dep't of Correction v. Passe*, OATH Index No. 1917/02 at 11 (Jun. 4, 2003), modified on penalty, Comm'r Dec. (Sept. 23, 2003) (respondent's 13-year tenure and clean record are mitigating factors which must be taken into account in assessing penalty).

Here, it is submitted that the ALJ did not take into account that Firefighter Buttaro has been an exemplary firefighter for the FDNY for over 16 years (Tr. 41, 511). He has received a number of citations and commendations over his career including, but not limited to, a World Trade Center Rescuer Ribbon, a Sandy Campaign Service Ribbon, and a Prehospital Save Commendation for successfully resuscitating a patient in cardiac arrest following a FDNY response in 2008. None of these facts were recognized or given any weight by the ALJ. Indeed, prior to the instant changes being brought against Firefighter Buttaro, he had never been accused of discrimination, never had a prior EEO complaint issued against him, never had any prior

complaint of retaliatory conduct, and never has been charged with violating any Department Rules or Regulations (Tr. 521-22).

In addition, to the extent that the ALJ found that Firefighter Buttaro was "unrelenting" and "intentional" in his alleged insubordinate and harassing actions, the Fire Commissioner should take note that Firefighter Buttaro indeed changed his modus operandi during 2012. Indeed, after speaking to his supervisor, Lieutenant Zuhlke, in August 2012, and getting clarification as to when (off duty) it was permissible to wear Merit Matters-related shirts, Firefighter Buttaro only wore the shirts off duty and to and from work. There is no evidence in the Record that he wore any Merit Matters shirts on duty after August 2012 and no Charges proffered against him that he wore Merit Matters shirts in 2013 at all! Clearly, the message got through to him.

On a final note, to the extent that the ALJ claims that 10 days would be inadequate as a penalty, one only needs to review a few cases to show that 10 days should be the maximum penalty imposed in light of the foregoing facts and case law. *See e.g., Small v. Human Resources Administration*, 299 A.D.2d 238 (1st Dep't 2002) (upholding 40 day suspension without pay for an employee who berated and physically provoked several clients and ignored his supervisor's instructions to stop, which was corroborated by four co-workers); *Krolick v. Lowery*, 32 A.D.2d 317 (1st Dep't 1969) (upholding a 10-day penalty where a firefighter reported to work drunk and disobeyed a supervisor's order to submit to a BAC test).

Finally, to the extent that Respondent has shown no remorse for his actions, it is his position that showing remorse is not warranted when he has been unjustly accused of these Charges. "The things that I have said that I believe are what I believe, and you can't apologize for your fundamental beliefs." - Mayor Bill de Blasio

CONCLUSION

For all the foregoing reasons, the Fire Commissioner should dismiss the instant Charges against Firefighter Buttaro with prejudice or, alternatively, substantially lessen the penalty imposed.

Dated: January 22, 2015
New York, NY 10105

Respectfully submitted,

ELLENOFF GROSSMAN & SCHOLE LLP

Adam C. Weiss
1345 Avenue of the Americas, 11th Floor
New York, New York 10105

Attorneys for Respondent