Dep't of Sanitation v. Parker

OATH Index No. 1923/10 (May 19, 2010)

Two days' pay fine recommended for respondent's failure to wear seat belt while operating the Department's vehicle.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
-against-
MICHAEL PARKER
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This is a disciplinary proceeding brought by the Department of Sanitation ("Department") pursuant to section 16-106 of the Administrative Code. Petitioner alleges that on July 16, 2008, while operating a Departmental vehicle, respondent, sanitation worker Michael Parker, wore his seat belt in a manner not permitted by the Department's General Order 2009-07,[1] and in violation of sections 5.11 and 5.13 of its Code of Conduct, General Order 2002-06.

A trial was held on April 21, 2010. Petitioner presented the testimony of James Tynan, one of its safety officers, and documentary evidence. Respondent appeared with counsel and testified on his own behalf. I held the record open until May 5, 2010, for respondent to provide documented proof of the color of respondent's seat belt on the day in question.

For the following reasons, I find the charges are sustained and recommend that respondent be fined two days' pay.

ANALYSIS

General Order No. 2009-07 requires any person operating a Department vehicle to wear a seat belt, unless the employee is engaged in house to house collection of refuse or recyclables, at which time the safety strap must be attached across the open door. The Order prescribes the

[1] The notice of the charge referenced General Order 2008-16. That Order was rescinded by General Order 2009-17.

proper manner for the seat belt to be worn and prohibits the use of the shoulder belt behind the driver's back. Rules 5.11 and 5.13 of General Order No. 2002-06 require employees to follow the Department's safety orders and to comply with all Department orders regarding the use or operation of its vehicles, respectively.

James Tynan, a Department safety officer since 2002, is charged with the responsibility of patrolling areas serviced by Department vehicles to monitor for safety violations and to ensure that employees follow the Department's rules and regulations. As a safety officer, he received training by the New York Police Department, Division of Highways, on seat belt usage and the consequences of wearing them improperly. As part of his job, Mr. Tynan patrols high-accident areas and the routes of relay trucks that are headed from garages to various dumpsites. He works a 4:00 p.m. to midnight shift (Tr. 7-9). Mr. Tynan testified that at around 7:00 p.m. on July 16, 2008, he headed in the direction of Woodhaven Boulevard because he knew that relays were about to commence and many of the trucks used Woodhaven Boulevard on their way to the Hugo Schnitzer dump site in Long Island City, Queens. Woodhaven Boulevard has three driving lanes going northbound and three going southbound, separated by a concrete divider ("island"). To the farthest sides of those lanes are one parking lane each. At around 7:26 p.m., after issuing a seat belt violation against one driver, Mr. Tynan continued to patrol Woodhaven Boulevard, monitoring trucks that were driving to and from the dumpsite. Traffic conditions were "light" to "moderate" (Tr. 20-21, 51-52, 54-55)

At around 8:05 p.m., while he was driving southbound, Mr. Tynan stopped at a red light. He was the first vehicle in the far left lane[2] closest to the center island, and respondent was the first vehicle in the center lane of the northbound traffic. Mr. Tynan testified that there was one car in the lane closest to the island going northbound, but that did not obscure his view of respondent, who had his door open and the safety chain on. He observed respondent wearing a seat belt, which he recalled to be black, strapped across his lap but not across his shoulder. The shoulder strap was tucked behind his back. According to Mr. Tynan, this could have caused respondent to sustain broken ribs or be thrown out of his truck, had he been involved in an accident. He attempted but was unable to get respondent's attention, so when the lights changed, Mr. Tynan made an admittedly illegal u-turn that brought him unto the northbound side of Woodhaven Boulevard. By that time, respondent was in the lane closest to the parking lane, and

[2] During cross-examination, Mr. Tynan stated that the speed limit was 30 mph, and admitted that he was driving at about 25 mph. in the fast lane. He explained that it was easier to observe the northbound traffic from that lane (Tr. 58-59).

Mr. Tynan was in the middle lane of the northbound traffic. He put his flashers on and signaled respondent to pull over. Respondent did so about two blocks later, at a bus stop in front of a 7-Eleven store (Tr. 22-25, 35, 43, 65-69).

Mr. Tynan pulled up in front of respondent, got out, and approached respondent with a copy of the Department's General Order regarding the proper use of seat belts. At that time, respondent still had his seat belt strapped across his lap and the shoulder strap tucked behind his back. Mr. Tynan introduced himself and pointed out to respondent that he was not wearing his seat belt properly. Respondent replied that the shoulder belt bothered his neck. Mr. Tynan suggested that respondent apply the slack adjuster, wrap a towel around the belt to cushion it, or purchase a device that is sold at places like Auto Zone or Strauss, to alleviate the discomfort from the belt. He explained that because the General Order was very new, his only intention in stopping respondent was to provide guidance, not issue a violation. However, respondent, who was upset, retorted, "If you're going to write the complaint, just write the f---ing complaint," and remarked that he was a grown man (Tr. 11-12, 25-27, 75-79, 83-86, 97-98). Mr. Tynan therefore complied. He asked respondent for his DS-350 card and his driver's license, which respondent provided. He signed his name and the time of the stop on the DS-350 and wrote a violation, after which respondent drove off (Tr. 35-37; Pet. Ex. 1). He could not recall visiting respondent's garage later that evening but testified that on the rare occasion he would do so if he did not obtain necessary information from the vehicle's operator (Tr. 188, 191). Mr. Tynan generated a complaint the following day (Tr. 94-95).

Mr. Tynan also documented his interaction with respondent on a form that he created for himself. The form, captioned "Unsafe Work Practice Observation," reflected the time and date of the stop, respondent's name and address, his date of birth, the location of the stop, the truck number, and other information extracted from respondent's driver's license (Tr. 37-39; Pet. Ex. 2). The violation that Mr. Tynan noted on the form was "No Seat Belt." During cross-examination, Mr. Tynan pointed out that the General Order made no distinction between the absence of a seat belt and the improper use of one. Thus, if a driver wore his seat belt improperly, a "no seat belt" violation may be issued (Tr. 47-48, 87-88, 96-97).

During his testimony, respondent, who has been employed by the Department for 12 years, made a concerted effort to impugn Mr. Tynan. He testified that he has worked the 4 p.m. to midnight relays for approximately five years. He is assigned to the Queens 8 ("Q8") district, and his job entails dumping trucks from the daytime collections. Recycling trucks are dumped

before collection trucks. A recycling truck has two sides, one of which contains metal, and the other, paper. Metal is dumped at the Hugo Schnitzer dumpsite in Long Island City, Queens, and paper is dumped at the Shepherd dumpsite near Sheffield and Stanley Avenues in Brooklyn (Tr. 110-16).

Respondent testified that on July 16, 2008, he was assigned recycling truck number CZ303, which has orange seat belts (Tr. 113, 116). He first went to Hugo Schnitzer to dump the metal recyclables. After that, as he headed southbound on Woodhaven Boulevard on his way to the Shepherd dumpsite, he spotted Mr. Tynan, whom he recognized by the Department's stickers on his vehicle. He denied that either he or Mr. Tynan was in a stationary position at the traffic lights. Rather, he contended that he was in the lane closest to the parking lane, and Mr. Tynan was on the northbound side of Woodhaven Boulevard, "pulled over" in the lane closest to the parking lane. Respondent maintained that his "seat belt was across, worn properly," and that it was "tucked in by [his] hip." He continued driving southbound at about 25 miles per hour and, in his rearview mirror, saw Mr. Tynan make a u-turn and drive up behind him. Mr. Tynan's lights were not on so he did not think that he was being pulled over. Nonetheless, he "found someplace safe," pulled to the extreme right, and Mr. Tynan pulled up behind him. During cross-examination, respondent offered a slightly different version. He stated that he pulled over after observing Mr. Tynan's hand gesture for him to do so (Tr. 118-28, 144-50).

Respondent claimed that Mr. Tynan got out of his vehicle and beckoned respondent out of his truck. Respondent got out and went towards the back of his truck, where he produced his license, job ID and badge at Mr. Tynan's request. Mr. Tynan then inquired how long he had been employed by the Department and whether he had "any hooks, any connections" on the job. At no time was he asked for his DS-350 card, nor did he produce it. Respondent testified that Mr. Tynan then inquired whether he had dumped metal, if he was in the military, and if he knew why he had been stopped. According to respondent, Mr. Tynan told him that he had been stopped "because [he] didn't have [his] seat belt on." Respondent stated that he challenged Mr. Tynan, who became agitated, and replied that "it's his job to make sure the streets are safe, and he's put here for that, and he's not going to have people driving any kind of way out here." Respondent claimed that Mr. Tynan threatened him with a urine analysis test because he felt that respondent was acting "irrational" and "had an attitude." He also maintained that Mr. Tynan rambled on about issues with his personal business and with his children, and revealed that "this job can ruin your marriage." Respondent added that Mr. Tynan "mentioned something briefly

about battling with alcohol, drinking, and his job is not the same no more. You can't drink on the job and all this stuff," but quickly added that he did not detect the odor of alcohol on Mr. Tynan. He admitted telling Mr. Tynan that he was a grown man, but denied using any expletives. Respondent further testified that he suggested to Mr. Tynan that his truck's GPS tracking device might reveal whether or not he was wearing his seat belt, and claimed that Mr. Tynan's entire disposition immediately changed, he assumed "a more chummy approach" and permitted respondent to leave (Tr. 128-32, 135, 156, 165-84). Respondent later added that during the approximately 20 minutes that he spent with him, Mr. Tynan did not use the word "complaint." Instead, he said "I'm going to keep this on record" (Tr. 168).

Respondent went to the Shepherd dumpsite before returning to his garage to exchange the truck for his next relay assignment, where he gave his supervisor his DS-350 (Tr. 133-35). He did not tell his supervisor or anyone else about the incident (Tr. 170). But when he returned from dumping the second load, his supervisor notified him that the safety officer had visited. He suggested that Mr. Tynan must have written on his DS-350 at that time. Respondent asserted that three days later he was served with the complaint, and that he saw Mr. Tynan's notation on the DS-350 for the first time when he appeared before this tribunal (Tr. 134-36, 139-41).

During cross-examination, respondent acknowledged that Mr. Tynan had sought his name, badge number, appointment date, vehicle ID number, social security number, his district, and his chart. He also admitted that upon stopping a worker, a supervisor regularly requests the DS-350, but he continued to insist that Mr. Tynan had never requested his (Tr. 136-38). He further revealed that when he emerged from his vehicle, he did not ask Mr. Tynan why he had been stopped. Even after Mr. Tynan requested his credentials, he still did not inquire. For the first time during cross-examination, respondent claimed that when he produced his credentials, Mr. Tynan went back to his vehicle and returned with a pad onto which he wrote information. At that time, he still did not ask Mr. Tynan why he was stopped because he opined that it was Mr. Tynan's job to inform him why he had stopped him. He admitted that he refused to sign for the complaint because "at the time the complaint was talked about, it was for no seat belt." However, because it reflected improper use of a seat belt, he felt that there might have been a mistake (Tr. 162-165, 185).

Where, as here, the facts are divergent, resolution often hinges on an assessment of witness credibility. This requires a careful consideration of "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).

As an initial matter, respondent's challenge to Mr. Tynan's recollection of the color of his seat belt failed. Even if he had established that the color was orange, not black as Mr. Tynan testified, that, by itself, would not have been fatal to petitioner's case. As a safety officer, Mr. Tynan has undoubtedly stopped numerous sanitation trucks between July 16, 2008, and the date of this trial, April 21, 2010. It was, therefore, not inconceivable that he might not accurately recall the color of respondent's seat belt two years later.

At the same time, I found Mr. Tynan to be forthcoming and his testimony credible. Plus, he displayed no bias against respondent. His recollection that both vehicles were stopped at a traffic light separated by the island and one lane when he observed respondent made sense. On the other hand, respondent's self-serving version which, not surprisingly, placed both vehicles five lanes and the center island apart did not. Given the distance that separated them, according to respondent, it was not plausible that he spotted Mr. Tynan in a "pulled over" position while driving southbound at 25 miles per hour, especially since he testified that Mr. Tynan's lights were not on. Further, he offered no explanation as to what, besides a seat belt infraction, might have motivated Mr. Tynan to leave his "pulled over" position, shift three lanes, and make an admittedly illegal u-turn to pursue respondent. Nor did it make sense that respondent pulled over without being motioned to do so, as he claimed.

Mr. Tynan's testimony that he had no intention of issuing respondent a violation until respondent became abrasive and spewed expletives was credible. I was convinced that because of the Department's newly issued General Order on seat belt usage, Mr. Tynan was more concerned with training drivers than he was issuing violations. Respondent's denial that he uttered expletives was unconvincing, given his selective and partial corroboration of Mr. Tynan's testimony regarding his responses. Moreover, while Mr. Tynan was testifying, respondent's demeanor was one of hostility towards authority, and I detected the "attitude," which he claimed Mr. Tynan had remarked on during the stop. I therefore got the distinct impression that respondent would not hesitate to use expletives if angry. *See Health & Hospitals Corp. (Brooklyn Central Laundry Services) v. Allen,* OATH Index No. 697/01 (Jan. 11, 2001), *modified on penalty,* Asst. Vice President's Decision (Mar. 27, 2007).

Respondent's claim that Mr. Tynan did not ask for his DS-350 was not credible. It did not make sense that Mr. Tynan would retrieve his log book from his truck in respondent's presence, and note details in it, yet overlook the DS-350, which is normally requested by a supervisor, according to respondent.

Respondent made much about the fact that the pre-printed violation, which reflected "You were not wearing a seat belt at the time which is a direct violation of the above orders and rules," was altered by Mr. Tynan with the insertion of the word "properly." The altered violation read, "You were not properly wearing a seat belt at the time which is a direct violation of the above orders and rules." Respondent suggested that because of Mr. Tynan's claim that improperly wearing a seat belt equated with not wearing one under the Department's rules, then alteration of the pre-printed form was unnecessary. I found respondent's concern to be "much ado about nothing." Mr. Tynan appeared to be meticulous and thorough. To this end, not only did he insert the word "properly," he followed it up with text to explain the manner in which he observed respondent wearing his seat belt tucked under his left arm. Thus, I found nothing unusual or inappropriate about the written violation.

Finally, respondent's testimony that Mr. Tynan engaged in some kind of discourse with him about Mr. Tynan's personal life was contrived and far-fetched. First, respondent's suggestion that Mr. Tynan was persuaded by his claim that his GPS could actually reveal whether or not he was wearing his seat belt was, at the least, ludicrous. Moreover, I could think of no reason why Mr. Tynan would become "chummy" with and disclose anything of a personal nature to respondent, or any other sanitation driver for that matter. Even though respondent stopped just short of characterizing Mr. Tynan as irrational or perhaps inebriated, his testimony nonetheless appeared to be a blatant and desperate attempt to depict Mr. Tynan as such and suggest that this was the reason for the stop. This served only to underscore how incredible and unreliable respondent's testimony was.

In sum, I found Mr. Tynan's testimony to be clear and consistent. He exhibited no bias towards respondent, whose testimony I found to be fabricated and totally incredible.

Accordingly, the charge against respondent is sustained.

FINDINGS AND CONCLUSIONS

1. Petitioner established that on July 16, 2008, respondent improperly wore his seat belt while operating a Departmental vehicle, in violation of General Order No. 2008-16 (which was superseded by General Order No. 2009-07), and rules 5.11 and 5.13 of General Order No. 2002-06.

RECOMMENDATION

Upon making these findings, I requested respondent's prior disciplinary history. Respondent has been employed with the Department since December 1997. In 2000, respondent accepted a five days' pay fine for a violation of the Department's Trade Waste Order. In 2003, respondent received a written reprimand failing to document medical leave. For the last three years, he received "satisfactory" annual evaluations.

At trial, petitioner stated that it would seek a penalty consistent with that set forth in the Department's general order on seat belt usage. General Order No. 2009-07 and its predecessor General Order 2008-16 set forth a specific penalty structure for seat belt offenses based upon whether the employee has ever before been disciplined for not wearing a seat belt. The minimum penalty for a first offense is the loss of one days' pay.

Throughout his testimony, respondent made a concerted attempt to impugn Mr. Tynan's integrity[3] because he was angry at Mr. Tynan for doing his job as a safety officer. Not only was his testimony incredible, but I found it to be an aggravating factor that warranted an increased penalty. Thus, while one days' pay loss might otherwise be appropriate, I find a two days' pay fine to be more appropriate, and I so recommend. *See Dep't of Sanitation v. Cerulli*, OATH Index No. 2272/01 at 13 (Jan. 28, 2002) (finding respondent's untruthfulness on the stand to be an "aggravating factor which can be taken into account when determining a penalty").

Ingrid Addison
Administrative Law Judge

May 19, 2010

[3] *See infra* pp. 4-5.

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

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