Triborough Bridge & Tunnel Auth. v. Nunez

OATH Index No. 870/12 (Apr. 20, 2012)

Evidence established that respondent took unauthorized absences on four occasions, failed to punch out at the end of his work day on thirty occasions, left work early on eight occasions, submitted a false report, and fought with a co-worker. Petitioner did not prove that respondent was excessively absent or that he left work on another occasion. A 60-day suspension without pay recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TRIBOROUGH BRIDGE & TUNNEL AUTHORITY
Petitioner
- against -
OSCAR NUNEZ
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner brought this proceeding, under section 75 of the Civil Service Law, charging respondent, bridge and tunnel officer Oscar Nunez, with excessive absenteeism, unauthorized absences, repeatedly failing to punch out at the end of a work day, leaving work early, submitting a false report, and fighting with a co-worker.

At a two-day day hearing that concluded on March 7, 2012, petitioner relied upon documentary evidence and testimony from four witnesses. Respondent offered documentary evidence, testified in his own defense, and presented two other witnesses.

For the reasons below, I find that petitioner proved most of the charges and recommend that respondent be suspended for 60 days without pay.

ANALYSIS

Excessive Absences

Petitioner hired respondent in 2004. He is normally assigned to the 11:00 p.m. to 7:00 a.m. shift at the Queens Midtown Tunnel. Respondent receives 21 vacation days and 12 sick

days per year (Tr. 39). He is permitted to use up to seven days (56 hours) of vacation time each year for emergency leave (Tr. 39). Petitioner alleged that respondent was excessively absent on eleven occasions for 168 hours, from September 16, 2010 to August 13, 2011, because he took sick or emergency leave when he had no available leave balances (Tr. 5, 405-06; ALJ Ex. 1, A). Respondent claimed that he provided documentation for nearly all of the cited absences (Tr. 8).

To find misconduct under the Civil Service Law, there must be some showing that an employee intentionally, willfully, carelessly, or negligently violated an agency rule. *See Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969); *McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979). Here, petitioner failed to prove that respondent was excessively absent.

Petitioner's rules prohibit excessive absenteeism (Pet Ex. 8). Rules and Regulations Governing Bridge and Tunnel Operating Officers, par. 168 (eff. Date June 1, 1970). However, unlike some other agencies, petitioner's rules do not define "excessive." *See Triborough Bridge & Tunnel Auth. v. Christiano*, OATH Index No. 493/12 at 12 (Mar. 21, 2012), *adopted*, President's Dec. (Apr. 11, 2012); *cf. Dept. of Correction v. Duclet*, OATH Index No. 972/09 at 3 (May 19, 2009) (discussing agency rule that reporting sick for 40 or more days or on 15 or more occasions in a twelve-month period may lead to termination of employment).

Where there is no definition of excessive absenteeism, this tribunal has looked to other factors. *Christiano*, OATH 493/12 at 12, 14. Absenteeism approaching 50% of all the work days during a relevant period is deemed *per se* excessive. *Id.* at 12 (citations omitted). Another relevant consideration is whether the absences disrupt agency operations. *See Triborough Bridge & Tunnel Auth. v. Rodriguez*, OATH Index No. 729/04 at 3-4 (May 28, 2004), *adopted*, President's Dec. (June 29, 2004) (absenteeism rate of 48.3% of scheduled work days, coupled with evidence of financial and logistical harm caused by absences, sufficient to prove employee's incompetence); *see also Cicero v. Triborough Bridge & Tunnel Auth.*, 264 A.D.2d 334, 336 (1st Dep't 1999) (it is "irrelevant" that absences are approved and medically documented, where employee is unreliable and absences have a disruptive, burdensome effect on budget, personnel matters, and morale); *Wallis v. Sandy Creek Central School Dist. Bd. Of Education*, 79 A.D.3d 1813 (4th Dep't 2010) (upholding termination of employment of driver who had an absentee rate of over 60% in 18 months after receiving several warnings about

excessive absenteeism and evidence showed that it was difficult for employer to secure substitute drivers when employee was absent).

There was evidence that respondent had many other absences due to work-related injuries, but those absences may not be considered because petitioner did not include them in the charges. *See Christiano,* OATH 493/12 at 12-13, *citing Murray v. Murphy*, 24 N.Y.2d 140, 157 (1969). The number of charged absences, 168 hours in one year (less than 10%), is well below the high number of absences deemed *per se* excessive. *See Triborough Bridge & Tunnel Auth. v. Davi,* OATH Index No. 339/01 at 7 (June 18, 2001) (107 days of absence in 17 months deemed *per se* excessive); *Triborough Bridge & Tunnel Auth. v. Lerner*, OATH Index No. 684/90 at 25 (July 16, 1990), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD91-69 (May 17, 1991) (evidence failed to show that history of absenteeism, including 21 unauthorized absences for 160 hours in 17 months, was excessive); *Admin. for Children's Services v. Hoffman*, OATH Index No. 1616/02 at 10 (Dec. 20, 2002) (25 unauthorized absences in a year not excessive *per se*).

Although there was some evidence of the potential need for mandatory overtime when an employee calls in sick or takes emergency leave, there was no specific evidence regarding the impact of respondent's absences. Based on the charges and evidence presented, petitioner failed to prove that respondent's 168 hours of absences were excessive.

Unauthorized Absences

Petitioner argued that each of the eleven above-mentioned occasions of absence was unauthorized because respondent had no leave balances available (Tr. 5, 405). Alternatively, petitioner argued that some of those absences were unauthorized because respondent provided insufficient documentation (Pet. Ex. 1, A). Respondent countered that he was not paid if he had no leave balances available. Thus, he argued, petitioner was punishing him twice by not paying him for his absence and charging him with misconduct (Tr. 8).

As a preliminary manner, there is no merit to respondent's argument that petitioner is "double-dipping" by charging him with misconduct for unpaid absences. Petitioner's rules and sick leave procedures make clear that loss of pay may result from an unauthorized absence, but there can also be a separate disciplinary action for failure to obey attendance procedures (Pet. Ex. 8, 9). To hold otherwise, would mistakenly suggest that an employee could routinely fail to report to work and suffer no consequences beyond the loss of pay for hours not worked.

On the other hand, petitioner does not have a rule prohibiting employees from calling in sick when they do not have sick leave available. *Christiano*, OATH 493/12 at 14. Thus, it is not necessarily misconduct for an employee to call in sick when there is no leave balance available, especially where there was no clear notice that leave balances had been exhausted and that disciplinary action could result from unscheduled absences. *Id.* Moreover, if an employee is too ill to work on a particular day, it is questionable whether calling in sick constitutes intentional, willful, careless, or negligent misconduct under the Civil Service Law. *Id.* at 17.

Of the eleven occasions of unauthorized absence charged in the petition, six involved documented illnesses of petitioner or his children: September 26, October 2, October 23-27, 2010 and January 1-5, January 10, and May 12, 2011 (ALJ Ex. 1, A; Pet. Ex. 1). For each of those occasions, there was no proof that respondent had received an explicit warning that he had exhausted his sick leave balances and that unscheduled absences could result in disciplinary charges (Pet. Ex. 1). On May 3, 2011, petitioner issued a memorandum to respondent advising him that he had failed to submit an absence report, referred to as a "green sheet," or acceptable documentation for an earlier absence (Pet. Ex. 1). There are spaces on the memorandum to indicate whether respondent had exhausted his sick leave or vacation balances, but those spaces were not marked (Pet. Ex. 1). Later, on May 18, 2011, petitioner issued another memorandum to respondent advising him that he had depleted his sick leave balances and that future unauthorized absences may result in disciplinary action (Pet. Ex. 1).

Because petitioner did not clearly notify respondent, prior to May 18, 2011, that his leave balances were exhausted and continued use of sick leave or emergency leave would result in disciplinary charges, the allegations of unauthorized absence from September 26, 2010 to May 12, 2011, solely due to unavailable balances, should be dismissed.

For the remaining five occasions of absence, addressed below, respondent was either on notice that his balances were depleted and that he could face disciplinary charges or there were questions about the adequacy of his documentation.

April 21, 2011

Petitioner alleged that respondent was absent from work on April 21, 2011, and he failed to submit a green sheet (ALJ Ex. 1, A). Respondent testified that he had been out on workers' compensation because of an on-duty injury since January 2011 (Tr. 278). Petitioner's physician

examined respondent on April 20, 2011, and found him fit to return to work, but the paperwork provided to respondent did not advise him what day or hour he was supposed to report to his facility (Tr. 286; Resp. Exs. K, L, M). Respondent claimed that he noticed the omission and asked the doctor when he was supposed to report for duty (Tr. 287). According to respondent, the doctor told him that somebody would call him (Tr. 287).

After leaving the doctor's office, respondent drove to his home in Wappinger's Falls, New York, and waited for a call (Tr. 290). He did not receive any call until 10:50 p.m. on April 20, 2011, when the 11:00 p.m. to 7:00 a.m. shift began (Tr. 290). Respondent spoke to a lieutenant, who asked whether he was coming to work (Tr. 291-92). According to respondent, he had just taken his evening dosage of pain medication and was unable to drive to work (Tr. 292). Even if he got dressed and left home after receiving the phone call, it would have been ninety minutes to two hours before he could report for duty (Tr. 293).

I did not fully credit respondent's self-serving claim that he noticed the omission on the form or that the doctor assured him that someone would call about returning to work. However, petitioner offered no evidence that anyone ever gave respondent advance notice that he was required to report to work for the shift beginning at 11:00 p.m. on April 20 and continuing the next morning. Absent proof that petitioner notified respondent that he was scheduled to work that shift, this specification should be dismissed.

June 2 and 4, 2011

On June 5, 2011, respondent submitted a green sheet explaining his absence from work on June 2 and 4 (Pet. Ex. 1). Respondent claimed that his car required immediate repair and classified his absence as an emergency (Pet. Ex. 1). In support, respondent provided a detailed written description of how he drove by an accident on his way home from work on June 1 (Tr. 305). Respondent claimed the debris from the accident caused serious damage to his car's brakes. To further support his claim, respondent provided two receipts for brake parts.

On the green sheet, Captain Booker denied respondent's request as "unauthorized" (Pet. Ex. 1). She also wrote that respondent's documentation was "insufficient" but crossed that word out (Pet. Ex. 1; Tr. 51). After reviewing the documentation at the hearing, Booker testified that it was insufficient because one invoice was dated May 31, before the accident described by respondent (Tr. 54; Pet. Ex. 1, Auto Parts Fulfillment Invoice). She also noted that respondent's emergency leave occurred before and after June 3, a regularly scheduled day off (Tr. 54).

Respondent insisted that the accident occurred on June 1 and that he ordered the parts when he arrived home (Tr. 306, 369). He claimed that the May 31 receipt was for an on-line order that was delivered a few days later, but he could not explain why the invoice predated the accident; he surmised that the retailer's invoice was mistaken (Tr. 306-07, 371). Although respondent ordered the parts with a credit card, he did not present a credit card statement or other documentation to support his claim regarding the order date (Tr. 382). Respondent also offered an implausible and insufficient explanation of why it took him four days to return to work (Tr. 311). He insisted on repairing the car himself and he did not make any other transportation arrangements, even though he has a second car that his wife usually drives (Tr. 372-73).

Based on the questionable proof presented by respondent, his June 2 and 4 absences were not due to an emergency. *See Triborough Bridge & Tunnel Authority v. Leibowitz*, OATH Index No. 1080/98 at 10-11 (July 24, 1998) ("car trouble" is not an emergency that justifies missing a full day of work). This specification should be sustained.

July 21, 22, 25, and 26, 2011

On July 27, 2011, respondent submitted a green sheet for his absences on July 21, 22, 25, 26 (Pet. Ex. 1). He attached a doctor's note which indicated that respondent was "too sick to travel" until July 23 (Pet. Ex. 1). On the green sheet, Captain Booker wrote that respondent had depleted his sick leave and that three of the four sick days would be without pay (Tr. 312; Pet. Ex. 1). According to respondent, he went to petitioner's doctor during this absence and the doctor told him that he could report to work on July 27 (Tr. 313-14). Respondent offered no document to support this claim and he could not recall when he saw the doctor (Tr. 313-14).

Petitioner did not contest the validity of the medical note submitted by respondent. Because respondent presented undisputed evidence that he was too ill to travel on July 21 and 22, his failure to report to work on those two days should not be deemed misconduct simply because he has no leave balances available. However, respondent's note did not excuse his absence on July 25 and 26. Respondent's vague, unsupported claim that he visited petitioner's doctor was insufficient proof of a continuing illness.

On these facts, where respondent had received explicit warning about his lack of available sick leave and there was no documentation that he was too ill to work on July 25 or 26, petitioner proved that those two day of absence were unauthorized. *See Christiano*¸ OATH 493/12 at 18. Thus, for those two days, this specification should be sustained.

August 4 and 13, 2011

For each of these two dates, respondent submitted green sheets and took one day off for emergency personal business (Pet. Ex. 1). Respondent was required to provide supporting documentation for each of those absences because he had already used three emergency days for the year (Tr. 55; Pet. Exs. 1, 2). Captain Booker notified respondent, in writing, that both emergency requests were denied because he did not provide required documentation (Pet. Ex. 1).

These specifications should be sustained. Respondent offered no explanation for his August 4 absence (Tr. 314-15). For the August 13 absence, respondent claimed that he realized while on his way to work that he left his shield and identification at home (Tr. 315-16). He recalled telling a sergeant that he had to go home and he would be taking an emergency personal business day because it would take too long to drive home and return to work (Tr. 316). Respondent's testimony on this point was unclear. At first he said that he noticed that he forgot his shield and identification about "halfway" to work (Tr. 315). Then he said that he realized it when he was "getting close to work" (Tr. 315). Finally, he said that he was "maybe five minutes" away from work (Tr. 315-16).

Ultimately, it does not matter when respondent realized his error. He admitted that he was unable to work an entire shift because he forgot essential equipment. This was not an emergency; it was respondent's negligence.

In sum, the charge of excessive absenteeism should be dismissed and four specifications of unauthorized absence (June 2-4, 2011, July 25-26, 2011, August 4, 2011, and August 13, 2011) should be sustained. Petitioner failed to prove the remaining charges of unauthorized absences and those specifications should be dismissed.

Failing to Punch Out

Petitioner uses an automated timekeeping system (Tr. 338). Ten minutes before the beginning and end of each shift, officers "punch in" or "punch out" by placing their hand on a scanner and entering an identification code (Tr. 338). Petitioner alleged that respondent failed to punch out at the end of his tour on thirty occasions from May 28, 2010 through August 31, 2011 (ALJ Ex. 1, C).

Respondent did not dispute that he repeatedly failed to punch out as required. He claimed that he simply forgot (Tr. 338-39). Captain Booker conceded that officers failed to

punch out with "some regularity" and not every officer is disciplined for every failure to punch out (Tr. 58). However, respondent had received nine written warnings, from May 29, 2010 to July 16, 2011, advising him that he had failed to punch out and warning him that violation of timekeeping procedures could result in disciplinary charges (Tr. 23; Pet. Ex. 3). Respondent also acknowledged that other officers are disciplined for failing to punch out (Tr. 339).

By failing to punch out thirty times in fifteen months, respondent committed misconduct. His claim that he forgot to punch out is not credible in light of the repeated warnings from his supervisors. It is also no defense that co-workers also occasionally failed to punch out. At best, respondent neglected his timekeeping obligations. *Taxi & Limousine Comm'n v. Joseph,* OATH Index No. 415/00 (Feb. 9, 2000), *modified on penalty*, Comm'r Dec. (Apr. 21, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD01-8-SA (Apr. 12, 2001) (failure to swipe out deemed negligent). At worst, he willfully defied petitioner's rules. This charge should be sustained.

Leaving Work Early

Petitioner alleged that respondent left work early on nine of the occasions that he failed to punch out (Pet. Ex. 1, B). Comparison of timekeeping and EZ Pass records indicated that respondent left the Queens Midtown Tunnel more than 20 minutes before the end of his shift. In two instances, June 4, 2010 and April 27, 2011, respondent left work more than an hour and twenty minutes before the end of this shift (Pet. Exs. 2, 5).

For most of the dates cited, respondent left work when he was scheduled to take a break during the last hour of his shift. An officer who is on break for the last hour of a shift may leave a facility. However, the officer must return to punch out at the end of the shift to ensure adequate staffing for the next shift. If an officer from the next shift fails to report, another officer may be required to stay and work mandatory overtime (Tr. 31, 93).

Respondent conceded that he was required to punch out at the end of this shift and he left work early on "several occasions" (Tr. 8, 321, 379). He also testified that he occasionally left work during a break and drove though the Queens Midtown Tunnel to Manhattan for a meal and then returned via the toll-free 59th Street Bridge, also referred to as the Ed Koch Queensboro Bridge, to avoid traffic (Tr. 330). Thus, EZ Pass records would reflect that he left the facility but would not show that he returned.

Based on the evidence presented, petitioner proved that respondent left work early on eight of the nine dates alleged in the petition.

On June 4, 2010, respondent was scheduled to work until 6:50 a.m. and EZ Pass records showed that he left the facility at 5:24 a.m. (Pet. Exs. 2, 5). Respondent was selected for random drug testing that day (Tr. 82). Testing is performed in Brooklyn and officers are given up to five hours for transportation and testing (Tr. 69). Upon their return officers may take a one-hour meal break and a one-hour relief break (Tr. 71-73). Respondent said that he returned to the facility at about 4:45 a.m. and received consecutive meal and relief breaks (Tr. 336-37). He did not dispute that he left work early that day. This specification should be sustained.

On November 12, 2010, respondent's regular shift ended at 7:00 a.m. and he was assigned to work four hours overtime (Tr. 335). However, respondent failed to punch out at 10:50 a.m. and EZ Pass records showed that he left the facility at 10:08 a.m. (Pet. Exs. 2, 5). Respondent testified that he was on a break the last hour of his shift, but he did not dispute that he left work early (Tr. 336). This specification should be sustained.

On April 27, 2011, respondent worked four hours overtime (Tr. 79). He failed to punch out at 10:50 a.m. and EZ Pass records show that he left the facility at 9:28 a.m. (Tr. 374). Respondent also made the final cash deposit for his shift at 9:20 a.m. (Pet. Ex. 7). In his testimony, respondent did not recall that date, but he claimed that he went to get something to eat during his break, the last hour of his shift, and then he returned to the facility (Tr. 375-76, 378). There was no support for respondent's claim that he returned to the facility after his break. On the contrary, the evidence showed that, as on other occasions, respondent did not punch out because he left work early. This specification should be sustained.

On May 3, 2011, respondent failed to punch out at 10:50 a.m. and EZ Pass records showed that he left the facility at 10:15 a.m. (Pet. Ex. 2, 5). Respondent again claimed that he went to Manhattan to get something on a meal break and he returned to the facility (Tr. 330). Unlike April 27, there is evidence to show that respondent returned to work on May 3 (Tr. 329). According to deposit reports introduced by petitioner, respondent made his final deposit for the day after 11:00 a.m. (Pet. Ex. 7; Tr. 329). Because of the conflicting documentary evidence, petitioner failed to prove that respondent left early. This specification should be dismissed.

On May 21 and 26, 2011, respondent worked overtime, he failed to punch out at 10:50 a.m., and EZ Pass records showed that he left the facility at 10:11 a.m. and 10:21 a.m.,

respectively (Pet. Exs. 2, 5). His break was scheduled for the last hour of those shifts (Tr. 75, 328). Respondent testified that he did not have any "specific duties or responsibilities" during that hour, but he did not dispute that he left early and failed to punch out as required (Tr. 328, 334). These specifications should be sustained.

On June 1, 2011 respondent failed to punch out at 6:50 a.m. and EZ Pass records showed that he left the facility at 6:27 a.m. (Pet. Exs. 2, 5). He was selected for random drug testing (Tr. 82). According to respondent, he returned from drug testing at about 4:30 a.m. and a sergeant told him to take his two breaks (Tr. 324-25). Respondent did not deny that he left work early (Tr. 326). This specification should be sustained.

For each of the last two dates charged, July 15 and 16, 2011, respondent was required to punch out at 10:50 a.m. but he failed to do so (Tr. 34). EZ Pass records showed that he left the facility on July 15 and 16 at 10:26 a.m. and 10:25 a.m., respectively (Tr. 62). Respondent was on a break at the end of those shifts (Tr. 320-321). He did not dispute that he left early on both days. These specifications should be sustained.

Submission of False Report

On July 27, 2011, respondent's supervisor asked him for a written statement regarding his failure to punch out on the morning of July 16 (Tr. 344). Respondent submitted a report stating that he forget to punch out at 10:50 a.m. that day because he fell asleep in his car and woke up at 11:30 a.m. (Pet. Ex. 4). Respondent deposited the proceeds from his shift at 10:13 a.m. and EZ Pass records showed that he left the facility at 10:25 a.m. (Tr. 26-27, 33; Pet. Exs. 4-5). Thus, petitioner alleged that respondent's written explanation was false (ALJ Ex. 1, D). At the hearing, respondent conceded that his written explanation was mistaken and said that he took "full responsibility" (Tr. 344, 394). But he also testified that he must have mixed up his dates when asked, on July 27, about his failure to punch out eleven days earlier (Tr. 344, 384).

At first, it seems plausible that respondent might have mixed up dates when asked about an incident that occurred eleven days earlier. However, respondent's claim does not hold up under scrutiny. He did not work from July 17 to July 26. In fact, respondent had only worked three out of the thirty days before July 27 (Pet. Ex. 2). It is unlikely that respondent was mixing up July 16 with some other day.

Of the three days that respondent worked in the month before July 27, he failed to punch out on two of them, July 15 and 16. On both of those days, EZ Pass records show that respondent left the facility at 10:25 a.m. (Pet. Ex. 5). Thus, even if respondent had confused those two days, the excuse he offered on July 27 would have been false. The truth was, as respondent knew, that he failed to punch out because he left the facility twenty-five minutes before the end of his shift. Respondent's alternative explanation in his written report was not merely an inadvertent mistake; it was a false report intended to deceive his supervisor. This charge should be sustained.

Workplace Fight

Petitioner alleged that respondent committed misconduct by engaging in a verbal and physical workplace dispute with temporary officer Anthony Pacheco on December 23, 2011 (ALJ Ex. 1, D). Respondent claimed that Pacheco assaulted him (Tr. 10).

There was no material dispute about what preceded the incident. On December 23, Pacheco had only been assigned to the Queens Midtown Tunnel for a few weeks and he had no prior contact with respondent (Pacheco: Tr. 113-14; Respondent: Tr. 345). At about 10:00 a.m. that day, Pacheco went to the lunchroom and there was nobody else there (Tr. 107, 121). He put two newspapers on a table and went to buy a bottle of water at a vending machine (Pacheco: Tr. 107, 120-21; Respondent: Tr. 346). When he returned to the table, he noticed that respondent had placed a jacket near the newspapers (Pacheco: Tr. 107, 122). Pacheco reached over and took the two newspapers towards another table (Pacheco: Tr. 108, 124; Respondent: Tr. 346). Respondent, said, "You could at least give me one" (Pacheco: Tr. 102, 123, 125; Respondent: Tr. 346). Pacheco offered respondent one of the newspapers. Respondent asked him whether he had a "problem" (Tr. 108, 125). When Pacheco said no, respondent said, "It looks like you have a problem with that" (Tr. 108, 125). Pacheco said that there was no problem and he sat down to read one of the newspapers for a few minutes (Tr. 108, 127).

Pacheco and respondent disagreed about what happened next. According to Pacheco, as he got up to leave, he asked respondent for the other newspaper and attempted to retrieve it (Tr. 108, 127). Respondent grabbed Pacheco's left arm and said, "What are you doing? You don't have to yank it from me" (Tr. 109, 128-29). From his seated position, respondent pushed the table slightly toward Pacheco, who was standing (Tr. 109, 130, 133, 135). Pacheco replied,

"What are you doing? It's mine, I paid for it" (Tr. 109, 133). Respondent crumpled the newspaper and yelled (Tr. 135). Pacheco became upset and pushed the table a few inches toward respondent, striking him in the waist or legs (Tr. 109, 139, 141). Respondent walked around the table, grabbed Pacheco's left arm from behind and pinned him to the table (Tr. 110. 141). In response, Pacheco grabbed respondent's hand and squeezed it (Tr. 110-11, 143). After putting his hands near Pacheco's face, knocking his glasses off, respondent called for help (Tr. 110, 112, 143, 145). Other officers arrived and they escorted Pacheco to a supervisor's office (Tr. 111).

Respondent testified that Pacheco grabbed the newspaper without saying anything (Tr. 347). Pulling the newspaper back, respondent asked, "What are you doing?" (Tr. 347). Pacheco loudly yelled that it was his newspaper (Tr. 348). Respondent, who was seated, said, "If it's your newspaper, tell me, don't snatch it from my hand" (Tr. 348). After respondent let go of the newspaper, Pacheco slammed the table into respondent's chest and "knocked the wind" out of him (Tr. 348, 358, 395). Respondent "immediately" got up, walked around the table, and told Pacheco, "You are under arrest for assaulting me" (Tr. 349). As respondent grabbed Pacheco's wrist and tried to pull it behind his back, Pacheco screamed, cursed, and resisted (Tr. 349). Respondent struggled with Pacheco and tried to handcuff him (Tr. 349). Officer Vega arrived and helped subdue Pacheco (Tr. 349). According to respondent, Pacheco said, "Get the fuck off me," "You fucking asshole," and "You broke my fucking glasses" (Tr. 350).

Officer Vega testified that he was on a break and he overheard a commotion in the lunchroom (Tr. 234-35). When he entered the lunchroom, Vega saw respondent holding Pacheco's hand behind his back (Tr. 235). It appeared that respondent was trying to arrest Pacheco (Tr. 251). Respondent asked Vega to radio for assistance (Tr. 236). Vega made the radio call and helped restrain Pacheco, who was yelling and cursing (Tr. 236, 240, 244). A sergeant and other officers arrived (Tr. 243). At the sergeant's direction, Vega and respondent let go of Pacheco, who continued to curse at respondent (Tr. 241). According to Vega, Pacheco was irate while respondent appeared to be calm and professional (Tr. 242, 244, 249).

Moments after the incident, Vega and respondent submitted written reports (Tr. 245, 351; Resp. Exs. H, P). Pacheco said that he was too upset to make a written report, but he gave an oral report to Superintendent Lake (Pacheco: Tr. 149; Lake: 191, 193). Lake placed Pacheco on furlough and had him escorted from the facility (Tr. 149, 151). Later that evening, investigators

spoke to Pacheco at his home (Pacheco: Tr. 152-53; Investigator Vasquez: Tr. 168). A week or two later Pacheco submitted a written statement (Tr. 152-53; Pet. Ex. 11).

Respondent claimed that he injured his upper right arm and right wrist during the incident (Tr. 367). He continued to receive treatment for his wrist and, as of the hearing, continued to be classified as injured while on duty (Tr. 368). Respondent did not know when he would be returning to work (Tr. 368).

When employees fight at the workplace, it does not matter who started the fight if both willingly participated. Employees have a duty to avoid fights and may use reasonable force in self-defense only if there is no realistic means of avoiding a physical confrontation. *Human Resources Admin. v. Jones,* OATH Index Nos. 1517/02 & 1798/02, at 11-12 (Oct. 2, 2002); *Triborough Bridge & Tunnel Auth. v. Simmons,* OATH Index No. 1166/96 at 29 (May 1, 1997).

Here, respondent had a duty to avoid an altercation. As respondent conceded, Pacheco was not blocking the exit to the lunchroom (Tr. 385-86). Thus, respondent could have easily walked out of the lunchroom and contacted a supervisor. Although respondent is a peace officer and he has the power to make an arrest, there was no need for him to exercise that power here. This was a petty, personal dispute over a newspaper and respondent overreacted.

Furthermore, I do not believe that Pacheco pushed the table with such force that it "knocked the wind" out of respondent. There was no credible evidence to support that claim. Respondent offered no proof that he sustained or reported any injury to his chest or abdomen. Indeed, respondent's reaction undercut the suggestion that he had the wind knocked out of him; he immediately attempted to arrest Pacheco.

It was more likely that Pacheco simply pushed the table back after respondent first pushed it forward. Despite respondent's attempt to portray Pacheco as unstable and belligerent, the evidence did not support that claim. During his testimony, Pacheco seemed introverted. He did not appear arrogant and he did not conceal his shortcomings. Instead, he admitted that he grabbed the newspapers, pushed the table, and used profanity. This leant credibility to his testimony. In contrast, respondent appeared stubborn and unreasonable. He claimed that the dispute about the newspaper had "no bearing" on his actions, he insisted that he was unable to call for a supervisor, and he suggested that he had no choice but to arrest Pacheco (Tr. 387).

Two officers testified about Pacheco's odd behavior prior to the lunchroom incident. Officer Vega recalled that, earlier that morning, he greeted Pacheco while making a deposit and

Pacheco did not reply (Tr. 238). Instead, Pacheco "snatched" the money from Vega (Tr. 238). Officer Eason testified that on a previous occasion she had a brief argument with Pacheco about payment procedures (Tr. 225). And on December 23, at about 6:45 a.m., Pacheco bumped into Eason and did not say anything (Tr. 219-20). Eason mentioned it to a sergeant at roll call (Tr. 220). After hearing about the lunchroom incident, Eason made a memo book entry about her earlier contact with Pacheco (Tr. 223, 228; Resp. Ex. F). At her sergeant's request, Eason later submitted a written report describing her interactions with Pacheco, whom she described as "emotionally disturbed," "angry," and "very explosive" (Tr. 226, 229-30; Resp. Ex. G).

Respondent's colleagues seemed to embellish their testimony regarding Pacheco's earlier behavior. Unlike respondent, who had been working at the Queens Midtown Tunnel for many years, Pacheco had only been there for a few weeks. The permanent officers were more familiar with respondent than Pacheco, a temporary worker. When the officers referred to Pacheco as a "temp," they did so in dismissive fashion. Although the failure to exchange friendly greetings bothered the officers, the claim that Pacheco was "angry" and "very explosive" sounded like an exaggeration. If an officer had seen such behavior, surely there would have been some mention of it prior to the lunchroom incident. Instead, one officer told a sergeant that Pacheco had bumped into her without saying "excuse me."

Minor discrepancies did not detract from Pacheco's overall credibility. For example, he said that respondent radioed for help as he attempted to make the arrest. Vega and respondent testified that respondent did not have a radio and he had asked Vega to radio for help. Even if respondent did not have a radio in the lunchroom, Pacheco's mistake was understandable. When respondent asked Vega for help, he was pulling Pacheco's arm back and pinning him on a table. Under those circumstances, Pacheco might not accurately recall precise details.

In short, this was a needless altercation. There was no reason for respondent to attempt to arrest a co-worker. Respondent could have avoided the entire dispute by simply walking out of the lunchroom at any point. Even if Pacheco pushed the table without provocation, respondent could have left the room and notified a supervisor. Instead, respondent showed a lack of professional judgment and committed misconduct by escalating a minor disagreement about a newspaper. He used excessive and unnecessary force against another worker. This charge should be sustained.

FINDINGS AND CONCLUSIONS

1. The evidence failed to prove that respondent was excessively absent from August 2010 to September 2011, as alleged in the petition.

2. The evidence proved that respondent was absent without authorization on four occasions: June 2-4, July 25-26, August 4, and August 13, 2011.

3. The evidence failed to prove that respondent was absent without authorization on seven other occasions as alleged in the petition.

4. The evidence proved respondent committed misconduct by failing to punch out on 30 occasions as alleged in the petition.

5. The evidence proved that respondent committed misconduct by leaving work early on eight of nine occasions as alleged in the petition.

6. The evidence proved that respondent submitted a false report on July 27, 2011, as alleged in the petition.

7. The evidence proved that respondent committed misconduct by engaging in a workplace altercation on December 23, 2011, as alleged in the petition.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondent's personnel history. Petitioner hired respondent in 2004. His disciplinary record consists of two recent penalties for attendance issues. He received a six-day suspension in February 2010 and a fifteen-day suspension in June 2010, with both penalties stemming from charges that he took excessive and unauthorized sick and emergency leave.

Petitioner now seeks termination of respondent's employment. That request was based, in part, on the assumption that petitioner had proven all of the charges. Because the evidence did not support all of the allegations, a lesser penalty would be appropriate.

The decision in *Christiano* is instructive. There, an officer with a history of unauthorized, excessive absences was fired for taking three unauthorized absences and engaging

in a disrespectful argument with another officer and a sergeant. The officer had previously received suspensions of 40, 45, and 60 days, respectively, with a "final warning" accompanying the most recent suspension. OATH 493/12 at 22.

Here, in contrast, respondent's most serious prior penalty was a 15-day suspension. Under these circumstances, respondent should be given the benefit of progressive discipline and one last chance to correct his behavior. *See Dep't of Sanitation v. Marquez*, OATH Index No. 1209/02 (July 12, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD03-45-SA (June 12, 2003). A penalty less than termination would also give appropriate weight to some mitigating factors. For the most part, respondent provided medical documentation for his emergency and sick leave. It appears that he used much of his leave to care for his minor children when they were ill. In addition, respondent's over-reaction during the argument with Pacheco was an aberration. Respondent has no history of similar conduct.

At the same time, however, a substantial penalty is appropriate. The evidence established that respondent was absent without authorization on four occasions, left work early on eight occasions, failed to punch out thirty times, submitted a false report, and engaged in a workplace altercation. Each of these forms of misconduct reflects a lack of professionalism and judgment requiring suspension without pay.

For example, penalties for misuse of emergency and sick leave normally range from three to ten days per incident, depending on the employee's disciplinary history. *Dep't of Sanitation v. Kaplan,* OATH Index No. 403/12 at 10 (Jan. 6, 2012). The penalty for making a false report is at least ten days' suspension. *See Dep't of Correction v. Jones,* OATH Index Nos. 1332/95, 1334/95 (Dec. 22, 1995). The penalty for repeatedly failing to punch out is at least ten days' suspension. *See Taxi & Limousine Comm'n v. Joseph*, OATH Index No. 415/00 (Feb. 9, 2000), *modified on penalty*, Comm'r Dec. (Apr. 21, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD01-8-SA (Apr. 12, 2001). Finally, the penalty for a brief workplace altercation, with some provocation, is at least five days' suspension. *See Dep't of Consumer Affairs v. Wilson,* OATH Index No. 1402/08 (May 2, 2008), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD09-11-M (Feb. 18, 2009).

A significant penalty, short of termination, should make clear to respondent that he could lose his job if he continues to engage in misconduct. Accordingly, I recommend a penalty of 60 days' suspension without pay.

Kevin F. Casey
Administrative Law Judge

April 20, 2012

SUBMITTED TO:

JAMES FERRARA
President

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