

Fire Dep't v. Krasner

OATH Index No. 2967/09 (Aug. 18, 2009)

Petitioner proved that fire protection inspector engaged in conduct prejudicial to good order and discipline, and disorderly and disruptive conduct, when he loudly refused to comply with his supervisor's instructions, regularly used profanity in the office, engaged in a physical altercation with his supervisor, and compared his workplace, Metrotech, with the "Virginia Tech" massacre, and himself, with the perpetrator of that massacre. ALJ recommends termination.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
-against-
GLENN KRASNER
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This is a disciplinary proceeding referred by the petitioner, the Fire Department, pursuant to section 75 of the Civil Service Law. The charges allege that respondent, Glenn Krasner, engaged in disorderly and disruptive conduct and conduct prejudicial to good order and discipline when he refused to perform a task assigned by his supervisor, used profanities in the workplace and directed profanities towards his supervisors, engaged in a physical altercation with his supervisors, and paralleled his workplace with the massacre that took place at Virginia Polytechnic Institute in 2007, and himself, with the perpetrator of that massacre, in violation of sections 1.3, 1.4, 1.5, and 1.6 of petitioner's Civilian Code of Conduct (ALJ. Ex. 1).

Prior to commencement of the hearing scheduled before me on July 21 and 22, 2009, petitioner's counsel sought an adjournment on grounds that she anticipated that respondent would raise his medical diagnosis as a defense, and petitioner had not been provided with respondent's medical records, in response to her discovery demands. Counsel admitted that, at a conference before this tribunal in May 2009, she became aware of a medical report issued by

respondent's treating psychiatrist. Counsel further admitted that she made her discovery demand on July 17, a few days before trial, after providing respondent with discovery. Counsel blamed the tardiness of her demand on respondent's counsel, because she was awaiting his discovery demand in order to make a reciprocal demand. She also protested that, despite her provision of discovery to respondent's counsel, he had failed to provide her with a formal written demand. Counsel further indicated that, while she was prepared to go forward, she would be at a severe disadvantage were respondent to call the doctor.

Respondent's counsel indicated that, indeed, he intended to call respondent's treating psychiatrist to testify as to her treatment and diagnosis of respondent, not in defense of respondent's conduct, but as mitigation. Counsel stated that petitioner had referred respondent for treatment since 2006, and was cognizant of the psychiatrist, yet waited until July 17 to make a demand for respondent to sign a release for his medical records. Respondent's counsel admitted that he refused petitioner's request because it was virtually impossible for medical records to be provided so rapidly. He also indicated that, prior to trial, he had suggested an adjournment when he learned of the unavailability of one of petitioner's primary witnesses, the supervisor with whom respondent had had an altercation. Petitioner, however, rejected his offer.

Under OATH's rules of practice, "[d]iscovery shall be requested and completed promptly, so that each party may reasonably prepare for trial." 48 RCNY § 1-33(c). Likewise, under section 3120 of the Civil Practice Rules and Regulations ("C.P.L.R."), "[a]fter commencement of an action, any party may serve on any other party a notice...(i) to produce [discovery]." C.P.L.R. 3120 (Lexis 2009). I indicated to petitioner's counsel that I am aware of no rule that required petitioner to await respondent's discovery demand before making her own. Our rules further instruct that pre-trial motions "shall be...addressed to the administrative law judge as promptly as possible, and sufficiently in advance of the hearing to permit a timely decision to be made. Delay in presenting such a motion may...weigh against the granting of the motion." 48 RCNY § 1-34(a). By delaying her discovery demand, petitioner's counsel's request on the day of trial was therefore not in compliance with rule 1-34.

I instructed the parties that I would commence the trial, and contemplate a one-month continuance. However, respondent's counsel informed me that respondent had decided not to rely on the psychiatrist's report, or her testimony, because he wanted a speedy resolution.

At the hearing, petitioner relied on the testimony of Deputy Chief Inspectors William Dease and John Tuah, Fire Marshal Richard Giampaolo, and documentary evidence. Respondent appeared with counsel, and testified on his own behalf. At the end of trial, I kept the record open until the close of business on July 22, for petitioner to submit the signed statement of charges, and the relevant section of petitioner's Civilian Code of Conduct. Upon receipt, I supplemented ALJ exhibit 1 with the signed statement of charges, marked the Code of Conduct as petitioner's exhibit 8, and closed the record.

For the following reasons, I find that petitioner has sustained its charges and recommend that respondent be terminated from his employment.

ANALYSIS

Respondent has been a fire protection inspector ("FPI") with petitioner for 17 years (Tr. 222). Petitioner's witnesses agreed that respondent is very bright, excels at his job, is very productive, and can be relied upon because his work is extremely thorough and he is extremely knowledgeable about fire safety codes (Dease: Tr. 70-71; Tuah: Tr. 133, 164). In fact, respondent was awarded "Inspector of the Year" in 2006 (Dease: Tr. 71; Tuah: Tr. 179; Krasner: Tr. 224). The witnesses testified that, regardless, respondent had long demonstrated idiosyncratic behavior, such as singing, or yelling in his work area, with periodic boisterous outbursts if he opposed a decision or an instruction (Dease: Tr. 72, 112-16; Tuah: Tr. 134). Thus, the incidents which gave rise to this proceeding were not isolated. However, the witnesses felt that respondent's conduct had only recently become threatening (Dease: Tr. 102; Tuah: Tr. 135).

William Dease is a deputy chief inspector ("DCI") at the Fire Department. He supervises eight fire protection inspectors who identify the likely sources of fire hazards, such as fuel oil, compressed gases, and air conditioning, among others, and perform yearly, scheduled inspections of the related equipment. On a monthly basis, the FPI unit receives inspection orders for the equipment to be checked, and its location. At inspection, if the equipment is not code-compliant, the inspector issues a Notice of Violation ("NOV"). The property/equipment owner has 35 days to correct the violation and file a certificate of correction. If the violation is not corrected within that time, the owner must appear before the Environmental Control Board for a hearing. Thereafter, a re-inspection is done, and if the violation persists, the inspector must issue

a repeat violation. Mr. Dease maintained that upon re-inspection, even if an inspector observes significant progress, the inspector has no discretion, and must issue a repeat violation. He can only do so if the violation has been entirely cured, and the inspector can submit the appropriate documentation to support the correction (Tr. 55-58, 61-63, 79, 82-87).

February 14 and 16, 2006

Petitioner charged respondent with refusing to perform a duty, using profane language, being discourteous to a fellow employee, engaging in disorderly or disruptive conduct, including physical altercations, and conduct prejudicial to the good order and discipline of the Department on February 14 and 16, 2006. I find that petitioner proved all of the charges.

In 2006, Mr. Dease supervised respondent at District Office 1 at 9 Metrotech in Brooklyn. Mr. Dease testified that, at approximately 8:30 a.m. on February 14, 2006, supervisor Holbrook Murray¹ instructed respondent to serve a repeat violation. Respondent cursed loudly and refused Mr. Murray's instruction on at least two occasions. Because he witnessed the interaction, Mr. Dease called respondent into his office, and told him that he needed to calm down and obey Mr. Murray's order. Mr. Dease stated that respondent, who was very agitated, cursed even more, and returned to his cubicle. Mr. Dease followed respondent, and reiterated the order that Murray had issued, but respondent, still agitated, retorted "I'm giving **you** [emphasis added] an order. I'm not doing it" and saluted Mr. Dease. At that, Mr. Dease instructed respondent to report to John Tuah, the senior DCI. He admitted that he had no details about the underlying assignment that led to the disagreement between Mr. Murray and respondent (Tr. 58-61, 81, 89).

Mr. Dease testified that two days later, a similar outburst occurred. Somewhere between 8:30 a.m. and 9:00 a.m. on February 16, he heard respondent, from about 30 feet away, loudly uttering "that sonaofabitch tried to get me to serve a repeat violation." Suspecting that respondent was referring to Mr. Murray and the prior incident, Mr. Dease called respondent and told him that he did not want to hear any more cursing. Respondent again got extremely agitated and said that he would get the "bird shot" and "kill" Dease, because Dease and Murray were "getting up [his] ass." Respondent then returned to his cubicle. Mr. Dease explained that the

¹ Although not expressly clarified, it appears that Mr. Murray is an examiner, who reviews the FPIs post-inspection paper submissions.

term “bird shot” meant ammunition for shotguns. He said that he waited for Mr. Tuah to arrive in order to report respondent’s behavior. Some time after, Mr. Dease overheard Mr. Murray discussing with respondent an error on respondent’s timesheet. Respondent erupted into cursing, and slammed into Murray with his stomach about two or three times, and then chest-bumped Mr. Dease. At that, Mr. Dease instructed respondent to leave the building, but respondent refused. Mr. Dease claimed that he felt threatened and summoned fire marshals, who spoke with Mr. Murray and respondent separately (Tr. 65-69, 97). Mr. Dease recounted the incidents of both days in an e-mail to one of the unit heads, Sam Asamoah, at 11:37 a.m. on February 16, 2006 (Pet. Ex. 1). In it, he reported that when he attempted to restrain him, respondent chest-bumped Dease, and screamed that he would kill both Mr. Dease and Mr. Murray. In spite of these incidents, Mr. Dease stated that he and Mr. Tuah recommended respondent for Inspector of the Year in 2006. He maintained that their recommendation was based on the following criteria: 1) number of inspections completed, 2) the variety of inspections done, and the level of technical difficulty involved, and 3) the inspector’s ability to perform the inspections (Tr. 71, 98).

Mr. Dease’s expectations of the FPIs whom he supervised were maturity and an appreciation of the seriousness of their roles. He does not believe that a person who lacks control meets those expectations. He identified the main function of the job as inspections, and could recall only one previous incident where he felt that respondent did not comprehend the seriousness of the inspection. Mr. Dease admitted that no property owner had ever complained about respondent, and none of his co-workers had accused him of disturbing them. He acknowledged that respondent often helped younger, newer inspectors, and that respondent’s work product was beyond reproach. During cross-examination, Mr. Dease compared respondent to Albert Speer, one of Adolf Hitler’s architects. He explained that his comparison was meant to convey that respondent was brilliant but lacked social skills (Tr. 72-76, 99-104). According to Mr. Dease, he spoke to respondent about his behavior on innumerable occasions (Tr. 113-16).

John Tuah, the senior DCI, was aware that respondent and Mr. Murray were having problems because Mr. Murray had complained about respondent’s use of profanities, and likewise, respondent had complained to him about Mr. Murray. Mr. Tuah recalled receiving reports from Mr. Dease about the February 14 and 16, 2006 incidents, but did not remember either Mr. Dease or Mr. Murray reporting that respondent had threatened to shoot them (Tr. 132-33, 143-44, 182-83). In any event, Mr. Tuah corroborated Mr. Dease’s testimony that, unless a

violation has been cured in its entirety, the inspector must issue a violation. He stated that an inspector may make recommendations but the ultimate decision is the supervisor's. If the inspector disagrees with the supervisor, the matter should be brought to Mr. Tuah's attention. When the issue regarding Mr. Murray's instruction to respondent was presented to him, he supported Mr. Murray's decision, and instructed respondent to write the repeat violation, which respondent eventually did. Mr. Tuah could not recall the circumstances under which the matter was presented to him (Tr. 144-46, 162-68, 195).

Respondent holds a Bachelor's degree in Mechanical Engineering from Brooklyn Polytechnic Institute, and projected himself to be a very avid learner who, on his own, attends seminars and classes to keep current with building and engineering regulations. He announced, with pride, that 1) he won an award for perfect attendance in 1993, 2) was awarded inspector of the month during 1995, 3) was nominated for inspector of the month based on his 9/11-related work, but did not win, and 4) was awarded inspector of the year in December 2006 (Tr. 222, 224).

Respondent testified that the assignment underlying the controversy on February 14, 2006, involved a commercial building with an existing violation. He explained that on two previous occasions, inspectors noted that they had been unable to gain access to the premises. However, respondent gained access and was directed to the president of the primary commercial tenant operating from the premises. To correct the previous violation, and for the FDNY to issue a permit, the business needed to obtain a sign-off from the Department of Buildings ("DOB") for its roof-mounted air conditioning unit. Respondent testified that the president showed him about 30 different filings that his architect had made with the DOB for "equipment use permit cards" for the unit, and an architect's bill for \$17,000. The president also informed respondent that he was awaiting approval from the DOB, and the issuance of the "permit cards." Respondent conceded that he could have issued a repeat violation but declined to do so. Rather, he told the business owner that he would indicate "progress shown" on the inspector order, and submit the documents to his supervisor, Mr. Murray. He contends that it was not unusual for an inspector to decline to issue a repeat violation if satisfied that genuine progress has been made, but acknowledged that such a decision may be overruled. Respondent stated that he submitted the paperwork to Mr. Murray the following day. The day after that, he found the file on his desk with a note from Mr. Murray instructing him to issue a repeat violation (Tr. 227-32).

Respondent testified that he went to Mr. Murray and explained that a repeat violation was unnecessary because a good faith effort had been made to correct the violation. When Mr. Murray insisted that the violation be written, respondent refused and returned to his desk. Respondent claimed that for the next five days, Mr. Murray kept nagging him to return to the premises and issue the violation, and he kept refusing. On the fifth day, Murray marched over to his cubicle, slammed the file on his desk, yelled, "Krasner, you're going back to issue a repeat NOV," and walked away. Respondent took the file back to Mr. Murray's desk and, once again, refused. As he returned to his desk, Mr. Murray pursued him, bumped several times against respondent's chair, and repeatedly said, "Krasner, you're going back to issue a repeat NOV." Respondent maintained that he got nervous because Mr. Murray was acting irrationally, screaming and yelling, as he continued to bump on respondent's chair. Respondent stood up and told Mr. Murray, "I'm going to fuck you up if you don't get away from me," and "You'd better leave me alone or I'm gonna fuck you up." He said that, at that, Mr. Dease came over to separate them, while other inspectors became alarmed at how the incident had escalated (Tr. 232, 236-39).

Respondent claimed that two mornings later, Mr. Tuah, while standing beside Mr. Murray's cubicle, beckoned him over and told him to go and issue the repeat violation. Once again, respondent tried to argue against its issuance but Mr. Tuah insisted, and respondent returned to the premises the same morning and issued the violation (Tr. 240).

Respondent could not recall having any kind of confrontation with Mr. Dease, and adamantly denied bumping into him. He further denied making any remarks about getting "the bird shot" because he was ignorant as to what that term meant. He stated that he owned no weapons or ammunition and would have nothing to do with weaponry of any sort. Thus, he also denied threatening to kill Mr. Murray or Mr. Dease. He conceded that he might have told Mr. Dease something to the effect that "You'd better stay away because I'll fuck you up too." Respondent said that after he followed Mr. Tuah's instructions, he heard nothing more about the incident. He was never written up, nor disciplined. Nor was he told that he would suffer any adverse consequences for his behavior (Tr. 224, 240-43).

Even though Mr. Murray was not present to testify about respondent's behavior on February 14 and 16, 2006, the evidence that respondent refused to obey his order is uncontroverted. Respondent himself acknowledged his refusal to issue a repeat violation

because he felt that the business owner had made a good faith effort to correct the initial violation.

Petitioner's Civilian Code of Conduct prohibits employees from refusing to perform duties. Fire Department, City of New York: Civilian Code of Conduct, Chap. 1 (6). This tribunal has consistently held that an employee does not have the prerogative to refuse to obey a supervisor's order, even if he thinks it imprudent. Rather, under the "obey now, grieve later" principle, an employee must obey an order which he believes to be objectionable and later dispute it through formal grievance procedures. *See Ferreri v. New York State Thruway Auth.*, 62 N.Y.2d 855 (1984); *Strokes v. City of Albany*, 101 A.D.2d 944 (3d Dep't 1984); *Health & Hospitals Corp. (Queens Health Network) v. Smith*, OATH Index No. 2019/08 (Oct. 17, 2008); *Dep't of Correction v. Shabazz*, OATH Index No. 111/03 (Aug. 21, 2003); *Health & Hospitals Corp. (Kings County Hospital Center) v. Gordon*, OATH Index No. 1843/98 (Nov. 2, 1998).

It is of little consequence that respondent later complied with the same order issued by DCI Tuah. We have also held that whether an employee's initial refusal of an order with which he later complies constitutes misconduct depends on the circumstances of the case. *See Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 (Aug. 30, 2007); *Dep't of Buildings v. Cortes*, OATH Index No. 577/90 (Feb. 9, 1990). Where compliance follows quickly on the heels of a refusal, a finding of insubordination is less likely. *See Transit Auth. v. Driess*, OATH Index No. 480/91 at 12-13 (Feb. 28, 1991), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD91-117 (Sept. 16, 1991) (transit officer who turned over his memo book to his sergeant almost immediately after first refusing to do so did not engage in an intentional act of disobedience but rather, only a momentary reaction). Here, respondent's compliance was neither prompt, nor at the order of his direct supervisor. According to respondent, at least a few days had elapsed between the initial order issued by Mr. Murray, and respondent's compliance with Mr. Tuah's instructions.

It is unclear whether respondent would have complied had he not been directed to do so by DCI Tuah, a senior supervisor. It was apparent that respondent respected Mr. Tuah as a supervisor, but not Mr. Murray. Nonetheless, even if an employee "dislikes [his supervisor], he must still comply with his directives." *Chappelle*, OATH 1918/07 at 4; *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital & Nursing Facility) v. Ramsey*, OATH Index No. 724/04 at 9 (Apr. 16, 2004).

Respondent's refusal to comply with Mr. Murray's order to issue a repeat violation therefore constitutes misconduct.

The charge that respondent used profanities to Mr. Murray and Mr. Dease on February 16 is not in dispute because respondent admitted to it. Respondent made no such admission for the February 14 charge. He further denied initiating any kind of physical altercation with Mr. Murray, threatening Mr. Dease and Mr. Murray with the "bird shot," or threatening to kill them.

I found Mr. Dease's comparison of respondent to Albert Speer to be insensitive and boorish, in spite of his attempt to rationalize it by professing to be a student of history. Nonetheless, I credited his testimony, over respondent's, because it was supported by his contemporaneous, detailed e-mail on February 16, memorializing what had occurred on February 14 and 16. *See Dep't of v. Sanders*, OATH Index No. 558/09 (Jan. 5, 2009); *Dep't of Correction v. Boyce*, OATH Index No. 789/97 at 13 (July 9, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 99-75-SA (July 19, 1999) ("contemporaneousness usually evinces reliability"). Mr. Dease demonstrated no animus towards respondent, whose prowess as a fire prevention inspector he clearly valued. Hence, I could see no reason why he would fabricate the contents of his e-mail. In addition, Mr. Tuah's testimony suggested that respondent's frequent use of profanities was characteristic, and troubling to Mr. Tuah. Thus, it was plausible that respondent resorted to expletives on February 14, as Mr. Dease testified.

This tribunal has held that not every disagreement with a supervisor constitutes misconduct. *See Dep't of Environmental Protection v. Berlyavsky*, OATH Index No. 1011/06 at 5-6 (Apr. 19, 2006) ("Every statement made to a supervisor in the heat of a disagreement does not constitute misconduct."). However, profanity directed towards a supervisor may constitute misconduct per se. *See Dep't of Buildings v. Cortes*, OATH Index No. 577/90 (Feb. 9, 1990). Not only is it inherently disrespectful, but it also serves to undermine the supervisor's authority. *Health & Hospitals Corp. (North Bronx Healthcare Network) v. Wolfe*, OATH Index No. 2844/08 (Sept. 8, 2008); *Health & Hospitals Corp. (Jacobi Medical Center) v. Thomas*, OATH Index No. 1369/99 (June 3, 1999) (uniformed peace officer may not openly debate an order or engage in a shouting match with her commanding officer, even inside a private office). Thus, an employee who uses profanity or expresses disagreement with a supervisor in a disrespectful manner may be disciplined for misconduct. *Fire Dep't v. Gonzalez*, OATH Index No. 210/02 (Feb. 8, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD03-08-SA (Feb. 5, 2003).

Here, on both days, respondent's responses to his supervisors were explosive, disrespectful, and disruptive. Respondent's regular use of expletives to express himself does not negate a finding of misconduct, which is predicated upon the "manner, tone and content" of respondent's language. *See Wolfe*, OATH 2844/08 at 6. Accordingly, I find respondent's use of profanity on both days constituted misconduct which was disorderly and disruptive, and prejudicial to good order and discipline.

Respondent disclaimer of knowledge of the term "bird shot" was not convincing. The term itself is not commonly used, and I could think of no reason why Mr. Dease would concoct such a tale or accuse respondent of using such an obscure term. On the other hand, it was entirely plausible that respondent, in an angry tirade, issued the unusual term, and threatened to kill Mr. Dease and Mr. Murray. According to Webster's Online Dictionary, a bird shot is defined as "small lead shot for shotgun shells."² Thus, Mr. Dease justifiably felt threatened.

Turning to the charge that respondent engaged in a physical altercation with Mr. Murray on February 16, I was persuaded that respondent initiated some kind of physical contact with Mr. Murray on that day. It was apparent that he felt frustrated by Mr. Murray's insistence that he issue the repeat violation given that he had already told the business owner that he would not issue one. Mr. Murray's inquiry into an entry on respondent's time sheet acted as a catalyst, and caused respondent, who was already volatile, to erupt and initiate physical contact with Mr. Murray. Respondent's version that Mr. Murray came after him and repeatedly bumped into his chair did not make sense because there was no need for Murray to do so. Further, had Mr. Murray been the initial aggressor, it was more likely than not that Mr. Dease, who was a witness to the interaction, would have called Mr. Murray away, and respondent would not have threatened to "fuck [Mr. Dease] up too" for his intervention. In any event, this tribunal has never condoned threats of violence, or physical confrontations in the workplace, regardless of the initial aggressor. *See Dep't of Sanitation v. Tripplin*, OATH Index No. 2308/07 at 7 (Oct. 5, 2007); *Bd. of Education v. Fuccio*, OATH Index No. 924/01 at 33 (June 21, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD03-37-SA (Apr. 11, 2003).

Thus, I find that respondent uttered verbal threats to Mr. Dease and Mr. Murray on February 16, 2006. I also find that respondent engaged in a physical altercation with Mr. Murray

² See <http://www.websters-online-dictionary.org/bi/bird+shot.html>

on February 16, and that respondent's words and actions were impermissible misconduct which was disorderly and disruptive, and prejudicial to good order and discipline.

I note that Mr. Dease's testimony and his e-mail indicated that he, too, was bumped in the chest by respondent, but that allegation was not included in petitioner's charges. While it was more likely than not that the physical interaction between Mr. Dease and respondent did occur, I was not convinced that it was intentional. It was hard to conceive that respondent would have deliberately engaged in a full frontal bump with Mr. Dease, who was much larger in stature than respondent. Rather, I got the impression from Mr. Dease's e-mail that respondent, while reacting in a blind rage to Mr. Murray, may have unintentionally bumped into Mr. Dease, who was attempting to restrain him.

April 24, 2007

Petitioner charged respondent with engaging in disorderly or disruptive conduct, and conduct prejudicial to the good order and discipline of the Department when he repeatedly chanted "Metrotech equals Virginia Tech" and referred to himself as "Cho," the gunman in the Virginia Tech. shootings. I find that petitioner proved the charges.

Like Mr. Dease, Mr. Tuah praised respondent's work but decried his use of expletives in the workplace. He testified that he has known respondent for about 14 years, during which respondent often displayed inappropriate behavior and made inappropriate statements. For instance, respondent maintained a sign at his desk which read "going postal." Mr. Tuah said that he had instructed respondent to remove the sign because it was reminiscent of a workplace tragedy that had occurred at a post office. In 2004, Mr. Tuah informed his own supervisors about the sign but no charges were initiated against respondent. On another occasion, while playing music in the office, specifically Bob Marley's "I Shot the Sheriff," respondent improvised with "I shot the examiner, but I didn't shoot the DCI." According to Mr. Tuah, respondent's behavior and remarks often evoked laughter from co-workers. He was unsure whether that laughter was the catalyst for respondent's persistence in acting inappropriately. In spite of respondent's behavior, Mr. Tuah maintained that he had never before felt threatened. However, he became disturbed by respondent's behavior on April 24, 2007, and reported it almost immediately (Tr. 131-39, 152-53, 160-61).

On that day, while seated at his desk, Mr. Tuah heard respondent loudly chanting "Metrotech equals Virginia Tech." He went over to respondent and instructed him to desist, but respondent continued his chant. Mr. Tuah called respondent over to his office, and once again instructed him to stop his chant, after admonishing, "I don't see how you could be joking about somebody gunning down 32 people." Instead of ceasing, respondent replied, "My own mother calls me Cho." Because Mr. Tuah could not assess respondent's intent with his parallel between Metrotech and Virginia Tech, and did not want to forget any of respondent's words, he e-mailed his supervisor, Sam Asamoah, within five minutes of the incident for directions on how to proceed (Pet. Ex. 2). As a result, fire marshals responded to the floor, revoked respondent's security, and determined that respondent would have to pass through metal detectors each morning (Pet. Ex. 3). Mr. Tuah reported that respondent made him aware that he was receiving counseling, and since April 2007, there have been no further incidents involving respondent (Tr. 124-26, 128-30, 148-51).

Mr. Tuah echoed Mr. Dease's justification for nominating respondent for Inspector of the Year during the same year that respondent engaged in misconduct. He maintained that independent criteria are considered for the nomination. Thus, he said, respondent's threat to shoot Mr. Dease and Mr. Murray would not have been a relevant consideration, even had he been made aware of it (Tr. 176-81).

Respondent did not dispute Mr. Tuah's testimony that on April 24, 2007, he remarked that "Metrotech equals Virginia Tech." Nor did he deny saying that his own mother called him "Cho." He said that, although inappropriate, his remarks were triggered by another no-access inspection. When he went to the address indicated on the inspection order, the building turned out to be residential. The building engineer even took him up to the tenth floor to prove that the business that was the subject of the inspection order was not located there. Respondent returned to his office, reviewed the file, and found that there had been a data entry error with respect to the street address. The next morning, he visited the correct location, spoke with the president of the business, and inspected the two 15-ton air conditioning units. Because of time constraints, the president of the company asked respondent to leave, and refused to sign a survey form that respondent had completed. The following day, on April 24, 2007, respondent made notes of what had been done. However, Mr. Dease ignored respondent's diligence, and told him that he had to return to the business because the president did not sign the survey form, which,

respondent claimed, had no impact on the paper work. Mr. Dease eventually said “You know what, I’ll let you go this time. But the next time you do a survey and don’t get the respondent’s signature, you’ll have to go back.” Respondent admitted that he felt frustrated and hurt that Mr. Dease did not appreciate the work that he had done and the initiative that he had shown, and therefore uttered, in jest, “Metrotech is like Virginia Tech.” He said that he recalled making the statement three times, and that his co-workers laughed (Tr. 245-53).

Respondent contradicted the documentary evidence which showed that his security had been removed the following day. Rather, he claimed that it was only from the fourth day following his remarks that his clearance was removed, and he currently has to be scanned by the metal detector before he can gain access to his office. He was also interrogated by two fire marshals. Respondent estimated that about two weeks had elapsed before he was served with notice of the charges and specifications by the Bureau of Investigations and Trials, which simultaneously ordered him to report to petitioner’s counseling unit for an evaluation (ALJ Ex. 1; Pet. Ex. 8). The order indicated that if treatment was deemed appropriate, the referral would be recorded as “supervisory,” rather than “voluntary.” Respondent testified that he immediately complied with the order, and scheduled an appointment with petitioner’s counseling unit. He reported that he has been seeing a counselor on a weekly basis since that time, and engages in cognitive therapy counseling. In addition, the counselor referred him to the FDNY psychiatrist, Dr. Sarah Gleacher, whom he sees on a monthly basis. Respondent testified that he was diagnosed with Asperger’s Syndrome, and was placed on 200 milligrams of Zoloft (Tr. 253-55, 257-60, 267-68).

Respondent expressed deep remorse for his “Virginia Tech” remarks, and stated that since he has been receiving treatment, he comprehends that they were “inappropriate,” “inane,” “dumb,” “stupid,” and “ridiculous.” He therefore issued an apology to the FDNY for the remarks. Further, he confirmed that he has had no further outbursts since he entered counseling. He claimed, however, that he still maintains the “going postal” sign in his cubicle, and denies that DCI Tuah, or any other person had instructed him to remove it (Tr. 281-82, 284-85).

Respondent maintained that apart from the instant proceeding, he had never been subjected to discipline by way of specifications or charges, nor been formally disciplined. During cross-examination, he appeared genuinely surprised when petitioner produced 1) letters of reprimand, which he had signed in 1996 and 1997 (one of which was in lieu of a formal

evidentiary hearing before this tribunal); 2) a 1996 memorandum issued to him by the then administrative chief inspector regarding petitioner's equal employment opportunity ("EEO") policies, and 3) a stipulation agreement executed between respondent and petitioner in 2003, in which respondent agreed to accept a formal reprimand "in resolution of discipline case No. 96/03" (Pet. Exs. 4, 5, 6, 7; Tr. 298, 305-12, 317, 322-23).

There is no dispute that respondent repeatedly uttered the phrase "Metrotech equals Virginia Tech" or "Metrotech is like Virginia Tech" on April 24, 2007. Taken in the factual context of the well-publicized massacre at Virginia Technical Institute earlier that month, there is little doubt that respondent's parallel of his office to Virginia Tech conjured up horrific images of a meticulously-planned, violent attack by a student upon fellow students, and caused Mr. Tuah to be justifiably concerned. That respondent would utter those words when he admittedly felt under-appreciated was clearly intended as a threat to his supervisor, or at least a reminder of what could happen if he became enraged. Respondent's testimony that co-workers responded by laughing does not dilute the threat that lurked behind his words. It might well be that the laughter of his co-workers was intended to temper respondent's ire, and not because they perceived that respondent's words were made in jest.

In any event, I found respondent's remarks to be disorderly and disruptive, and prejudicial to good order and discipline. As previously discussed, an employee should not threaten a co-worker or supervisor with any type of violence. *See Health & Hospitals Corp. (Kings County Hospital Center) v. Stafford*, OATH Index No. 519/04 (Jan. 27, 2004) (termination recommended where respondent choked supervisor, threatened to kill him, was insubordinate, and used profanities); *Bd. of Education v. Fuccio*, OATH Index No. 924/01 at 33 (June 21, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD03-37-SA (Apr. 11, 2003) (termination recommended for respondent's refusal to follow a lawful order, threatening one supervisor, and screaming at and punching another).

FINDINGS AND CONCLUSIONS

1. Petitioner established that respondent used profane language and loudly refused to issue a repeat violation as directed by two supervisors on February 14, 2006, in violation of Chp. 1 (3), (4), (5) & (6) of its Civilian Code of Conduct.

2. Petitioner established that, on February 16, 2006, respondent yelled at and directed profanity at two supervisors, verbally threatened the supervisors, and engaged in a physical confrontation with one of those supervisors by bumping his chest against the supervisor's, in violation of Chp. 1 (3), (4) & (5) of its Civilian Code of Conduct.
3. Petitioner established that, on April 24, 2007, respondent loudly repeated the words "Metrotech equals Virginia Tech," and referred to himself as the perpetrator of that massacre to intimidate his supervisors, in violation of Chp. 1 (3) & (5) of its Civilian Code of Conduct.

RECOMMENDATION

After making these findings, I requested respondent's personnel abstract. I received copies of evaluations for respondent's first six years with the Department. Those earlier evaluations reflected overall ratings of good, very good, and outstanding. In some, respondent's supervisors remarked that respondent interacted well with people; demonstrated a genuine desire to make the area under the purview of his district office a safer place; did not shirk responsibility; and, demonstrated supervisory potential. In 1996, for the first time, he received an evaluation which reflected dissatisfaction with his written reports and his manner. Notably, that evaluation was given by a different supervisor from the previous ones. During that same year, respondent was issued a letter of reprimand, which was based on respondent's refusal to follow his supervisors' instructions regarding inspections and procedures, and also his failure to perform inspections or write violations as instructed. It also reflected that respondent ignored instructions that his work was being excessively packaged.

In April 1997, respondent received another letter of reprimand, in lieu of formal proceedings before this tribunal, for disrespecting a co-worker three months prior (in January 1997). The following month, respondent was awarded "Inspector of the Month" title for uncovering a potentially hazardous condition in the field. His evaluation for 1997, written by yet another supervisor, resumed the standards set in the earlier evaluations. In May 2003, respondent executed a stipulation in lieu of formal disciplinary charges, and accepted a formal reprimand. The stipulation agreement did not articulate respondent's conduct. In 2004, Mr. Tuah issued a memorandum to respondent about respondent's behavior at a meeting in the district office. The memorandum reaffirmed Mr. Tuah's testimony about respondent's proclivity

for using profanities, engaging in boisterous behavior, and having a verbal altercation with his supervisor. The memorandum was signed by the then supervisor, with Mr. Dease and Mr. Murray as witnesses, but respondent indicated that he would not sign, even though he initialed it. On the other hand, as has been noted, respondent was awarded “Inspector of the Year: title for 2006. Even in the absence of his more current evaluations, I note that his supervisors had only high praise for respondent’s work. Petitioner now seeks respondent’s termination.

Respondent has been found guilty of refusing to perform a duty as instructed by a supervisor; multiple instances of using profane language to his supervisors; engaging in a physical altercation with his supervisor; and multiple instances of making threatening remarks to his supervisor, one of which implicated serious harm to his co-workers. Respondent acknowledged that some form of discipline is appropriate but, in arguing against termination, pointed to his tenure, and the fact that he has never been suspended.

This tribunal has often applied the fundamental principle of employment law that “employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it.” *Dep’t of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990). The concept underlying progressive discipline is employee behavior modification through increasing penalties for repeated or similar misconduct. *See Health & Hospitals Corp (Kings County Hospital Center) v. Meyers*, OATH Index No. 1487/09 (Jan. 26, 2009); *Police Dep’t v. Schaefer & McGrath*, OATH Index Nos. 1114 & 1169/99 (July 2, 1999), *aff’d. sub nom. Schaefer v. Safir*, 281 A.D.2d 163 (1st Dep’t 2001).

Hence, in cases where an employee was found to have disobeyed his/her supervisor’s order and/or engaged in cursing or threatening a supervisor, this tribunal has imposed penalties ranging from five to forty days suspension without pay, and in extreme circumstances, termination. *See Dep’t of Sanitation v. Parks*, OATH Index No. 178/05 (Mar. 9, 2005) (5-day suspension without pay for sanitation worker’s failure to obey his supervisor’s order to return to the garage at a particular time); *Dep’t of Sanitation v. Gonzalez*, OATH Index No. 1841/01 (Aug. 17, 2001) (three consecutive suspensions of 20 days recommended, one of which stemmed from the sanitation worker’s failure to obey his supervisor’s order); *Dep’t of Sanitation v. Mitchell*, OATH Index No. 1823/00 (Nov. 3, 2000), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 01-60-SA (July 27, 2001) (30 days recommended for the sanitation worker’s insubordination and use of

profane and threatening language); *Health & Hospitals Corp. (Metropolitan Hospital Center) v. Williams*, OATH Index No. 386/98 (Dec. 8, 1997), *aff'd*, HHC Personnel Review Bd., Dec. No. 923 (Oct. 26, 1998) (40-day suspension recommended for making threatening statements to a co-worker and other conduct); *Bd. of Education v. Fuccio*, OATH Index No. 924/01 (June 21, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD03-37-SA (Apr. 11, 2003) (termination recommended for respondent's refusal to follow a lawful order, threatening one supervisor, and screaming at and punching another); *Health & Hospitals Corp. (Woodhull Medical and Mental Health Center) v. Pawlowski*, OATH Index No. 1836/00 (Oct. 4, 2000), *aff'd. sub nom. Pawlowski v. N. Brooklyn Health Network*, 299 A.D.2d 156 (1st Dep't 2002) (employee with lengthy disciplinary history terminated for threats to supervisors and co-workers).

In his closing arguments, respondent's counsel blamed petitioner for "doing nothing" about respondent's past aberrant behavior, and accused petitioner of confusing respondent by conferring "Inspector of the Year" title upon him during the same year that he was accused of multiple instances of misconduct. Respondent's argument is without merit. Respondent confuses inaction with leniency. It was clear to me that respondent is highly regarded for his job-related knowledge and skills, and that those were relevant considerations when petitioner was contemplating discipline for respondent's previous infractions. The record is replete with instances in which respondent was warned about his aberrant behavior, and in some instances, accepted formal reprimands.

While it is entirely possible that respondent's conduct may be attributable to factors not fully within his control, respondent's claim that he has been diagnosed with Asperger's Syndrome as a mitigating circumstance was unsupported. Even if he had produced documentation of such a diagnosis, there was no expert testimony to substantiate his claim that his behavior was symptomatic of Asperger's Syndrome, and therefore, not willful. Moreover, even if respondent established that he suffers from a mental disability or defect that caused his misconduct, it did not preclude his ability to perform the essential functions of his job over the past two years. In any event, neither the Human Right Law nor the Americans with Disabilities Act protects an employee, where even a reasonable accommodation for the employee's disability would not eliminate the direct threat that that employee poses to the health or safety of others. *See Johnson v. Maynard*, 2003 U.S. Dist. Lexis 2676 (S.D.N.Y. 2003); *Valentine v. Standard &*

Poor's, 50 F. Supp. 2d 262 (S.D.N.Y. 1999); *Palmer v. Circuit Court of Cook County*, 117 F.3d 351 (7th Cir. 1997).

Respondent's compliance with petitioner's order for him to seek counseling is commendable. Further, Mr. Tuah corroborated respondent's testimony that there have been no further incidents of misconduct since respondent has been attending counseling sessions. However, respondent's admission that he still maintains the "going postal" sign in his cubicle, in spite of the numerous counseling sessions, and even though he had been asked to remove it, is troubling. Thus, contrary to his testimony, it is not clear to me that respondent fully comprehends the impropriety of his actions.

In a case somewhat analogous to the instant proceeding, Administrative Law Judge John Spooner found that an employee's remarks about "going postal," and his reference to Virginia Tech, followed by "If I came in here with an Uzi and laid people out..." were improper threats that were intended to coerce management into succumbing to his transfer request. *See Dep't of Environmental Protection v. Danko*, OATH Index No. 1060/08 (Apr. 11, 2008). In recommending less than termination, Judge Spooner considered respondent's 15-year tenure with the Department, a recent favorable evaluation, and two minor disciplinary penalties, one of which was time and leave related. He also found that the respondent's remarks were made during a heated dispute, and that there was little proof that the respondent intended to harm his supervisors or co-workers. Thus, Judge Spooner found application of the principle of progressive discipline to be appropriate, to provide the respondent with an opportunity to preserve his job.

Here, petitioner tried progressive discipline with respondent, in that he received reprimands in 1996, 1997, and 2003, and received a memorandum in 2004. Despite repeated warnings, respondent's misconduct not only persisted but escalated. Respondent's refusal to comply with his supervisor's order, his use of profanities towards his supervisors, and his engagement in a physical altercation with his supervisor were compounded by his threatening language. Even though respondent's threats here were almost identical to *Danko's*, I found them to be more ominous. Moreover, unlike *Danko*, respondent's Virginia Tech remarks were not isolated. Nor were they uttered to achieve a particular goal (respondent in *Danko* wanted a transfer). Viewed in this light, and mindful of the serious threat to human lives suggested by respondent's analogizing Virginia Tech to his workplace, I find termination to be appropriate.

Fuccio, OATH 924/01 (termination recommended for respondent's refusal to follow a lawful order, threatening one supervisor, and screaming at and punching another); *Pawlowski*, OATH 1836/00 (employee with lengthy disciplinary history terminated for threats to supervisors and co-workers)

Accordingly, I recommend that respondent be terminated.

Ingrid M. Addison
Administrative Law Judge

August 18, 2009

SUBMITTED TO:

NICHOLAS SCOPPETTA
Commissioner

APPEARANCES:

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