

Admin. for Children's Services v. Toro

OATH Index Nos. 1023/12, 1024/12 (June 11, 2012)

Special officers made false statements to supervisors and an investigator regarding their involvement with the traffic stop of a relative, and former ACS special officer, who showed Port Authority police a photocopy of an ACS identification card. Additionally, Officer Brian Toro appeared at the traffic stop and falsely told the police officer that his brother would be getting a new ID once his problems at work were resolved. Despite lack of prior disciplinary record, termination is recommended for Brian Toro. No penalty recommendation is made as to Edwin Toro, since he was terminated post-trial on a different matter.

On June 15, 2012, Brian Toro submitted his resignation. As a result, the Commissioner did not make a final determination

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
ADMINISTRATION FOR CHILDREN'S SERVICES
Petitioner
-against-
BRIAN TORO and EDWIN TORO
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

The Administration for Children's Services ("ACS") brought this disciplinary proceeding, pursuant to section 75 of the Civil Service Law, against special officers Brian and Edwin Toro.¹ The charges allege that on February 4, 2010, Brian appeared at the scene where his brother, Eliot Ocasio, was pulled over for speeding. Purportedly, Brian showed the police officer his ACS identification, lied to the police officer about Eliot's employment status, and made false representations about the incident to his supervisor. Brian allegedly called his supervisor again that night and retracted his earlier statements about the incident. On the same

¹ Because the respondents and some of the witnesses share the same last name they will be referred to by their first names in this decision.

night, Edwin, who is Eliot and Brian's uncle, allegedly also called the same supervisor and stated that he was the one who had been pulled over, not Eliot. The charges further allege that Brian and Edwin lied about the incident in investigative interviews on March 5, 2010.

During a four-day trial, petitioner presented the testimony of its employees, Lieutenant Rafael Sanchez, Special Officer Jermaine Bonner, Sergeant Rogelio Sampson, Jr., and James Hawkins, an asset and information technology manager. Petitioner also presented the testimony of Port Authority Officer Constantine Mokanos, NYPD Sergeant Stephen Loud, and Jessica Ho, a computer forensic analyst at the District Attorney's Office. Respondents testified on their own behalf and presented the testimony of Laura Ocasio, Eliot Ocasio, and Wilfredo Toro. The parties also submitted documentary evidence. The record was held open for the submission of post-trial briefs. On April 24, 2012, respondents notified the tribunal that they would not be making any more submissions and the record was closed.

For the reasons set forth below, I find that the charges are sustained in large part and recommend that Brian Toro be terminated from his employment. No recommendation is made as to Edwin Toro, as he was terminated post-trial on a separate matter.

ANALYSIS

It was not disputed that on the evening of February 4, 2010, in Weehawken, New Jersey, Port Authority Police Officer Constantine Mokanos and his partner pulled over Eliot Ocasio for speeding. A woman and a child, who Eliot said were his wife and stepson, were also in the car (Tr. 502). However, the parties presented radically divergent accounts about what occurred at that traffic stop and later that evening. In sum, the parties dispute whether Brian was at the car stop, whether Brian ever told Officer Mokanos that Eliot still worked for ACS, and whether Brian and Edwin ever spoke to any supervisors about the car stop.

The Car Stop

Officer Mokanos was petitioner's main witness regarding the car stop. He has been a police officer for the Port Authority Police Department since May 10, 1999 (Tr. 197). He testified that when he asked Eliot for his license, registration and insurance card, Eliot also produced what appeared to be a photocopy of an ACS employee ID ("ID") card. Asked what this was, Eliot explained that it was an ID card from work and displayed an ACS shield (Tr.

200). Officer Mokanos then asked Eliot what he did for ACS and Eliot responded that he was a police officer (Tr. 200). Officer Mokanos thought the photocopy ID card looked strange, and asked Eliot about it. Eliot said that it was the ID card that ACS had given him (Tr. 200). Officer Mokanos further questioned the authenticity of the ID card when Eliot's license check revealed he was a sex offender (Tr. 204-05).²

Officer Mokanos testified that while he was in his squad car checking Eliot's license, a black Dodge Durango pulled up with two men in it (Tr. 201, 213). A man got out and approached him (Tr. 201). Officer Mokanos asked the man if he could help him (Tr. 201). The man replied that he was Eliot's brother and produced his own shield and ID card, stating he was a police officer with ACS (Tr. 201, 235). The ID card identified the man as Brian Toro, who Officer Mokanos identified in the courtroom (Tr. 202). Brian told Officer Mokanos that the other man, who remained in the car, was his father, Wilfredo Toro, who had given him a ride to the scene (Tr. 213). Officer Mokanos thought Brian's ID looked real and told Eliot so (Tr. 201-02). Officer Mokanos then showed Brian the photocopy of an ID that Eliot had given him and asked Brian if he could explain what was going on (Tr. 203). Brian stated that Eliot was going through "some problems" at work and that there had been a "misunderstanding" (Tr. 204). Brian also said that Eliot would get his ID back after everything had been resolved (Tr. 204). Brian gave Officer Mokanos the telephone number for Lieutenant Sanchez, who was the Operations Lieutenant for the ACS Police that night, to clear things up (Mokanos: Tr. 204, 234-35; Sanchez: Tr. 22). However, Officer Mokanos was unable to reach Lieutenant Sanchez at this time (Tr. 205, 235).³ As it had been about an hour since they had stopped Eliot, and Brian had vouched for Eliot, Officer Mokanos and his partner decided to issue Eliot a summons and let him go. The summons was issued at 2040, or 8:40 p.m. (Tr. 210; Pet. Ex. 5).

Eliot denied presenting a photocopy of an ACS ID or an ACS shield to the officers and stating that he was a police officer (Tr. 518-19, 522). He testified that he was not driving his

² Respondents introduced evidence that in 2009, the Appellate Division of the New Jersey Superior Court vacated Eliot's guilty plea (Resp. Ex. C).

³ Lieutenant Sanchez and Officer Mokanos ultimately spoke via telephone. Lieutenant Sanchez testified that he recalled Officer Mokanos telling him he would issue Eliot a citation and let ACS handle the situation internally (Tr. 56). This would indicate that Eliot was still on the scene when he and Officer Mokanos spoke. However, it appears that Lieutenant Sanchez did not recall the precise timing of this call, as his phone records confirm that he received telephone calls from 10:12 p.m. and 10:23 p.m. (Pet. Ex. 1). By this time Officer Mokanos had already released Eliot. Lieutenant Sanchez wrote an e-mail on February 4, 2010, at 11:22 p.m., referencing the 10:23 p.m. call (Pet. Ex. 2).

own car when he was pulled over for speeding, since it was being serviced; instead he was driving Wilfredo's Dodge Durango (Tr. 502-03, 516-17). When the officer asked for Eliot's license and registration, he could only provide his license as the registration was not in the vehicle, so he telephoned his father, asking that he bring the registration (Tr. 502, 507, 525). While he was waiting for Wilfredo to arrive, the officer asked Eliot to step out of the car and asked him for his social security number, which Eliot provided. The officer asked Eliot if he had ever been arrested; Eliot replied that he had (Tr. 503). The officer then brought up his sex offender status to which Eliot replied that his case was being reversed (Tr. 504). The officer told him to get back into his car (Tr. 504).

Wilfredo and his wife, Laura Ocasio, both testified that Eliot called them at home from the scene and asked Wilfredo to bring the registration. Wilfredo said he had removed the registration from the Durango while cleaning the car (Wilfredo: Tr. 420). Wilfredo drove a black Lincoln Aviator to the scene of the car stop to give Eliot the documents (Wilfredo: Tr. 420, 427; Laura: Tr. 381). Wilfredo testified that one of the five cars he owned was a Lincoln Aviator (Tr. 419), while Laura testified that the Lincoln Aviator was Brian's car or the car that he "uses" (Tr. 379). Laura testified that Brian had arrived at the house earlier in the day, as he was sick. Although Brian was home when Eliot called, Laura said she did not mention the call to him because she "didn't think anything of it" and "didn't make it a big to do" (Tr. 405). She did not explain why Wilfredo took the Aviator, if it was Brian's car, rather than driving one of his own.

Eliot and Wilfredo were consistent on what happened once Wilfredo arrived. They said that Wilfredo gave the officer the registration, returned to his vehicle, and waited for the registration to be returned (Eliot: Tr. 505; Wilfredo: Tr. 421, 429-30). Eventually the officers returned the paperwork to Wilfredo (Wilfredo: Tr. 422), and issued Eliot a summons for speeding, after which Eliot and Wilfredo left (Eliot: Tr. 504, 505; Wilfredo: Tr. 422). Eliot denied that Brian was ever present during the car stop and denied speaking with either Brian or Edwin that night (Tr. 509, 523-24, 538-39). When describing the car stop, Wilfredo did not specifically address whether Brian was in the car with him. However, when asked where Brian was when he returned home, he testified that Brian "supposedly was in the pharmacy getting some medication" (Tr. 432). He then said Brian was at the house (Tr. 433).

Brian denied being present at the car stop. At the time he worked at the Children's Center, on First Avenue. He testified that he was not at work on February 4 due to illness. In the

afternoon, he saw his doctor, who told him to get some rest and wrote him a prescription (Tr. 633). He went to his house in Brooklyn to get his daughter, and then drove to his parent's North Bergen, New Jersey house to see if his mother could look after his daughter until his wife got home (Tr. 633-34, 656, 659).⁴

He arrived at his mother's house at about 7:00 p.m. (Tr. 635, 659). At about 8:30 p.m., he left the house to fill the prescription at a local pharmacy. His wife had just arrived at the house (Tr. 563). He had to wait about half an hour before the pharmacy filled the prescription; then he returned to his mother's house, which he did not leave again that evening (Brian: Tr. 636). Brian said he left the house while Wilfredo was still at home (Tr. 662, 663). When he returned, Wilfredo was not yet home. Wilfredo arrived at the house perhaps 30 or 40 minutes later (Tr. 664).

Laura confirmed that Brian went to the pharmacy, leaving the house after the pharmacy called him about his prescription (Tr. 381, 399). Unlike Brian, she said that Wilfredo had already left the house when Brian left. As Wilfredo had taken Brian's car to bring the registration to Eliot, Brian had to use her car to go to the pharmacy (Laura: Tr. 378-81). Laura testified that Wilfredo returned about half an hour after Brian returned (Tr. 381-82).

There is no dispute that Edwin was at work during the car stop; he signed out of work at 1274 Bedford Avenue in Brooklyn, the field site to which he was assigned, at 9:00 p.m., using a timekeeping hand scanner (Edwin: Tr. 590, 591-92; Sanchez: Tr. 96, 98, 99; Sampson: Tr. 164, 168, 177).

Police Investigation

Although Officer Mokanos and his partner let Eliot leave the scene, they tried to locate him after speaking with the Port Authority central police desk. This was a result of a conversation between Officer Mokanos and Port Authority Police Officer Lee, who was assigned to the central desk. Officer Mokanos testified that Officer Lee told him that he had spoken to ACS Sergeant Sampson, who was the sergeant on duty at the ACS police central command that

⁴ Brian testified that his wife works in Manhattan (Tr. 661). It was not clear from Brian's testimony why she went to New Jersey after work rather than the Brooklyn residence. Testifying that his residency was under investigation, Brian asserted his constitutional right against self-incrimination when asked about his wife's residence (Tr. 657, 658, 661).

night.⁵ Officer Lee told Officer Mokanos that Eliot was not supposed to have an ID or shield and that ACS would like to speak to him (Tr. 209-10, 236). Officer Mokanos noted that he had taken down a North Bergen address that Eliot's car was registered to (Tr. 210-11, 212-13).

Officer Mokanos and his partner drove to that address and rang the doorbell (Tr. 222). Brian and his father were there (Tr. 222). Officer Mokanos testified that he told them that ACS had said that Eliot was not supposed to have an ID or the shield (Tr. 222-23). He asked Brian to try to contact Eliot. Brian said he had tried unsuccessfully to reach Eliot via cell phone (Mokanos: Tr. 223, 232). While at the house, Officer Mokanos wrote down Brian's shield and ID number on a notepad. When he returned to his command, he photocopied the notepad and the traffic summons together on one document (Tr. 212-18; 244; Pet. Ex. 6).

Brian, Wilfredo, Eliot, and Laura testified that three officers arrived at Wilfredo and Laura's house in two marked squad cars (Eliot: Tr. 636; Wilfredo: Tr. 422, 434; Laura: Tr. 382). According to Wilfredo, the officers arrived almost two hours after he had returned home. Laura opened the door and began speaking with the officers; Wilfredo stayed upstairs with Brian's baby but came down after "observing what was going on" (Wilfredo: Tr. 422). Wilfredo testified that the officers asked for his son, but did not indicate which one (Wilfredo: Tr. 422, 435, 486). One of the officers, who Brian identified as Officer Mokanos, pointed at Brian (Brian: Tr. 637; Wilfredo: Tr. 423, 435; Laura: Tr. 382). Laura got the impression that the officer thought Brian was Eliot (Tr. 382).

After Brian told Officer Mokanos that he was not Eliot, Officer Mokanos asked to see his ID (Brian: Tr. 643, 637). Brian's ID was in his wallet which also contains his ACS shield (Brian: Tr. 638-39, 641). Officer Mokanos saw the shield and asked to see it (Brian: Tr. 641). The officer then started writing in his notepad, which Brian testified looked like a division memo book (Brian: Tr. 641; Laura: Tr. 391). Brian denied ever telling the Port Authority police that Eliot was on leave from ACS and was having a hard time obtaining new information (Tr. 647). He also denied ever giving Lieutenant Sanchez's phone number to Officer Mokanos (Tr. 672, 691). At some point Officer Mokanos told Laura that Eliot was a sex offender, but Laura

⁵ Sergeant Sampson confirmed that Officer Lee telephoned him and said that Eliot had been pulled over, said he was with the ACS police, and produced a copy of an ACS ID card (Tr. 163, 165-66, 169, 176; Pet. Ex. 4). Officer Lee also said a background check revealed Eliot to be on a list of sex offenders and asked Sergeant Sampson to verify whether Eliot worked at ACS (Tr. 166). Sergeant Sampson replied that he did not believe Eliot still worked at ACS (Tr. 166).

produced the Superior Court order which noted that his plea had been vacated and terminated all aspects of his sentence (Laura: Tr. 383; Brian: Tr. 643, Resp. Ex. C). Soon after that the officers left (Laura: Tr. 383).

Alleged Telephone Calls by Brian and Edwin to ACS Supervisors

According to petitioner's witnesses, Brian and Edwin made conflicting telephone calls to their supervisors throughout the night of February 4. ACS telephone records relating to Lieutenant Sanchez's ACS-issued cell phone corroborate that telephone calls were made between Brian and Lieutenant Sanchez, but the substance of the calls is in dispute. Petitioner did not seek to introduce into the record any similar telephone records pertaining to calls purportedly made between Edwin and Sergeant Sampson.

It was undisputed that Brian spoke to Sergeant Sampson and Lieutenant Sanchez at least once during the evening, although the substance of the calls is in dispute. Additionally, Officer Bonner, the ACS desk officer that night, testified that Brian telephoned and spoke to him. Although the caller identified himself only as "Toro," Officer Bonner recognized Brian's voice, having worked with him for eight months and spoken with him on the phone numerous times (Bonner: Tr. 135, 137, 140, 141-42). Brian told Officer Bonner that he wanted to speak to the sergeant on duty (Bonner: Tr. 137-38). The sergeant was not available so Officer Bonner told Brian to call back in ten or fifteen minutes (Tr. 138). When Brian called back, again identifying himself as "Toro," he asked if anyone had called asking about him and asked to be put through to Sergeant Sampson (Bonner: Tr. 139).

Like Officer Bonner, Sergeant Sampson testified that when he received the call he knew it was Brian because the caller identified himself as "Toro" and Sergeant Sampson recognized his voice (Sampson: Tr. 171, 183). "They [respondents] have two very distinct voices . . . you can tell it's two different Toros. They don't have the same voice on the phone" (Tr. 171). Brian told Sergeant Sampson that officers were at his house questioning his wife about his brother and asked Sergeant Sampson what was going on. Sergeant Sampson replied that he did not understand why the police would be at his house. Brian said he was sick and just wanted to know what was going on. Sergeant Sampson said he didn't know what to tell him and that nobody had called asking about his brother (Sampson: Tr. 171-72).

Lieutenant Sanchez also spoke with Brian that night. Telephone records document that Lieutenant Sanchez received a telephone call on his ACS cell phone lasting approximately one

minute at 9:54 p.m., from a number identified as belonging to Brian on his ACS contact sheet (Pet. Exs. 1, 7, 10). At 9:55 p.m. Lieutenant Sanchez called Brian's number and spoke for approximately ten minutes (Pet. Exs. 1, 10). At 12:49 a.m. on February 5, 2010, Lieutenant Sanchez received another call from Brian which lasted approximately three minutes (Pet. Ex. 10).

Lieutenant Sanchez testified that the 9:54 p.m. call was dropped, so he called Brian back. During that call, Brian identified himself and said that he had identified himself as a peace officer to the Port Authority police. Lieutenant Sanchez asked if there was "a problem" and Brian said there was not (Tr. 44-45). After midnight, Lieutenant Sanchez received another phone call from Brian (Sanchez: Tr. 59-60). Brian informed him that there had been a "misunderstanding," it was just a traffic stop, and everything was fine (Tr. 60, 121). Lieutenant Sanchez told Brian he had already contacted Commissioner Blades and they would talk about it the next day (Tr. 121).

In his testimony, Brian recalled speaking with both Sergeant Sampson and Lieutenant Sanchez. He said that he called the ACS central command and spoke to Sergeant Sampson after Officer Mokbanos left his parents' house. Brian asked Sergeant Sampson "if he knew about what was going on." Officer Sampson said he did not and "nothing else followed" (Tr. 644). Brian did not recall speaking with Officer Bonner (Tr. 673). He testified that he called Lieutenant Sanchez at approximately 9:54 p.m. to report that he would be out sick the next day (Tr. 677, 682-83). This was the only reason he called Lieutenant Sanchez; he never informed Lieutenant Sanchez about any personal matter involving him and Eliot (Tr. 648, 683). Brian also testified that he did not recall making another phone call to Lieutenant Sanchez at 12:49 a.m. on February 5, 2010, and said that that there was a "possibility" that his telephone "probably" made the call by mistake (Tr. 684).

Special Officer Bonner and Sergeant Sampson both testified that they received telephone calls from Edwin, which Edwin denied. Special Officer Bonner testified that Edwin called to speak to Sergeant Sampson. Edwin identified himself and Officer Bonner also recognized Edwin's voice (Tr. 141). Sergeant Sampson testified that Officer Bonner summoned him to the telephone. This was about ten or fifteen minutes after he had spoken with Officer Lee, or about

8:30 p.m. (Tr. 167, 168).⁶ The caller identified himself only as “Toro” (Tr. 167). However, Sergeant Sampson testified that he knew the caller was Edwin because he had talked with Edwin many times and recognized his voice (Tr. 167, 183-84). “[Edwin’s] voice is very distinct. So, I knew it was him” (Tr. 167). Edwin told Sergeant Sampson that he was the one who had been pulled over, not Eliot, and that the officer had made a mistake (Tr. 167-68). Sergeant Sampson thought this was odd, as Edwin did not get off work until 9:00 p.m. and the summons was issued at 8:40 p.m. (Tr. 168-69, 177).

At 11:23 p.m., Sergeant Sampson telephoned Lieutenant Sanchez and spoke with him for about ten minutes (Pet. Ex. 1). Lieutenant Sanchez testified that Sergeant Sampson told him he thought something “funny” was going on, as he had gotten conflicting information from Brian and Eliot about the car stop. Brian had told Sergeant Sampson that Eliot had been pulled over and he, Brian, had arrived on the scene, while Edwin had told Sergeant Sampson that he was the one driving the car (Tr. 58). Lieutenant Sanchez told Sergeant Sampson to document this in a report (Tr. 58). At 11:58 p.m., Sergeant Sampson sent an e-mail to Lieutenant Sanchez indicating that Brian had told him during the conversation that he had been “in the car” with Eliot and wanted to figure out what the police wanted from Eliot. Edwin had also telephoned him, saying he had been pulled over and had shown his shield and ID to the police officer and that Eliot was only a passenger in the car (Pet. Ex. 4).

Edwin denied making this telephone call (Tr. 590, 591, 628). He said that he was on his post until the end of his shift, at 9:00 p.m. (Tr. 588-89, 590, 591-92). He testified that he did not learn during his tour that Eliot had been pulled over in New Jersey. Nor did he communicate with Eliot that night (Tr. 593). Indeed, Edwin said that he did not learn about the incident until questioned by investigators on March 5, 2010 (Tr. 596). Moreover, he did not believe that Sergeant Sampson would be able to recognize his voice on the phone. He testified that he rarely spoke to Sergeant Sampson over the phone because he “normally” sat next to him at the desk (Tr. 622, 624).

⁶ Sergeant Sampson’s e-mail to Lieutenant Sanchez, sent February 4, 2010 at 11:57 p.m. indicates otherwise: that Officer Lee called him at about 8:54 p.m., and that Edwin Toro called him about 25 minutes later, or about 9:25 p.m. (Pet. Ex. 4). Given the contemporaneity of the e-mail, I find it more reliable than Sergeant Sampson’s testimony, more than a year after the incident, about the timing of the telephone calls.

March 5, 2010 Interviews

On March 5, 2010, ACS Investigator Brenda Wilson interviewed both respondents about the events of February 4, which she documented in two investigative reports. As related in her investigative report on Brian's interview (Pet. Ex. 12), she asked Brian to tell her what happened on February 4, when he arrived to where Eliot had been pulled over by the Port Authority Police. Brian said he did not know anything about Eliot being stopped by the police. He said he never arrived at a scene where Eliot was pulled over and never showed his ACS ID or badge to a police officer on the night of February 4, 2010 (Pet. Ex. 12). He explained that he always leaves his badge in his locker at work, except when he takes his uniforms to be laundered. Brian also told Investigator Wilson that he never called Lieutenant Sanchez on February 4, 2010, or any other day, to relay any information about the car stop. Further, he related that he and Edwin had not discussed why they were told to present themselves for an interview, he had not asked any of his supervisors about the reason for the interview, and Eliot had not mentioned the traffic stop to him. Asked when Eliot had stopped working for ACS, he said that Eliot had stopped working for the agency a few years ago and had taken a leave of absence. He said he did not know why Eliot took a leave of absence (Pet. Ex. 12). Investigator Wilson's report was corroborated by Brian's testimony (Tr. 645-47). Brian also testified that the information he gave to the investigators was accurate (Tr. 645-46).

As related in her investigative report on Edwin's interview (Pet. Ex. 13), Investigator Wilson asked Edwin to explain the phone call he made on February 4, 2010, informing Sergeant Sampson that he was the driver of the car pulled over by Officer Mokbanos. Edwin responded that he never called Sergeant Sampson about anything pertaining to a traffic incident or his nephew Eliot. He said he was unaware that Eliot had been stopped by the Port Authority police and that he does not keep in touch with Eliot and had not seen him since a Christmas celebration. Edwin also said that he had not discussed the reason for the interview with Brian (Pet. Ex. 13). Edwin's testimony was consistent with the report. He testified that he recalled being questioned by investigators about the call made to Sergeant Sampson and that he truthfully told them that he did not telephone Sergeant Sampson (Tr. 594-95).

Credibility

Resolution of these charges rests on an assessment on the relative credibility of the witnesses. As frequently noted, there are multiple factors considered in analyzing credibility, including “witness demeanor, consistency of a witness’ testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness’ testimony comports with common sense and human experience.” *Dep’t of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 98-101-A (Sept. 9, 1998).

Regarding the car stop itself, I found Officer Mokanos to be an entirely credible witness and found Brian, Eliot, Wilfredo, and Laura to be less than credible. It was clear, listening to Officer Mokanos and observing his demeanor, that he was astonished by the events of February 4, 2010, and that they stood out in his mind because they were so unusual. As Officer Mokanos testified, referring to both Brian and Eliot, “. . . in my time as a police officer, it’s like the first time I had two police officers lie to me, I guess to the extent that they did, which obviously kind of like embedded in my head . . . And I mean this incident happened in February of 2010, so ever since this whole thing happened, I’ve had a definitely different outlook on how I go about things” (Tr. 226).

There is no plausible reason why Officer Mokanos would intentionally perjure himself about the car stop. Brian testified that he had never met Officer Mokanos prior to that evening and did not know why Officer Mokanos would say that he appeared at the scene of his brother’s car stop (Tr. 690, 692). Officer Mokanos testified credibly that he had never met or made contact with Brian, Eliot, or Lieutenant Sanchez prior to that night (Tr. 224). Thus, there is no discernible bias or motive on the part of Officer Mokanos that would cause him to lie.

Respondents made much of Officer Mokanos’s testimony that he does not maintain a memo book (Tr. 228). Officer Mokanos acknowledged that Port Authority Police rules require him to carry a memo book (Tr. 246), although he said he did not know whether it was specifically required by the Patrol Guide (Tr. 246). In fact, the Port Authority Instruction on Regulation Police Equipment (P.D.I. 7-8) states that police officers “shall” carry equipment, including their “regulation memo book,” and that they “shall” make “complete and accurate entries of the duty performed, as well as all unusual occurrences on assigned posts,” within the memo book (Resp. Ex. D). Brian’s counsel contended in summation that Officer Mokanos lied

at trial to cover up the fact that he did not note the details of the car stop, including that there was a child in the car and that the driver's name had come up on a list of convicted sex offenders (Tr. 704).

However, far from covering up that he did not note the details of the car stop, Officer Mokanos freely admitted that he did not make notations that evening and does not carry a memo book. In explanation, he testified that a memo book "is more of a New York City document," that he has "never" been asked in the New Jersey courts if he has a memo book, and that he has never been reprimanded by a superior for not having a memo book (Tr. 225). It strains belief that Officer Mokanos would fabricate this elaborate tale, regarding Brian, simply because he did not note the details of the car stop in the memo book (Tr. 704).

This is particularly the case since it is undisputed that Officer Mokanos followed up by proceeding to Wilfredo's and Laura's house and speaking to Brian. Officer Mokanos testified credibly that he wrote down Brian's shield and identification number at that time. His testimony was corroborated by a photocopy which he produced of the traffic summons together with Brian's information. Officer Mokanos also spoke to both Sergeant Sampson and Lieutenant Sanchez about the situation (Sanchez: Tr. 42-43, 56-57). ACS telephone records confirm the calls between Lieutenant Sanchez and Officer Mokanos (Pet. Ex. 1).

Respondents' argument would be stronger if Officer Mokanos did not tell anyone for months after the car stop that Brian was at the scene. That, however, is not the case. Instead, Lieutenant Sanchez testified that Officer Mokanos told him in a telephone call at 10:23 p.m. that evening that Brian had appeared at the car stop (Tr. 56-57). Lieutenant Sanchez sent an e-mail to Commissioner Blades at 11:22 p.m. on February 4, noting that Officer Mokanos reported that Brian had arrived at the scene (Pet. Ex 2). The contemporaneous nature of that e-mail evinces its reliability.

Respondents also contend that Brian and Eliot look alike, that Officer Mokanos confused Brian for Eliot when he arrived at Laura's and Wilfredo's house, and that Officer Mokanos erroneously testified that Brian was driving a Dodge Durango (Tr. 704). These contentions are not persuasive, for various reasons. First, despite Eliot's testimony that he often gets confused with his brother because they look alike (Tr. 505), there are some physical differences between Brian and Eliot, apparent in photographs of each (Resp. Ex. E). Brian is less stocky, he has a narrower face, and his eyebrows are less pronounced (Resp. Ex. E). Second, I found the Toros

generally to be less than credible witnesses, for reasons to be discussed. Most importantly, however, even if I credited Laura's and Wilfredo's testimony that Officer Mokanos mistook Brian for Eliot, this would not establish that Officer Mokanos lied in his testimony. Officer Mokanos was unequivocal, on both direct and cross-examination, that he stopped an individual for a traffic stop -- Eliot -- who presented fake-looking identification, and that subsequently, that person's brother, Brian, appeared with his father and presented his own shield and identification card, which looked authentic. Officer Mokanos was clear, both in his testimony and in talking to Lieutenant Sanchez, that two people arrived at the scene after he stopped Eliot, not one. This was more credible than respondents' claim that only Wilfredo arrived.

Moreover, whether Officer Mokanos was correct in testifying that Wilfredo pulled up in a black Durango (Tr. 201) is inconsequential. Counsel notes that Officer Mokanos testified that Eliot was driving a black Durango (Tr. 229), while Wilfredo testified that he has only one Dodge Durango and Eliot drove it that night (Tr. 419, 434). Thus, counsel asserts, Wilfredo could not have been driving a Dodge Durango. However, this is beside the point. There is no dispute that Wilfredo, at least, arrived at the car stop, regardless of whether he was driving a black Durango or, as he and Laura testified, a Lincoln Aviator. Moreover, Officer Mokanos acknowledged that he was unsure both about the make and the color of the car that Brian and Wilfredo pulled up in (Tr. 230). This stands to reason, given the other, more memorable circumstances of the stop, including Eliot pulling out a photocopy of an ACS ID that looked fake and the license check which indicated (erroneously) that Eliot was on a list of convicted sex offenders.

Regarding Brian, Eliot, and Laura, several things stand out. First, Brian's testimony that he left his parents' house in New Jersey at 8:30 at night to fill a prescription that he had obtained many hours ago from a doctor in Brooklyn seemed convoluted and implausible. Brian did not explain why he did not fill the prescription earlier in the day, in Brooklyn, if he was not feeling well. But even if Brian's testimony that he did not fill the prescription until 8:30 p.m. at night in New Jersey was credited, his testimony that he had to wait half an hour for the prescription to be filled was at odds with Laura's testimony that the pharmacy called Brian about his prescription, which would indicate that the prescription was ready to be picked up.

Moreover, Laura said Brian was still at home when Wilfredo left to go to the car stop, while Brian's testimony had him leaving the house to go to the pharmacy before Wilfredo departed. Laura also testified that Wilfredo took Brian's car to Eliot. It is possible, of course,

that family members could drive each others cars based upon the placement of cars in the driveway and their proximity to the street. Here, however, it is more likely that Wilfredo took Brian's car to Eliot because both he and Brian were in the car, on the way to see Eliot.

Regarding Eliot, his credibility was undercut in multiple ways. First, while he denied presenting a photocopy of an ACS ID or ACS shield to Officer Mokbanos, I credited Officer Mokbanos's testimony to the contrary. Officer Mokbanos testified that it took almost an hour after stopping Eliot before they decided to let him go, because they were alarmed by the fake-looking photocopy of ACS ID card and the information that Eliot was on a list of convicted sex offenders.⁷ Indeed, they only let Eliot go because Brian had vouched for him. Subsequently, Port Authority Police Officer Lee followed up by speaking with Sergeant Sampson, because of concern about Eliot having produced an ACS shield and ID. There were also multiple telephone calls between Officer Mokbanos and Lieutenant Sanchez, at 10:12 p.m. and 10:23 p.m., during which Officer Mokbanos sought verification of Eliot's employment status (Mokbanos: Tr. 205-06, 223; Sanchez: Tr. 46-47, 55). These calls are confirmed by ACS telephone records (Pet. Ex. 1). It is preposterous that such an attempt would be made to verify Eliot's employment status had he not produced an ACS shield or ID. Indeed, respondents' version of events does not explain how Officer Mokbanos became aware of Eliot's association with ACS.

Moreover, although Eliot testified that he returned his ACS police ID when he resigned (Tr. 556-57), he acknowledged that the ACS police ID was found in his car when he was pulled over on a subsequent occasion on June 4, 2010, while driving one of Wilfredo's cars (Tr. 567). Asked why his ACS police ID was there, if he had returned it, Eliot replied, "I'm still asking myself that same question" (Tr. 567). The more plausible answer is that Eliot had not returned the ID. Eliot's credibility was further diminished by his testimony that he did not use the ACS police ID in Wilfredo's car to hold himself out as an ACS officer on the evening of June 4, 2010, despite pleading guilty to impersonating an ACS officer on that occasion (Tr. 567).

I also found both Brian and Eliot to be less credible than Lieutenant Sanchez and Sergeant Sampson about the telephone calls which each of them allegedly made regarding the car stop.

Lieutenant Sanchez testified that he spoke to Brian about 10:00 p.m., during which Brian said he had identified himself as a peace officer to the Port Authority police. It was undisputed

⁷ As noted earlier, Eliot's conviction was overturned.

that Brian called Lieutenant Sanchez's ACS-issued cell phone at 9:54 p.m., that the call dropped, and that Lieutenant Sanchez then returned Brian's call, after which they spoke for about ten minutes. Brian testified that the call lasted for ten minutes because he told the lieutenant about his medical condition (Tr. 683). "Lieutenant Sanchez, every time when someone calls out, he would ask if everyone's okay, how are you doing, is your health in order, you know, what are you taking, such and such" (Tr. 683). Brian's testimony that he only talked about his health, for ten minutes, and did not once mention that he had identified himself as an ACS police officer to a Port Authority police officer, as Lieutenant Sanchez testified, was not credible.

Moreover, even though the ACS telephone records document that Brian called Lieutenant Sanchez again at 12:49 a.m. on February 5, 2010, and that the call lasted approximately three minutes, Brian denied making that call. His testimony that the telephone "probably" dialed the number by mistake seemed entirely speculative. While it is possible, certainly, that buttons on a cell phone could be activated accidentally, Brian did not testify that he was doing anything at 12:49 a.m. that would make this likely. He did not say, for example, that he was awake and moving around and that the telephone was in his back pocket, such that it might have auto-dialed. Moreover, it is unlikely that Lieutenant Sanchez would have stayed on the phone for three minutes, rather than hanging up right away, when no one was on the other line. Brian's credibility was further undercut by his admission that he did not know why Lieutenant Sanchez would testify that Brian called at 12:49 a.m. and say that everything was okay and it had just been a misunderstanding (Tr. 685). Brian told the investigators on March 5, 2010, that he had a good relationship with Lieutenant Sanchez (Pet. Ex. 12). He testified that Officer Bonner and his current sergeant have issues with him, because he is Hispanic, which have caused his "current situation" (Tr. 675). However, he did not explain why any negative perceptions on the part of either his current sergeant or Officer Bonner would cause Lieutenant Sanchez to lie about him. He acknowledged that Lieutenant Sanchez, like him, is Hispanic (Tr. 676).

As between Edwin and Sergeant Sampson, I credited Sergeant Sampson's testimony that he was called to the phone by a man who identified himself as "Toro," whom he recognized to be Edwin, and that Edwin said that he had been the driver who had been pulled over, not Eliot. As noted in Sergeant Sampson's e-mail to Lieutenant Sanchez, this call occurred about 9:25 p.m. (Pet. Ex. 4). Although Edwin denied making this call, I credited Sergeant Sampson's testimony that he recognized Edwin's voice. Sergeant Sampson testified that Brian and Edwin have two

different voices. Indeed, both Brian and Edwin testified at trial and their voices were distinct in that Brian's was deeper and Edwin's was more nasal. More importantly, Sergeant Sampson credibly testified that he recognized Edwin's voice because he had worked with him many times. As well, he testified that he had spoken to Brian that night and recognized Brian's voice – which was also identifiable because Brian referred to investigators asking about his brother.

Edwin's testimony that he did not talk to Sergeant Sampson was not believable. Edwin's initial testimony that he did not speak with Sergeant Sampson on the telephone was contradicted by his statement in the investigative interview that he would usually use a landline telephone to communicate with Sergeant Sampson (Pet. Ex. 13). Moreover, in explaining at trial why he did not talk to Sergeant Sampson on the telephone, Edwin said it was because he sat next to Sergeant Sampson during his tour, which lasted the better part of a year (Tr. 625). He then suggested that Sergeant Sampson would not be able to recognize his voice because he did not speak to Sergeant Sampson on a regular basis, due to their poor working relationship. At one point, Edwin said that he never spoke to Sergeant Sampson in the entire time they worked together (Tr. 624). This testimony was incredible on its face, even given Edwin's testimony that he often went back and forth to the search room, instead of continually sitting next to Sergeant Sampson (Tr. 624).

Moreover, Edwin went on to say that he did not feel comfortable talking to Sergeant Sampson because he thought that Sergeant Sampson would "treat other people better than me" (Tr. 625). Edwin's testimony that he and Sergeant Sampson did not have a good working relationship and he did not feel comfortable talking to Sergeant Sampson was belied by Edwin's statement to the contrary in his investigative interview. Indeed, in that interview Edwin stated that he did not know why Sergeant Sampson would fabricate a story about him making such a phone call, and that he and Sergeant Sampson had a good working relationship (Pet. Ex. 13). Edwin also acknowledged at trial that he had "no idea" why Sergeant Sampson would lie about him (Tr. 629).

Further, I did not credit Edwin's testimony that he did not learn during his tour that Eliot had been pulled over in New Jersey, he did not communicate with Eliot that night, and he did not learn of the incident until questioned by investigators on March 5, 2010. It is undisputed that Edwin remained on the job until 9:00 p.m. on February 4, 2010. This does not mean, however, that he could not have spoken with Eliot or any other family member about the situation. Indeed, while not necessary for my finding that Edwin telephoned Sergeant Sampson that night and said

that he had been the individual the police pulled over, there are telephone records which petitioner introduced which tend to indicate that there were telephone conversations between Eliot and Edwin that very night.

The telephone records were for the telephone which Eliot had when he was arrested for criminally impersonating an officer on June 4, 2010. Sergeant Stephen Loud, a New York City police officer, testified that Eliot gave him the cell phone along with two telephone numbers to call on it to verify his employment at ACS (Tr. 326, 333-34).⁸ The cell phone was vouchered as arrest evidence, and after a search warrant was obtained for it, it was taken to a lab where a computer forensic analyst downloaded information from its SIM card (Loud: Tr. 326, 239-30). This information generated a report showing the number in the phone's phonebook, the last number dialed, and text messages stored on the phone (Loud: Tr. 329-30; Ho: Tr. 344, 364; Pet. Ex. 15). ACS also obtained call records from Sprint for the phone (Pet. Ex 11; Tr. 319).

The phone records show that on February 4, 2010, there were multiple calls to and from a phone number which is identified in the phone's phonebook as belonging to "Pops" (Pet. Exs. 11, 15) and matches the number Edwin had provided to ACS for Wilfredo Toro (Pet. Exs. 8, 11, 15). Specifically, the record shows the following calls to and from Wilfredo: an outgoing call at 8:43 p.m., incoming calls at 8:50 p.m., 9:04 p.m., 9:07 p.m., 9:48 p.m., outgoing calls at 10:04 p.m. and 10:17 p.m., and an incoming call at 10:56 p.m. (Pet. Ex. 8). Additionally, there is an outgoing phone call at 9:50 p.m. to a number identified in the phone's phonebook as belonging to Brian (Pet. Exs. 11, 15), which matches the number listed on Brian's "ACS Info of ACS Police" form as belonging to his cell phone (Pet. Ex. 7). There are also seven outbound calls that night (at 8:45 p.m., 8:46 p.m., 8:48 p.m., 8:49 p.m., 9:51 p.m., 10:04 p.m., and 11:41 p.m.) and three incoming calls (at 9:01 p.m., 9:10 p.m., 9:57 p.m.) to a phone number ending in 0672 that is identified in the phone's phonebook as belonging to "Ed" (Pet. Exs. 11, 15). There were two other outbound calls to Ed that were for zero duration (at 8:45 p.m. and 8:46 p.m.).

Edwin testified that he did not recognize that number and has never had a phone number ending in 0672 (Tr. 592, 594). Edwin's home phone number, as indicated by his ACS contact sheet, ends in 3123, and his old cell phone number ended in 3740 (Tr. 597, 610, 618; Pet. Ex. 8). Indeed, he claimed that he did not have a cell phone on February 4, 2010 (Tr. 610) and he does not currently have a cell phone (Tr. 621-22). Although he has a close relationship with his

⁸ As noted above, by this date Eliot had resigned from ACS.

nephew Eliot, he said that he does not speak with Eliot on the phone and his number did not appear in the phonebook on Eliot's cell phone (Tr. 611, 614-15).

Eliot testified that he did not recall making the entry in the phonebook for "Ed" with the corresponding number ending in 0672 (Tr. 508). He explained that his grandmothers, wife, and son all had access to the phone and he did not enter all of the information on the phone (Tr. 508). He stated that though he made the calls in the phone log to his father at 8:43 p.m. and 9:04 p.m., he did not make the call on the log to the number ending in 0672 at 8:45 p.m. and did not know who that number belonged to (Tr. 529-32). He did not recall making another call to that number at 8:49 p.m. or receiving a call from that number at 9:01 p.m. (Tr. 530-32). Nor did he remember receiving a call from that number at 9:57 p.m. or making a call to that number at 10:04 p.m. (Tr. 536, 541).

I did not credit either Edwin's or Eliot's testimony. Eliot's testimony that although he made telephone calls at 8:43 p.m. and 9:04 p.m. from his cell phone, he did not make a call at 8:45 p.m. to the number ending in 0672, was patently incredible. Eliot did not suggest that any other person had access to his phone at this time and there is no reasonable explanation for who else could have made this call, the three other calls that followed in rapid succession, and the other calls made and received later that night from "Ed." Eliot's testimony that he did not remember making the other telephone calls was similarly difficult to fathom, given that he recalled making the calls to Wilfredo. This is particularly the case because there are a total of ten calls to "Ed," seven of which were outgoing from Eliot's phone, after 8:45 p.m. While the initial calls between 8:45 p.m. and 8:48 p.m. lasted just a few seconds, some of the calls were quite substantial in length. The call from Ed at 9:10 p.m. lasted nine minutes. The call to Ed at 9:51 p.m. was slightly under a minute, but the 9:57 p.m. call from Ed lasted over five minutes and the 10:04 outgoing call to Ed lasted over seven minutes. The final call of the night with Ed, at 11:41 p.m., was an outgoing call that lasted just over five minutes. It is not likely that multiple calls of this duration would be entirely forgotten.

It is similarly difficult to believe that Eliot called an "Ed," who was someone other than Edwin. Whether or not other family members had access to his cell phone, it was not plausible that he would have an entry for "Brian" and for "Pops" but not for "Ed." Moreover, Eliot dialed Ed's number five times between 8:45 p.m. and 8:48 p.m., just after calling his father at 8:43 p.m., and just after Officer Mokbanos issued the summons. Eliot offered no plausible explanation

of any other “Ed” besides Edwin that he may have called or received a call from 12 times between 8:46 p.m. and 11:41 p.m. that night. When asked who “Ed” was, Eliot testified, “Possibly, one of my wife’s friends.” It is unlikely that Eliot would have called his wife’s friend, who he seemed to barely remember, 12 times on the night that he was pulled over, his ACS ID was questioned as fake, he was told that he was on a list of convicted sex offenders, and Port Authority police officers drove to his parents’ house looking for him.

Edwin’s credibility was greatly undermined by his convoluted attempts to explain that he never spoke to Sergeant Sampson, either in person or on the telephone, despite working directly next to him for months on end. Beyond that, I found his assertion that he never spoke to his nephew Eliot on the telephone, even though he was close to him, to be highly implausible. Along these lines, I found Edwin’s statement during the March 5, 2010 investigative interview that he did not know that Eliot had been stopped by the Port Authority police to be incredible. Even if Edwin had not telephoned Sergeant Sampson on February 4 -- and the evidence indicates that he had -- he testified that he has lived with Brian for the past five years (Tr. 618). Edwin testified that he “barely” sees Brian at home as they work different shifts, and that when he does, he often does not talk to Brian because Brian is playing video games (Tr. 616). However, while it is plausible that Edwin might generally not want to interrupt his nephew during a video game, it is inconceivable that Brian and Edwin would not find time between February 4, 2010 and March 5, 2010 to discuss that Eliot had been pulled over by Port Authority police, after which multiple Port Authority officers arrived at Wilfredo’s and Laura’s New Jersey residence looking for Eliot and questioning whether he was a convicted sex offender.

Respondents’ attorneys stressed in summation that the calls which respondents are alleged to have made to Sergeant Sampson and Lieutenant Sanchez were not listed in the ACS command log for that evening (Tr. 700, 703). Officer Bonner acknowledged that when Brian and Edwin called trying to reach Sergeant Sampson, he did not enter their calls into the command log (Tr. 145). Sergeant Sampson also confirmed that he did not make any notations in the command log about these phone calls (Tr. 174). Indeed, the only entry for February 4 relating to respondents states that Brian called out sick at 4:28 p.m. (Bonner: Tr. 148; Resp. Ex. B). Officer Bonner also acknowledged that he did not make any entries concerning these calls in his memo book (Tr. 153).

Brian testified that he has been in charge of the command log at ACS Central Command in the past and that any encounters between an ACS officer and a police officer are supposed to be recorded in the command book (Tr. 649-50). This allows ACS to investigate (Tr. 650). Telephone calls are also logged in (Tr. 651). Likewise, Edwin testified that he has made notations in the command log and “everything and anything that occurs” must be entered into the command log (Tr. 602). He said this rule is embodied in the Patrol Guide and that Sergeant Sampson had specifically instructed him to update the command log at all times (Tr. 604, 607). He was unaware of any rule that items relating to an arrest or interaction of a special officer with police officers were not to be entered into the command log (Tr. 603).

In contrast, Lieutenant Sanchez testified that an incident of this nature would not go in the command log; rather, a separate e-mail, written report, or fax about the incident would go to headquarters (Tr. 102, 129). He said that this rule was put in place to protect officers’ privacy, because there was a rampant rumor mill at ACS. He testified that he had been instructed not to put incidents involving the arrest of officers or similar occurrences in the command log where everyone could read it (Tr. 102-04, 120-21, 129). While acknowledging that the Patrol Guide says to document unusual incidents, he testified that that Inspector Harris and Captain Rosario gave verbal directives to the contrary and their orders supersede the Patrol Guide (Tr. 103-04, 113). Sergeant Sampson likewise testified that situations of this nature do not get entered into the command log (Sampson: Tr. 174). Though Officer Bonner testified that he was aware of the same rule (Tr. 157-58), he testified that Sergeant Sampson never told him what the calls were about and he did not know that they had anything to do with Eliot being pulled over (Tr. 152, 158). Thus, he had no knowledge that there was an unusual incident to report (Tr. 145, 159-60).

I found Sergeant Sampson’s, Officer Bonner’s and Lieutenant Sanchez’s testimony to be credible. In any event, although there were no command log entries this night, there were e-mail reports by Sergeant Sampson and Lieutenant Sanchez which documented the incident, including the phone calls made by respondents to Sergeant Sampson. Thus, the lack of command log entries does not mean that nothing unusual happened that evening.

Findings, Brian Toro

Charge one, specification one, against Brian, is sustained for the most part, but not entirely. Based upon my credibility assessments, I find that Officer Mokanos pulled over Eliot’s

car on the evening of February 4, 2010, in Weehawken, New Jersey. Eliot produced a photocopy of an ACS ID which looked fake to Officer Mokanos. Officer Mokanos ran a license check which produced information which indicated that Eliot was a convicted sex offender. This was incorrect as Eliot's guilty plea had been vacated by the Appellate Division in 2009. Brian arrived on the scene with his father, Wilfredo. Brian produced his shield and identification card, and identified himself as an ACS police officer. Officer Mokanos showed Brian the copy of the ID card which Eliot had produced and asked Brian to explain. Brian said that Eliot was having some difficulties or problems at work but would get his ID card back once everything had been cleared up. Further, Brian gave Officer Mokanos Lieutenant Sanchez's phone number so Officer Mokanos could make further inquiries. Officer Mokanos was unable to reach Lieutenant Sanchez to verify Eliot's employment status. However, although he had concerns about whether Eliot had produced fake ACS identification, he decided to issue Eliot a traffic summons rather than detain him further.

Thus, charge one, specification one is sustained to the extent it alleges that Brian arrived at the scene of the car stop, identified himself as an ACS officer and showed his ACS identification card and ACS issued badge. However, the specification goes on to state that Brian also stated that Eliot "was on leave from ACS police and was having difficulty obtaining a new identification card, despite knowing that Eliot is a known sex offender no longer employed by ACS having resigned on or about December 2006 following his arrest."

As set forth above, there was no testimony that Brian told Officer Mokanos that Eliot was on leave. Moreover, petitioner failed to establish that Brian "knew" that Eliot was a "known sex offender" or even that Eliot had resigned from his job after his arrest in December 2006. Eliot's guilty plea had been vacated in 2009. Thus, petitioner did not establish that Eliot was a "known sex offender." Nor did petitioner establish that Brian knew on February 4, 2010, precisely what Eliot's employment status was. When asked at trial if he knew Eliot's employment status, Brian asked, "Currently?" He was told, "Yeah," and then testified that Brian had resigned (Tr. 647). This does not show that Brian knew as of February 4, 2010 that Eliot had resigned from employment at ACS. Moreover, when he was interviewed on March 17, 2010, Brian admitted that Eliot had stopped working for the agency but said only that he had taken a leave of absence, not that he had resigned (Pet. Ex. 12).

Accordingly, specification one is sustained as amended to conform to the proof, that Brian told Officer Mokanos that Eliot was having some problems at work and would get a new identification card once these problems were resolved. This amendment is appropriate as this issue was fully litigated at trial and as it does not change petitioner's theory of the case regarding comments by Brian to Officer Mokanos regarding Eliot's employment status that were inaccurate and detrimental to the interests of ACS. *See Dep't of Sanitation v. Marcus*, OATH Index No. 1502/06 at 7 (Feb. 6, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-68-SA (June 25, 2007) (conforming charge that sanitation worker accepted a gratuity to the proof that he shared in a gratuity that was handed to his co-worker); *Dep't of Transportation v. Mendez*, OATH Index No. 384/05 at 3-4 (Jan. 19, 2005) (conforming charge that respondent used vulgar language to a superior to the proof that he used vulgar language, that was less profane than what petitioner alleged); *Police Dep't v. Coll & Gadoll*, OATH Index Nos. 245/95 & 242/95 at 6-7 (Feb. 16, 1995) (confirming specification that police officer kicked or struck civilian with a nightstick to proof that officer punched civilian, because issue as to force was fully litigated at trial).

As alleged in the charges and specifications, Brian's conduct at the car stop violated numerous provisions of the ACS Code of Conduct and Patrol Guide, including the ACS Code of Conduct, sections III (B)(1) (19), and (42), and the ACS Patrol Guide, Rules of Conduct section E.24, which prohibit conduct prejudicial to good order and discipline and detrimental to the agency, as well as the improper use of an ACS ID card.⁹ Section III (B)(19), which governs the use of an ACS ID card, provides that ACS cards and badges may not be used in a manner which conflicts with the purposes of the City and/or ACS, to gain a benefit unavailable to the general public, or to identify an employee as acting on behalf of ACS when the employee is not acting on behalf of the agency. Here, by the time Brian and Wilfredo arrived on the scene, Officer Mokanos and his partner were concerned about the photocopy of the ACS ID that Eliot had produced. Brian appeared, not simply as a concerned brother, but as an ACS special officer vouching for Brian and dissuading any concerns that Eliot improperly possessed the ACS ID.

⁹ In drafting the charges, petitioner alleged the particular rule violations in a prefatory paragraph prior to the actual specifications. Petitioner did not specify which rule violations pertained to which specifications. However, it is reasonable to conclude that the rule violations relating to the improper use of a false ID card pertain to specification one, dealing with the car stop itself, and that the other rule violations, relating to false statements, pertain to specifications two and three, dealing with the telephone calls to Lieutenant Sanchez as well as the statements made in the March 5, 2010 investigative interview.

However, this was not the case. Eliot should not have been presenting himself as an ACS police officer in an attempt to avoid a speeding summons or otherwise obtain leniency from Officer Mokanos. Brian was not acting in the best interests of the agency by telling Officer Mokanos that Eliot would be getting a new ID once his problems at work were resolved. This was not true, as Eliot had resigned from ACS in 2007.

Additionally, the charges and specifications allege that, by his conduct at the car stop, Brian violated chapter 68 of the New York City Charter, section 2604(b)(2) and Conflict of Interest Board Rule 1-13. However, the charges and specifications are somewhat confusing, because although they allege a violation of section 2604(b)(2), they track the language of section 2604(b)(3) by alleging that Brian “used or attempted to use his position as a public servant to obtain financial gain, privilege, or other private or personal advantage, direct or indirect, for [himself] or a person associated with [him].” While similar, section 2604(b)(2) provides:

No public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.

Conflicts of Interest Board Rule 1-13(b) clarifies that “it shall be a violation of City Charter § 2604(b)(2) for any public servant to use City letterhead, personnel, equipment, resources, or supplies for any non-City purpose.” 53 RCNY § 1-13(b) (Lexis 2012).

Despite the puzzling drafting, there is no prejudice because Brian’s conduct at the car stop violated both section 2604(b)(2) and section 2604(b)(3). By identifying himself as an ACS police officer, presenting his ACS badge and ID and vouching for his brother Eliot, Brian used City equipment for a non-City purpose, in conflict with the proper discharge of his official duties. There was no City purpose in vouching for Eliot, as he no longer worked for ACS and should not have been presenting a photocopy of an ACS ID when pulled over for speeding. The proper discharge of Brian’s official duties did not involve lying to a Port Authority police officer in order to extricate Eliot from a difficult situation. Brian used his position as a public servant to obtain an advantage to his brother. Thus, the elements of both 2604(b)(2) and 2604(b)(3) are satisfied. *See Conflicts of Interest Bd. v. Maldonado*, OATH Index No. 1323/11 (Apr. 4, 2011), *adopted*, Bd. Chair’s Dec. (Dec. 8, 2011) (Inspector violated 2604(b)(2) and (3) by using his badge and position in an effort to get special treatment for his son who had been arrested); *see*

also *Conflicts of Interest Bd. v. Harris*, Conflicts of Interest Bd. Case No. 2011-547 (Jan. 25, 2012) (employee violated section 2604(b)(2) by using a photocopy of a City parking placard to avoid receiving parking tickets while not performing official duties); *Conflicts of Interest Bd. v. Andrews*, Conflicts of Interest Bd. Case No. 2011-156 (June 22, 2011) (NYCHA Vice-Chairman violated 2604(b)(2) by sending letter on NYCHA letterhead to a federal judge seeking leniency for a family friend about to be sentenced on one count of distribution of child pornography); *Conflicts of Interest Bd. v. Dixon*, OATH Index No. 585/11 at 4 (Dec. 9, 2010), *adopted*, Bd. Dec. (May 23, 2011) (finding city planner violated Charter § 2604(b)(3) when she identified herself as an HPD employee in an attempt to resolve a dispute with her landlord about a security deposit); *Dep't of Correction v. Rodriguez*, OATH Index No. 792/09 at 17-18 (July 27, 2009), *modified on penalty*, Comm'r Dec. (Sept. 1, 2009), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 10-23-M (Apr. 26, 2010) (respondent violated section 2604(b)(3) by identifying herself as a correction officer and signing in on official business at a court when she was there for personal business).

In sum, charge one, specification one against Brian is sustained to the extent petitioner established that Brian identified himself as an ACS officer, showed his ACS ID card and badge, and explained that Eliot would be getting a new ID card once his problems at work were cleared up. By so doing, Brian violated the ACS Code of Conduct, sections III (B)(1) (19), and (42), the ACS Patrol Guide, Rules of Conduct section E.24, and Chapter 68 of the New York City Chapter, section 2604(b)(2) and/or section 2604(b)(3).¹⁰

Charge one, specification two against Brian is not sustained. Specification two, part (a) alleges that Brian called Lieutenant Sanchez at about 10:00 p.m. and said that Eliot had been pulled over by the Port Authority police and had presented an expired ACS ID, and that he, Brian, had identified himself as an ACS special officer and vouched for his brother by saying Eliot was on leave and was having problems getting a new ID card. Petitioner did not establish that that Brian made all these statements. I found Lieutenant Sanchez credible, but his only testimony about the 10:00 p.m. call was that Brian said that he had identified himself as a peace

¹⁰ For purposes of penalty I am only considering this as one violation of the Conflicts of Interest Law as it is inappropriate to punish a civil servant multiple times for the same instance of misconduct. See *Dep't of Transportation v. Mendez*, OATH Index No. 384/05 at 4, n.2 (Jan. 19, 2005); see also *Conflicts of Interest Bd. v. Tatum*, OATH Index No. 2891/10 at 8 (Sept. 20, 2010), *adopted*, Conflicts of Interest Bd. Determination COIB Case No. 09-467 (Mar. 24, 2011).

officer to the Port Authority police, and that when he asked Brian if there was a problem, Brian said there was not a problem. It was not misconduct for Brian to truthfully relate that he identified himself as a peace officer to the Port Authority police. Brian telling Lieutenant Sanchez that there was not a problem is more troubling. The ACS Patrol Guide, Rule of Conduct, Section (D)(7) which petitioner alleges was violated, prohibits the submission of false statements or statements intended to mislead. However, that one statement -- that there was not a problem -- is insufficient to establish the submission of a false or misleading statement.

Specification two, part (b) alleges that Brian called Lieutenant Sanchez around midnight and said that he made a mistake when he initially stated he showed his ACS ID and badge to the ACS police, and that it was Eliot who had shown his father's private investigative shield and identification to Officer Mokanos. Lieutenant Sanchez did not testify that Brian made these statements. All Lieutenant Sanchez said was that Brian told him there was a "misunderstanding," it was a traffic stop, and everything was fine. This testimony alone is insufficient to establish the misconduct charged.

Specification three alleges that Brian made false official statements regarding conduct under investigation in his March 5, 2010 interview with ACS Investigator Wilson, in violation of the ACS Code of Conduct, section II(E)(4)(b) and the ACS Patrol Guide, Rule of Conduct Section E.10, namely that: he never arrived at the scene of the car stop on February 4, he never showed his ACS ID and badge to any police officer on February 4, 2010, he never told a Port Authority police officer that Eliot was on leave and was having a hard time getting a new ID, he did not know about his brother being stopped by the police for any reason, and he never called Lieutenant Sanchez on February 4 or any later date to inform him of any personal matter involving himself or his brother. Investigator Wilson's written report confirms that Brian made these statements. Petitioner established that these statements were false, with one exception. The exception pertains to Brian's statement that he never told the ACS police officer that Eliot was on leave. As discussed above, Officer Mokanos's testimony was that Brian said Eliot was having problems at work and would get a new ID once the problems were cleared up. With this limited exception, specification three is sustained.

Findings, Edwin Toro

Charge one, specification one, against Edwin Toro, alleges that he telephoned his supervisor, Sergeant Sampson, at approximately 9:20 p.m. on February 4, 2010, and said that he, Edwin, was the person pulled over by Port Authority police, and not Eliot. Further, Edwin is alleged to have told Sergeant Sampson that he showed his shield and ID to the Port Authority police officer and that Eliot was simply a passenger in the car. Petitioner alleges that by so doing, Edwin conducted himself in a manner prejudicial to good order and discipline and engaged in conduct detrimental to the Agency, in violation of the ACS Code of Conduct, Section III(B)(1) and III (B)(42), and the ACS Patrol Guide, Rules of Conduct, Section E(24). Petitioner also alleges that Edwin violated the ACS Patrol Guide Rule of Conduct, Section D(7) by providing a false statement that was intended to mislead.¹¹

As I credited Sergeant Sampson's testimony over Edwin's, I find that Edwin telephoned Sergeant Sampson that evening and said that he had been pulled over, not Eliot, that he had shown his shield and ID to the police officer, and that Eliot was only a passenger in the car. This statement was false. Hence, charge one, specification one, is sustained.

Charge one, specification two, alleges that Edwin made false official statements regarding conduct under investigation in his March 5, 2010 interview with Investigator Wilson, namely, that he never called Sergeant Sampson on February 4, 2010, and that he never told Sergeant Sampson that he had been pulled over by the Port Authority police on that date, that Eliot was only a passenger in the car, and that he, Edwin, showed his badge to the Port Authority police. Investigator Wilson's investigative report summarizing her interview shows that Edwin repeatedly denied calling Sergeant Sampson on February 4, 2010 about any matter pertaining to a traffic incident or his nephew, Eliot. However, the investigative report does not indicate that Eliot made all of the specific statements alleged. Thus, charge one, specification two, is sustained, but as amended to the proof that Edwin falsely told Investigator Wilson that he never called Sergeant Sampson on February 4, 2010, about any matter pertaining to a traffic stop or any matter involving his nephew Eliot.

¹¹ As with the charges against Brian, the charges and specifications against Edwin contain a prefatory paragraph listing various rule violations, but the specifications themselves do not reference particular rule violations. Thus, I have construed these rule violations as relating to specification one. The other rule violations charge pertain to false official statements or false or misleading information concerning conduct under investigation, which relate to the statements made to ACS Investigator Wilson, are charged in specification two.

FINDINGS AND CONCLUSIONS

1. As alleged in specification one, as amended to conform to the proof, respondent Brian Toro appeared at the scene of his brother Eliot Ocasio's car stop on February 4, 2010, identified himself as a special officer and showed his ACS ID card and badge. Respondent Brian Toro told Port Authority Officer Mokanos that Eliot was having some problems or difficulties at work but would get his ID card back once everything was cleared up. By so doing, respondent violated Section III(B)(19) of the ACS Code of Conduct, which prohibits the use of an ACS card or badge in a manner which conflicts with the purposes of the City and/or ACS or to gain a benefit unavailable to the general public. Respondent also violated Chapter 68 of the New York City Charter, Section 2604(b)(2) and/or (3) by using his badge and ID for a non-City purpose.
2. Petitioner failed to establish by a preponderance of the credible evidence that respondent Brian Toro told Lieutenant Sanchez at approximately 10:00 p.m. on February 4, 2010 that he had vouched for his brother by saying Eliot was on leave and was having problems getting a new ID card, as alleged in specification two (a). Further, petitioner failed to establish by a preponderance of the credible evidence that respondent Brian Toro told Lieutenant Sanchez at approximately midnight on February 4, 2010 that he had made a mistake when he said that he had shown his ACS badge and ID to Port Authority police and that Eliot had shown his father's private investigative shield and identification to Officer Mokanos, as alleged in specification two (b). Finally, petitioner failed to establish that respondent Brian Toro committed misconduct by the more limited statements he made to Lieutenant Sanchez at approximately 10:00 p.m. and midnight.
3. Respondent Brian Toro made false official statements about a matter under investigation on March 5, 2010, as alleged in specification three, with the exception of the statement alleged in specification three (c). As to specification three (c), petitioner failed to establish that respondent Brian Toro made a false official statement by telling the investigator that he did not tell the Port Authority police that Eliot was on leave from ACS.
4. Respondent Edwin Toro made a false statement to Sergeant Sampson on February 4, 2010, by saying that he had been pulled over, not Eliot, that he had shown his shield and ID to the police officer and that Eliot was only a passenger in the car, as alleged in specification one.

5. Respondent Edwin Toro made false official statements about a matter under investigation on March 5, 2010, by saying that he never called Sergeant Sampson on February 4, 2010 about any matter pertaining to a traffic stop or involving his nephew Eliot, as alleged in specification two as amended to conform to the proof.

RECOMMENDATION

Having made these findings, I requested and received information concerning respondents' employment history. This information indicated that Edwin Toro and Brian Toro have been employed by ACS since June 26, 2006. Both have no disciplinary history, and both received an overall rating of "good" on their most recent performance evaluation.

Thereafter, petitioner informed me that Edwin Toro had been terminated on other grounds and that it no longer requested a penalty recommendation for him. Edwin Toro's attorney requested a penalty recommendation nonetheless, as he was planning to file an Article 78 relating to the termination. However, unless Edwin is restored to employment, a penalty recommendation would be moot, and therefore I am refraining from issuing one at this juncture. Should Edwin be restored to employment, the agency may request a penalty recommendation based upon the findings made in this report.

Brian's misconduct is serious on two levels. First, he used his badge and city identification for a non-city purpose, vouching for his brother Eliot, even though Eliot had lied to Officer Mokanos about being an ACS police officer and had displayed a photocopy of an ACS identification. Invoking one's peace officer or police officer status for personal benefit has resulted in penalties ranging from fifteen days to termination, depending upon the circumstances. *See, e.g., Dep't of Health & Mental Hygiene v. Williams*, Comm'r Dec. (June 19, 2008), *modifying on penalty*, OATH Index No. 1968/08 (May 30, 2008) (termination imposed for special officer found to have displayed her badge in three-off duty incidents, two of which involved requests to a police sergeant to void a parking ticket because she was an "officer"); *Dep't of Correction v. Sweeney*, OATH Index No. 1929/99 at 17 (Sept. 16, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-77-SA (July 24, 2000) (20-day suspension recommended for correction officer who falsely represented himself to be a police officer in an off-duty incident with fellow law enforcement officers, in an attempt to obtain favorable treatment for a friend whose car had been seized, and who failed to report the incident, as required); *see also*

Police Dep't v. Torres, Comm'r Dec. (Dec. 29, 1998), *modifying on penalty*, OATH Index No. 618/97 (June 23, 1997) (20 days for police officer who attempted to use his status as a police officer to bully staff at a concert he attended while off-duty); *Police Dep't v. DiRusso*, OATH Index No. 769/91 at 13-15 (Apr. 26, 1991) (25-day suspension recommended for police officer who tried to use his status to avoid a traffic ticket, and then verbally abused traffic agents when request was denied); *Police Dep't v. Shea*, OATH Index No. 136/90 (Dec. 21, 1989), *aff'd sub nom. Shea v. Brown*, 177 A.D.2d 253 (1st Dep't 1991) (court upholds termination of police officer who was chronic sick leave abuser, who, while off-duty, displayed unofficial department shield).

Here, Brian's conduct was particularly egregious because Officer Mokbanos relied upon his representation to let Eliot leave the scene, despite concerns that Eliot was not an ACS officer and should not have been presenting an ACS ID. Brian acted contrary to ACS's best interests by vouching for Eliot, thus betraying the trust reposed in him as an ACS peace officer, who must be relied upon to act with integrity and in the best interests of the agency. *See Human Resources Admin. v. Townsend*, OATH Index No. 1325/11 at 14 (Feb. 28, 2011), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 11-85-M (Nov. 2, 2011); *Health & Hospitals Corp. (Harlem Hospital Ctr.) v. Manning*, OATH Index No. 1480/10 at 21 (May 26, 2010); *Dep't of Consumer Affairs v. Laguda*, OATH Index No. 658/10 at 13-14 (Feb. 10, 2010).

Moreover, Brian compounded his misconduct by blatantly lying about what happened in the investigative interview conducted one month later. He denied ever being at the car stop or showing his badge and ID to a police officer. He denied knowing that Eliot had been stopped by the police for any reason, and he also denied speaking to Lieutenant Sanchez on February 4 or afterwards about any personal matter involving himself or his brother. Because of the nature of their job, when special officers such as Brian engage in misconduct which brings their trustworthiness into question, it is particularly serious and may result in termination. *See Dep't of Correction v. Roman*, OATH Index No. 1026/05 at 29 (Feb. 10, 2006) (termination where officer "engaged in a deliberate pattern of fraud and deceit which is inimical to his obligations as a correction officer and gives the Department reason to doubt his integrity"); *Dep't of Correction v. Melendez*, OATH Index Nos. 237/05 & 240/05 at 15 (Aug. 25, 2005) (repeatedly lying and filing false report proved respondent an untrustworthy officer who lacked integrity and led to termination of employment); *Transit Authority v. Davila*, OATH Index No. 369/93 at 6 (Feb. 18,

1993) (recommending termination of transit police officer where his misconduct “demonstrate[d] a fundamental irresponsibility and dishonesty that are incompatible with his role as a police officer”).

Accordingly, I recommend that respondent Brian Toro’s employment be terminated.

Faye Lewis
Administrative Law Judge

June 11, 2012

SUBMITTED TO:

RONALD E. RICHTER

Commissioner

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