

Dep't of Sanitation v. Kaplan

OATH Index Nos. 2269/09 & 2270/09 (Sept. 4, 2009)

Respondents charged with accepting a gratuity for taking trade waste from a church that was off their route while their truck was parked facing the wrong direction. Judge recommends that charges of accepting a gratuity and collecting trade waste be dismissed. Charges of being off route and parking the truck against traffic are sustained.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
KEITH KAPLAN and JUAN ORTEGA
Respondents

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Sanitation, pursuant to section 16-106 of the New York City Administrative Code. The charges allege that on July 27, 2007, Sanitation Workers Keith Kaplan and Juan Ortega accepted a gratuity for collecting trade waste materials at a church that was located off their route while their truck was parked facing the wrong direction (ALJ Exs. 1, 2).

Following a six-day hearing on the charges, I find that the Department failed to meet its burden of proving by a preponderance of the credible evidence that respondents accepted a gratuity or violated the Department's trade waste order. The charges with respect to being off route and parking against traffic at the time of the incident were undisputed and therefore should be sustained. I recommend that respondent Kaplan be suspended without pay for 5 days and respondent Ortega be suspended without pay for 15 days.

ANALYSIS

Respondents were charged with violating the Department's Code of Conduct, in particular, failing to obey all Department rules, regulations and orders (rule 3.1); conducting themselves in a manner prejudicial to good order and discipline (rule 3.2); failing to report conduct involving a conflict of interest, corruption or other criminal activity by a City employee (rule 4.2); accepting money in connection with their duties as employees of the Department (rule 4.3); unauthorized use of a Department vehicle (rule 5.2); permitting the unauthorized use of a Department vehicle (rule 5.3); and accepting, removing, or helping to remove trade waste (rule 6.1). In addition, respondents were charged with violating the City Charter, in particular, section 2604(b)(2), which prohibits a public servant from engaging in any business or transaction which is in conflict with the proper discharge of his official duties; section 2604(b)(3), which prohibits a public servant from using his position to obtain any financial gain or other private or personal advantage; and section 2604(b)(13), which prohibits a public servant from accepting a gratuity or compensation for performing his official duties (ALJ Ex. 1).

The Facts

The charges proffered by the Department arose from the allegations and observations made by Paul Visconti, Bronx Borough Chief. On July 27, 2007, Chief Visconti, who at the time was a deputy chief, arrived at the Bronx 12 garage at approximately 5:45 a.m. to conduct a supervisors' meeting, which was to immediately follow the 6:00 a.m. roll call. Chief Visconti drove directly to the garage from his home in his personal car rather than stop at the Bronx borough office to pick up a Department vehicle. He parked the car near the entrance of the garage, about 30 to 40 feet from both the garage office and where roll call is conducted. Either shortly before or shortly after roll call, Chief Visconti was notified by Garage Supervisor John Stabile that his car had been "keyed." Chief Visconti, along with Supervisor Stabile and some sanitation workers, went to look at the car. On the rear driver's-side door was a 15 to 20 inch scratch that someone had made by dragging a key against the side of the chief's car (Resp. Ex. G; Tr. 27-29, 44, 68, 111, 170-71, 173-75, 178, 359-61, 364, 366-67, 369, 375, 664).

Chief Visconti testified that he was surprised that someone had keyed his car and if he had thought that it would have been damaged he would never have parked it there. Although he

was upset and wanted to know who was responsible, he testified that he simply shrugged his shoulders. Chief Visconti maintained that he would not outwardly display his emotions, stating, that as a deputy chief he would conduct himself “properly” whether he was furious or just annoyed (Tr. 180). Chief Visconti instructed Supervisor Stabile to file an Unusual Occurrence Report about the incident and returned to the garage offices to conduct the supervisors’ meeting. He testified that after the meeting, he went to the police precinct located on 229th Street and Laconia Avenue to file a criminal complaint about his car being vandalized (Pet. Ex. 4; Tr. 35, 50-51, 55, 176-77, 181-82, 377, 380-81, 386).

Chief Visconti testified that after leaving the police precinct, he had intended on going directly back to the borough office. He drove south on Bronxwood Avenue so that he could take East Gun Hill Road west to the entrance of the Bronx River Parkway. When Chief Visconti reached the intersection of Bronxwood and Gun Hill, as he was in the process of making a right turn, he looked to his left to make sure that no cars were going to run the red light. As he was turning right and still looking left, he noticed the rear flashing lights of a Department truck, parked against traffic several blocks down Gun Hill Road. He made a u-turn and as he approached he noticed that the truck was facing east on the west-bound lane of Gun Hill, parked against traffic in front of a storefront church (Pet. Exs. 5, 6A, 6B, 8; Resp. Ex. H; Tr. 183-84, 186-88, 405, 408, 410-411, 415, 417, 423).

Chief Visconti testified that he observed respondents looking “owly” by turning their heads in either direction as though to make sure that they were not being observed while they loaded materials into the truck. The chief parked his car approximately 100 feet east of the truck on the opposite side of the road so that he could further observe respondents’ actions. He recounted that respondents carried trade waste from a small alley next to the church. The trade waste consisted of construction materials, such as dozens of tied and untied rugs, more than 30 black bags, and bundled and unbundled wood. According to Chief Visconti, he observed respondents working for a “solid ten minutes” loading the materials. He testified that respondents cycled the refuse in the hopper into the body of the truck anywhere from 30 to 40 times (Pet. Exs. 5, 6A, 6B, 8; Resp. Ex. H; Tr. 188-89, 191-92, 215, 419, 428, 429-31, 454, 569, 956).

As respondents slowed their pace, Chief Visconti left his car and proceeded across the street to confront them. He indicated that based on his experience as an investigator he timed his appearance to allow respondents enough time to take all of the trade waste that they intended to collect but before they had an opportunity to get back in the truck to drive away. Chief Visconti testified that just as he was approaching the back of the truck, he observed an elderly black woman, later identified as Youlanda Simms, hand respondent Ortega money. Respondent Ortega stuck the money in his shirt pocket unfolded so that the bill was upright, with a half to one third of it sticking out. Chief Visconti testified that he approached and said, "this is a gratuity." He took a \$20.00 bill from respondent Ortega's pocket and said, "you can't take gratuities, you just committed a trade waste violation" (Tr. 198-99). Chief Visconti testified that respondent Ortega immediately replied, "it's not my money" (Tr. 468-69, 539). Chief Visconti walked towards the front of the truck and respondent Ortega and Ms. Simms followed him. Chief Visconti testified that he tried to distance himself from them because respondent Ortega was "yelling and screaming" that "I had nothing to do with your car," and Ms. Simms was "ranting and raving," telling him to "leave these boys alone, they didn't do anything." Chief Visconti told respondent Ortega that this had nothing to do with his car and directed Ms. Simms to "back off" (Tr. 200, 203, 419, 458, 461, 469-70, 538-39).

Chief Visconti immediately called District Superintendent John Butkiewicz and directed him to have himself and all of the supervisors in the district report to the scene. Chief Visconti explained that he wanted all six supervisors present because "the more witnesses the better" (Tr. 200-01) since it was turning into a hostile situation with respondent Ortega and the civilian "chasing" him. He testified that at this point, respondent Ortega was now yelling "give me back my money" (Tr. 36, 76, 124, 201, 641-42, 665, 667).

The first supervisor to report to the scene was respondents' immediate supervisor, Martin Vanihel, followed by Superintendent Butkiewicz and four other supervisors. Chief Visconti apprised Superintendent Butkiewicz and Supervisor Vanihel of what had occurred. He directed the superintendent to call the Field Investigative Audit Team ("FIAT") while he called the borough office. Chief Visconti testified that he did not conduct an investigation but instead left the scene after 10 to 15 minutes because respondent Ortega was getting "crazier and crazier" and

“[his] job was done” (Tr. 208). After leaving the scene, Chief Visconti drove back to the borough office (Tr. 129-30, 204-08, 431, 513).

Superintendent Butkiewicz testified that when he arrived at the scene he met with Chief Visconti, who told him that he had observed respondents carrying black bags and rugs from an alley next to the church and Ms. Simms giving respondent Ortega \$20.00. The chief then instructed the superintendent to obtain Ms. Simms’ name and telephone number. Superintendent Butkiewicz testified that he did not go into the church, look at the alley, interview any witnesses, or speak to the respondents. Other than taking Ms. Simms’ contact information, he acted as a liaison at the scene and spoke with the police officers who arrived in response to a 911 call placed by respondent Ortega. The police arrived at some point after Chief Visconti had already left for the borough office. Superintendent Butkiewicz explained to the police what had taken place and informed them that this was an internal investigation, which required the Department to take the truck to verify its contents. Superintendent Butkiewicz stayed at the scene until Superintendent Burge arrived and joined him in accompanying the seized truck to the dump (Tr. 644-48, 672-733, 682-83, 689-692, 699-700).

Supervisor Vanihel testified that after Chief Visconti related what had taken place, he approached respondent Kaplan and asked him why they were off route. Respondent Kaplan explained that they were sitting at a traffic light when Ms. Simms approached them and asked them to pick up some carpeting at her church. Ms. Simms told them that there had been a flood which damaged the carpeting and it had to be pulled up. The church was having an event that night and the carpeting needed to be removed from the sidewalk and alley because people could trip on it. Respondent Kaplan told Supervisor Vanihel that they were reluctant to take the carpeting because it was off route but finally relented because she was an older woman and it was at a church (Tr. 129-31, 134-35).

Respondent Kaplan further related to Supervisor Vanihel that Chief Visconti appeared out of nowhere, saying that he saw respondents taking trade waste materials from the church and that respondent Ortega took \$20.00 from Ms. Simms. Both respondents told Supervisor Vanihel that Chief Visconti was digging in respondent Ortega’s pocket and pulled out respondent Ortega’s money. Supervisor Vanihel testified that when he arrived at the scene, respondent Kaplan was calm, but respondent Ortega was agitated because Chief Visconti had taken \$20.00

out of his pocket. Supervisor Vanihel also spoke with Ms. Simms, who corroborated respondents' account of what occurred and complained about Chief Visconti's attitude. Supervisor Vanihel testified that he asked an AAMCO worker who was standing on the sidewalk if he had observed what had happened. The AAMCO worker stated that he had seen respondents collect some carpeting from the church alley but did not see Ms. Simms give respondent Ortega any money (Tr. 82, 135-38, 185).

Supervisor Vanihel was present at the scene for approximately 45 minutes. He was aware that the police had arrived at some point, but he did not speak to them. Although he was certain that Chief Visconti had left early on, he was unable to pinpoint exactly when he departed. Supervisor Vanihel credibly testified that Superintendent Charles Burge, from FIAT, arrived at the scene after Chief Visconti had already left (Tr. 87, 133).

Superintendent Burge testified that he was out in the field when he received a call from his supervisor about the incident on Gun Hill Road. He was instructed to get his equipment and go to the dump to document the contents of the truck. Superintendent Burge testified that after going back to his office to retrieve his video camera, he intended on going directly to the dump, but changed his plans after speaking with Chief Visconti, who was still at the scene. Instead, Superintendent Burge decided to go directly to Gun Hill Road. According to the superintendent, when he arrived at the church, he spoke to Chief Visconti in person, who apprised him of the situation. Superintendent Burge was at the scene for approximately 10 to 20 minutes before escorting the truck to the dump (Tr. 915-17, 948-50, 952, 955-59).

Meanwhile, someone had contacted Supervisor Stabile at the garage and directed him to report to the scene with a sanitation worker who could drive the seized truck to the dump. Supervisor Stabile subsequently arrived with Sanitation Worker Mark Mischel. Shortly after arriving, Sanitation Worker Mischel was instructed to drive the truck directly to the dump and not to make any sudden movements. The truck was driven in a caravan surrounded by Department supervisors. Chief Visconti met them at the dump to observe the contents being dumped (Pet. Exs. 5, 6A, 6B; Tr. 37, 122, 815).

The truck was weighed when it arrived at the dump and it was determined that it held 3.76 tons of waste. The floor of the facility was cleaned to remove any extraneous debris before Sanitation Worker Mischel was instructed to lift the tailgate and dump the truck. Sanitation

Worker Mischel was directed to dump small amounts of waste at a time and move the truck forward slowly. Once the truck was emptied, the contents were reviewed. Sanitation Worker Mischel testified that he was directed by both Superintendent Burge and Chief Visconti to open various black bags and sift through their contents. Anything that Superintendent Burge classified as “trade waste” was moved to the side and placed in a separate pile. The pieces of carpeting that were taken from the church were stuck in the lifted tailgate and were only removed after the entire truck had been dumped and its contents searched. Superintendent Burge videotaped the dumping, and all of the materials that he classified as trade waste were itemized and documented in a report that he later issued. He concluded that respondents took carpeting, padding, bundled and unbundled wood, black bags containing construction materials, a church organ, and hedges from the church (Pet. Exs. 2, 13; Tr. 579, 650, 711-12, 816, 820, 824-25, 920, 922, 936, 997).

After cataloging the contents of the truck, Superintendent Burge continued his investigation by returning to the church to find Ms. Simms. When he arrived, he saw a man taping and plastering a wall inside the church. When the superintendent attempted to speak to him, Reverend Vinette Small, the church’s pastor, stopped him. She informed Superintendent Burge that Ms. Simms was next door at an AAMCO shop. From the superintendent’s recording of the encounter with Reverend Small, it is clear she had told Superintendent Burge in no uncertain terms that the work was being done by church members who were not being compensated for the work. From listening to the recording, it sounded as though Superintendent Burge became somewhat aggressive in his questioning, which the reverend did not appreciate so she elected not to answer anymore of his questions. She agreed to give Ms. Simms the superintendent’s business card and he left to look for Ms. Simms next door at AAMCO. Ms. Simms, however, had already left AAMCO, so Superintendent Burge took the opportunity to interview two AAMCO workers who were present at the scene. The AAMCO workers told Superintendent Burge that they saw respondents loading the carpeting into the truck but that they did not see Ms. Simms give the sanitation workers money. They told him that Chief Visconti reached into respondent Ortega’s pocket and pulled out money (Pet. Exs. 10, 11, 12; Tr. 923-25, 927-28, 976, 986).

Respondents testified that they are not regularly partnered together, but on July 27, 2007, respondent Ortega’s steady partner was out for the day. They were assigned refuse collection in

section 1, the furthest section from the garage. After roll call, they left for their route, with respondent Ortega driving. The route sheet indicates that the route consists of 24 portions or ITSAs. Although the ITSAs are numbered, it is very common for sanitation workers who are familiar with the area to cut up the route, taking the ITSAs out of order, so as to complete the work in the quickest and most efficient way. On this particular day, respondents cut up the route and did the last four ITSAs, in the northern portion of the route, first. In addition, respondents decided that they would be running, meaning that they were going to work as quickly as possible, without taking their break or to having lunch in order to finish the route early. It is a standard practice for sanitation workers, especially on hot summer days, to complete their routes as early as possible so that they can dump their trucks and go back to the garage, where they wait for their shift to end. Depending on how quickly they are running the route, sanitation workers may get back to the garage three to four hours before their shift ends (Pet. Exs. 1, 3, 8; Tr. 66, 93, 1065-66, 1095-1132, 1136).

After completing the northern portion of the route, respondents were sitting at a traffic light on Bronxwood Avenue, waiting to cross East Gun Hill Road to proceed to the southern portion of their route. Respondents testified that while they were waiting at the light, Ms. Simms approached the truck and asked respondent Kaplan, who was on the passenger side of the truck, if they could do her a favor. Ms. Simms explained that her church had a flood and the carpeting had been ruined. They pulled the carpeting up and had left it in a little alley next to the church. The church was having a convention that evening and the carpet remnants were in the way and creating an unsafe condition. She asked respondents if they could go to the church and pick up the discarded pieces of carpet (Tr. 740-41, 767, 779, 1069-70, 1090, 1134, 1164).

Respondent Kaplan told her that it was not on their route for the day so they could not do it. Respondents testified that Ms. Simms pleaded with them, asking several more times if they could please help her and the church. Respondent Ortega, who had seen Ms. Simms on his route previously, finally agreed to do it. Respondents testified that they ultimately relented and decided to help her because she was an older woman and the trash was at a church. Respondent Ortega testified that it would be good public relations for the Department. Although it is undisputed that respondents should have contacted their supervisor to get permission to do the pick-up, both respondents, as well as several other sanitation workers who testified, maintained

that sanitation workers often use their own judgment in the field without contacting supervisors for each unusual occurrence. Respondent Ortega further contended that he planned on letting his supervisor know about the pick up once he got back to the garage, which was his usual practice (Pet. Ex. 8; Tr. 740-41, 1070-71, 1085, 1090-91, 1093, 1096, 1135, 1165).

Once the sanitation workers agreed to pick up the carpeting, they drove directly to the church. They were trying to do the collection quickly so that they could get back to the route and finish early for the day. Although prohibited by Departmental rules, it is not unheard of for a sanitation worker to park against traffic in order to save time. Rather than make a u-turn, respondent Ortega drove the truck east on Gun Hill Road and cut across the lanes to the north side of the street to get as close to the trash as possible. Ms. Simms, who walked to the church from the intersection, met them there shortly after they arrived. Respondents testified that they were at the church for about ten minutes. They saw that the pieces of carpeting were spilling onto the sidewalk from a short alley next to the church. Some of the pieces were trodden on. The alley did not extend the entire length of the building; instead, the narrow, fenced-in alcove area extended only about a third of the length of the structure, ending at a protruding portion of the building. A side door from the church opened into the area. This alcove appeared to be more like a secondary form of egress and a storage space for church garbage than an actual alley (Pet. Ex. 8; Resp. Exs. A, B, D, J; Tr. 742, 766-67, 782, 1072, 1075, 1101-02, 1137, 1166).

Respondents picked up the bundled and unbundled pieces of carpeting and threw them in the hopper of the truck. Respondents testified that as they were finishing up, Chief Visconti appeared "out of nowhere." Respondent Ortega testified that he was approached by someone from behind who reached around, grabbed his shirt, and started digging in his pocket. At first respondent Ortega was shocked that someone was touching him and then he recognized Chief Visconti as he pulled out money and a cell phone from respondent Ortega's pocket. Respondent Ortega testified that Chief Visconti went "beserk" and was yelling "this is what you bastards get for scratching my car" and "you're going to lose your jobs." Respondent Ortega told him that he did not know what he was talking about and that he wanted his money back. Respondent Ortega further testified that Ms. Simms approached and tried to explain to Chief Visconti why respondents were helping her and "he flipped out on her." Chief Visconti shouted at her to mind her own business and "called her a liar." Ms. Simms became agitated and respondent Ortega

tried to calm her down. One of the AAMCO employees, who had been standing near the church watching the scene unfold, approached Chief Visconti and told him to stop yelling at Ms. Simms, but Chief Visconti yelled at him as well (Resp. Ex. R; Tr. 1075-76, 1106, 1078, 1110-11, 1138-39).

Respondent Ortega testified that he had always maintained that it was his money and was very upset that Chief Visconti not only physically touched him, but had “robbed” him. Chief Visconti refused to return the \$20.00, so respondent Ortega called 911 to report what happened. By the time the police arrived, Chief Visconti had already driven away. The police officers spoke with Superintendent Butkiewicz first. When respondent Ortega later attempted to speak with them they informed him that there was nothing that they could do because it was a Department matter (Tr. 1076, 1089, 1112, 1143).

Respondents were immediately suspended for 30 days and were driven back to the garage. Afterwards, they went to the union hall and made some telephone calls to try to sort everything out. They tried several times to file a complaint at the police precinct to no avail. After making a complaint at a local councilman’s office, the councilman assisted them in ultimately filing a police complaint several days later. Meanwhile, the union applied pressure on the Department, and after ten calendar days, respondents were taken off suspension. When respondents met with Chief Ferrari, he lifted the suspension and returned the \$20.00 bill to respondent Ortega (Resp. Ex. L; Tr. 523, 1081-83, 1112, 1145, 1170).

Credibility of the Witnesses

It is undisputed that respondents were off their route and that respondent Ortega had parked the truck facing the wrong way against traffic. I find both respondents guilty of being off route and I find respondent Ortega guilty of parking the Department truck improperly against traffic. Respondent Kaplan, who was the passenger at the time, was not driving. Although he was complicit in going off route because he participated in collecting the carpeting at the church, he should not be held accountable for parking the truck against traffic. Pursuant to General Order 85-12 (eff. May 22, 1985), which deals with the procedures for processing parking tickets issued to Department vehicles, only the driver of a vehicle is held responsible for parking

summons. By analogy, respondent Ortega, the driver, who parked the truck illegally, should be the only one held responsible for this violation.

The question remaining is whether they actually violated the trade waste order by taking a gratuity and/or collecting trade waste. The charges in this case stem from the allegations made by Chief Visconti. His testimony about what occurred stands in marked contrast to that of respondents and Ms. Simms. In order to reach a resolution of the trade waste charges, a credibility determination must be made.

In analyzing credibility, this tribunal may consider such factors as witness demeanor; consistency of a witness' testimony; supporting or corroborating evidence; witness motivation; bias or prejudice; and the degree to which a witness' testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd* NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). Chief Visconti experienced more than two grueling days on the witness stand. On the whole, I found Chief Visconti to be defensive, evasive, and challenging. His testimony was inconsistent at times and lacked corroboration.

With respect to bias or prejudice, respondents' counsel spent a significant amount of time trying to demonstrate that Chief Visconti harbors some animosity towards respondent Kaplan by focusing on two specific incidents. The first incident occurred during a labor/management committee meeting that took place awhile ago. During the meeting, respondent Kaplan's name came up and Chief Visconti referred to him as "a piece of shit worker." At first, the chief testified that he did not recall making the comment, but later acknowledged that he may have said it. Still, later on, Chief Visconti expressed that he does indeed think that respondent Kaplan is "a piece of shit worker" because he has a criminal record, bad attendance, and was involved in a practical joke against him (Tr. 295-96, 496-98, 604, 607, 609).

The second incident involves the practical joke. On March 16, 2006, respondent Kaplan was on restricted medical duty and was working as a mailman in the Bronx 12 garage. His duties included general clerical work and delivering the garage mailbag to the borough office. On this particular day, when respondent Kaplan emptied the mailbag at the borough office, he discovered that a pair of shoes addressed to Chief Visconti had been placed in the bag. Respondent Kaplan testified that he did not know why the shoes were in the bag or even that the

shoes were in the bag when he took it from the garage. He assumed that someone was playing a prank because the shoes looked as though they had been found in the garbage. Not knowing what to do, respondent Kaplan just left the shoes with the rest of the mail (Tr. 296-97, 301-02, 1122-24).

When Chief Visconti received the shoes, which were meant to poke fun at the way he walked, he testified that he got a “little upset” (Tr. 302, 1042, 1052). From all other accounts, however, Chief Visconti was more than a little upset. He was furious and very intent on punishing whoever was involved. Supervisor Gregory Bufano, who was on probation at the time, testified that he was working as the Bronx 12 garage supervisor that day. Chief Visconti blamed him for the shoes being delivered and threatened him with a demotion. Supervisor Bufano tried to explain to the chief that he did not even touch the mailbag that day and knew nothing about the shoes being in the bag. Chief Visconti was uninterested in what Supervisor Bufano had to say and told him he was holding him responsible because as the garage supervisor he was in charge of the mail (Tr. 109, 308, 318, 847-48, 857, 1125-26).

Supervisor Bufano was very concerned about being demoted so he asked Superintendent Patrick Hickey to help straighten out the matter. Although it is not entirely clear why, Supervisor Michael Cambria stepped forward and took the blame for the practical joke. According to Supervisor Cambria, Superintendent Hickey approached him and asked him how his relationship was with Chief Visconti. When he replied that it was okay, the superintendent explained that Chief Visconti was threatening to demote Supervisor Bufano over a practical joke that was not well received. He asked Supervisor Cambria if he could “take the hit.” Being the shop steward and having more seniority, Supervisor Cambria agreed to be the “fall guy” (Tr. 303, 849, 851, 857-58, 869-70, 1044).

Superintendent Hickey’s testimony, however, was completely different. Superintendent Hickey downplayed his role in the incident and testified that he knew that Supervisor Cambria was responsible for putting the shoes in the mailbag. Superintendent Hickey further testified that he told Supervisor Cambria to “step up and admit it” so that Supervisor Bufano did not get demoted as a result of Supervisor Cambria’s practical joke. During one of his conversations with Chief Visconti about this incident, Superintendent Hickey mentioned that respondent Kaplan was “in on the joke” and told Supervisor Cambria “mission accomplished” when he returned from

delivering the shoes. I found Supervisor Cambria to be more credible than Superintendent Hickey with respect to this incident. Supervisor Cambria's testimony was straightforward and unembellished. In contrast, Superintendent Hickey tried to avoid appearing at this hearing and when he did finally appear, he was extremely defensive and hostile. Ultimately, for the purposes of this case it is irrelevant who was responsible for putting the shoes in the bag. The incident is, however, illustrative (Tr. 305-06, 315-16, 319, 358, 594, 613-14, 1044-45, 1051, 1054).

As a result of the practical joke, Supervisor Cambria was suspended for one day. Respondent Kaplan, on the other hand, was transferred out of Bronx 12 that day. He had been working a 7:00 a.m. to 3:00 p.m. shift when this occurred and was told to report later that evening to Bronx 9 for a midnight to 8:00 a.m. shift. His duties were dramatically changed, requiring him to clean the entire three-story garage -- sweeping, mopping, and emptying all of the oversized trash cans. Not only was this assignment more physically strenuous, the garage supervisor in Bronx 9 was told to monitor respondent Kaplan's work. When he arrived for duty that first evening, the supervisor said, "Oh, you're the guy who pissed off Visconti." He explained to the supervisor that he was recovering from a torn rotator cuff and would be unable to do the work as assigned. After some phone calls were made, respondent Kaplan was told that if he could not do the work he should go home. He decided to stay and do his best, but ended up re-injuring his shoulder and went out on leave because of the injury (Resp. Exs. E, F, K, L; Tr. 1127, 1129-30).

When asked about the "shoe incident," Chief Visconti acknowledged being angry about the shoes being delivered. Although he seemed a bit annoyed with Supervisor Cambria about the incident because he is a supervisor and should set an example, Chief Visconti appeared to harbor more resentment towards respondent Kaplan, which has persisted to this day. Chief Visconti unconvincingly testified that he did not think that being transferred was a punishment. Clearly, the facts indicate otherwise. Respondent Kaplan was forced to work two shifts within nine hours and his duties were changed dramatically. Instead of working a day tour, he was assigned an overnight shift. His medical duty status was disregarded and the workload was no longer clerical in nature, but instead physical. Moreover, the supervisor on duty was specifically instructed to monitor respondent Kaplan's work (Tr. 331-32).

Chief Visconti tried to downplay his role in transferring respondent Kaplan out of Bronx 12 by making a point of saying his clerk did the transfer. It is clear, however, that the clerk got his instructions with respect to the transfer from the chief. When asked why respondent Kaplan had to be transferred from Bronx 12, Chief Visconti responded, “if Kaplan and Supervisor Cambria were conspiring to play jokes on the Borough Chief, who knows what else they were doing” (Tr. 304, 326-29, 334, 615-16, 1046).

During the hearing, Chief Visconti appeared overly focused on his title and standing within the Department. He repeatedly corrected respondents’ counsel with respect to his rank and how his position related to others in the Department. Collateral witness testimony provided further insight into Chief Visconti’s temperament and management style. Nearly every witness, with the exception of Superintendents Butkiewicz and Burge, was hesitant to testify about Chief Visconti. Whenever his name was mentioned, the witnesses looked increasingly uncomfortable. Those who tried to be more neutral in their assessment of him provided meaningless platitudes and appeared ill at ease, while those who were more forthcoming openly acknowledged that they were nervous about testifying and worried that this would be held against them in some way by the chief.

The overall picture presented by multiple witnesses’ testimony and demeanor is that Chief Visconti has a temper and manages his subordinates by intimidation and fear. Chief Visconti’s testimony, itself, demonstrated that he holds on to grudges and can be overly punitive for any actual or perceived wrongdoing. I found it particularly telling that John Pezzullo, who had been a supervisor for 13 years, voluntarily demoted himself to a sanitation worker so that he would not have to interact with Chief Visconti anymore. Sanitation worker Pezzullo gave up his supervisory title in March 2008, a year and a half short of his planned retirement date. He testified that he never had a problem with his immediate supervisor, but Chief Visconti did not like him and continually harassed him. Although this demotion will most certainly affect Sanitation Worker Pezzullo’s pension income, he would rather accept a smaller pension than try to persevere for a year and a half (Tr. 879-84).

With respect to Chief Visconti’s testimony about the incident at the church on July 27, 2007, I found him incredible. For the most part, his testimony failed to comport with common sense and human experience. For instance, Chief Visconti denied having anything but a minimal

reaction to his car being vandalized. Instead, he testified that he showed no emotion and shrugged it off. The evidence discussed above demonstrated that Chief Visconti has a temper. Moreover, even the most even-tempered individual would be overtly upset about having their car damaged, especially by someone they work with. It was obvious that this was not a random act and that whoever damaged Chief Visconti's car knew that it belonged to him. This fact, in and of itself, had to be distressing. Superintendent Butkiewicz's and Supervisor Stabile's testimony that Chief Visconti was unemotional about his car being damaged appeared contrived. In contrast, Sanitation Worker Jamie Irizzary's testimony that Chief Visconti did indeed get angry and said something to the effect that "someone is going to fucking pay for this," was far more believable (Tr. 29, 50, 69, 157, 639, 889-90).

Another aspect of Chief Visconti's testimony that was problematic had to do with the route he took from the police station to the borough office. Chief Visconti had testified that after filing a criminal complaint at the police precinct at 230th Street he drove south on Bronxwood Avenue to take East Gun Hill Road to the Bronx River Parkway. When asked why he did not just drive north three blocks to take 233rd Street, the closest entrance to the parkway as opposed to 20 blocks south to take Gun Hill Road, Chief Visconti maintained that he did not want to go north to go south. While it may be odd to drive a much longer route through more traffic lights to get to the parkway, it is not inconceivable. The problem was that the more Chief Visconti denied driving around looking for respondents or any other sanitation workers, the more implausible his testimony became. In discussing potentially more direct and quicker routes to get to the parkway, Chief Visconti minimized his knowledge of the streets in the Bronx and became evasive in answering questions. Every time a question was posed about a different route, he would claim to be unfamiliar with the area. This is surprising considering that Chief Visconti is currently the Bronx Borough Chief and in the 22 years that he has worked for the Department, he spent more than half of that time working in the Bronx. During his tenure with the Department, he worked in the Bronx as a sanitation worker, collecting trash on routes; as a snow supervisor, making sure streets were cleared; and as a field supervisor, following routes to make sure his subordinates did their jobs properly. Chief Visconti's assertion that he is unfamiliar with Bronx geography was not believable (Pet. Ex. 8; Resp. Ex. H; Tr. 246, 251-53, 268-69, 271-72, 383-90, 392-93, 396-97, 400).

I found Chief Visconti incredible in testifying that although he was not deliberately looking for a Department truck, he just happened to notice one parked in front of the church several blocks to his left as he was making a right turn on to Gun Hill Road. Chief Visconti maintained that he always looks to the left when he is making a right hand turn, especially in the Bronx where drivers routinely run red lights. While it is sensible to glance to the left before turning, it is dangerous to continue to do so while actually turning. In order for Chief Visconti to have possibly seen the truck as he casually made the turn, he would have had to have been looking all the way to the left as he drove slowly into the middle of the intersection. This would have led to him potentially getting hit by an oncoming car trying to make the same turn on to Gun Hill Road or possibly hitting a pedestrian in the crosswalk. To further exacerbate the situation, if Chief Visconti had been looking left as he described, he would have been looking east, directly into the early morning sun (Pet. Ex. 17; Tr. 408, 410-11).

Respondents tried to establish that it would have been impossible to see the truck without purposely looking for it, by restaging the event and filming it. Some sanitation workers who were taking an official break in the area agreed to park their truck in front of the church, albeit facing the correct direction, for the reenactment. Respondent Kaplan drove the same route as described by Chief Visconti, while holding a video camera. When he reached the intersection of Bronxwood and Gun Hill, he almost got into an accident because he was trying to crane his head far enough left to see the truck as he was making a right turn. He was almost past the middle of the intersection when an oncoming car trying to make the same turn onto Gun Hill Road nearly hit him. Respondent Kaplan made the turn three times and in each instance he demonstrated that it would have been impossible to see the truck if you had not been looking for it (Resp. Ex. I; Tr. 1149).

In response, the Department staged its own reenactment and parked the truck against traffic, as it was the day of the incident. Chief Visconti drove his car while Superintendent Robert Durante, from the advocate's office, sat in the front passenger seat holding the video camera. They drove the car very slowly, pausing as they advanced into the intersection. Despite driving slowly, it was still almost impossible to see the truck in the video. Later in the video, Superintendent Durante then got out of the car and stood five to six feet into the street and filmed straight down Gun Hill Road with the camera trained on the truck, but again it was still nearly

impossible to see the truck. At one point in the filming, Superintendent Durante used the zoom feature on the camera to better show where the truck was located. When asked why he zoomed in on the truck, he stated, “to make sure that everyone could see it.” In essence, Superintendent Durante admitted that it was difficult to see the truck without his manipulating the lens. Indeed, before the zoom feature was shown on the Department’s reenactment video, the witness had to actually point out where the truck was parked so that I could see it (Pet. Ex. 16; Tr. 1181-82, 1184, 1204-05).

While the evidence established that it would have been very difficult to see the truck without looking at it, I am not persuaded by respondents’ theory that Chief Visconti was specifically looking for them. Chief Visconti would have had no reason to know that respondents were off route or to look for them at that particular location. It appears, however, that he was angry about what had happened to his car and may have been looking for someone to take his frustration out on, which would explain the longer, round about way that he took to go back to the borough office. The fact that respondents were parked the wrong way and making a pick-up off route gave him the perfect opportunity to capitalize on the situation.

Another aspect of Chief Visconti’s testimony that did not make sense involved his observations in front of the church. Chief Visconti testified that when he arrived at the church, he watched respondents loading the truck at a quick and steady pace for a “solid ten minutes.” He described the materials that respondents had taken as trade waste, consisting of construction debris, such as tied and untied rugs, more than 30 black bags, and bundled and unbundled wood. Chief Visconti further testified that respondents cycled the hopper of the truck 30 to 40 times while he was watching them. The hopper can hold approximately one ton of refuse. The truck that respondents were driving that day holds approximately 15 tons, but if respondents had completed their entire route it would only have amounted to approximately nine to ten tons of trash (Tr. 120, 454, 550, 568-69, 819, 939).

It is undisputed that respondents completed four ITSAs before they went off route to the church. According to Supervisor Vanihel, who is very familiar with the route, the four completed ITSAs constituted a heavy portion of the route, equating to approximately three to four tons of garbage. When the truck was weighed at the dump it held 3.76 tons of garbage (Pet. Exs. 2, 3, 8; Tr. 121, 160).

During the filming of the dumping process, the carpet remnants that were taken from the church were stuck in the lifted tailgate, meaning that the carpeting had most likely still been in the hopper when the truck was seized. Respondents, Ms. Simms, and the AAMCO workers maintained that the only material that respondents had loaded into the truck was carpeting. This testimony would be consistent with the Department's video of the dumping which showed that the last materials to go into the truck consisted primarily of carpeting and padding (Pet. Ex. 13; Tr. 785, 1074, 1101-02).

Chief Visconti's testimony with respect to what materials were loaded into the truck and how much had been taken is overly exaggerated and embellished. It is highly unlikely that respondents loaded and cycled the truck 30 to 40 times in the ten minute period that they were in front of the church because if they had, the quantity of material Chief Visconti alleged they had taken would have far exceeded the documented weight of the truck's contents. While he was testifying, Chief Visconti was vague and evasive about quantifying the amount of material taken. I found his contention that he is unable to assess or approximate tonnage to be implausible considering his experience and length of tenure with the Department. Supervisor Vanihel, a Department witness, credibly testified about the amount of trash collected on the portion of the route that respondents had completed. If they collected anywhere between three to four tons, and the total weight of the contents of the truck was only 3.76 tons when it was dumped, the only reasonable conclusion is that Chief Visconti seriously misrepresented how much material was taken from the church and how many times the truck was cycled. This could possibly explain why he was so evasive when he was asked to approximate the tonnage of refuse taken at the church (Pet. Ex. 1; Tr. 455-56, 458, 602).

The most serious allegation with respect to this case is that Ms. Simms gave respondent Ortega a gratuity, which he accepted and placed in his pocket. The only witness to this allegation is Chief Visconti, whose testimony on this matter is suspect. Chief Visconti's testimony that just as he was walking over to the truck, Ms. Simms happened to hand respondent Ortega money is extremely coincidental. It is even more unbelievable that after what Chief Visconti himself described as the respondents acting "owly" that respondent Ortega would take a gratuity and place it in his pocket so that half of the bill was exposed. Under normal circumstances, it would be highly unlikely that someone would place money in their pocket in

such a manner without at least folding it. It is even more implausible here, where it is alleged that the money was an illegal gratuity. Indeed, it defies the imagination that someone who was trying to be circumspect would cavalierly stick money in their pocket so as to draw attention to the fact that it is there. Granted it is unclear how Chief Visconti knew or why he assumed that there was money in respondent Ortega's pocket. Perhaps money which was already in his pocket was sticking out a bit or his cell phone made it look like there was something in the pocket. Nevertheless, Chief Visconti's testimony with respect to respondent Ortega accepting a gratuity was incredible.

In contrast, respondents, Ms. Simms, and the AAMCO workers credibly stated that Ms. Simms did not hand respondent Ortega money. It goes without saying that respondents have a self interest in the outcome of the proceeding which must be considered in evaluating their testimony. Despite their motivation for self-preservation, respondents acknowledged a number of things that they do on a regular basis which violate several Department rules. For the most part I found their testimony to be relatively candid. Their credibility was further bolstered by Ms. Simms' testimony and the statements from the AAMCO workers, who had no vested interest in the outcome of this proceeding (Pet. Exs. 11, 12; Tr. 748, 750, 1083, 1144) .

From the very beginning, while she was still at the scene, and later on when she was interviewed by Superintendent Burge, Ms. Simms consistently and repeatedly denied giving money to respondent Ortega. The Department argued that she felt badly that respondents had gotten into trouble while doing her and the church a favor, so she may have been trying to help them by making up a story. Ms. Simms' testimony was a little colorful at times. It appeared that she was enjoying her moment in the spotlight and that portions of her testimony seemed a bit embellished. During her interview with the superintendent, she indicated that money may have fallen out of respondent Ortega's pocket while he was picking up the carpeting and she might have handed it back to him. She theorized that this may have been why Chief Visconti thought she handed him money. During the hearing, however, she denied that money fell out of respondent Ortega's pocket, stating only his cell phone fell out and could not recall telling Superintendent Burge that money had fallen out of respondent Ortega's pocket. Ms. Simms also had some difficulty in estimating timeframes and distances. Nevertheless, I found Ms. Simms' testimony to be truthful and accurate, especially with respect to the most salient points. Any

inconsistencies appear to be attributable to the length of time between the incident and the hearing, and her age¹. (Pet. Exs. 11, 12, Tr. 748, 750, 789-90, 792-93).

Both in her interview and her testimony, Ms. Simms never waived from two facts: that she did not give respondents money and Chief Visconti was aggressive and rude. She consistently maintained that she had only \$1.25 on her because she was going to the store to buy milk when she saw respondents stopped at a traffic light. Since her encounter with respondents was accidental and unplanned, it is completely plausible that she did not have more money on her. During her interview with Superintendent Burge and her testimony at the hearing, she queried why she would give money to respondents since it was their job to collect the trash. Everything in her demeanor attests to this line of thinking. She believes that there would be no reason to compensate someone for doing their job. In the past when she has needed something taken away by the Department, she has called Bronx 12 directly and asked them to come to get it. It appears she thought that stopping two sanitation workers in the street was pretty much the same as calling the garage (Pet. Exs. 11, 12; Tr. 748, 750, 932, 1001, 1023).

With respect to her assessment of Chief Visconti's attitude at the scene, she testified that "everyone was looking at him like he was crazy." She further testified that Chief Visconti arrived at the scene mad, and stated, "these bastards scratched my car." When Ms. Simms tried to explain that respondents were only picking up some carpeting from the church, Chief Visconti was very rude and disrespectful to her. She testified that he was speaking to her like she was a child. Ms. Simms was so upset by how Chief Visconti treated her that she called 311 later that day to make a complaint about his behavior. Nearly two years later, while testifying at the hearing, the more she described what occurred, the angrier she became, stating "I would love to face that man again . . . he was very rude" (Pet. Ex. 7; Tr. 747, 807-08).

I found respondents' and Ms. Simms' testimony that she did not give a gratuity to be much more credible than Chief Visconti's assertion. Chief Visconti's testimony on the whole was unreliable. Chief Visconti's demeanor during the hearing, the inconsistencies in his testimony, the lack of corroboration, an evident bias towards at least one of the respondents, and the fact that much of what he said did not comport with common sense, negatively impacted his

¹ During the hearing Ms. Simms testified that she was 74 years old. During the interview with Superintendent Burge, however, she mentioned that she was born in 1924, which would mean that she is actually 85 (Pet. Exs. 11, 12; Tr. 749, 813).

credibility. As such, I find that the Department failed to establish by a preponderance of the credible evidence that respondents took a gratuity from Ms. Simms.

The Department's other primary witness with respect to the trade waste allegations was Superintendent Burge, who was in charge of the investigation. The superintendent repeatedly testified that he arrived at the scene and Chief Visconti approached him in person to speak about the incident. This was not borne out by the evidence. At first, it may appear that Superintendent Burge was just confused about the timeline given the fact that the incident occurred two years ago. Indeed, several witnesses who testified that they actually saw Chief Visconti at the scene and spoke to him were unable to recall exactly when Chief Visconti left the scene or if he was present when the police arrived (Tr. 916-17, 949-50, 952, 955, 958-59).

In marked contrast to the uncertainty displayed by these witnesses, Superintendent Burge gave very detailed testimony about seeing Chief Visconti in person at the scene and having a conversation about what occurred. Moreover, he testified that Chief Visconti waited at the scene until the truck left for the dump and maintained that Chief Visconti either joined the caravan escorting the truck to the dump or met them there. Despite repeatedly being asked if he was sure Chief Visconti was still at the scene when he arrived, he remained steadfast that he was, providing very detailed testimony. There was no ambiguity or equivocation in his testimony. Unfortunately, his testimony was very inaccurate. According to every witness, including Chief Visconti, the chief had already left the scene before Superintendent Burge arrived. His only conversations with Chief Visconti had to have been on the telephone and the first time they actually saw each other that day was at the dump. This degree of rigidity on a point easily mistaken is troubling and prompts a cautious assessment of other portions of his testimony.

The Investigation

Superintendent Burge was placed in charge of the investigation into whether respondents violated the trade waste order. The superintendent has worked for the Department since 1981. He was promoted to Superintendent in 1993 and was assigned to FIAT the same year. Although there are seven individuals in the FIAT unit, Superintendent Burge is assigned most of the trade waste cases because of his experience and tenure (Tr. 913-14).

Superintendent Burge's investigation consisted of speaking to Chief Visconti about his observations, securing the seized truck at the scene, escorting the truck to the dump, supervising the dumping of the truck while he videotaped it, returning to the scene to interview witnesses at the church and AAMCO, speaking to one of the police officers from the 47th precinct who responded to the scene, and interviewing Ms. Simms. At the conclusion of his investigation, he issued a report summarizing his findings and setting forth his conclusions. As a result of his findings, he concluded that respondents were parked against traffic and off route when they were observed taking trade waste and a gratuity. In essence, all of the allegations made by Chief Visconti were deemed to be true (Pet. Exs. 10, 11, 12, 13).

Indeed, Superintendent Burge did not even interview respondents, which left the impression that it really did not matter what they had to say because he already knew it would be false. Superintendent Burge also failed to speak to Superintendent Butkiewicz or any of the other responding supervisors at the scene. He testified that he did not need to speak to them because they were not involved and Chief Visconti conducted the investigation at the scene. Chief Visconti, however, adamantly denied conducting an investigation and testified that he extricated himself from the scene as quickly as he could. This testimony was corroborated by other witnesses. Ironically, the only person from the Department who bothered to question respondents was Supervisor Vanihel, who appeared to make an attempt to actually gather facts and conduct an investigation. In addition to speaking to respondents, he interviewed Ms. Simms and a worker from AAMCO, who was standing nearby. Despite his diligence, his investigation went no further because no one spoke to Supervisor Vanihel about it and he never wrote a report (Tr. 139, 433-34, 537, 988).

Investigate is defined as "to search into so as to learn the facts." Websters' New World Dictionary – 3rd College Edition 1988. In contrast, conclusion is defined as "the last step in a reasoning process, judgment, decision or opinion formed after investigation or thought." Superintendent Burge's "investigation" proved to not really be an investigation, as much as a mission to try to find information to support Chief Visconti's allegations. It appears that he reached his conclusions before he conducted the investigation, rather than after it. Indeed, Superintendent Burge testified that he believed Chief Visconti's statements "because they were factual" (Tr. 1013). In essence, whatever Chief Visconti had said about the incident was

accepted as truth and was not challenged or questioned. Once the allegations were deemed true, Superintendent Burge set forth to find “facts” to support them. Anyone who stated something that differed from Chief Visconti’s version of events was automatically thought to be lying, especially Ms. Simms (Tr. 1002-03, 1005, 1010).

Superintendent Burge not only supervised the dumping of the truck, he was also the videographer. The audio portion of the video cut in and out causing significant portions of the video to be without sound so it was not possible to hear the commentary as the truck was being dumped. Despite the fact that the carpeting that respondents had taken from the church was stuck in the tailgate, the video demonstrated that the entire contents of the truck were dumped and raked through. Regardless of where something was located in the body of the truck, if it appeared to be some sort of construction material it was set aside by Superintendent Burge and Chief Visconti to be included in the list of “trade waste.” When asked if everything that was listed in his report as trade waste was taken from the church, the superintendent replied not necessarily, but it could have been. He testified that he does not know what came from the church, so he wrote down everything that was on the truck that in his opinion constituted trade waste (Pet. Ex. 13; Tr. 920, 997).

Superintendent Burge was informed that respondents did four ITSAs of the route but never asked if that was a heavy or light portion of the route. Moreover, he inquired about how much would be picked up on the entire route, which was 10 to 12 tons, but never asked how much trash is usually collected on the portion that respondents had completed. When asked if he should have determined how much trash had been collected before respondents had gotten to the church to better assess the ratio of materials in the truck that had actually been taken at the church, Superintendent Burge became very evasive and simply responded that he did not know why it would be important to know (Tr. 942-44, 962).

Sanitation Worker Mischel drove the seized truck to the dump and assisted in the dumping of the truck. He raked through the trash and opened black bags as directed by Superintendent Burge and Chief Visconti. Sanitation Worker Mischel testified that, “it was weird stuff they were pointing out.” He explained that the items in the truck that they pointed to and put aside as trade waste were actually normal trash that would be picked up on a regular basis. According to Sanitation Worker Mischel, they would instruct him to open a bag and if

they found a screw or a piece of tile in it they would tell him to pull it out and then classified it as trade waste. Everyday household trash was being categorized as trade waste. He further testified that Superintendent Burge and Chief Visconti would become very happy whenever they found what they classified as a "trade waste" item. They kept saying, "Oh, we got them." I found Sanitation Worker Mischel to be the most credible witness during this entire hearing. He was extremely candid and forthright. He did not have an obvious vested interest in the outcome. Simply because he was in the same union and a fellow sanitation worker was insufficient to impeach his credibility. He acknowledged that although he had never had a problem with Chief Visconti before, that he was worried about testifying because Chief Visconti would probably read the transcript and target anyone who said something bad about him (Tr. 815, 820-22, 831-32).

Sanitation Worker Mischel's testimony about the investigation at the dump was corroborated by the video of the dumping. It was clear that Superintendent Burge was looking for anything and everything that could possibly substantiate a trade waste violation, regardless of where it was located in the truck. Since the carpeting was still in the hopper, it was highly unlikely that anything located in the front of the truck, in the area furthest from the hopper, could be part of the materials taken from the church, even if the trash had shifted slightly in transport. This, however, did not deter Superintendent Burge, who assumed that an organ or an electric keyboard found in the front of the truck near household trash, which included a tricycle, was actually an organ taken from the church. Even though there was no allegation that respondents had taken an organ or keyboard from the church, the only possible conclusion to draw after finding one in the body of the truck according to Superintendent Burge was that it must have come from the church (Pet. Ex. 13; Tr. 218-19, 787).

After dumping the truck, Superintendent Burge went back to the church to look for Ms. Simms. He did not videotape or take photographs of the scene. He used an audio recorder when he went into the church to relate his observations and record his conversations with others. He testified that he did not videotape inside the church because he thought it was impermissible, yet it is unclear whether anyone in the church was aware they were being audio recorded. Despite Superintendent Burge's contention that he observed a lot of construction work going on in the church, he himself testified that he saw only one person on a ladder taping and plastering a wall.

He acknowledged that there were no signs indicating a contractor was doing work, there were no commercial trucks parked outside, and no other people were present (Pet. Exs. 11, 12; Tr. 923-24, 976, 986, 978-79).

Superintendent Burge started to ask the gentleman on the ladder if he was a paid worker or a member of the church when he was interrupted by Reverend Small. The reverend was not very cooperative with the investigation and after she told the superintendent that Ms. Simms was not present, she made it clear that she wanted him to leave. Superintendent Burge, however, persisted. He sounded annoyed that the reverend was not being helpful, and started aggressively pursuing the matter. He told the reverend that he believed that Ms. Simms committed a crime and that he could turn this matter over to the Department of Investigation if she and Ms. Simms did not cooperate. Reverend Small made it quite clear that she did not appreciate being threatened. She refused to allow Superintendent Burge to speak to the gentleman on the ladder and told him to leave. He left the church to get his business card so that the reverend could give it to Ms. Simms, and when he returned inside, Reverend Small was nowhere in sight. He walked to the back of the church, where the offices are located, to look for her. When he found the reverend, she became even angrier and started yelling at him for coming into a private space of the church without permission (Pet. Exs. 11, 12; Tr. 927, 979, 981, 984-86).

Superintendent Burge's interview style can best be described as selective. Since he had already concluded that respondents had taken trade waste from the church and that Ms. Simms had given them a gratuity, it appeared that his questions were not meant to elicit the truth as much as to find information to support his conclusions. While interviewing George Ralph and Jose Diaz, two AAMCO workers, he never asked if any other AAMCO workers had seen what had happened. It turns out that there was a third worker, Louis Matos, who was present and tried to tell Chief Visconti to stop yelling at Ms. Simms. Respondents were able to obtain a statement from Mr. Matos. The statement indicated that he saw respondents take the carpeting and that Chief Visconti approached one of them and grabbed money out of his pocket. He stated that Chief Visconti said something about his car being scratched. Mr. Matos further stated that Ms. Simms did not give any money to respondents and that he tried to tell this to Chief Visconti, but he would not listen to him. The signed statement is not notarized, but it is witnessed by George

Ralph. It also has a copy of Mr. Matos' business card attached and his home address and telephone number, which lends to its credibility (Resp. Ex. R; Tr. 963, 1151).

Superintendent Burge's questioning of Mr. Ralph and Mr. Diaz was abbreviated. The superintendent asked if they saw Ms. Simms put money in respondent Ortega's pocket and they said no. Mr. Ralph began to elaborate, and from listening to the audio tape of the interview, it appears that the superintendent changed the subject to ask if the police arrived at the scene. Once he elicited that Chief Visconti did not physically assault respondent Ortega he concluded the interview. Mr. Ralph and Mr. Diaz provided mostly yes and no answers. Superintendent Burge did not encourage them to elaborate (Pet. Exs. 11, 12).

Superintendent Burge was a very difficult witness. It was plain that he did not like the questions posed by respondents' counsel, and instead answered the questions he thought should be asked. He was evasive and non-responsive throughout his testimony. At one point, Superintendent Burge had to be admonished to answer the questions as they were asked. As discussed above, his testimony about the scene was so inaccurate that it negatively impacted his overall credibility. His lack of credibility coupled with the inadequacy of his investigation calls his findings into question.

Accordingly, based on the credible testimony of Ms. Simms and the AAMCO workers, and the lack of credibility attaching to the testimony of Chief Visconti and Superintendent Burge, I find that the only materials that respondents took from the church were carpeting and padding. The Department was unable to establish by a preponderance of the credible evidence that respondents took black bags, hedges, an organ, bed frames, mattresses, wooden furniture, or any item other than carpet remnants and padding. Moreover, the Department failed to credibly establish that respondents took more than the material that was still in the hopper when the truck was seized. I find that more likely than not all of the trash in the body of the truck was collected while respondents serviced the four completed ITSAs.

The Trade Waste Order

Having found that respondents did not take a gratuity and that the only materials that they took from the church were various sized pieces of carpeting and padding, the only question remaining is whether taking carpet remnants from a church constitutes a violation of the trade

waste order. General Order 2001-19 regarding trade waste has been in effect since December 24, 2001. The order generally explains that sanitation workers may not solicit or accept a gratuity for doing their job and that they should not collect trade waste. The order defines trade waste as:

1. Any material originating from any building, premises, property or site other than a residential building, a building occupied by a New York State (“State”) or New York City (“City”) government agency or department (“agency”), or a building which is exempt from New York City Real Estate Taxes for which service has been approved by the Department’s Deputy Commissioner for Legal Affairs (i.e., a “special use” building).
2. Any material originating from a commercial tenant of:
 - a. A residential building, or
 - b. A building occupied by a State or City agency, or
 - c. A special use building,except where such commercial tenant is a participant in the Department’s Pro/Fee Program.
3. Any material originating from the alteration, construction, repair or maintenance of a residential building (“Work”), which was performed for a fee, by a contractor or any person engaged in the home improvement business (“Contractor”). Such material may include, but is not limited to cement, concrete, lumber, plasterboard, plaster, rock, or timber (“Construction Debris”).
4. Any grass clippings and tree limbs or branches (“Grass Clippings”) originating from work performed by a commercial landscaper or gardener (“Landscaper”) on a residential property.

The materials that respondents collected were various sized pieces of carpeting and padding from a church, which is a non-profit entity. Churches are exempt from New York City Real Estate Taxes, Real Property Tax Law § 420-a (Lexis 2009), and it is undisputed that the church in question is serviced by the Department (Tr. 54, 675, 982). Therefore, pursuant to paragraph 1, churches are generally exempt from the trade waste order. Interestingly, most of the Department’s witnesses were unsure whether churches are exempt (Tr. 103-04, 161, 433-34, 440-41, 724). Even Chief Visconti initially acknowledged that churches are exempt from the trade waste order and then later changed his mind (Tr. 446-47).

Paragraphs 2 and 4 do not apply because the church is not a commercial tenant and the materials taken did not include grass clippings from work done by a commercial landscaper. Paragraph 3 refers to materials generated from construction work performed for a fee by a contractor for work done on a residential building. Since this case involves a church, not a residential building, this section of the trade waste order does not apply either.

Even if it did, the Department still failed to establish that the work was done by a paid contractor. Several witnesses testified that it was not apparent from the outside of the church that any construction was taking place. Indeed, Superintendent Burge testified that there were no construction signs or commercial vehicles. He observed only one person performing work and Reverend Small told the superintendent that he was a member of the church, not a paid worker. The only person who indicated that the workers may have been paid to do the work was Ms. Simms and her testimony was inconsistent on this point since she also testified that people doing the work were members of the church. I find Reverend Small's statement to Superintendent Burge on this point to be more credible than Ms. Simms' inconsistent testimony as to whether the church paid for the work to be done. It is unclear if Ms. Simms' would be privy to the information regarding payments, whereas the reverend would be. I find that the Department failed to establish that anyone was paid to remove the carpeting or fix the damage from the leak. Regardless, it is of little consequence because the order clearly states that materials generated by a paid contractor constitute trade waste only if that work is done on a residential building. A church is not a residential building (Tr. 160-61, 434-35, 688, 767-68, 774). Therefore, the materials taken from the church do not constitute "trade waste" as defined by General Order 2001-19.

The only question that remains is whether the amount of materials collected at the church violated the other portions of the order. Pursuant to section III of General Order 2001-19, a collection crew may take six bags, boxes, bundles, and cans of construction debris that may be considered trade waste if the work was not performed by a contractor. Taking anything in excess of this number would violate the trade waste order. This section of the order, however, clearly refers to construction debris "placed out for collection at the curb adjoining a *residential building*." (emphasis added). Even if respondents took more than six bundles of carpeting, they

still did not violate this provision because the materials were taken from a church, not a residence.

The only portion of General Order 2001-19 that potentially applies to a church would be the gratuities section, which does not make a distinction about where a collection is being made. The Department, however, failed to credibly establish that respondents solicited or accepted a gratuity. Therefore, I find that respondents have not violated the trade waste order.

Conflicts of Interest Violations

Respondents were charged with violating the City Charter, in particular, section 2604(b)(2), which prohibits a public servant from engaging in any business or transaction which is in conflict with the proper discharge of his official duties; section 2604(b)(3), which prohibits a public servant from using his position to obtain any financial gain or other private or personal advantage; and section 2604(b)(13), which prohibits a public servant from accepting a gratuity or compensation for performing his official duties. I have found that respondents did not accept a gratuity nor did they collect trade waste. Although doing a favor for an “associated” person could violate section 2604(b)(3), in this case there was no evidence that respondents were associated with Ms. Simms within the meaning of sections 2604(b)(3) and 2601(5). Ms. Simms was not a relative, friend, or business associate. She is a civilian who lives in the neighborhood and works for a neighboring church. *Cf. Conflicts of Interest Bd. v. Campbell Ross*, Conflicts of Interest Bd. Case No. 97-76 (Dec. 22, 1997), *adopting* OATH Index No. 538/98 (Nov. 13, 1997) (advantage was not financial, but violated 2604(b)(3) because city employee violated her official duty to favor her “associated” spouse). Nor did respondents violate section 2604(b)(13) of the Charter because the disciplinary charges regarding accepting a gratuity should be dismissed.

Section 2604(b)(2) of the Charter must be interpreted in conjunction with section 1-13 of the Conflicts of Interest Rules. 53 RCNY § 1-13. Section 1-13(a) states that it shall be a violation of section 2604(b)(2) for any public servant to pursue personal and private activities during times when he is required to perform services for the City. Section 1-13(b) states that it shall be a violation of section 2604(b)(2) for any public servant to use City equipment for any non-City purpose.

Respondents were found guilty of being off route to pick up carpet remnants from a church and parking the truck illegally. By leaving their route and collecting this trash at the church, respondents violated the Department's Code of Conduct. They did not, however, engage in their own personal and private activities on City time nor did they use City equipment for a non-City purpose. The Department normally services this church and would have collected the carpeting using City equipment in the ordinary course of business. Moreover, removing the carpeting from the church should be construed as a City purpose. Several witnesses testified that the carpeting would have been collected from the church on the following day during the Department's regular routing (Pet. Ex. 8; Tr. 95, 982). In other words, the Department services this church, just not on the day respondents collected the carpeting. The most that respondents did wrong was to do the work a day earlier than they should have. *Cf. Conflicts of Interest Board v. Brenner*, Conflicts of Interest Bd. Case No. 2008-716 (Jan. 23, 2009) (Deputy Director for the Department of Parks and Recreation used a city-owned vehicle and E-ZPass without authorization to conduct personal errands on the weekend); *Conflicts of Interest Board v. Guerrero*, Conflicts of Interest Bd. Case No. 2008-922 (Apr. 29, 2009) (Sanitation Worker, while on city time, sold unauthorized Department of Sanitation merchandise for personal profit from his personal vehicle outside a Department garage). While in other circumstances, doing a favor for a private citizen, using City equipment, might constitute a violation of 2604(b)(2) and rule 1-13, such is not the case here.

Accordingly, I find that respondents did not violate sections 2604(b)(2), (b)(3), and (b)(13) of the Charter.

FINDINGS AND CONCLUSIONS

1. The Department established that respondents failed to obey all Department rules, regulations and orders (rule 3.1) on July 27, 2007.
2. The Department established that respondents conducted themselves in a manner prejudicial to good order and discipline (rule 3.2) on July 27, 2007.
3. The Department failed to establish by a preponderance of the credible evidence that respondents failed to report a conflict of

interest, corruption or criminal activity by a city employee (rule 4.2) on July 27, 2007.

4. The Department failed to establish by a preponderance of the credible evidence that respondents accepted money in connection with their duties as employees of the Department (rule 4.3) on July 27, 2007.
5. The Department established that respondents used a Department vehicle without authorization (rule 5.2) on July 27, 2007, to service a stop that was not on their route for that day.
6. The Department established that respondents permitted the unauthorized use of a Department vehicle (rule 5.3) on July 27, 2007, to service a stop that was not on their route for that day.
7. The Department failed to establish by a preponderance of the credible evidence that respondents accepted, removed, or helped remove trade waste (rule 6.1) on July 27, 2008.
8. The Department failed to establish by a preponderance of the credible evidence that respondents engaged in any business or transaction which is in conflict with the proper discharge of their official duties on July 27, 2007, in violation of section 2604(b)(2) of the City Charter.
9. The Department failed to establish by a preponderance of the credible evidence that respondents used their positions to obtain a financial gain on July 27, 2007, in violation of section 2604(b)(3) of the City Charter.
10. The Department failed to establish by a preponderance of the credible evidence that respondents accepted a gratuity or compensation for performing their official duties on July 27, 2007, in violation of section 2604(b)(13) of the City Charter.

RECOMMENDATION

Upon making the above findings and conclusions, I requested and reviewed a copy of respondents' personnel abstracts in order to make an appropriate penalty recommendation. Respondent Kaplan was appointed as a sanitation worker on April 17, 2000. During his nine-year tenure with the Department, he has been disciplined on three occasions for sick leave violations. On December 10, 2004, he was suspended for one day for failing to submit medical

documentation and being out of residence while on sick leave. Respondent Kaplan received a reprimand for being out of residence while on sick leave on August 29, 2007 and a \$50 pay fine for failing to provide medical documentation.

Respondent Ortega was appointed as a sanitation worker on August 9, 1993. During his 16-year tenure with the Department he has been disciplined on thirteen occasions. Respondent Ortega has violated the Department's drug and/or alcohol random testing program on three occasions. For the most recent violation in 2008, he signed a last chance agreement and is required to be tested monthly and attend counseling for two years. On February 10, 1997, respondent Ortega forfeited two vacation days for an unauthorized absence, a lateness, and being out of residence while on sick leave. He received a reprimand for failing to be familiar and comply with all Departmental Orders and rules on July 18, 1997. On October 29, 1997, respondent Ortega forfeited one vacation day for an unauthorized absence. He was similarly suspended for two days on March 20, 2007, and four days on August 29, 2007, for subsequent unauthorized absences. Respondent Ortega forfeited one vacation day on April 27, 1998, and was suspended 11 days on June 1, 2001, for acting in a discourteous, unprofessional or threatening manner. He forfeited three vacation days on April 6, 1998, for failing to be present at an assigned work site during work hours. On July 2, 1999, respondent Ortega received a 15-day pay fine for an unauthorized absence, failing to be present at an assigned work site on two occasions, failing to call in at least one hour before the start of his assigned tour, being out of residence while on sick leave on two occasions, and causing or permitting Department property to be damaged. Finally, on January 21, 2009, he was suspended for five days for acting in a discourteous, unprofessional, or threatening manner, failing to be present at an assigned work site, and causing or permitting Department property to be damaged.

Respondents were originally suspended for 30-days immediately following this incident. The suspension, however, was lifted after 10 calendar days and the \$20.00 bill was returned to respondent Ortega. The Department requested that respondents be terminated if all of the charges were sustained. The more serious charges of accepting a gratuity and collecting trade waste, however, have not been established. Instead, both respondents have been found guilty of being off route and respondent Ortega has also been found guilty of parking the Department truck facing the wrong way against traffic, in violation of rules 3.1, 3.2, 5.2, and 5.3 of the Department's rules of conduct, subjecting respondents to penalties under the Administrative

Code. The Administrative Code provides for the following penalties for each substantiated complaint: "forfeiting or withholding pay for a specified time, not exceeding thirty days; . . . suspension, without pay during such suspension, for a period not exceeding thirty days; or . . . dismissal from the force." Admin. Code § 16-106(a) (Lexis 2009).

During the course of the hearing, more than one witness testified that on occasion sanitation workers have crossed a road and parked against traffic to expedite the collection process and avoid having to drive around the block. Even if this happens on a regular or semi-regular basis, it is still unsafe and unnecessary, not to mention illegal. Moreover, East Gun Hill Road, where this occurred, is a six-lane road. In order to be able to park curbside while facing in the wrong direction, respondent Ortega had to cross at least two lanes of traffic on a very busy thoroughfare. I find it hard to believe that anyone in the Department would condone or even look the other way with respect to such a practice on this particular street. Respondent Ortega's justification for parking the truck in such a manner was to expedite this collection and get back to their route so that they could return to the garage early. This rush to complete the route so that they could finish early is an insufficient reason for parking the truck against traffic on a six-lane road.

In *Department of Sanitation v. Guastafeste*, OATH Index No. 658/00 (May 1, 2000), *aff'd*, 282 A.D.2d 398 (1st Dept. 2001), a sanitation worker was suspended for 30 days for unsafe driving, running a stop sign and getting into two accidents. Similarly, in *Department of Sanitation v. Mullings*, OATH Index No. 1087/03 (May 20, 2003), a sanitation worker was suspended for 30 days for negligent driving and causing two accidents, in addition to lying to an investigator about an accident. These cases can be distinguished from the present case because they both involved moving violations that resulted in accidents. Here, respondent Ortega did not get into an accident but rather parked the truck in an illegal and unsafe manner. Taking into account the type of street that this occurred on and the circumstances presented in this case and his significant disciplinary history, respondent Ortega should receive a ten-day suspension for illegally parking the truck against traffic.

I find both respondents guilty of being off route. In prior cases involving sanitation workers being off route, the penalties have ranged from seven to 20 days, depending upon the circumstances and how many occasions the sanitation worker had left his route. *See Dep't of Sanitation v. Whitehead*, OATH Index No. 2176/01 (Dec. 12, 2001) (seven-day suspension for

leaving the route to use the bathroom after being given a direct order to stay); *Dep't of Sanitation v. McCutchen*, OATH Index No. 1728/98 (Jan. 25, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD00-102-SA (Nov. 15, 2000) (10-day suspension for being off route to conduct a personal errand and returning to the garage without permission); *Dep't of Sanitation v. Gonzalez*, OATH Index No. 1841/01 (Aug. 17, 2001) (20-day suspension for being off route during a coffee break and being involved in a minor accident). In this case, respondents did not disobey a direct order nor did they leave the route for personal reasons. Moreover, they were not involved in an accident. Their motivation to assist an 85-year old woman from the neighborhood and do a favor for a house of worship mitigates their wrongdoing. The appropriate penalty under the circumstances is a five-day suspension without pay for both respondents.

Accordingly, I recommend that respondent Kaplan be suspended for 5 days without pay and respondent Ortega be suspended for 15 days without pay.

Kara J. Miller
Administrative Law Judge

September 4, 2009

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

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