

Dep't of Education v. Robles

OATH Index No. 2275/09 (Oct. 19, 2009)

Custodian engineer was guilty of theft for removing a liquid substance in 55-gallon drums from his assigned school on several occasions without permission or authority and converting the substance to his own personal use. ALJ also concluded that conflicts of interest rules were violated by this conduct and by his improper receipt of compensation through a scheme intended to conceal from the Department private payment for work on the school basement. Termination recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF EDUCATION
Petitioner
-against-
LOUIS ROBLES
Respondent

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, Department of Education (the "Department"), pursuant to section 75 of the Civil Service Law. Respondent Louis Robles is a custodian engineer charged with four specifications of misconduct, which include removing a liquid substance in 55-gallon drums from P.S. 266 without permission or authority and converting the substance to his own personal use, and building a wall in the school basement during work hours and receiving compensation for it, in violation of anti-collusion rules, conflicts of interest rules, and the New York Penal Law.¹ Respondent denies the charges.

A hearing was conducted before me on July 28 and 30, and August 19, 2009. Petitioner presented the testimony of five witnesses in its case-in-chief and one rebuttal witness. Respondent called two witnesses but did not testify himself. Counsel submitted closing briefs on September 3 and September 10, 2009, respectively, at which time the record was closed.

¹ Petitioner withdrew specification 3 on the first day of trial.

For the reasons set forth below, I find respondent guilty of misconduct and recommend his termination.

ANALYSIS

Mr. Robles is employed by the Department as a custodian engineer. He is assigned to Public School 266 in Queens. A custodian engineer's responsibility is to maintain a safe and clean environment in the school that is conducive to the educational process (Tr. 187). This encompasses all chores attendant to making sure the building is heated, lighted, warm, and ready to go for the children, the mechanical equipment is functioning, the bathrooms are stocked with toilet paper, paper towels, and soap, the floors are polished, the grounds are neat, clean and groomed, and the garbage is put out. The custodian engineer is an employee of the Department whose responsibilities are memorialized in the collective bargaining agreement between the City of New York and the International Union of Operating Engineers, Local 891 (Pet. Ex. 11). The custodian engineer is responsible for hiring his own staff to assist him. These workers are not employees of the Department, but are employees of the custodian engineer.

In April 2007, the Department commenced an investigation of Mr. Robles after receiving an anonymous letter written by a whistleblower who asserted that Robles was stealing heating oil from the school by siphoning the oil from the boiler system into 55-gallon drums and transporting the drums from the school to his home during work hours (Pet. Ex. 1, Tr. 30-31). The letter, admitted in evidence as Petitioner's Exhibit 1, also reported that Mr. Robles received cash from Samuel Field Y, an independent contractor that operates afterschool programs at P.S. 266, to build a wall in the basement of the school. The letter enclosed 24 numbered photographs of the school facility, including its two boilers and the 55-gallon drums allegedly used in the theft (Pet. Ex. 2). The photographs also showed the wall construction. The writer wanted this improper activity to be stopped.

There are two boilers in the basement of P.S. 266. The writer, who was never identified during the course of the Department's investigation, claimed that a flow valve had been attached to boiler number 1 to tap the oil supply (Pet. Ex. 1). Photographs showed a bright red handle (later identified as a flow valve) on boiler 1 and on one of the 55-gallon drums, and a siphon hose atop a drum (Pet. Ex. 2). The writer claimed that respondent would take the oil shortly after the oil was delivered.

With respect to the wall constructed in the basement, the letter claimed that the wall was built entirely by school workers during work hours (Pet. Ex. 1). Built to provide storage space for the afterschool program, the wall effectively reduced the size of a space that had been used to store mechanic's equipment.

The anonymous letter was addressed to Thomas Keaney, who had been recently installed as deputy director of facilities for District 26 in Queens, which oversees the custodians in their day-to-day operation of school buildings. He reported its receipt to the Special Commissioner of Investigations for the New York City School District ("SCI") (Pet. Ex. 1, Tr. 31, 184-85, 198-99).

Matthew Martucci was assigned by SCI to investigate the allegations. Investigator Martucci went to the school and videotaped the areas described in the letter (Pet. Ex. 3), interviewed members of school staff, and reviewed video streamed from surveillance cameras at the school (Pet. Exs. 4, 5). At the conclusion of his investigation, he submitted a final report to the Chancellor which substantiated the charges that Louis Robles and his employee, Victor Core, removed an unidentified liquid from P.S. 266 in 55-gallon drums and that Robles was paid a sum of money to construct a partition wall in the basement of the school (Pet. Ex. 10, Tr. 139).

Investigator Martucci visited P.S. 266 for the first time in this investigation on May 18, 2007 (Tr. 62-63). That day, he conducted interviews and videotaped the areas depicted in the photos received by Mr. Keaney. He videotaped the two boilers located in the basement of P.S. 266, which appear to be the same as those in the photos, except there was no flow valve on either boiler (Tr. 66, 72-80). He also taped the fourth floor room where several 55-gallon drums were located. Three drums were present on the day he visited, not the five depicted in the photos, and none had flow valves attached to them. Also, there was no siphon hose present, as in the photos. He noted that the barrels appeared to contain antifreeze coolant. Investigator Martucci did not verify whether the drums in the photographs were the same as those he saw during his visit, by comparing the serial numbers shown on top of them. He did not examine the content of the drums that were present except to note that they had a "residue" in them (Tr. 159). He said he turned one barrel over and observed a liquid run out but he could not identify the liquid. He did not indicate whether the residue bore any resemblance to oil, and he did not recall touching the residue with his fingers (Tr. 160).

During his May 18 visit, Investigator Martucci met with Thomas Keaney who told him he had never seen a flow valve on the boiler (Tr. 147, 201). Keaney showed him the school's 24-hour video surveillance security system at the school and Martucci had the surveillance video downloaded to portable disks so he could review it (Tr. 89-90). Petitioner submitted a portion of the video in evidence along with still photographs taken from the video (Pet. Exs. 4, 5). In video captured on December 18, 2006, from 7:39 p.m. to 7:50 p.m., Robles is seen with one of his employees, Victor Core, Sr., removing two 55-gallon drums from the school with a hand truck (Tr. 92, 99-101). When the investigator interviewed respondent about the footage, he admitted being in the video and stated that he was removing degreaser in the drums (Tr. 103-04). He said that he and Core used the degreaser to clean up their work area at a garage they rented to work on classic cars. Investigator Martucci did not inquire whether the school kept degreaser on site that could have been pilfered by Robles (Tr. 174). Later on the same videotape, Robles and Core can be seen, at approximately 10:32 p.m. returning the two drums to the school (Tr. 143-44, Pet. Ex. 5).

On August 3, 2007, Investigator Martucci interviewed Victor Core, Sr., who was also identified in the surveillance video. Mr. Core was a custodian engineer at another school and he worked part time as a cleaner for respondent (Tr. 108-10, 112). Core told him he had been approached by Robles approximately five times in 2006 and 2007 and directed to remove 55-gallon drums of degreaser from the school. He said they both worked on classic cars at a garage they rented from a Dr. Patel. Core said there was no water supply at the garage and they used a power washer to clean the floor with the degreaser.² He admitted they did this during work hours and he would return to the school afterward and clock out (Tr. 111). Core said he saw a flow valve on boiler 1 but said he did not know why it was there (Tr. 112). Core did not verify the Department's claim that Robles took oil from the school. In his notes, Martucci wrote that Core told him they removed water in the drums (Tr. 154, Resp. Ex. B at 3).

Investigator Martucci interviewed the school fireman, Harold Kane on May 18 (Tr. 80). As fireman, Kane was one of a number of staff hired by Robles to assist him in maintaining the school. The fireman's duties are to operate and maintain the heating, ventilation and air conditioning systems, which includes the boiler (Tr. 181). Kane testified at the hearing that he

² On August 7, 2007, Investigator Martucci interviewed Dr. Patel who confirmed he had a lease agreement with Robles and Core (Tr. 114). This financial arrangement between superior and subordinate could have been charged as a violation of section 2604(b)(14).

noticed shortly after he started working there in January 2007 that there was a flow valve on boiler 1, and when he asked about it, respondent told him it had been put there because of a problem with the boiler (Tr. 81-83, 282-84). He identified the valve as the one depicted on boiler 1 in Petitioner's Exhibit 3 (Tr. 285). He also said that, in March or April, respondent told him to remove the flow valve from the boiler and paint the boiler room (Tr. 292-93). Robles told him that inspectors were coming so they had to take the valve off and place an elbow on the piping (Tr. 293). Kane said he believed the purpose of the flow valve was to remove oil from the boiler system, and he said he threw the valve in the garbage after Robles told him to remove it. He also said that he threw away a journal that he kept in which he detailed his daily work activities (Tr. 301-03).

Investigator Martucci testified that Kane told him that he "heard" that respondent was stealing oil from the school, but he denied seeing respondent remove oil and said he was never asked to assist him (Tr. 83). Investigator Martucci did not indicate whether he inquired who had told him respondent was stealing oil or why he had thrown the valve in the garbage without reporting it to anyone. Kane also told him there had been five 55-gallon drums on the fourth floor but there were only three now (Tr. 85). He did not know what had happened to the other two. Kane denied being the informant who sent the letter and photographs to the Department (Tr. 85, 310), but Investigator Martucci said that the return address on the package belonged to a relative of Kane's (Tr. 152).

On May 22, Investigator Martucci interviewed Victor Loor, who was employed by Robles as a cleaner (Tr. 105-06, 232). Mr. Loor told the investigator, as he also testified, that in the Fall of 2006 he helped Robles move two 55-gallon drums from the school to his pickup truck; Robles told him the drums contained oil that he was transporting to another school that had a shortage (Tr. 238-39). Loor testified that he at one time observed a flow valve on boiler 1 and later noticed it was gone (Tr. 240, 246). He did not know who removed it. He said respondent never asked him to remove oil from the boiler. Loor denied sending the anonymous letter and photographs to the Department (Tr. 107, 248).

Investigator Martucci interviewed Mr. Robles on November 14, 2007 (Tr. 131). Though respondent knew the function of a flow valve, he said that he had never placed one or seen one on boiler 1. Robles denied ever giving Harold Kane a direction to remove a flow valve from the boiler and called Mr. Kane a liar (Tr. 132). Respondent admitted removing 55-gallon drums

from the school four or five times but said they were filled with degreaser that was taken to the garage where he and Victor Core worked on classic cars (Tr. 133). He also denied working at the garage during hours when he was required to work at the school and said that Victor Core was lying about that.

With respect to the wall built in the basement of P.S. 266, Investigator Martucci interviewed Glynis Harrison, the program director for the afterschool program at P.S. 266 which was run by Samuel Field YM & YWHA, Inc. ("Samuel Field Y") on May 18 (Tr. 86-87, 382). She admitted entering into a verbal agreement with Robles to construct a wall in the school basement to create a storage space for snack food purchased for the children attending the program so it would be safe from mice. Ms. Harrison testified that respondent offered to build the room when she complained to him about the mice problem in the basement (Tr. 387). She said Robles told her he was having someone else (whom he did not name) do the work, and she gave him a form to be completed by that person so that a check could be issued by Samuel Field Y (Tr. 393). The name written on the form he returned to her was Thomas Urbanik. She said that Robles set the fee for the labor and said he would have "his guys" do the work (Tr. 398, 400). She was not sure who he meant. According to her interview and testimony, she did not know who Urbanik was and had no negotiations or conversations with him (Tr. 399). Urbanik, it turns out, is Robles's brother.

She and Robles went to Home Depot to purchase the materials on January 8, 2007, and she gave Investigator Martucci a receipt and invoice indicating \$555 in construction materials were purchased that day (Pet. Ex. 6). She paid for the labor with a \$350 check, dated March 30, 2007, written on Samuel Field Y's account to Thomas Urbanik, which she gave to respondent and made the notation "submitted to Lou on 4/12/07" (Tr. 88, 394, 396, Pet. Ex. 7). She gave Investigator Martucci a copy of the cancelled check. This was the only check issued for the construction work. Urbanik's bank records indicate that he negotiated the check on May 7, 2007, after writing a \$300 check to Robles on May 5, 2007 (Pet. Ex. 8). Robles cashed the check later that month (Pet. Ex. 9).

Investigator Martucci met Kenneth Morris, the principal of P.S. 266 on May 18. Principal Morris testified that he had a conversation in Fall 2006 with Robles and Harrison about the need to put a divider in the storage area to protect the food from mice which had become a problem in the school due to construction in the surrounding area (Tr. 410-11). He understood

that a wall would be built, that Samuel Field Y would pay for the materials, and that Robles would “take care of . . . the wall being built” (Tr. 412). He said they did not discuss who would pay for the labor and he was not aware that a contractor was involved. Investigator Martucci said the principal told him that he was aware the partition wall was being built but he had directed that no money be exchanged between respondent and the afterschool program for its construction (Tr. 64). Morris denied any recollection of meeting or speaking with Thomas Urbanik (Tr. 412-13).

Harold Kane said that in March or April 2007 he installed the sheetrock and insulation for the basement wall and that respondent constructed the 2 x 4 framing for the wall (Tr. 83-84, 304, 308). He said this work was performed during school hours and that Robles was paid to construct the wall but Kane received no compensation (Tr. 84-85, 205). He said he never met anyone named Thomas Urbanik and he was unaware of an outside contractor doing any work on the wall (Tr. 306).

Victor Core, Sr., who did not testify at the hearing, told Investigator Martucci that he, Robles, and Kane built the wall (Tr. 112-13). Core did the 2 x 4 framing, Robles installed the insulation, and Kane did the installation. He said that Robles directed him to do the work, which was performed during work hours, and he received no compensation for his work. Core never heard of anyone named Thomas Urbanik.

Mr. Robles told Investigator Martucci that Ms. Harrison negotiated construction of the wall directly with Principal Morris and Robles’s brother, Urbanik, and that she falsely represented otherwise (Tr. 134-35). Although he admitted purchasing the building materials at Home Depot with Ms. Harrison, he denied taking any part in building the wall or negotiating payment (Tr. 136). He also denied receiving payment from his brother for the wall construction and said that he had received money from Urbanik to purchase bedroom furniture for his children, a claim that Urbanik corroborated (Tr. 137).

Investigator Martucci interviewed Thomas Urbanik by phone on September 19, 2007. Urbanik said he was in California at the time (Tr. 114-16). Urbanik told Martucci that he wrote his brother a check on May 5, 2007, and that he writes checks to family members occasionally. He at first said he had never worked for the NYC public schools but then said that he had done some work for his brother. He either could not or would not identify the person who contracted with him to do work at the school, and he did not describe the nature of the work. He became

heated when asked if he was an authorized Department contractor. Their conversation was brief and Urbanik ended it abruptly saying he wanted to contact his attorney.

Mr. Urbanik testified by telephone at the hearing. Although scheduled to appear at trial, he was unavailable on the trial date and explained that his job required him to travel out of town unexpectedly (Tr. 338-39). Mr. Urbanik works as a solutions engineer for a software company. He does not usually do construction work, but he said he does a lot of work around the house as a hobby. He said he contracted with Samuel Field Y to build the wall in the basement of P.S. 266 around Thanksgiving 2006. The prospect arose when he accompanied his brother to a comedy night held at the school and met Principal Morris, who told him he wanted a wall built because of a rodent problem. Although Robles was there, he said he was introduced to Morris by another brother, Joseph Weis (Tr. 344). The job was simple enough for him to do, so he agreed to build the wall. When Urbanik told Robles that he had agreed to do the work, his brother said Robles should not do it and that he would have no involvement in it, which was fine with Urbanik (Tr. 350). According to Urbanik, after he started the work, he had to travel for his job and he told Morris that he would finish when he returned, but Morris needed the work done right away. He said they “went back and forth” about it until he learned that his brother was under investigation; he then decided it was best to stay away from the project. He said he did the work alone, at night, after his day job, between 7:00 and 10:30 p.m. He was there on two nights, the Monday and Wednesday following Thanksgiving in 2006 (Tr. 340, 359). He said he talked by phone with Harrison, negotiating the amount of his \$350 fee, and giving her the information needed to process his check, which he said he received by mail. He denied that it was mailed by his brother (Tr. 340, 347).

Aside from his statement that he is respondent’s half brother, there was no aspect of Mr. Urbanik’s testimony that seemed credible. Most importantly, no one associated with the school or construction project knew who Urbanik was except his brother. Principal Morris and Ms. Harrison denied any knowledge of him and any contact with him, and they both testified that it was Harrison, not Morris, who wanted the wall built and that Morris had little to do with it. Urbanik seemed confused even about who Morris was, describing him as the principal of the Samuel Field program, rather than the school (Tr. 339). His claim that he performed the construction around Thanksgiving 2006 was contradicted by Harrison’s testimony and by the

receipt evidencing the purchase of the building materials in January 2007, two months later (Tr. 392).

Aside from the contradictions with more credible evidence in the record, Urbanik's story itself made no logical sense. First, he was unpersuasive in his assertion that as a systems engineer he would have any interest in taking on a minor construction project in the public school where his brother worked, particularly when (he claimed) his brother disapproved of it. Equally as unpersuasive was the notion that he had all discussions about taking on this work not with his brother, who was in charge of all custodial work in the school, but with the principal who would have no hands-on involvement in the project. We are asked to believe that this witness left his full-time job as a systems engineer on two days to work construction in a school basement, while no one else was present to observe, all for the relatively minor fee of \$350. How he gained access to the school after hours was never pursued during his questioning. The story is quite unbelievable. It hardly seems worth the loss of one's credibility to spin such an implausible yarn, under oath, even for a close relative.

Adverse inference

For his failure to testify, the Department contends that an adverse inference should be taken against Mr. Robles. Although respondent had the opportunity to answer and to contradict petitioner's evidence, he chose not to. Respondent's failure to testify "allow[s] the trier of fact to draw the strongest inference against him that the opposing evidence in the record permits." *Comm'r of Social Services v. Philip De G.*, 59 N.Y.2d 137, 141 (1983); *see also Noce v. Kaufman*, 2 N.Y.2d 347, 353 (1957). The adverse inference does not permit the trier of fact to fill in gaps in the petitioner's proof, or to speculate about what the respondent's testimony might have been. *Laffin v. Ryan*, 4 A.D.2d 21, 26-27 (3d Dep't 1957). Instead, "[t]he adverse inference relates only to the question of contradicting or corroborating evidence which is already in the case. It cannot be used as a basis for finding upon a point on which there is no evidence at all." *Dep't of Sanitation v. Richins*, OATH Index No. 167/01 at 13 (Oct. 15, 2001). Where noted, I have drawn such inferences from respondent's refusal to testify, taking the evidence presented in the light most favorable to petitioner, including all reasonable inferences to be drawn from such evidence.

Removal of liquid substance from P.S. 266 without permission or authority
(Specifications 1 and 2)

Specifications 1 and 2 allege that respondent removed a liquid substance from P.S. 266 in 55-gallon drums without permission or authority during 2006 and 2007 and converted the substance to his own personal use or benefit.³ These allegations were sustained principally with hearsay evidence.

The school's video surveillance tape shows Robles and Victor Core, Sr., removing two 55-gallon drums on December 18, 2006, and returning with the drums hours later. Both Robles and Core admitted they were captured on the tape (Tr. 99).

In his post-trial brief, respondent concedes that he removed liquid from the school in 55-gallon drums but contends that the drums contained only water (Respondent's Post-Hearing Brief, at 3). Martucci testified, however, that both respondent and his accomplice, Mr. Core, admitted to him that they removed degreaser from the school in 55-gallon drums (Tr. 111-12, 133). According to Martucci, both Robles and Core offered a motive by admitting they were bringing the degreaser to a garage where they worked on classic cars; Martucci confirmed their relationship with the garage when he interviewed the garage owner. Core said he participated at Robles's direction and they did so on at least five occasions. Core also told Investigator Martucci that they conducted these acts during his work hours, which respondent disputed (Tr. 111, 133).⁴

Although respondent contended in his post-trial brief that there was water in the drums and that Investigator Martucci's notes of his interview with Core confirmed this fact, without his own testimony, respondent failed to offer an effective rebuttal to the investigator's credible testimony. More importantly, even if there was water in the drums, respondent effectively concedes taking and consuming resources owned by the Department without authorization.

Hearsay evidence is admissible in administrative proceedings with few limitations. *People ex. rel. Vega v. Smith*, 66 N.Y.2d 130, 139 (1985); *300 Gramatan Avenue Associates v. NYS Division of Human Rights*, 45 N.Y.2d 176, 179-80 n.* (1978). Hearsay may, in certain circumstances, form the sole basis for an administrative adjudication. *Police Dep't v. Ayala*, OATH Index No. 401/88 (Aug. 11, 1989), *aff'd sub nom. Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't), *leave to appeal denied*, 78 N.Y.2d 851 (1991). The hearsay must, however, be sufficiently probative and reliable before it is accorded significant weight.

³ Specifications 1 and 2 have been combined because they allege essentially the same facts (Tr. 367-69).

⁴ The Department did not seek to prove that the removal occurred during respondent's work hours (Tr. 368).

Courts rely upon a number of factors to assess the reliability and probative value of hearsay, including the declarant's personal knowledge of the facts, the independence or bias of the declarant, the detail and range of the hearsay, the degree to which it is corroborated, the centrality of the hearsay evidence to the agency's case, and the magnitude of the administrative burden should the hearsay be excluded. *Police Dep't v. Ayala*, OATH 401/88 at 6; *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980), *cert. den.*, 452 U.S. 906 (1981); *Richardson v. Perales*, 402 U.S. 389, 402-06 (1971). The more important the hearsay is to the proof of the case, the more critical the fact finder must be in assessing its value. *Calhoun*, 626 F.2d at 150; *Transit Auth. v. Maloney*, OATH Index No. 500/91 at 33 (Apr. 19, 1991), *aff'd sub nom. Maloney v. Suardy*, 202 A.D.2d 297 (1st Dep't 1994) (citing reluctance where the statements of a hearsay declarant are central to the agency's case and there is some doubt as to the declarant's credibility).

Investigator Martucci's hearsay statements were the most crucial evidence in petitioner's case. I perceived no bias in the investigator's testimony and I found his statements to be reliable and credible. In particular, his statements that Robles and Core admitted to him using 55-gallon drums to remove a liquid for their own personal use were corroborated in part by the surveillance video where they were seen removing something in two 55-gallon drums in December 2006. It is reasonable to infer that the men took degreaser because, according to Martucci, they explained their need for degreaser to clean the garage where they worked on cars. Not only did I find this evidence credible, but I note that Robles opted not to take the witness stand to offer any contrary explanation. I am thus entitled to make an adverse inference that respondent was improperly removing a thing of value for the personal use described in Martucci's testimony.

There was no evidence that Robles had authority to remove any liquid supplies from the school. Even if respondent were removing only water, the Department pays for water and a custodian has no right to its personal use off premises (Tr. 222). The reasons for which this conduct is inappropriate are numerous: (i) it constitutes a personal use, or theft, of school resources (water, degreaser, or oil), (ii) removing the liquid required the personal use of school equipment – the drums, and (iii) if done during work hours, the school lost the value of the services that Robles and/or Core should have been rendering to the school while they were engaged in personal pursuits (Tr. 210).

I therefore find that respondent is guilty of misconduct for removing quantities of liquid owned by the Department for his own personal use without authorization.

I am unable to make a finding that respondent absconded with heating oil siphoned from the school's boiler system, however, because the evidence was insufficient to do so. As an initial matter, there was no testimony supporting the authenticity of the photographs sent by the whistleblower which painted a picture suggesting that respondent used a flow valve and siphon hose to steal heating oil from the boiler system. Although witnesses confirmed seeing the flow valve on boiler 1 in testimony that was quite plausible, no one connected the dots that would establish that oil had been transferred from the boiler to the drums and then transported in the drums from the facility by respondent. Thus, it remained a possibility that was not established as fact by a preponderance of the evidence. Although theft was one reason for the flow valve to be present on the boiler, Mr. Keaney testified that oil might legitimately be drained from the system for purposes of making a repair (Tr. 203, 216-17).

Harold Kane's testimony that respondent told him to remove the flow valve because inspectors were coming and that he disposed of the valve and a journal he used to record his daily tasks because of this warning suggests that both men were engaging in a cover up and that they knew that they were doing something that was improper and/or illegal. Kane's testimony was equivocal, however ("I kind of knew what was going on" (Tr. 303)); he never admitted having personal knowledge of oil theft. This circumstantial evidence was insufficient proof that Robles stole heating oil.⁵

Finally, it was never made clear that oil was actually missing. James Merlot, who is in charge of the Department's fuel division gave evidence suggesting that it was. He told Investigator Martucci that P.S. 266 and P.S. 208, two schools built on the same campus, utilize an identical fuel system (with a dual oil and gas option) and that P.S. 266 used more oil than P.S. 208 (Tr. 107-08, 173). Records show that P.S. 266 received 7,501 more gallons of oil than P.S. 208 from September 2004 to February 2007 (Resp. Ex. C, Tr. 155-58). There was no evidence, however, of the relative size of the two facilities or of their projected or expected oil usage. Moreover, the afterschool programs at P.S. 266 (which ran until 10:00 in the evening) would have accounted for a heavier usage of oil, particularly in winter when the system ran solely on oil after the temperature dropped to 20 degrees (Tr. 214-15). Again, there is the suggestion that P.S.

⁵ I should note here the testimony of Victor Loor, who said that he helped Robles move two 55-gallon drums from the school to his pickup truck in Fall 2006 (Tr. 238-39). Although he said Robles told him the drums contained oil that he was transporting to another school that had a shortage, the content of the drums was never established. Nor was it established that this was not a legitimate work-related task.

266's oil consumption was suspiciously high but no conclusive proof that it was and, if so, insufficient data to conclude that Robles was the cause. Investigator Martucci admitted that his review of respondent's actions on the surveillance video did not support the conclusion that respondent had stolen 7,500 gallons of heating oil from the school.

Nevertheless, a preponderance of the credible evidence did show that respondent removed from P.S. 266 quantities of a liquid substance owned by the Department in 55-gallon drums for his own personal use and without permission or authority. I also find that he directed his employee Victor Core to assist him during Core's work hours. These acts constitute misconduct.

Violation of Penal Law §155.25, petit larceny

The Department contends that these acts constitute petit larceny, a class "A" misdemeanor (Tr. 371). Penal Law §155.25. I agree. Although this tribunal does not have jurisdiction to determine whether a crime has been committed under the Penal Law, *Board of Education v. Forde*, OATH Index No. 491/95 (Mar. 29, 1995), the Department has charged respondent with acts which, if proven in a court of competent jurisdiction would constitute a crime. Under these circumstances, the tribunal can make a determination as to whether respondent engaged in misconduct by referring to the Penal Law for guidance. *See Human Resources Admin. v. Rickenbacker-Miller*, OATH Index No. 603/01 at 4 (Dec. 12, 2000). In this administrative proceeding, petitioner must prove all elements of the crime alleged by a preponderance of evidence. *See Dep't of Correction v. Battle*, OATH Index No. 1052/02 at 7-8 (Nov. 12, 2002) (citing *Aronsky v. Bd. of Education*, 75 N.Y.2d 997, 1000 (1990)).

Under the New York Penal Law, a person "is guilty of petit larceny when he steals property." Penal Law §155.25. To establish the charge of petit larceny, the Department must prove: (1) ownership of the property in question, (2) a taking of that property, (3) that the taking was without the Department's consent, (4) that it was done by respondent, and (5) that it was done with the intent to deprive the owner of the property or to appropriate the same to respondent or a third person. *People v. Shurn*, 69 A.D.2d 64, 65 (2d Dep't 1979); Penal Law §§ 155.25, 155.05.

Respondent does not dispute elements one through four (Respondent's Post-Hearing Brief, at 5), which were additionally established by the evidence. The surveillance tape conclusively established that respondent left the school with two 55-gallon drums on December

18, 2006. Credible hearsay statements made to Investigator Martucci by Victor Core and by respondent establish that the drums contained a liquid, either water or degreaser, and that Core made at least five such trips with respondent. It is undisputed that the liquid contained in the drums was the property of the Department, and there was no evidence that consent to take the liquid was sought or obtained.

As to the fifth element, it too was established by the evidence. The admissions made by Core and Robles establish that they intended to take the water and/or degreaser and that they consumed them in conjunction with their personal business working on cars at a garage they rented. There is no allegation that the liquid taken from the school was returned to the school, or that there was a work-related reason for taking it. This evidence establishes that Robles committed a theft by taking the liquid and converting it to personal use. *See People v. Camelo*, 48 A.D.3d 1303 (4th Dep't 2008) (defendant's conviction for petit larceny was against the weight of the evidence where there was no proof that defendant intended to withhold the property permanently, as he voluntarily returned items within a short time); *Human Resources Admin. v. Williams*, OATH Index No. 226/02 (Mar. 7, 2002) (employee guilty of larceny for taking a spiral notebook and an answering machine belonging to the agency from the desktop of a co-worker with the intent to deprive the agency and/or to appropriate the property to herself or another).

Thus, petitioner proved all elements of the crime of petit larceny by a preponderance of the evidence.

Conduct of personal business and improper receipt of compensation for building a wall in the school basement (Specifications 4 and 5)

Specification 4 alleges that respondent conducted personal non-departmental business during working hours, when he built a wall in the school basement (Tr. 369). Specification 5 alleges that respondent used his brother's identity to create a ruse to collect compensation for constructing the wall. Petitioner also contends in its post-trial brief that respondent violated anti-collusion rules by accepting compensation from an outside contractor (Petitioner's Closing Argument, at 5).

Rules set forth in the collective bargaining agreement ("CBA") prohibit members from engaging in "collusion" with outside contractors (Tr. 369-70). Specifically, the CBA prohibits a custodian engineer and his employees from "accept[ing] any fees or gratuities from Outside

Contractors for any work or service except as specifically authorized by the Board of Education” (Pet. Ex. 11 at F-37). The Department’s Rules and Regulations for the custodial force similarly prohibit any “collusion” between the custodian engineer and outside contractor stating:

Neither the Custodian nor any custodial employee shall accept any fees or gratuities from the contractors for any work or service except as specifically authorized by the Board of Education.

(Pet. Ex. 12, section 7.1.8, at p. 39). Mr. Keaney testified that all custodian engineers receive training on the conflict of interest rules which, among other things, prohibit them from accepting payments from contractors (Tr. 191-93).

Although the term “outside contractors” appears in the CBA with initial capital letters, as would a defined term, the contract appears to contain no definition for the term and petitioner has offered none. Moreover, the evidence did not establish that Urbanik was an outside contractor as might be contemplated under the CBA. There was no evidence that he was a party any contract to perform regular services for the Department or any of its contractors, which would be subject to the approval of the Department. In his testimony, Urbanik simply claimed to have made a verbal agreement with Samuel Field Y to build a wall in this single instance. However, Ms. Harrison had no discussions with Urbanik and did not know who he was, thus undermining any contention that there was any agreement to which he was a party. By contrast, Ms. Harrison treated Robles as the contractor, inasmuch as he had authority as the custodian for the school, offered to have the wall built, discussed with her the work to be done, purchased the building materials with her, and negotiated the cost of the labor. She even delivered the check to him, although it was made out to his brother, Urbanik. At the time, she was unaware that Urbanik was Robles’s brother. To the extent that an agreement or contract was entered with Samuel Field Y, Robles was the contractor. Robles merely provided Urbanik’s identity for purposes of having a check issued that would not be transparently connected to him. Under these circumstances, I did not find that Urbanik was an outside contractor and, thus, was unable to find that anti-collusion rules were violated. The heart of the violation here is that Robles used his brother as a means of channeling money he sought to collect for construction of the wall. Such behavior violated conflicts of interest rules, as discussed below.

As to specification 4, I find that Robles participated in and directed the building of the basement wall and that he did so for his own personal business, but there was insufficient proof

that he did so during his own work hours. Although Core and Kane indicated that they did the construction during their work hours, their work hours were not the same as Robles's. Time sheets were never submitted and the record did not clearly indicate what hours Robles worked on the wall. Thus, specification 4 is not sustained.

As to specification 5, that respondent used his brother's identity to create a ruse to collect compensation, it essentially alleges the conflict of interest that is the essence of respondent's misconduct.

It is undisputed that respondent was not authorized to receive payment for building a wall in the basement of his school. I find that the evidence established that, by entering into an agreement with Glynis Harrison to have a wall built, he engaged in a scheme with his brother that would allow him to collect payment for it. My conclusion is based upon reasonable inferences drawn from the credible evidence.

I credited Ms. Harrison's testimony, finding her lacking in self-interest and with no reason to lie about her interactions with respondent. Both Kane (who testified) and Core credibly stated that they built the wall with Robles, that work was done during the hours they should have been working for the school, and that neither of them had ever heard of Urbanik. They had no reason to fabricate their testimony. By contrast, Thomas Urbanik had a strong interest in protecting his brother from the repercussions of disciplinary action. I discredited most of respondent's statements to the investigator and found the testimony offered by his brother, Urbanik, untrustworthy.

I discredited Urbanik's claim that he built or worked on the wall. He claimed to have numerous discussions with Principal Morris, who denied it and he seemed not to know that Morris was the principal of the school. The construction materials were purchased months after he claimed to have done the work. I also discounted his assertion that his \$300 payment to his brother, made around the time Urbanik negotiated the check from Samuel Field Y, was a gift to buy furniture for Robles's children. No proof was offered that children's furniture was ever purchased. The most reasonable inference to be drawn from the timing of the payment is that it was for building the wall.

I therefore find that a preponderance of the credible evidence proved the following. In or about March 2007, a partition wall was built in the basement of P.S. 266 by Robles, Harold Kane, and Victor Core pursuant to a verbal agreement between Ms. Harrison and respondent.

Harrison purchased the construction materials in January 2007 during a trip she made to Home Depot with respondent, and, in payment for the construction work, she delivered a check, made payable to Thomas Urbanik, to respondent on April 12, 2007. On May 7, Urbanik negotiated the \$350 check, days after he wrote a check (minus \$50) to Robles.

I conclude that these facts depict a thinly veiled scheme to funnel money to Robles in violation of the City's conflicts of interest rules.

Violation of conflicts of interest provisions, 2604(b)(2) and (b)(3)

Respondent is charged with violating section 2604(b)(2) of the City Charter, which prohibits a public servant from engaging in any business or transaction that is in conflict with the proper discharge of his official duties, and with violating section 2604(b)(3), which prohibits a public servant from using his position to obtain any financial gain or other private or personal advantage. In this case, Robles violated these provisions by making personal use of city equipment and resources and by using his city position to obtain a financial gain for himself. He also forced his employees to assist him during their work hours in both instances.

Personal use of an agency vehicle has been held to violate both 2604(b)(2) and (b)(3).⁶ *See Conflicts of Interest Bd. v. Allen*, OATH Index No. 1791/07 (June 12, 2007), *aff'd*, Bd. Dec. (Sept. 11, 2007) (employee's personal use of agency van conflicted with the proper discharge of his duties and his excessive use constituted a misuse of his position as a public servant to obtain a financial gain or personal advantage, in violation of 2604(b)(2) and (b)(3)); *see also Dep't of Sanitation v. Rivera*, OATH Index No. 2056/09 (June 4, 2009), *aff'd in part, rev'd in part*, Comm'r Dec. (June 22, 2009) (Commissioner found sanitation worker violated (b)(2) and (b)(3) for taking sanitation truck without authority to run personal errands, which Commissioner also found constituted theft even though the truck was returned). Similarly, personal use of other agency resources has been held to violate these provisions. *Conflicts of Interest Bd. v. Katsorhis*, OATH Index No. 1531/97 (Feb. 12, 1998), *aff'd in part, modified in part*, COIB Case No. 94-351 (Sept. 17, 1998) (use of city resources and personnel, title, position and office to write letters on city letterhead, on behalf of private law clients violated 2604 (b)(2) and (b)(3)). I find that Robles violated sections 2604(b)(2) and (b)(3) when he used the Department's 55-gallon drums to remove Department resources (degreaser or water) from the school to a private location for his

⁶ Section 1-13 of the Rules of the Conflicts of Interest Board, 53 RCNY § 1-13 (Lexis 2009), specifically prohibits misuse of office for private gain and use of City equipment for non-City purposes.

own personal use and that he improperly diverted the work hours of his employee, Victor Core, to this personal task.

As required by 2604 (b)(2), respondent failed to display an “undivided loyalty” to his city employer by using his employer’s resources to supply his personal hobby. *See Conflicts of Interest Bd. v. Holtzman*, COIB Case No. 93-121 at 13 (Apr. 3, 1996), *aff’d sub nom. Holtzman v. Oliensis*, 240 A.D.2d 254 (1st Dep’t 1997), *aff’d*, 91 N.Y.2d 488 (1998). With respect to subsection (b)(3), Robles obtained access to the school equipment and supplies, and the labor of his employee, because of his position as the school custodian, thus using his position to gain a personal benefit.

Robles violated the same conflict of interest provisions when he entered into an agreement with Samuel Field Y to build a wall in the school basement, for which he collected a \$350 fee, and used his employees to assist him during their work hours. *See Conflicts of Interest Bd. v. Okanome*, OATH Index No. 110/08 (Nov. 9, 2007), *aff’d*, Bd. Dec. 2005-132 (Mar. 10, 2008) (employee solicited an agency client to make repairs on his home and received benefit of the repairs, while promising to provide social services to the client’s family in exchange for the repair work); *Conflicts of Interest Bd. v. Fraser*, COIB Case No. 2002-770 (Oct. 30, 2004) (former Department of Correction commissioner agreed in a settlement that he misused his official position for private gain by using three subordinates to repair his swimming pool while off-duty); *Conflicts of Interest Bd. v. Smith*, COIB Case No. 2000-192 (Mar. 27, 2002) (caseworker used her official City position for her own personal gain by soliciting and accepting a \$2,500 loan from a client whom the caseworker was assigned to evaluate and whose home she supervised).

I have found that the payment to Urbanik was in actuality a payment to Robles; Urbanik did not build the wall and he had no other business with the school or with Samuel Field Y for which he could have received payment. The fact that Robles engaged in a ruse designed to cover up his receipt of the funds is evidence that he understood the wrongfulness of his actions. He used his position “to obtain a financial gain” and his conduct conflicted with the proper conduct of his responsibilities as the school’s custodian.

FINDINGS AND CONCLUSIONS

1. Petitioner established that respondent removed a liquid substance in 55-gallon drums from P.S. 266 on five different occasions without permission or authority and converted the substance to his own personal use, which violated Department rule 9.19, conflicts of interest provisions in the City Charter, and constituted petit larceny.
2. Petitioner established that respondent engaged in personal business by building a wall in the school basement for compensation, in violation of Department rule 9.19 and conflicts of interest provisions in the City Charter.

RECOMMENDATION

After making the above findings and conclusions, I requested and received a summary of Mr. Robles's personnel history. Respondent joined the Department on July 1, 2004. He has no prior formal discipline. His file contains a single memorandum from 2006 counseling him about excessive sick leave. He has received consistently positive performance reviews from the principals who have evaluated him. To his credit, his supervisor testified that he ran an "exceptional" building (Tr. 219, 226).

Nevertheless, for the misconduct charged in this case, the Department seeks Mr. Robles's termination, asserting that he can no longer be trusted to perform the duties of a custodian engineer as he has demonstrated a clear disregard for authority. Respondent has been found guilty of theft and using his position to gain a financial benefit.

Ordinarily, the only appropriate penalty for an employee who steals from his employer is termination, without regard to the value of the items stolen. *See Pell v. Bd. of Education*, 34 N.Y.2d 222 (1974); *Human Resources Admin. v. Williams*, OATH 226/02 (termination appropriate for theft of a spiral notebook and an answering machine belonging to the agency but not imposed because employee had already been terminated for other misconduct); *Dep't of Transportation v. Delprete*, OATH Index No. 506/95 (Feb. 17, 1995) (termination for supervisor who stole cobblestones belonging to the agency and had subordinates install them in his personal driveway); *Dep't of Transportation v. Mascia*, OATH Index No. 403/85 (May 30, 1986) (office aide's theft of a \$28.50 roll of tokens from his supervisor's desk drawer was a deliberate criminal act against his employer that justified termination). Employee theft robs the public fisc and

undermines the integrity and operations of a public agency, in this case, one whose mission is the education of school children. Such conduct reflects a lack of moral integrity and is such a fundamental breach of the necessary trust that must exist between an employer and employee that it generally cannot be repaired by a penalty less than termination. Even a lengthy job history with the employer fails to provide a basis for mitigating the penalty where the misconduct involves deliberate acts of deception. *See Pell*, 34 N.Y.2d at 235 (deliberate acts involving dishonesty render mitigatory factors inapplicable); *Dep't of Education v. Halpin*, OATH Index No. 818/07 (Aug. 9, 2007) (21-year employee and supervisor of carpenters terminated for time theft where he falsified his time sheets on 63 occasions in a four-month period).

Respondent presents no grounds for penalty mitigation. His tenure with the Department is brief, in this case only five years. Respondent offered no testimony either to explain his actions or to express remorse for them. Thus, I am presented with no reason to diverge from the general rule that termination should be imposed under the circumstances. I so recommend.

Tynia D. Richard
Administrative Law Judge

October 19, 2009

SUBMITTED TO:

JOEL I. KLEIN
Chancellor

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