

Fire Dep't v. Holdip

OATH Index No. 1404/14 (May 19, 2014)

Emergency medical technician charged with harassing female co-worker, threatening a male co-worker with a broomstick and another female co-worker with a knife, insubordination, false statements, and driving in front of an ambulance while making an obscene gesture to a female co-worker. ALJ found that most of the charges should be sustained and recommended that the technician be terminated.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
-against-
SEAN HOLDIP
Respondent

REPORT AND RECOMMENDATION

JOHN B. SPOONER, *Administrative Law Judge*

This case involves disciplinary charges initiated by petitioner, the Fire Department, against respondent, Sean Holdip, an emergency medical technician (EMT), pursuant to section 75 of the Civil Service Law. The five specifications allege that respondent harassed a female co-worker, threatened one male co-worker with a broomstick and another female co-worker with a knife, was insubordinate, made false statements, and drove in front of an ambulance and made an obscene gesture to a female co-worker.

A hearing was held before me on April 16, 2014. Petitioner called as witnesses five paramedics and EMT's and two supervisors. Respondent testified, denying most of the charges.

For the reasons given below, I recommend that the majority of the charges be sustained. As a penalty for this misconduct, I recommend that respondent be terminated from his employment.

ANALYSIS

Respondent has been an EMT since 2007. The charges concern five incidents in 2010 and 2011. After the March 2011 incident, respondent was reassigned to a supply room and has not been working as an EMT.

Incident of September 12, 2010

Specification 1 alleges that respondent used a computer to “annoy, harass and alarm” a female co-worker and “engaged in a verbal altercation” with another male co-worker. Petitioner’s proof of these charges consisted of testimony from three witnesses who saw respondent display an offensive term on a Department computer. Paramedic Frawley testified that on September 12, 2010, at around 10:45 p.m., she went into the equipment room, which contained a number of shared computers, to scan in and submit her paperwork. She initially noticed respondent in the room and, because he makes her “uncomfortable” due to previous hostile interactions, she left and waited until respondent left.

After respondent left the equipment room, Ms. Frawley returned, went to a computer, and began doing her paperwork. After about one or two minutes, respondent came back into the room and sat down next to her at the adjacent computer (Tr. 24-25). He started giggling more and more loudly “as to catch [Ms. Frawley’s] attention” (Tr. 26). She looked over at his computer screen and saw that it displayed a website called Urban Dictionary with the definition of the word “thesbian,” spelled like the word “thespian” with a “b” instead of a “p.” The website defined the word as “a woman who isn’t really a Lesbian but is just acting gay, either as a response to negative learned behavior towards men or not wanting to be alone due to unattractiveness” (Pet. Ex. 6). Ms. Frawley found the website offensive and left the room (Tr. 26). She complained about respondent’s actions to the officer on duty and to her union delegate, Mr. McGuire (Tr. 27).

Mr. McGuire testified that, after Ms. Frawley complained to him about being harassed, he went into the room and saw the website Urban Dictionary with word “thesbian,” along with a definition, on respondent’s computer screen (Tr. 63). He asked respondent if he had brought this up on the screen. When respondent admitted that he had, Mr. McGuire told respondent that this was inappropriate and that he could get into trouble (Tr. 67). Respondent replied that Mr. McGuire did not know what he was talking about and that respondent had a right to do computer

searches (Tr. 68). Respondent became “loud” and “aggressive,” putting up his fists “in the air.” Mr. McGuire said, “If you’re going to hit me, just hit me” (Tr. 68). Mr. McGuire identified a printout (Pet. Ex. 6) from the Urban Dictionary as the same website he had seen on respondent’s computer screen (Tr. 65-66).

Ms. Muhammad, another EMT, came into the equipment room as Mr. McGuire and respondent were talking. She recalled seeing something on respondent’s screen about lesbians. Mr. McGuire asked respondent, “What’s your problem?” and “why are you looking at that on the computer?” (Tr. 38). Respondent began “defending himself” by swinging his fists, but Ms. Muhammad came between the two men and held respondent back (Muhammad: Tr. 37-38; McGuire: Tr. 69). Ms. Muhammad did not mention in her report (Pet. Ex. 4) or in her testimony any remarks made by respondent to Mr. McGuire.

A supervisor, Lieutenant Borello, came into the room and told both respondent and Mr. McGuire to calm down. The Urban Dictionary website was still on the screen (McGuire: Tr. 68-69). Lieutenant Borello wrote in his report (Pet. Ex. 5) that he came into the room as Mr. McGuire and respondent were being “separated.” Both EMT’s were told to leave. Mr. McGuire left, but respondent initially “became threatening,” refused to leave, and left only after being persuaded to do so by his union delegate.

Ms. Frawley testified that, after respondent left the facility, he stood across the street staring towards the facility entrance for about 10 minutes (Tr. 28). This was confirmed by Lieutenant Borello’s report (Pet. Ex. 5), which further stated that Ms. Frawley “felt menaced,” that she was escorted to her vehicle by station officers, and that respondent left only after Ms. Frawley had driven away.

In his account, respondent admitted looking up the word “thesbian” on the computer but denied that it was intended to insult Ms. Frawley. Respondent testified that, sometime around the incident, he heard the word “thespian” used on a televised Oscar awards ceremony, did not know what it meant, and tried to look it up in an online dictionary. He noticed that Ms. Frawley was in the room but denied that she seemed upset (Tr. 171).

He contended that, upon entering the equipment room, Mr. McGuire started pointing in respondent’s face and looked like he might hit respondent (Tr. 170). Mr. McGuire said, “We don’t need you here, Figuero, Negro.” Respondent said he perceived the phrase to be an insult (Tr. 171). Respondent stated that he deserved to work there because he was born in the hospital

and “I know the community” (Tr. 171). He acknowledged that he was ordered to go home by his supervisors (Tr. 172).

Respondent admitted the two central allegations in the charges: that he displayed the definition of the slang word “thesbian” on a Department computer screen and that he had an argument with Mr. McGuire about the impropriety of doing so. Several significant details, however, were disputed. Ms. Frawley testified that respondent giggled loudly and for some seconds; respondent did not admit this. Mr. McGuire and Ms. Muhammad testified that, during the argument, respondent pumped his fist in the air and swung his arms; respondent insisted that only Mr. McGuire displayed physical aggression. Respondent insisted that Mr. McGuire used the phrase “Figuro, Negro;” Mr. McGuire denied saying this.

As to these details, I found that petitioner’s witnesses were more credible than respondent. Ms. Frawley was a very credible witness who testified in a straight forward and neutral manner. While she confessed to having had strained past interactions with respondent, she did not appear to have any bias toward him and respondent himself admitted that he displayed the word “thesbian” on the computer screen as she accused him of doing. I credited the details supplied in her testimony that respondent returned to the equipment room right after she entered and that he giggled more and more loudly as he brought up the word “thesbian” on the screen.

Mr. McGuire was generally credible with no apparent interest in the outcome of the case. Ms. Muhammad was very credible, since far from being biased toward the Department she showed herself to be sympathetic to respondent, whom she was friendly with when they were in training together. She characterized respondent’s swinging of his arms as “defending” himself (Tr. 38). She also seemed unaware as to why Ms. Frawley complained about the incident, since she only recalled seeing the word “lesbian” on the computer screen. Ms. Muhammad’s testimony about respondent’s actions was corroborated by a contemporaneous written report (Pet. Ex. 4).

Respondent, on the other hand, was less credible than Ms. Frawley, Ms. Muhammad, or Mr. McGuire. He had a significant motive to modify his testimony to avoid being disciplined for misconduct. Respondent’s account that, in the middle of his tour, he was spontaneously motivated to look up the word “thespian,” not the word “thesbian,” after having seen at an unspecified time some awards program on television, seemed unconvincing.

Respondent's accusation that Mr. McGuire used the racist phrase "figuero, negero" was not credible for a number of reasons. First, Ms. Muhammad did not recall hearing the phrase. This was significant because Ms. Muhammad would likely have remembered such an unusual and racially tinged taunt and also, due to her good will toward respondent, would have testified about it, had the phrase been uttered. The "figuero" remark was also not mentioned in the report (Pet. Ex. 5) of Lieutenant Borello, who spoke with respondent following the incident. Had such a racial insult been used by Mr. McGuire, it seems improbable that respondent would have failed to mention it to the lieutenant.

While I found Mr. McGuire to be more credible than respondent, I nonetheless did not find his testimony sufficient to establish exactly what respondent said to Mr. McGuire. I note that Mr. McGuire, unlike Ms. Muhammad, did not record his recollections in a contemporary report. Nor did Ms. Muhammad, who wrote a report, confirm any of the remarks that respondent made. I therefore find only that, based upon the combined testimony of Mr. McGuire and Ms. Muhammad, after Mr. McGuire told respondent that respondent acted inappropriately in displaying the word "thesbian" on a computer screen, respondent replied to the effect that Mr. McGuire was mistaken and that he was permitted to use the computer to do internet searches.

I find that the facts surrounding respondent's display of the word "thesbian" on the computer screen are sufficient to demonstrate that he displayed the definition as an intentional insult to Ms. Frawley. Respondent returned to the equipment room just before Ms. Frawley entered. He promptly went to the Urban Dictionary website and displayed the word "thesbian." He then laughed or giggled loudly repeatedly until Ms. Frawley looked at the computer screen. These actions violated the Department rule that employees must treat one another courteously. *See* Department Regulations 101-01 § 4.1.10 (Employees must "[b]e courteous, polite, respectful and helpful to fellow members, hospital staffs and the public, at all times.").

I do not find, however, that respondent's remarks to Mr. McGuire constituted misconduct, as alleged. All workplace verbal altercations or disagreements are not misconduct. *Dep't of Correction v. Peterson*, OATH Index No. 2095/12 at 7 (Jan. 11, 2013) ("While it is permissible to disagree with a supervisor or a co-worker, the disagreement must remain within the bounds of decorum and discretion"); citing *Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Thomas*, OATH Index No. 531/04 at 6 (May 4, 2004). Further, Mr. McGuire, by his own admission, initiated the incident by chastising respondent for bringing up

the Urban Dictionary website and told him that he might get into trouble. It was understandable that, coming from a fellow EMT, this sort of accusation might make respondent defensive. Replying that a co-worker was wrong, even in emphatic or rough language, during a discussion initiated by a co-worker about whether an internet search is permitted, does not rise to the level of misconduct. *See Dep't of Transportation v. Mooney*, OATH Index No. 1026/02 at 8 (Apr. 24, 2002) (co-worker's initial "rough language" supported finding that employee's similarly rough language was not misconduct); *Fire Dep't v. Donofrio*, OATH Index No. 2042/96 at 5-6 (Oct. 23, 1996) (supervisor's initial profanity supported finding that subordinate's use of a vulgar metaphor was not misconduct).

The portion of specification 1 alleging that respondent harassed Ms. Frawley must be sustained, while the portion alleging that respondent was involved in a verbal altercation must be dismissed.

Incident of November 28, 2010

Specification 2 alleges that respondent threatened another EMT with a broom handle and refused to put the handle down when ordered by a supervisor. The proof of this charge consisted of the testimony of an EMT and a supervisor. EMT Withworth testified that in 2010 he had worked four to five times with respondent as his partner (Tr. 84) and, as background, described a prior incident in which respondent had become angry at him. In late November 2010, EMT Withworth and respondent were partners in an ambulance responding to a job. Mr. Withworth saw that respondent, who was driving, was taking the wrong route to a location and tried to give him directions. Respondent told him, "Don't fucking talk to me like that." Mr. Withworth was "taken aback" and said little else to respondent for the remainder of their shift (Tr. 85-86).

The charged incident occurred a day or two later, on November 28, 2010, at around 11:15 p.m. Mr. Withworth and Lieutenant DeLuca testified that Mr. Withworth was in the office when respondent entered with a broom handle in his hand, hit the handle on the ground, and said that respondent kicked him (Withworth: Tr. 87, 89; DeLuca: Tr. 103). Mr. Withworth testified that he had no idea what respondent was talking about. Lieutenant DeLuca asked respondent when this happened, and respondent said it was in the parking lot a few minutes before (DeLuca: Tr. 104). From some six feet away, respondent continued to wave the broom around, making Mr.

Withworth feel uncomfortable (Withworth: Tr. 90). Lieutenant DeLuca ordered respondent to put the handle down and respondent refused (DeLuca: Tr. 104).

Mr. Withworth then left the room and Lieutenant DeLuca again ordered respondent to put down the broom handle. This time respondent complied and put the handle down. Respondent said he wanted to go home and did not feel safe. Lieutenant DeLuca permitted respondent to leave (DeLuca: Tr. 105-06). Both Mr. Withworth and Lieutenant DeLuca wrote reports about the incident (Pet. Exs. 7, 9).

Respondent testified that the argument with Mr. Withworth about driving routes occurred, not on a previous tour, but on the date of the incident. Respondent stated that he was driving when Mr. Withworth “started screaming that I missed the fucking turn.” As he spoke, Mr. Withworth “raised his fists” as if he were going to hit respondent as he was driving (Tr. 172). They responded to the call and transported a patient with a sprained ankle.

Respondent admitted that, after he and Mr. Withworth returned to the station, he picked up a broom, but he insisted that he did so only after Mr. Withworth attacked him in the station parking lot. He stated that Mr. Withworth “lunged at” and “assaulted” him, kicking him in the shin (Tr. 173). Mr. Withworth then went to his car, backed out, and took out a steering wheel locking device. Respondent went into the station to tell a supervisor that he feared he was going to be attacked. Behind him he could hear a “click, click, click” noise as Mr. Withworth opened the lock.

In the station, respondent picked up a broom, tapped it on the floor, and told Mr. Withworth to “stay away from me” because he had just assaulted him. Respondent denied swinging the broom or approaching Mr. Withworth with it (Tr. 174). Respondent asked if he could go home because he was upset about having been kicked (Tr. 175).

Respondent wrote a two-sentence report (Pet. Ex. 8) indicating that Mr. Withworth kicked his leg “when walking out of the base and he was walking in.” He indicated he did not feel “safe” working that night.

Mr. Withworth was a very credible witness with no apparent motive to lie about the incident. His account was corroborated by the eyewitness account of Lieutenant DeLuca and by his own written report. Lieutenant DeLuca’s account was likewise entirely credible in testifying that respondent swung the broom handle toward Mr. Withworth and initially refused to put the handle down.

Respondent's account of Mr. Withworth attacking him in the parking lot, first by kicking him and then menacing him with a locking device, was incredible. It seemed unlikely that any EMT would attack his partner by kicking and then threatening him with a heavy lock after a minor disagreement about a driving route. Such behavior seemed highly out of character for Mr. Withworth, a quiet and soft spoken man who was reluctant to repeat any of the profanity he had heard respondent use. Respondent's version was also at odds with his written report, in which he never described an attack and pursuit from the parking lot but stated only that Mr. Withworth kicked him just as he "was walking in."

Based upon the credible testimony of Mr. Withworth and Lieutenant DeLuca, I find that, on the date of this incident, respondent picked up a broom handle, accused Mr. Withworth of kicking him, and swung the broom handle several times in proximity to Mr. Withworth. Based upon the credible testimony of Mr. Withworth, I find that no prior kicking or attack took place. I further find that respondent refused to put down the broom handle when ordered to do so by Lieutenant DeLuca.

These actions constituted violations of Department Regulation 101-01 sections 4.1.10 (Employees must "[b]e courteous, polite, respectful and helpful to fellow members, hospital staffs and the public, at all times.") and 4.2.54 (Employees must not "[d]isobey an order given by a supervisor."). Specification 2 must be sustained.

Incident of February 14, 2011

Specification 3 alleges that respondent was insubordinate and disobeyed orders of Lieutenant DeLuca. Lieutenant DeLuca testified that, on February 11, 2011, he was the supervisor of the EMT's and paramedics at Station 35, where respondent was assigned for part of the previous year. On this date, as recounted in a memorandum written on February 14, 2011 (Pet. Ex. 10), Lieutenant DeLuca notified the command at respondent's current station to order respondent to return to the station so that the lieutenant could deliver respondent's evaluation. When the lieutenant arrived at the station, respondent was seated in his vehicle outside. Lieutenant DeLuca told respondent that the lieutenant needed to issue him his evaluation. Respondent replied that the lieutenant could not issue him an evaluation because respondent did not work at the lieutenant's station. The lieutenant said that this did not matter because respondent had previously worked under him. Respondent said he would have to speak with his

union representative first. Lieutenant DeLuca explained to respondent that he could review the evaluation and rebut it if he feels it necessary. Respondent asked the lieutenant to wait because he was on a break and the lieutenant indicated this was fine (Tr. 109).

Ten minutes later the lieutenant returned to respondent's vehicle and found respondent eating and reading a book. The lieutenant asked respondent if he could come inside to speak with him and respondent said, "No." Respondent rolled up the window, raised the radio volume, and ignored the lieutenant. Lieutenant DeLuca reported this incident to the station command and, just as the station captain and chief arrived at the station, respondent went home sick (Tr. 109-10).

Respondent provided little testimony about this incident, indicating only that on the day Lieutenant DeLuca spoke with him he had a stomach virus and went home sick (Tr. 175).

Based upon the uncontroverted testimony and report of Lieutenant DeLuca, I find that, after being directed by the lieutenant to meet with him about an evaluation, respondent sat in his vehicle, refused to let the lieutenant inside or to speak with him, rolled up his window, and raised the radio volume. These actions were insubordinate in violation of Department Regulation 101-01 sections 4.1.10 (Employees must "[b]e courteous, polite, respectful and helpful to fellow members, hospital staff and the public, at all times.") and 4.2.54 (Employees must not "[d]isobey an order given by a supervisor.").

Incident of March 10, 2011

Specification 4¹ alleges that respondent had a verbal altercation with co-workers at a hospital and then displayed a knife. The proof of this charge was provided by the testimony of respondent's partner, EMT (now paralegal) Stewart and Lieutenant Roberts, as well as the interview statements of two paramedics, Mr. Gutilla and Mr. Aguirre. EMT Stewart testified that, on March 10, 2011, she and respondent were assigned to an ambulance as partners. They were sent on a call to assist a man having difficulty breathing. Upon arriving at the man's residence, they found that the man was elderly and weighed around 250 pounds. Respondent checked the patient's vital signs and found evidence of an acute pulmonary embolism. He therefore called for the assistance of paramedics, since, at the time, neither respondent nor Ms.

¹ Charge 6, alleging that the March 10, 2011 incident violated the Department rule against engaging in criminal activity, was withdrawn at the beginning of the hearing (Tr. 6-7).

Steward were trained as paramedics. Two paramedics, Mr. Aguirre and Mr. Guttilla, arrived soon afterwards. They did an assessment and decided to take the patient to the hospital (Tr. 119-20).

The patient was placed on a chair and carried down the steps to the street by respondent and Mr. Guttilla. Ms. Stewart saw respondent trip on the stairs, but the patient was not harmed (Tr. 121-22). Mr. Guttilla stated that respondent failed to “coordinate” his movements to that of Mr. Guttilla, almost causing the patient to fall (Pet. Ex. 20 at 9). At the ambulance, Mr. Guttilla and Mr. Aguirre wanted to lift the chair into the ambulance, but respondent said he would not help with this (Stewart: Tr. 122; Guttilla: Pet. Ex. 20 at 31-32; Aguirre: Pet. Ex. 18 at 9).

Respondent and the paramedics accompanied the patient in the ambulance to Brookdale Hospital. Ms. Stewart saw respondent and Mr. Guttilla walking to the back with the patient (Tr. 125-26). She then returned to the ambulance, placed the equipment back inside, and began working on her paperwork.

Mr. Guttilla and Mr. Aguirre stated that at the hospital Mr. Aguirre tried to speak with respondent concerning how the patient was to be lifted into the ambulance. Respondent replied that he “don’t want anything to fucking do with you” (Guttilla: Pet. Ex. 20 at 32) or “I don’t have to talk to you. I don’t have to do shit and I don’t give a shit” (Aguirre: Pet. Ex. 17) and walked away.

Ms. Stewart testified that, as she was inside the ambulance writing, respondent came out of the hospital excitedly saying, “Let’s go. Let’s go” or “Let’s fucking go. Let’s fucking go” (Tr. 141) and, “They don’t know who they are messing with” (Tr. 126) or “They don’t know who they are fucking with” (Tr. 134).

Ms. Stewart heard a click and looked up to see respondent holding a knife with a 3- to 4-inch blade. Respondent again said, “We need to go. Let’s go.” He then banged on the dashboard with the hand holding the knife (Tr. 127). Ms. Stewart knew “something is not right,” exited the vehicle, and walked rapidly toward the hospital. Respondent followed her and caught up with her at the hospital door, still holding the knife. He said, “If you go into the hospital you’re going to see what’s going to happen” (Tr. 127-28).

Ms. Stewart then went into the hospital and spoke with Mr. Guttilla and Mr. Aguirre, telling them that respondent had pulled out a knife (Stewart: 129; Guttilla: Pet. Ex. 20 at 40; Aguirre: Pet. Ex. 18 at 51). Mr. Aguirre told Ms. Stewart that the paramedics had tried to

discuss with respondent “what he could have done better,” but respondent “flipped out,” cursing and screaming (Tr. 129-30).

Ms. Stewart called her station command, described what had happened, and indicated that she would not work with respondent any more. Lieutenant Roberts testified that he reported to the hospital and drove Ms. Stewart back to the station, while respondent drove the ambulance (Tr. 152). In the kitchen at the station, the lieutenant, Ms. Stewart, respondent, and the paramedics held a meeting. Respondent was asked what he was doing with the knife. Respondent stated that the knife was legal and that he needed it in case he needed to cut a patient free from a seat belt (Stewart: Tr. 130-31). Respondent also said that he got out the knife to clean his nails, although Ms. Stewart denied that she ever saw respondent use the knife for this purpose (Tr. 131, 134). During the meeting respondent produced the knife and Lieutenant Roberts inspected it and gave it back to respondent (Roberts: Tr. 155-56).

Respondent admitted having a knife as part of a collapsible utility tool, but denied waving or brandishing it as described by Ms. Stewart. He also denied making the remarks concerning the paramedics not knowing who they were dealing with and that he did not know what would happen if he were forced to confront them. He complained that, on March 10, Ms. Stewart complained on her cell phone about her children and “baby fathers” (Tr. 177). He confirmed assessing the male patient and requesting paramedic assistance (Tr. 178). For the transport, respondent insisted that it was Mr. Guttilla, not respondent, who “slipped off the top a little bit” (Tr. 179). At the ambulance he insisted that the paramedics wanted to do “an illegal lift” of the chair which, with a heavy patient, “can break your back” (Tr. 179).

At the hospital, one of the paramedics told respondent he wanted to speak with him. Respondent suggested they discuss it later after the paramedic cooled down (Tr. 180-81). Respondent was convinced by the paramedic’s “body language” that he wanted to start an argument “in front of all the staff in the hospital” (Tr. 181). Respondent had already finished his paperwork and left the hospital and returned to the ambulance. He insisted that Department rules give EMT’s no more than 30 minutes pause before they notify the dispatcher that they are again available (Tr. 181-82).

In the ambulance, Ms. Stewart told respondent that the paramedics wanted to speak with him, making respondent feel as if she, too, wanted to “instigate an argument” (Tr. 182). Ms. Stewart then exited the ambulance and went back into the emergency room. Respondent stated

that, in the ambulance, he was holding a “workman’s tool” given to him by the union to clean his nails and cuticles. The tool includes a knife, wrench, pliers, and screwdriver. Respondent carries it in case he needs to cut a seat belt to extract a passenger (Tr. 183). Respondent said he stopped walking towards the emergency room because “somebody came out to smoke a cigarette and said, “Look, we just don’t even go in.” He returned to the ambulance and waited for a “conditions boss to come” (Tr. 184). The supervisor examined the tool and found nothing wrong with it (Tr. 184).

In a report (Pet. Ex. 15) written on the date of the incident, respondent stated that he told Ms. Stewart that the paramedics “looked angry” and asked to leave the hospital. He stated that Ms. Stewart went into the hospital to call a supervisor. He did not mention displaying a knife.

The proof on this charge was largely uncontroverted in that respondent admitted that he took out a knife blade. Respondent insisted that he was using the knife blade only to clean his nails and denied making the threatening remarks described by Ms. Stewart that the paramedics did not know who they were “messing” or “fucking” with.

I found Ms. Stewart’s testimony more credible than that of respondent for a number of reasons. Unlike respondent, who had a compelling motive to avoid being disciplined, she had no interest in the outcome of the hearing. In fact, she (like Ms. Muhammad) seemed more sympathetic to respondent than hostile, commenting that the preferred method for lifting a patient into an ambulance is on a stretcher, as suggested by respondent, not on a chair, as insisted upon by the paramedics (Tr. 122-23). Her testimony that she was very upset by respondent’s brandishing of the knife and by his verbal threats against the paramedics was corroborated by the paramedics themselves, who spoke with her immediately after she came inside the hospital.

Ms. Stewart did appear to be mistaken about one detail. According to Ms. Stewart, she drove the paramedics’ vehicle back to the hospital (Tr. 123). According to Mr. Aguirre, as well as respondent, respondent drove the paramedics’ vehicle while Ms. Stewart assisted with the patient in the back of the ambulance and then drove the ambulance back to the hospital (Pet. Ex. 18 at 11). As to this fact, I credited the testimony of respondent, as corroborated by Mr. Aguirre. I attributed Ms. Stewart’s inconsistency about this detail to a faulty memory that did not otherwise undermine the credibility of her statements as to respondent’s actions at the hospital.

Respondent’s statements that he was using the blade on a tool to clean his nails and that he refrained from entering the hospital because of a comment by a worker smoking a cigarette

were not credible. These statements were not mentioned in his written report. It seemed implausible that respondent would clean his nails just as he emerged from the hospital in order to go back on duty or that he would decline to enter the hospital due to a comment by an anonymous worker that “we” shouldn’t go inside. More importantly, both of these statements were expressly denied by Ms. Stewart who stated that she had never seen respondent use a knife blade to clean his nails and that respondent tried to stop her from entering the hospital by warning her about “what’s going to happen.”

I therefore find that, on March 10, 2011, respondent displayed a knife to Ms. Stewart and stated, “They don’t know who they are messing with” and “If you go into the hospital you’re going to see what’s going to happen.” These remarks, made while respondent had a knife in his hand, conveyed to Ms. Stewart that respondent was threatening to harm the two paramedics. The display of the knife and the verbal threats violated Department Regulation 101-01 sections 4.1.10 (Employees must “[b]e courteous, polite, respectful and helpful to fellow members, hospital staffs and the public, at all times.”) and 4.2.1 (Employees may not “[e]ngage in conduct tending to bring the City of New York, the Fire Department, or any other City agency into disrepute.”).

Specification 4 should be sustained.

Incident of July 13, 2011

Charge 5 alleges that, while off duty, respondent yelled and displayed his middle finger to Ms. Frawley and another paramedic while they were responding to an emergency. Ms. Frawley testified that, early in the morning on July 13, 2011, she and her partner Ms. Pierre were in their ambulance responding to a job with their siren on and lights flashing. As they were making a left turn, a car cut them off on the passenger’s side. The driver, who Ms. Frawley recognized as respondent, leaned out of the window, yelled something, and raised his middle finger. He forced the ambulance to stop for a minute before he drove away. That same day Ms. Frawley made a written statement (Pet. Ex. 2) concerning the incident, indicating that a “gold four-door sedan” cut off her vehicle which was responding with “lights and sirens” (Tr. 31-32).

In a written statement (Pet. Ex. 3) made the next day, Ms. Pierre confirmed that she saw respondent block her vehicle and yell something out the window.

Respondent denied that he owns a car and denied that he ever cut off an ambulance as described by Ms. Frawley (Tr. 176). He admitted that he does rent cars (Tr. 210).

As discussed above, I found Ms. Frawley to be both a credible and a reliable witness. Her testimony was corroborated by the statement of Ms. Pierre. The fact that the incident occurred in daylight, when Ms. Frawley apparently had a clear view of the driver, and that Ms. Frawley was familiar with respondent enhanced the reliability of her identification. I found respondent's uncorroborated denial to be of limited weight given his motive to avoid being disciplined. In addition, respondent's testimony concerning the other incidents was disjointed and defensive.

Based upon Ms. Frawley's credible account, I find that respondent drove his vehicle in front of Ms. Frawley's ambulance which had its lights and sirens on, forcing it to stop, and then as he drove away raised his middle finger toward her. These actions violated Department Regulation 101-01 sections 4.1.10 (Employees must "[b]e courteous, polite, respectful and helpful to fellow members, hospital staffs and the public, at all times.") and 4.2.1 (Employees may not "[e]ngage in conduct tending to bring the City of New York, the Fire Department, or any other City agency into disrepute."). Charge 5 must be sustained.

FINDINGS AND CONCLUSIONS

1. Specification 1 of case #58/11D should be sustained in that, on September 12, 2010, respondent harassed a co-worker by displaying a website with an insulting term in violation of OGP No. 101-01 § 4.1.10.
2. Specification 2 of case #58/11D should be sustained in that, on November 28, 2010, respondent threatened another EMT with a broomstick and refused to put it down when ordered by a supervisor, in violation of OGP No. 101-01 §§ 4.1.10 and 4.2.54.
3. Specification 3 of case #58/11D should be sustained in that, on February 14, 2011, respondent was insubordinate and disobeyed orders of a supervisor in violation of OGP No. 101-01 § 4.1.10 and 4.2.54.
4. Specification 4 of case #58/11D should be sustained in that, on March 10, 2011, respondent displayed a knife and made verbal threats concerning co-workers in violation of OGP No. 106-02 §§ 4.1.10 and 4.2.1.

5. Specification 5 of case #58/11D should be sustained in that, on July 13, 2011, respondent drove his vehicle in front of an ambulance with its siren and lights on, causing it to stop, and raised his middle finger in violation of OGP No. 106-02 § 4.1.10 and 4.2.1.

RECOMMENDATION

Upon making the above findings, I requested and received a summary of respondent's personnel history. He was appointed as an EMT in 2007 and has no prior disciplinary history. Even though these seven years of service would normally provide some grounds for mitigation, I note that three of these years, from 2011 to date, respondent was assigned to a supply room and not working as an EMT.² Respondent was suspended for 30 days as a result of the March 10, 2011 incident and for 10 days as a result of the July 13, 2011 incident.

Respondent's misconduct of attacking a co-worker with a broom handle, displaying a knife to another co-worker while making veiled threats about the safety of two other co-workers, and interfering with an ambulance responding to an emergency with sirens and lights are extremely serious. These actions suggest a volatile and unstable personality who instills fear and hostility in many of his co-workers. In addition, respondent's unpredictable outbursts make him ill-suited to dealing with the stress of emergency medical situations. When combined with the insubordinate insolence of the treatment of Lieutenant DeLuca and the insults to EMT Frawley, it is clear that an extremely severe penalty is called for.

Petitioner has requested that respondent be terminated for this misconduct. Other employees who made veiled threats of violence against co-workers were also terminated in part due to the paralyzing effect these threats had upon the workplace. *See Health & Hospitals Corp. (Coler Goldwater Memorial Hospital) v. Cato*, OATH Index No. 643/11 (Jan. 19, 2011) (termination recommended where 23-year employee alluded to a well-publicized episode of deadly workplace violence while telling his employer's representative in a disciplinary proceeding to "do the right thing," threatened coworkers, and disobeyed orders). *Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Smith*, OATH Index No. 1398/98 (May 19, 1998), *modified on penalty*, Director's Determination (June 17, 1998), *aff'd* HHC Pec. Rev. Bd. Dec. No. 951, Dkt. No. 1485/98 (July 20, 1999) (respondent terminated for threatening supervisor).

² No explanation was offered for the delay of nearly two years between the service of the charges, in March 2012, and the docketing of the case at this tribunal in December 2013.

Respondent's attorney, on the other hand, argued that the more appropriate penalty under the principle of progressive discipline would be suspension. *See Dep't of Health & Mental Hygiene v. Dillon*, OATH Index No. 108/14 at 16 (Feb. 14, 2014) ("The theory of progressive discipline is to modify employee behavior through increasing penalties for repeated same or similar misconduct."). In a number of past cases termination has been found appropriate even in the absence of a previous lengthy suspension penalty. Thus, a 15-year employee who displayed a knife to co-workers was terminated. *Human Resources Admin. v. Jordan*, OATH Index No. 453/97 (Apr. 7, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-58-SA (May 12, 1998) (15-year employee with minor disciplinary record terminated for displaying knife in argument with co-worker); *cf. Kings County Hospital v. Johnson*, OATH Index No. 1833/96 (Mar. 28, 1996) (9-year employee suspended for 25 days for carrying a knife).

In this case, respondent offered neither explanations nor excuses for his increasingly violent behavior, apparently in denial as to the unsettling effect his actions have had upon his colleagues. And while it is true that respondent had no formal prior discipline, respondent was suspended for 30 days from March through April 2011 and then, three months later in July 2011, deliberately drove in front of Ms. Frawley's ambulance while it was responding to an emergency, apparently in anger at her 2010 complaint about him. This seems a vivid indication that suspending respondent may accomplish little except make him more angry and prone to violent outbursts, as suggested by petitioner's attorney.

Accordingly, I find that the most appropriate penalty here is termination and I so recommend.

John B. Spooner
Administrative Law Judge

May 19, 2014

SUBMITTED TO:

SALVATORE J. CASSANO
Commissioner

APPEARANCES:

SIHEEM ROSEBOROUGH, ESQ.

MARIE VILLANI

Representatives for Petitioner

BRIAN ZAPERT, ESQ.

Attorney for Respondent