

Dep't of Sanitation v. Jefferies

OATH Index Nos. 2529/09, 2530/09 (Sept. 18, 2009)

Termination of employment recommended for sanitation workers found to have violated the Trade Waste Order by going off their assigned route on two separate days to collect a large amount of garbage, far in excess of six bags, from a house, without first getting authorization from a supervisor. Respondents found to have accepted gratuities on both occasions. Respondents used a sanitation truck without authorization and were absent from the workplace without authorization while collecting this refuse.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION

Petitioner

- against -

**WESSIE JEFFERIES
PAUL ANDRUSZKIEWICZ**

Respondent

REPORT AND RECOMMENDATION

JULIO RODRIGUEZ, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Sanitation ("Department"), pursuant to section 16-106 of the Administrative Code. The Department alleged that on March 31, and April 5, 2006, respondents went off route, collected a large amount of assorted materials, and accepted a \$30 and \$50 gratuity, respectively in violation of Department Code of Conduct rules 3.2, 3.23, 4.3, and 5.2, General Order No. 2001-19, and Mayoral Executive Order No. 16 ("MEO16").

During a three day hearing, the department called three witnesses and offered several documents, a video recording, and audio recordings of respondents' interviews conducted by the Department of Investigation ("DOI") pursuant to MEO16. Respondents testified, called one witness and offered documentary evidence.

For the reasons set forth below, I find that the Department proved most of the charges by a preponderance of the credible evidence.

ANALYSIS

It is undisputed that on at least one occasion in 2006, respondents, who at the time had been partnered for at least a year, backed their sanitation collection truck up to the driveway of a home on 233rd Street in Rosedale, New York, owned by Mona Fils, and collected garbage from the driveway. These events were recorded by Seymour Cespedes, who owns a home approximately three houses away from Ms. Fils's home (Pet. Ex. 8).

The video recording, which Cespedes testified he shot on April 5, 2006, shows sanitation truck 25CW-552 with its hopper backed up and overhanging the sidewalk. It is undisputed that the truck is parked as described-above in front of Ms. Fils's driveway and that it was raining. Respondents are seen loading numerous pieces of loose wood, wood paneling, carpet, cardboard, sheetrock, a mattress, a table, and at least 17 black garbage bags. Respondents were video taped at the location for approximately 10 minutes loading garbage. They cycled the truck's hopper six times before leaving. Early in the video, a woman later identified by DOI investigators as Fils is seen walking briskly towards the hopper where respondent Andruszkiewicz is loading garbage and then walking towards the house. Although not depicted, it appears she came from and then returned to her home from which the garbage was being picked up.

The Department contends that respondents went off their route to Fils's home on March 31, 2006, with a Department collection truck, collected a large amount of assorted materials from Fils's driveway, and accepted a \$30 gratuity. The Department further contends that they went off route and returned to Fils's home on April 5, 2006, as depicted in the video taken by Cespedes, and again collected a large amount of assorted materials from her driveway and accepted a \$50 gratuity.

Respondents did not contest that they are the individuals depicted on the video collecting garbage and loading it onto the sanitation truck. However, Jefferies maintained that they collected the garbage on a scheduled collection date and both respondents denied ever accepting money from Fils.

Central to the Department's case is the testimony of Seymour Cespedes. Cespedes is a New York State correction officer. He resides in a two story single family home on 233rd Street in Rosedale, New York. Cespedes testified that his street is scheduled for garbage collection on Mondays and Thursdays. In early 2006, Cespedes noticed that his trash was not being collected on the scheduled collection days, although his neighbors' trash was collected. Cespedes

identified respondent Jefferies as the sanitation worker who failed to collect his garbage. Cespedes testifies that he called the local district office numerous times to complain (Tr. 108-16)

Cespedes, frustrated by the situation, approached respondent Jefferies in February 2006 and asked her why she was not collecting his trash. According to Cespedes, respondent Jefferies told him that it would cost him money (Tr. 127). Cespedes recalled another incident in early 2006 during which respondent Jefferies responded to his complaints by making an obscene gesture with her middle finger (Tr. 185-86).

On March 31, 2006, Cespedes was home nursing a work-related back injury. He was sleeping in his bedroom, which is located on the second floor, when he heard a sanitation truck. Cespedes was surprised to hear the truck because it was a Friday, a non-collection day (Tr. 116-18, 188). After hearing the truck making noise for approximately fifteen minutes, Cespedes went downstairs and looked out his living room window. Cespedes testified that he saw respondents loading a sanitation truck that had been backed up to the driveway of a house three doors down from his (Tr. 118-23, 188-90). At the time, Cespedes was familiar with respondent Jefferies because of the issues he was having with her, but Cespedes was not familiar with her partner, respondent Andruszkiewicz (Tr. 119). Cespedes testified that he had a clear view and observed respondents removing sheetrock, wood, metal, piping and black bags from the driveway and loading it onto the truck (Tr. 122-23, 191). According to Cespedes, there was a lot of garbage, far in excess of 15 pieces (Tr. 122-23). Cespedes testified that he went upstairs to get a video camera to record but could not because the camera's battery was not charged (Tr. 123). He continued watching as respondents loaded garbage for an additional fifteen minutes.

Cespedes testified that while respondents were loading the garbage onto the truck, a woman, who he referred to as the owner of the house, but whose name he did not know, came out of the house and had a conversation with respondent Jefferies. The woman handed something to Jefferies, which Jefferies placed in her pants pocket. Cespedes was unable to see what the woman gave respondent Jefferies (Tr. 123-25, 193). Respondents continued loading the truck and then left. Cespedes estimated that respondents were at the location approximately an hour (Tr. 123).

Cespedes testified that he was "mad as hell" to see the sanitation workers collecting what he described as a ton of garbage from his neighbor on a non-collection day in light of the issues he was having regarding the collection of his trash on scheduled collection days (Tr. 126).

On April 5, 2006, Cespedes, who was still home due to his bad back, was again awakened by the rumblings of a sanitation truck. Cespedes went downstairs to his living room, looked out the window, noticed that it was raining and saw respondents loading garbage from the same driveway, three doors down. Again Cespedes was surprised because April 5, 2006, a Wednesday, was a non-collection day. Cespedes got his video camera, which this time was charged, and began recording from his window (Tr. 128-29, 195). He was able to record the last tens minutes (Tr. 196).

According to Cespedes, respondents were at the location for approximately 30 minutes, going back and forth “a hundred” times, loading “tons” of garbage. Cespedes testified that he saw the same woman he had seen on March 31, 2006, speak with respondents but did not see her give anything to either respondent (Tr. 130-31).

Cespedes did not immediately report either incident. He testified that he was hoping to resolve the issues regarding the collection of his trash directly with respondent Jefferies without having to go any further (Tr. 131). When pressed on cross-examination regarding the five-month delay in reporting his observations, Cespedes explained that he did not intend to get any of the sanitation workers in trouble. Rather, his goal was to get his garbage picked up on the scheduled collection days (Tr. 131-32, 196-201). Unfortunately, the problems persisted.

From April to September 2006 sanitation workers failed to collect Cespedes’s garbage on at least twelve occasions (Tr. 200-01). On September 14, 2006, respondent Jefferies failed to collect the trash that Cespedes put out for collection. According to Cespedes, respondent Jefferies “looked” at the garbage, made no effort to lift the bags, and just kept walking. He testified that he had not put out any extra garbage that day. Having reached his boiling point, the next day Cespedes called the Department to report what he had observed on March 31, and April 5, 2006 (Tr. 132-34, 202). He was provided with a telephone number and directed to call the Department’s Inspector General. Cespedes complied. Cespedes copied the video recording onto a Digital Video Disk and provided it along with a typed statement to the Inspector General (Tr. 135-36).

The Inspector General for the Department of Sanitation opened a case based on Cespedes’s complaint and assigned the matter to Charles Busch for investigation. Busch has since left the Department of Investigation (“DOI”) and did not testify (Tr. 21, 71). Instead,

petitioner offered the testimony of Yves Desiré, Acting Deputy Inspector General, who supervised Busch and the investigation.

Desiré testified that DOI received Cespedes's complaint on September 15, 2006. On September 21, 2006, investigators Busch and Alan Lefkof interviewed Cespedes. Investigators later identified Mona Fils as the owner of the house at issue in Cespedes's complaint (Tr. 33, 38).

On November 3, 2006, Desiré went to Cespedes's home and viewed the video recording on Cespedes home equipment. Although the video recording offered in evidence did not display a date or time stamp when played, Desiré testified that when the video was played at Cespedes home the date April 5, 2006 appeared on the screen. Cespedes confirmed to investigators that he shot the video on April 5, 2006 (Tr. 104-06).

On November 8, 2006, Busch and Desiré interviewed Fils (Tr. 42). Desiré testified that when they arrived at the residence, Fils answered the door wearing clothing similar to the clothing she was wearing in the video shot by Cespedes. He recognized Ms. Fils to be the homeowner depicted in the video approaching respondents (Tr. 42-43).

Fils invited the investigators inside. As they discussed the purpose of their visit, Fils, who is Haitian, asked Desiré if he was Haitian. When Desiré confirmed that he was, Fils began speaking to him in Creole. Desiré explained that he and Fils spoke mostly in Creole and that he translated their conversation to English for investigator Busch (Tr. 43-44, 48). Desiré's conversation with Fils in Creole was not recorded.

Desiré testified that while speaking Creole, Fils told him that she purchased the home around the time of the alleged incidents and that the previous owner had left a lot of garbage in the house. Fils stated that on or about March 31, 2006,¹ she approached a sanitation truck that was around the corner from her house and asked the sanitation workers, a white male and a black female, if they could help her remove the garbage. The sanitation workers agreed and they drove to her house and removed the garbage. Fils offered the sanitation workers \$30.² According to Fils, the sanitation workers did not ask her for any money (Tr. 43-44, 90).

Fils went on to tell Desiré that she approached the same sanitation workers on a subsequent day because she had more garbage for collection. The sanitation workers drove to her house and collected the garbage. Similarly, the sanitation workers did not ask her for any

¹ It is not clear from the testimony whether Fils had an independent recollection of the dates.

² The evidence fails to establish whether Fils offered the sanitation workers money before or after they collected the garbage from her driveway.

money, but she gave them \$50. Fils explained that the sanitation workers deserved the \$50 because they collected a lot of garbage (Tr. 44). Fils told Desiré that she gave the money on both occasions to the white male sanitation worker (Tr. 44-45, 80, 90).

Desiré informed Fils that it is against the law to give a city employee a gratuity. Desiré then told Fils that they were going to record her statement in English (Tr. 45). Fils agreed, but soon after the tape recorder was turned on, she said that she needed to call her sister and walked into another room, leaving the investigators alone in the kitchen. Fils returned a few minutes later and the interview resumed. Desiré testified that he asked her “basically the same question[s]” he had asked in Creole. This time, however, Fils was equivocal in her responses and her demeanor and willingness to cooperate changed (Tr. 44-46). Fils began referring to the payments as gifts and waffled on whether the respondents accepted the moneys she offered (Pet. Ex. 7).

Desiré explained that he decided to turn off the tape recorder because it became clear that Fils’s demeanor and willingness to cooperate changed after speaking with her sister. Moments after the tape recorder was turned off, Fils’s sister arrived and told the investigators that she is very familiar with the law, that “this is a gift,” and that her sister had done nothing wrong (Tr. 49). The investigators concluded the interview and left.

On February 27, 2007, Desiré and Busch interviewed both respondents at the Department of Investigation pursuant to MEO16 (Jefferies: Pet. Ex. 9; Andruszkiewicz: Pet Ex. 10). Respondent Jefferies told the DOI investigators that in the spring of 2006 she was partnered with respondent Andruszkiewicz and that they had been assigned to route 1. Jefferies admitted that they would occasionally go off their assigned route to collect garbage from a location that they would be scheduled to service on other days of the week. Jefferies could not recall if they engaged in this practice in April or May 2006. Jefferies also admitted that on several occasions she has backed the hopper of her sanitation truck up to a driveway in order to easily access the garbage she was to collect. She explained that this is a common practice so long as the truck’s wheels are not on the sidewalk. Lastly, she admitted collecting refuse that had not been placed out on the curb for collection. Jefferies denied ever asking for or accepting money from anyone to collect refuse, but acknowledged that she had been offered money on several occasions. Jefferies further admitted that she did not report the offers to her superiors or the Department of Investigation (Pet. Ex. 9).

Respondent Andruszkiewicz admitted to DOI investigators that in the spring of 2006 he and respondent Jefferies collected garbage from the driveway of a house on 233rd Street, route 1, on at least two occasions, both of which were non-collection days. He explained that the homeowner, whose name he did not know but was later identified as Fils, had recently purchased the house and had placed garbage in the driveway. According to Andruszkiewicz, he and respondent Jefferies were driving by when they saw the garbage in the driveway. He recalled seeing Fils pull up to the front of the house in a green truck. Andruszkiewicz asked Fils if she was going to put the garbage out for collection. Fils replied that she intended on placing it out for collection on the scheduled collection day. Respondents decided to collect the garbage reasoning that they would have to collect it eventually. He admitted returning to the house on a second non-collection day and collecting more garbage from the driveway (Pet. Ex. 10).

Andruszkiewicz did not recall how much garbage was in the driveway on the two occasions and described the garbage as being in small piles. He estimated that they took five minutes to collect the garbage which included cabinets, possibly wood and metals, bags and “house stuff.” Andruszkiewicz denied picking up construction debris. He acknowledged to the investigators that their actions of being off-route and collecting trash on a non-collection day on both days violated Departmental policies. Andruszkiewicz denied, however, that he asked for or accepted any money for collecting the garbage. He explained that they picked up the garbage because “either way, I would have to pick it up” (Pet. Ex. 10).

At the hearing, Jefferies testified that she has been with the Department for 19 years, approximately fourteen years of which she has been assigned to section 5 in Queens East 13. As such, she has worked on every street in section five and is familiar with many of the homeowners in the section (Tr. 236-37, 245-46). Jefferies further testified that she was aware that Fils, who she knew by face but not by name, had an accent and had purchased the house at issue on 233rd Street sometime in March/April 2006, after the previous owners died (Tr. 243, 247).

Despite her contention that she is familiar with homeowners on the route, Jefferies denied recognizing Cespedes or seeing him on her route. She further denied ever cursing at Cespedes or asking him, or any homeowner, for money in exchange for collecting extra garbage (Tr. 239-40). She recalled having a problem with heavy cans, containing concrete, sand, and sheet rock, being placed out for collection in front of Cespedes’s home (Tr. 239).

Jefferies saw the video taken by Cespedes for the first time when it was played during the hearing. She recognized herself and respondent Andruszkiewicz in the video, but did not know when the video was taken. She testified that the video must have been taken on a Monday or Thursday, a scheduled collection day (Tr. 238).

Jefferies admitted collecting garbage from Fils's driveway but denied taking money from Fils to do so. She testified that she observed Fils taking out a lot of garbage from the home and putting it in her driveway. Jefferies told her that she could not put out the garbage all at once. Jefferies testified that she knew the garbage was in the driveway and that eventually they would have to pick it up, so on days in which their route was light, respondents went off their assigned route to Fils's home and collected the garbage (Tr. 241, 250-51). According to Jefferies, she never promised Fils that they would come back and collect all of the garbage. Although Fils knew that respondents were going to collect the garbage, she did not know when. Jefferies recalled picking up garbage from Fils's driveway and returning at least one other day to finish but did not recall the specific dates (Tr. 250-54). Despite her inability to recall the specific dates, she maintained that they collected the garbage on a scheduled collection date (Tr. 262-63, 268).

At the hearing, respondent Andruszkiewicz's testimony was far less detailed than the answers he provided to DOI investigators on February 27, 2007. Although he recalled collecting garbage from Fils's driveway, he did not have an independent recollection of the events on March 31, or April 5, 2006 (Tr. 271). Andruszkiewicz recognized himself on the video tape but did not know when the video was taken (Tr. 271). Andruszkiewicz's testimony on direct examination was limited to denying that he asked for or accepted money from Fils to collect the garbage and corroborating Jefferies account regarding their practice of going off route to collect garbage on days they were light in order to ease their workload in the future (Tr. 270-75).

The Department called Jerry Klein, a rotating officer, who was assigned to supervise collections on Wednesday, April 5, 2006, in Queens East 13, section 135 (Tr. 168, 173). He testified that both respondents were assigned to truck 25CW552 in route 1 (Tr. 169). Klein explained that the house in question is in section 135 and was scheduled for collection on Mondays and Thursdays, not Wednesdays. He testified that he did not authorize either respondent to go off their route on April 5, 2006. Klein stated that he would have made a notation on the DS350 card had he authorized either respondent to go off route. The DS350 does not contain such authorization (Tr. 170-71; Pet. Ex. 11). Klein further testified that he had not

received nor was he aware of any complaints from residents on 233rd Street about trash not being collected (Tr. 173).

Respondents called Roger Rebando, who has been a supervisor in Queens East 13 since 2000. He has supervised respondents since October 2006 when he was the garage supervisor (Tr. 222). Rebando testified that he had been assigned to the garage a month prior to meeting Cespedes and in that time he had neither directly received nor was informed of any complaints from Cespedes (Tr. 234). On November 27, 2006, someone from the Inspector's General Office directed him to interview Cespedes regarding a problem he was having with a collection crew. That same day Rebando interviewed Cespedes at his home. When he arrived he inspected the trash that had been placed at the curb for collection and then met Cespedes who was standing by the door. Rebando observed two 45 gallon pails full of sheet rock in black bags (Resp. Ex. A; Tr. 224). Rebando informed Cespedes that he had placed the trash on the curb improperly because it was too heavy for sanitation workers to lift (Tr. 224, 226). Rebando asked Cespedes if a contractor was doing the work in his house. Cespedes replied that he was doing the work himself and invited Rebando inside to see for himself. Rebando was satisfied that Cespedes was doing the work himself and informed Cespedes that he had to lighten up the cans and that the workers would take the trash away. Rebando instructed Cespedes to call the garage if trash was left behind again (Tr. 225).

Rebando explained that pursuant to Department policy both sanitation workers are to attempt to lift a pail that is too heavy for one sanitation worker to lift. If the pail cannot be lifted by both workers, then they are required to dump its contents on the ground and shovel it onto the truck (Tr. 228). The sanitation workers are required to take the trash under all circumstances. If they fail to do so for any reason, such as the delay caused by shoveling up the garbage would result in them not finishing their route, they are supposed to notify their supervisor (Tr. 229).

During their conversation, Cespedes reported to Rebando that respondent Jefferies told him to go "fuck himself." Rebando testified that when he returned to the garage later that day he spoke with Jefferies and her partner, Andrew DeJoseph. Both denied that Jefferies cursed at Cespedes but acknowledged that they bypassed the pails in front of Cespedes's home that day because they were too heavy (Resp. Ex. A; Tr. 226-28, 232).

Resolution of the charges here is largely dependent on witness credibility. In determining witness credibility, factors to be considered include 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. 4, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

I find Cespedes to be a credible witness. Cespedes has no stake in the outcome of this matter. His testimony was consistent and unequivocal. Most importantly, his testimony was corroborated by other evidence, the most compelling of which is respondent Andruszkiewicz's tape recorded interview at DOI and the video of the April 5, 2006 pick-up.

Respondents' testimony on the other hand was not credible. Jefferies was disingenuous and her testimony was replete with material inconsistencies and entirely self-serving. Jefferies claimed to not recall the specific dates on which she collected the garbage from Fils's driveway. She testified that she collects garbage from hundreds of houses every day and that it all becomes one in her mind. Despite her professed lack of memory, she maintained that the video taken by Cespedes was recorded on a day on which Fils's house was scheduled for collection, but offered no basis for her conclusion.

Jefferies explained a practice in which she occasionally went off her assigned route, if her route was light or if inclement weather was forecast, to collect garbage that she knew would be scheduled for collection on another day (Tr. 241). She testified no one complained as long as she completed her assigned route, but stopped short of saying that her supervisors were aware and approved of this practice (Tr. 242). Initially, respondent testified that she was engaging in this practice when she collected the garbage from Fils's driveway (Tr. 250-52). Later she insisted that they only collected garbage from Fils's driveway once, on the one occasion she could not deny because it was captured on Cespedes's video recording (Tr. 261).

Respondent Andruszkiewicz's testimony at trial was limited in light of the various admissions he made under oath during his MEO16 interview at DOI. During the MEO16 interview, Andruszkiewicz admitted collecting garbage from Fils's driveway on two non-collection days and acknowledge that doing so violated Departmental policies. At trial, he admitted collecting the garbage but could not recall whether it was a collection day.

Cespedes's video recording and testimony, Fils's hearsay statement to DOI investigators, respondent Jefferies testimony at trial and respondent Andruszkiewicz's sworn statements at his MEO16 interview, clearly establish that respondents collected garbage from Fils's driveway on

two different days. I credit Cespedes testimony that he observed respondent collecting the garbage from Fils's driveway on March 31 and April 5, 2006. He recalled the dates because he was home on worker's compensation nursing a bad back and made it a point to recall the dates because of the issue he was having with respondent Jefferies. Accordingly, I find that on March 31 and April 5, 2006, respondents went off their assigned route, without authorization, to Fils's home on 233rd Street and collected garbage from her driveway, in violation of Code of Conduct rules 3.2, 3.23, and 5.2.

The next issue is whether respondents violated General Order No. 2001-19, commonly referred to as the "Trade Waste Order." The order defines "trade waste" as, *inter alia*, "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")." This material is defined as including but not limited to "cement, concrete, lumber, plasterboard, plaster, rock, or timber ("construction debris")."

Pursuant to the Trade Waste Order, a "collection crew may service a stop which contains up to a total of six (6) bags, boxes, bundles and cans of construction debris that may be considered trade waste which is placed out for collection at the curb adjoining a residential building on their route if the work is not being performed by a contractor." If there is any indication that the work is being performed by a contractor, such as a sign containing the contractor's name, the collection crew is prohibited from servicing the stop and "shall report the stop to the Section Supervisor."

Regardless of whether a contractor appears to have been retained, if there are more than six "bags, boxes, bundles and cans of construction debris that may be considered trade waste placed out for collection at the curb," the collection crew "shall not service the stop." Additionally, the crew "shall report the stop to the Section Supervisor" who is charged with investigating the stop and interviewing the homeowner, to determine the origin of the construction debris. If the supervisor determines that the homeowner performed the work, the supervisor may instruct the crew to collect up to six bags, boxes, bundles, and cans of the debris.

Here, there are no allegations or evidence that work was being performed in Fils's house by a contractor. The fact that there was sheet rock and wood in the refuse collected by respondents does not necessarily give rise to an inference that there was a paid contractor

working at the house. *See Dep't of Sanitation v. Brooks*, OATH Index Nos. 559/09 & 560/09 (Jan. 30, 2009). However, Cespedes's testimony and the video recording, establish that on April 5, 2006, respondents during the course of half an hour, the last ten minutes of which were video taped, collected well in excess of "six (6) bags, boxes, bundles and cans of construction debris that may be considered trade waste." At the start of the video, the hopper is full and is being cycled, indicating that respondents had been collecting garbage from the driveway for some time prior to the recording. Respondents are then seen collecting numerous pieces of loose carpets, tables, cardboard, sheetrock, and wood and 17 black garbage bags. During the ten minute recording, respondent cycled the hopper at least six times. While the uncontroverted evidence establishes that respondents had no affirmative duty to open the black bags they collected from Fils's driveway to inspect for evidence of trade waste, it is clear under the trade waste order that the nature and quantity of the materials in the driveway was such that respondents were prohibited from servicing the stop, even if it had been a scheduled collection day, and were required to report the quantity of material to the section supervisor. Klein's testimony establishes that respondents did not report it as required pursuant to the Trade Waste Order. Accordingly, I find that on April 5, 2006, respondents collected an excessive amount of material that may be considered trade waste without notifying a supervisor and obtaining approval in violation of General Order No. 2001-19.

Respondent Andruszkiewicz admitted during the MEO16 interview and respondent Jefferies testified initially that they collected garbage from Fils's driveway on two occasions. Cespedes's testimony establishes that the first occasion was on March 31, 2006, a non-collection day. Unfortunately, Cespedes could not record his observations because his video camera was not charged. However, I credit his testimony that he observed respondents loading sheetrock, wood, metal, piping and black bags from Fils's driveway into the sanitation truck (Tr. 191). I also credit his testimony that respondents loaded a lot of garbage, far in excess of 15 pieces, for approximately an hour. Accordingly, I find that on March 31, 2006, respondents collected an excessive amount of material that may be considered trade waste without notifying a supervisor and obtaining approval in violation of General Order No. 2001-19.

The final issue to consider is whether respondents accepted a gratuity for collecting the garbage from Fils's driveway. The Department's proof on this issue consists of Desiré's testimony regarding his interview of Fils.

It is well established that hearsay evidence is admissible in administrative proceedings and may form the sole basis for a finding of fact. *See People v. Smith*, 66 N.Y.2d 130 (1985); *S & S Pub, Inc., v. NYS Liquor Auth.*, 49 A.D.3d 654 (2d Dep't 2008); *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, 565 N.Y.S.2d 114 (1st Dep't 1991) (1988); *Dep't of Correction v. Jackson*, OATH Index No. 134/04 (May 5, 2004), *aff'd*, NYC Civ Serv. Comm'n Item No. CD 05-67-SA (Sept. 14, 2005). The hearsay evidence, however, must be sufficiently reliable and probative in order to be given significant weight *300 Gramatan Avenue Associates v. NYS Division of Human Rights*, 45 N.Y.2d 176, 179-80 (1978); *Human Resources Admin. v. Muniz*, OATH Index No. 445/88 (Nov. 17, 1988); *Dep't of Transportation v. Brown*, OATH Index No. 432/85 (Jan. 15, 1986).

Here, Desiré testified that while speaking in Creole with Fils, she told him that respondents collected garbage from her driveway on two separate occasions. She stated that she gave the white male sanitation worker, respondent Andruszkiewicz, \$30 on the first and \$50 on the second occasions. Fils explained that the sanitation workers never asked her for money but that they deserved the money because they collected a lot of garbage. Fils's demeanor, cooperation and ultimately her answers to the investigators' questions wavered after Desiré informed her that it is against the law to give a city employee a gratuity. After calling her sister, Fils attempted to change her responses. While she reluctantly admitted to offering them money on both occasions, she maintained that they were gifts. Fils maintained that respondents refused the \$30 the first time, but accepted the \$50 on the second occasion after she insisted that they take it (Pet. Ex. 7). Desiré, apparently frustrated with the inconsistencies, turned off the recorder to question her about changing her story.

Respondents' counsel argued that Desiré's testimony regarding his interview of Fils should not be credited for several reasons. First, the most damning statements made by Fils were allegedly made in Creole, which only Desiré spoke and understood. Second, those statements were not recorded. Third, Fils's recorded statement reveals that respondents did not take the money she offered. Last, Desiré turned off the recorder when Fils provided responses that he either did not like or was not expecting.

Desiré's decision to stop recording and terminate the interview, while not the most prudent, did not affect his credibility. Desiré has no discernable interest in the outcome of this matter and no motive to lie. His testimony was direct, consistent, and credible. Accordingly, I

credit his testimony, specifically, that Fils told him while speaking in Creole that respondents collected garbage from her driveway on two separate days and that she gave the white male sanitation worker money, \$30 on the first day and \$50 on the second day, for doing so.

The issue before me now is whether Fils's hearsay statements are trustworthy and reliable and how much weight I should accord to the statements. Fils's motivation in making the statements has a direct bearing on their trustworthiness and reliability. Fils's statements to Desiré in Creole were made at a time when she had no motive to lie or be uncooperative with the investigators. Desiré testified that initially she was fully cooperative and answered all his questions. Most importantly, her statements were partially corroborated by respondents' admissions that they collected garbage from her driveway on two non-collection days.

The tone of the interview, as well as Fils's responses, changed after Desiré informed her that it was illegal to give a city employee a gratuity for carrying out his/her official duties. Fils's apprehension was apparent when she called her sister presumably for advice, resulting in the sister appearing at Fils's home and effectively ending the interview within minutes of being called. It is obvious that Fils's attitude and focus changed from telling the unfettered truth to protecting herself after learning that she may have violated the law. Yet, a review of Fils's recorded statements shows that she did not totally recant what she told Desiré. While being recorded Fils attempted to classify her giving of money to respondent Andruszkiewicz as gifts. First she stated that she offered respondents the money but that they refused to take it. Ultimately, however, she wavered between not recalling if respondents accepted the \$30 during the first occasion to stating that they did not. Regarding the \$50 on the second occasion, she ultimately stated "I think they took it" (Pet. Ex. 7). Further, it is telling that when Fils's sister arrived she told investigators that Fils gave the sanitation workers a "gift" and had done nothing wrong.

I credit Fils's initial statements made to Desiré in Creole. Accordingly, I find by a preponderance of the credible evidence that on March 31, 2006 and April 5, 2006, respondent Andruszkiewicz accepted \$30 and \$50, respectively, from Fils for collecting garbage from her driveway, in violation of Code of Conduct rule 4.3.

There is no direct evidence that respondents shared the \$30 and \$50 gratuities that were accepted by respondent Andruszkiewicz. Rather, the Department's relies on circumstantial evidence to establish that respondent Jefferies shared in the gratuities.

In *Department of Sanitation v. Ivy*, Administrative Law Judge Merris explained that circumstantial evidence is defined as “evidence of a collateral fact that is, of a fact other than a fact in issue, from which, either alone or with other collateral facts, the fact in issue may be inferred.” OATH Index No. 2376/00 (May 3, 2001), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 02-07-SA (Mar. 22, 2002), (quoting *Dep’t of Transportation v. Mascia*, OATH Index No. 403/85 at 8 (May 30, 1986)); *See also Dep’t of Transportation v. Spence*, OATH Index No. 217/82 (April 25, 1983)(“circumstantial evidence is evidence of a fact not explicitly in issue, but which tends logically to prove the fact in issue”); *People v. Vitalis*, 67 A.D.2d 498 (2d Dep’t 1979); *Sherman v. Concourse Realty Corp.*, 47 A.D.2d 134 (2d Dep’t 1975). Misconduct can be established in a civil service disciplinary proceeding solely by circumstantial evidence, where burden of proof is by a preponderance of the credible evidence. *Ivy*, OATH 2376/00.

Judge Merris further explained that in order to establish a fact in issue by circumstantial evidence, the inference sought to be drawn must be based on proven collateral facts. *Id.* (citing *Transit Auth. v. Dugger*, OATH Index No. 794/91 (May 14, 1991); *Mascia*, OATH 403/85 at 8-9; *Ridings v. Vaccarello*, 55 A.D.2d 650 (2d Dep’t 1976)). “It is only permissible to draw an inference from the proven collateral facts where it is more likely that the inference arises as a consequence of the proven facts. If the probabilities are evenly balanced, no inference as to the fact in dispute may be drawn. To do so would be speculative.” *Ivy*, OATH 2376/00 (citing *Police Dep’t v. Leonick*, OATH Index No. 1342/90 (Oct. 2, 1990) (police officer not guilty of allegation of theft where it was equally probable that the complaining officer lost or misplaced the money but mistakenly believed that respondent stole it from him)).

Here the circumstantial evidence against respondent Jefferies is strong. Respondents had been partners for over a year on the dates at issue. The evidence establishes that respondents went to Fils’s home on two separate occasions, both non-collection days, and collected a large quantity of garbage from her driveway in violation of the Department’s Trade Waste Order. Moreover, respondent Andruszkiewicz admitted as much during his MEO16 interview. On the first occasion, March 31, 2006, respondents were at the home collecting garbage for approximately one hour. While respondents collected the garbage, Fils approached respondent Jefferies and handed her an object that Jefferies placed in her pants pocket. On the second occasion, April 5, 2006, respondents were at the home collecting garbage for about a half hour in the rain, ten minutes of which were video taped. This evidence and Cespedes’s testimony, which

I credit, that prior to these incidents, respondent Jefferies, when confronted as to why she was not picking up Cespedes garbage told Cespedes that it would cost him, leads to the reasonable inference that respondent Jefferies was aware of and shared in the \$30 and \$50 gratuities given by Fils on March 31 and April 5, 2006, respectively. Accordingly, I find that respondent Jefferies violated Code of Conduct rule 4.3 as well.

The Department did not offer any evidence or factual allegations in support of the charges that respondents violated Mayor's Executive Order No. 16. Therefore, those charges are dismissed.

FINDINGS AND CONCLUSIONS

1. The Department proved by a preponderance of the credible evidence that on March 31, 2006, respondents went off their assigned route and collected a large quantity of garbage from the driveway of a house on 233rd Street without obtaining a supervisor's approval and accepted a \$30 gratuity from the homeowner in violation of Code of Conduct rules 3.2, 3.23, 4.3, and 5.2 and General Order No. 2001-19.
2. The Department proved by a preponderance of the credible evidence that on April 5, 2006, respondents went off their assigned route and collected a large quantity of garbage from the driveway of a house on 233rd Street without obtaining a supervisor's approval and accepted a \$50 gratuity from the homeowner in violation of Code of Conduct rules 3.2, 3.23, 4.3, and 5.2 and General Order No. 2001-19.
3. The Department failed to prove that respondents violated Mayoral Executive Order No. 16.

THEREFORE:

All the charges against each respondent are sustained, with the exception of the charges relating to violations Mayoral Executive Order No. 16. Those charges are dismissed.

RECOMMENDATION

After making the above findings, I requested and received summaries of respondents' personnel histories. The Department hired respondent Jefferies on June 25, 1990. Jefferies has 12 instances of discipline dating from June 9, 1992, the most serious of which resulted in a five day suspension without pay. Respondent Andruszkiewicz was hired on December 8, 1997. He has no prior disciplinary record.

Respondents have been found guilty of going off-route with a Department collection truck, without authority, on two separate occasions to collect large amounts of garbage from a homeowner's driveway on non-collection days and accepting a gratuity from the homeowner on each occasion. Respondents engaged in two forms of serious misconduct, accepting gratuities and violating the Trade Waste Order.

Section 16-106 of the Administrative Code limits the penalties that may be imposed after a finding of misconduct to a forfeiture of up to thirty days pay, suspension without pay for a period not exceeding thirty days, or dismissal from the Department.

Here the Department seeks termination of respondents' employment. This request is consistent with prior precedent of this tribunal involving the receipt of gratuities by sanitation workers and other employees. *See, e.g., Dep't of Sanitation v. Marcus*, OATH Index No. 1502/06 (Feb. 6, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-68-SA (June 25, 2007) (Termination recommended for sanitation worker who, on two occasions a year apart, accepted a gratuity from an undercover investigator posing as a management company representative); *Dep't of Sanitation v. Davenport*, OATH Index No. 1501/06 (Oct. 17, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-43-SA (Apr. 17, 2007) (termination recommended for sanitation worker who accepted three gratuities on three separate occasions, with one incident involving trade waste); *Dep't of Sanitation v. Lowe*, OATH Index No. 1499/06 (Sept. 22, 2006) (termination recommended for sanitation worker found to have solicited and accepted a gratuity for picking up commercial waste); *Dep't of Sanitation v. Kempf*, OATH Index No. 998/03 (Oct. 22, 2003) (termination recommended despite respondent's unblemished 20-year record where respondent picked up debris from an open bed pick-up truck and accepted a gratuity); *Dep't of Sanitation v. Sanchez*, OATH Index Nos. 992/03 & 997/03 (Mar. 19, 2003) (termination recommended for two 18-year veterans, one with no prior record and one with a minimal record, each of whom accepted \$20 from an undercover detective to take debris from a pick-up truck).

The purpose of barring the receipt of unlawful gratuities is to prohibit “tipping” a public servant because it undermines the integrity of governmental administration. *Pesale v. Beekman*, 81 A.D.2d 590 (2nd Dep’t 1981), *aff’d*, 54 N.Y.2d 707 (1981) (discussing New York Penal Code provision on the receipt of unlawful gratuities by public officials). As stated by the Second Circuit, “[t]he awarding of gifts thus related to an employee’s official acts is an evil in itself... because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees... for those who give gifts as distinguished from those who do not.” *United States v. Irwin*, 354 F.2d 192, 196 (2d Cir. 1965) (discussing Congress’s purpose in enacting a similar federal statute); *see also Marcus*, OATH 1502/06 at 12-13. This tribunal has characterized the acceptance of an unlawful gratuity as “one of the most serious and egregious kinds of misconduct... which is proscribed by law and... violates [the] public trust.” *Dep’t of Health v. Sealy*, OATH Index No. 129/85 at 5 (Dec. 11, 1986).

Additionally, General Order No. 2001-19 puts employees on notice that anyone who knowingly violates the trade waste prohibitions will be subject to a disciplinary penalty, including termination of employment. We have noted, repeatedly, that trade waste collection is “an abuse of public property and resources and misconduct that undermines the Department’s responsibility for enforcing the Administrative Code and adds to the expense of exporting refuse.” *Kempf*, OATH 998/03 at 4.

This tribunal has consistently recommended termination of employment for violations of the trade waste order even where the sanitation workers involved had lengthy tenures and unblemished records. Termination of employment has been recommended even in the absence of proof that the worker accepted a gratuity *See e.g. Dep’t of Sanitation v. Cerulli*, OATH Index No. 2272/01 (Jan. 28, 2002) (sanitation worker’s prior twelve-year unblemished record insufficient to warrant penalty less than termination, even absent proof of gratuity); *Dep’t of Sanitation v. Joyce*, OATH Index Nos. 888/00 & 889/00 (Aug. 16, 2000), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 00-75-SA (Oct. 22, 2001) (one employee’s 13 year tenure and minor disciplinary record and the other’s twelve year tenure did not constitute compelling mitigation against termination, even absent proof of gratuity); *Dep’t Sanitation v. Macari*, OATH Index Nos. 606/00 & 607/00 at 9 (Apr. 4, 2000) (termination recommended for 19-year employee with minor disciplinary record, where there was no evidence of gratuity, but a very large amount of commercial waste was collected); *Dep’t of Sanitation v. Mallon*, OATH Index Nos. 1209/98 &

1210/98 (May 6, 1998), *aff'd sub nom. Mallon v. Doherty*, 269 A.D.2d 282 (1st Dep't 2000) (termination recommended for employees found to have collected construction waste; no evidence of gratuity; one employee had 9 years on the job and no history of prior discipline).

On rare occasions, this tribunal has recommended penalties short of termination for trade waste violations. Among the mitigating factors that may be considered are lengthy tenure, the lack of a prior disciplinary record, and the absence of any financial benefit. *See Dep't of Sanitation v. Tribble*, OATH Nos. 994/03 & 995/03 (May 16, 2003) (30-day suspension recommended for respondent who did not accept gratuity and only accepted trade waste after undercover detective threatened to dump the debris in the street); *Dep't of Sanitation v. Sanchez*, OATH Index No. 1722/98 (Feb. 3, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-35-SA (Apr. 7, 2000) (30-day suspension recommended in view of respondent's tenure and lack of prior disciplinary record).

Respondent's counsel cited three cases to support his argument that violations of the trade waste order do not always result in termination of employment. I agree with counsel that termination is not an automatic penalty for violation of the trade waste order and that an appropriate penalty must be determined on a case by case basis. However, the three cases he relies on are readily distinguishable from the case at hand.

The first case is *Dep't of Sanitation v. Hyatt*, OATH Index No. 2009/06 (Dec. 8, 2006) *modified on penalty and remanded sub nom., Hyatt v. Doherty*, Index No. 104501/2007 (Sup. Ct. N.Y. Co. Oct. 4, 2007). In *Hyatt*, this tribunal recommended termination of employment for a sanitation worker of five years with an unblemished record who allowed construction debris to be deposited in his truck. There was no evidence that Hyatt solicited or received a gratuity. The Department adopted the recommendation and terminated Hyatt. Hyatt commenced an article 78 proceeding in Supreme Court. Judge Rakower determined that the penalty of termination was excessive, annulled the Department's decision to terminate Hyatt, and remitted the matter to the Department for reconsideration of an appropriate sanction *Hyatt*, Index No. 104501/2007. Judge Rakower stated that this tribunal's "finding was that [Hyatt] merely acquiesced to the dumping. [The ALJ] explicitly found that [Hyatt] did not take any gratuity from the men who dumped the refuse in the truck," and distinguished *Mallon v. Doherty*, 269 A.D.2d 282 (1st Dep't 2000) where, as here, the record showed the sanitation worker's "active participation in loading

renovations debris” *Id.* at 4. *In* this case, respondents didn’t just acquiesce, they actually collected trash and accepted gratuities on two occasions.

The second case cited is *Dep’t of Sanitation v. Iannello*, NYC Civ. Serv. Comm’n Item No. CD 09-13-M (Mar. 3, 2009). There the respondent was terminated for violating the trade waste order by collecting at least 27 bags of construction debris from a single location. The evidence further established that respondent failed to report that he had been offered a gratuity. The Civil Service Commission found termination to be excessive and modified the penalty to time served. The Commission based its decision on the Department’s lack of opposition to a penalty less than termination and the Department’s witnesses’ testimony that the order limiting pick-up to six bags is loosely enforced. The present case is distinguishable in that respondents were found to have accepted gratuities and the Department is seeking termination.

The third is *Dep’t of Sanitation v. Anthony*, OATH Index Nos. 793/07 & 794/07 (Feb. 27, 2007). *In Anthony* this tribunal found that respondents deviated from their route to collect an excessive amount of construction debris and recommended that both respondents’ employment be terminated. The Department adopted the recommendation and terminated respondents. Respondents then commenced an article 78 proceeding. The article 78 proceeding was discontinued after the parties entered into a stipulation of settlement. *Anthony v. Doherty*, Index No. 109516/2007 (Sup. Ct. N.Y. Co. Dec. 12, 2007). This case is illustrious of the parties’ ability to reach a negotiated settlement even after a report and recommendation is issued by this tribunal and, as outlined in the settlement, “shall [not] be cited to or deemed as precedent in any current or future litigation, administrative hearing, trial or proceeding, or settlement negotiation.” *Id.* at 3, ¶ 5.

Here, respondent Jefferies is a 17 year veteran of the Department. Her disciplinary record while lengthy has resulted in a maximum penalty of a five-day suspension. Respondent Andruszkiewicz is an eleven year veteran with no disciplinary history. Their lengthy tenures, and in respondent Andruszkiewicz’s case, his lack of a disciplinary record, are insufficient mitigating factors to warrant a penalty less than termination. Respondents are guilty of two of the most serious forms of misconduct that a sanitation worker can commit, accepting a gratuity and violating the trade waste order, either of which alone would warrant termination.

Accordingly, I recommend that both respondents' employment be terminated.

Julio Rodriguez
Administrative Law Judge

September 18, 2009

SUBMITTED TO:

JOHN J. DOHERTY

Commissioner

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