

## ***Dep't of Transportation v. Solli***

OATH Index No. 2888/10 (Jan. 26, 2011)

Respondent was charged with engaging in a physical and verbal altercation with a co-worker, being insubordinate and improperly or inefficiently performing her duties by failing to follow her supervisor's directive regarding a pothole assignment, and being insubordinate by refusing to punch out at the end of her tour. The Department established that respondent initially refused to follow her supervisor's directive regarding the pothole assignment. The remaining charges were not supported by the evidence. ALJ recommended an eight-day suspension.

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### **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF TRANSPORTATION**  
*Petitioner*  
*- against -*  
**DONNA SOLLI**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**KARA J. MILLER**, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Transportation, pursuant to section 75 of the Civil Service Law. The charges allege that respondent Donna Solli, a highway repairer, spoke discourteously to a co-worker, engaged in a verbal and physical altercation with a co-worker, was insubordinate and improperly performed her duties by failing to follow a supervisor's directive regarding a pothole assignment, and failed to follow a supervisor's orders regarding punching out at the end of her shift (ALJ Ex. 1).

Following a hearing held before me, I find the Department established that respondent initially refused to comply with her supervisor's directive to complete an additional pothole assignment. The remaining charges, however, were not sustained. For the reasons stated below, I recommend that respondent be suspended for eight days without pay.

## ANALYSIS

### *December 9, 2009*

Respondent was charged with engaging in a physical and verbal altercation with a fellow employee, Taeron Blacknall, on December 9, 2009. Respondent was additionally charged with speaking discourteously to Ms. Blacknall during this encounter. Ms. Blacknall, an assistant highway repairer, was assigned to work in the yard at 10 Pitt Street in Manhattan on the day in question. Ms. Blacknall testified that towards the end of her shift, at approximately 2:45 p.m., she was changing in the locker room when the crews that had been working in the field returned to the yard. Renee Yusef, a seasonal worker, was also present in the locker room at the time. Ms. Blacknall testified that respondent, upon arriving in the locker room, asked Ms. Yusef if she would be willing to speak to Frank Cucuzza, another highway repairer (Tr. 15-18). Mr. Cucuzza stepped into the locker room to speak with Ms. Yusef. He gave Ms. Blacknall the impression that he wanted her to leave the locker room, which was confirmed when she overheard respondent state that she did not “need [Ms. Blacknall] there while they have this conversation” (Tr. 18, 27-28).

Ms. Blacknall told them that she was not going to rush and would leave the locker room when she had finished changing her clothes. She remained there for another five minutes. Ms. Blacknall testified that in the interim, respondent left the locker room and went to the office trailer to change her clothes in the bathroom, but at the time she was unaware where respondent had gone. After leaving the locker room, Ms. Blacknall went to her car to leave her bag and then went directly to the office trailer. She testified that she walked inside past Lindsay Davis and Nicole Major, who were engaged in a conversation near the entrance of the trailer. She also walked past the district supervisor’s office, where Miguel Lopez, one of the supervisors, was sitting. Ms. Blacknall testified that she walked directly to the back of the trailer where she found respondent in the kitchen area, near the bathroom (Tr. 19-21, 28-30).

When she approached respondent, Ms. Blacknall said, “Let me ask you a question” (Tr. 21, 31). Ms. Blacknall testified that respondent put her hand up and said, “you better back off” (Tr. 21, 31). Ms. Blacknall maintained that at first she was startled and puzzled by respondent’s reaction, but then became angry. Ms. Blacknall questioned respondent by twice asking “I better back off?” (Tr. 21, 31). According to Ms. Blacknall, respondent repeated it again as she walked

towards her. The women were standing face to face, yelling at each other. Ms. Blacknall told respondent that she better “keep [Ms. Blacknall’s] name out of [her] mouth” (Tr. 21). Respondent asked Ms. Blacknall what she was going to do about it and started waving her hands in Ms. Blacknall’s face. At this point there was no physical contact between them and Ms. Blacknall acknowledged that she was physically able to leave the room because respondent was not blocking the exit (Tr. 21-22, 31-33, 38, 41).

Ms. Blacknall contended that Mr. Lopez appeared on the scene and stood in between them to prevent the incident from escalating. Ms. Blacknall at first asserted that it was at this point that respondent “jumped over [Mr. Lopez] and swung” (Tr. 22). She testified that respondent’s punch landed a blow on her left cheek before respondent’s fist slid down towards her collarbone (Tr. 22). When asked on cross-examination when Mr. Lopez appeared, Ms. Blacknall testified that he arrived after respondent had hit her, in response to Ms. Blacknall’s screams (Tr. 33). Minutes later, she went back to her original testimony that Mr. Lopez had appeared because he heard the two yelling at each other and stood in between them to separate them, when respondent “jumped over” Mr. Lopez to hit Ms. Blacknall in the face (Tr. 34-35).

Ms. Blacknall further testified that she tried to retaliate by hitting respondent, but was unsuccessful because Mr. Lopez pulled her away and was holding her back. Ms. Blacknall maintained that although respondent had struck her, she never struck respondent. Mr. Davis appeared and helped Mr. Lopez restrain Ms. Blacknall by pulling her away from respondent. Ms. Blacknall explained that she was “a little irate” and was trying to break free to reach respondent (Tr. 24). She was yelling and questioning why they were holding her when she was the one who had been hit. Meanwhile, respondent was “all over the place like yelling and screaming and making like a scene” (Tr. 24). She was unable to say whether respondent was wearing her glasses, but reasoned that she must have been because respondent always wears glasses and no one had hit her in the face (Tr. 35-36). Ms. Blacknall testified that she continued to struggle to reach respondent, but Mr. Lopez and Mr. Davis pulled her towards the front of the trailer and outside. Ms. Major followed and convinced Ms. Blacknall to calm down (Tr. 22-26, 34-35).

Mr. Lopez testified that he was in his office in the main trailer, speaking on his cell phone when he heard a commotion in the kitchen area of the trailer. Upon investigating, he saw

respondent and Ms. Blacknall arguing face-to-face. Mr. Lopez maintained that he had not noticed respondent entering the trailer. Although he acknowledged noticing Ms. Blacknall walk past his office, he denied speaking to her when she passed by (Tr. 56-58, 74-77).

According to Mr. Lopez, when he entered the kitchen area respondent and Ms. Blacknall were screaming at each other. Mr. Lopez further testified that, “then I seen fists go by my face” (Tr. 57). When asked to clarify whose fist, Mr. Lopez corrected himself and stated that respondent’s fist went past his face and his “face followed the punch” which landed on Ms. Blacknall’s left cheek (Tr. 57). Mr. Lopez stated that, “it wasn’t a forceful fist, but it was a punch nevertheless” (Tr. 57).

Mr. Lopez separated Ms. Blacknall and respondent to prevent any more physical contact. He testified that Ms. Blacknall never had an opportunity to retaliate because he pulled her away from respondent. Someone appeared on the scene and pulled Ms. Blacknall from the room while he kept respondent in the room. At first he thought it was Ms. Majors who removed Ms. Blacknall, but later found out that it was Mr. Davis. Mr. Lopez testified that when he entered the room respondent was wearing her glasses but at one point he picked respondent’s eye glasses off of the floor and handed them back to her. He could not explain how the glasses ended up on the floor. Mr. Lopez subsequently contacted the deputy director of Manhattan Roadway Maintenance, John Messina, and the director, Richard Cicale, to inform them about the situation (Tr. 56-58, 74-79).

Respondent testified that Ms. Blacknall had been “acting very strangely, like she was on some kind of medication” that day (Tr. 161). Respondent testified that after she returned to the yard, she went into the locker room to change her clothes. She decided to go to the office trailer to change in the bathroom after being confronted by Ms. Yusef and Ms. Blacknall in the locker room because Ms. Blacknall frightened her. She asked Mr. Lopez if she could change her clothes in the supervisor’s bathroom and he told her she could. Respondent noted that Ms. Major and Mr. Davis were present in the trailer, but she did not stop to talk to them (Tr. 148-49, 161-63, 166, 169-70).

Respondent had already finished changing when she heard Ms. Blacknall enter the trailer. Respondent testified that Ms. Blacknall approached her and was “screaming in [her] face” that “she was going to kick [her] ass” (Tr. 150). Respondent asked Ms. Blacknall to leave her alone,

but she refused and instead came closer and was spitting in respondent's face as she was screaming at her. Mr. Lopez and Mr. Davis entered the room at about the same time. Mr. Lopez tried to stand between them and Mr. Davis tried to pull Ms. Blacknall out of the room. As he was pulling her away, Ms. Blacknall reached over Mr. Lopez and hit respondent in the face hard enough to knock her glasses off her face. Respondent testified that she can not see without her glasses. Once they were knocked off, she threw her hands up and was asking for help to find them (Tr. 150-51, 166, 169-70).

Respondent believed that either Mr. Lopez or Mr. Davis handed her back her glasses, which were slightly damaged and bent. Mr. Davis, meanwhile, had removed Ms. Blacknall from the area. Respondent testified that she was so shaken by the incident, that she grabbed her boots, leaving her safety gear behind, and ran to her car, locking herself inside. Respondent denied hitting Ms. Blacknall, stating that she never had an opportunity to do so. Although she acknowledged that after her glasses were knocked off, she threw her hands up in the air and might have touched someone, but does not believe that she did because Ms. Blacknall was already being pulled out of the room. Respondent further denied calling Ms. Blacknall any names or using profanity during the incident. She testified that she was frightened of Ms. Blacknall because she had heard stories about her getting into fights with other DOT employees (Tr. 151-52, 161, 169).

Ms. Major, a clerical associate, confirmed that she was present in the office trailer during the altercation between Ms. Blacknall and respondent. She testified that she was talking to Mr. Davis near the front of the trailer while respondent was sitting quietly in the back of the trailer by herself. Ms. Blacknall entered the trailer, and walked past them without saying anything. She stopped to ask Mr. Lopez where respondent was. Mr. Lopez was on his cell phone but told her that respondent was in the back of the trailer. Ms. Major testified that she observed Ms. Blacknall walk directly to the back and then she heard "loud screaming" (Tr. 44-45, 50).

Ms. Major further testified that she heard respondent telling Ms. Blacknall "to back away from her and get out of her face" and Ms. Blacknall responded, "I don't understand why my name is coming out of your mouth" (Tr. 46, 51). Ms. Major observed Mr. Lopez walk to the back of the trailer. She heard him telling them "to stop it" and "to cut it out" (Tr. 47, 51). Ms. Major then heard Ms. Blacknall yelling at Mr. Lopez to let go of her. Mr. Davis, meanwhile,

went to the back of the trailer to assist. Soon after, Ms. Blacknall was being ushered towards the front of the trailer where Ms. Majors was located, but she was struggling to return to the back and was yelling “that fucking bitch hit her” (Tr. 46, 52). Ms. Major went outside with Ms. Blacknall and did not see respondent until she returned inside about 20 minutes later. Ms. Major testified that respondent told her that she was scared and nervous because Ms. Blacknall had smacked respondent’s glasses off her face. She observed that respondent was shaking and red in the face (Tr. 47, 52-53).

Lindsay Davis testified that he was in the office trailer, talking to Ms. Major when respondent entered the trailer and walked past them. Mr. Davis testified that respondent stopped to ask Mr. Lopez if she could change her clothes in the bathroom before she made her way to the back of the trailer. Shortly thereafter, Ms. Blacknall entered the trailer “running her mouth” (Tr. 193), walked past Mr. Davis and Ms. Major, and stopped at Mr. Lopez’s office. She told Mr. Lopez, “you need to talk with her before I do something” (Tr. 190). Ms. Blacknall then proceeded to the back of the trailer to confront respondent (Tr. 189-91, 193).

According to Mr. Davis, as Ms. Blacknall walked towards the back, Mr. Lopez told her “three times” not to go back there. Mr. Davis then heard Ms. Blacknall and respondent arguing. Respondent was telling Ms. Blacknall to leave her alone and was trying to get away from her. Ms. Blacknall was yelling at respondent, telling her that she “needed to keep her name out of her mouth” (Tr. 191). Mr. Davis testified that Mr. Lopez was not doing anything to stop the argument, so he told Ms. Major that he was going to the back to pull one of them out of the room. Mr. Davis testified that as he was walking into the room, Ms. Blacknall struck respondent in the face, knocking respondent’s glasses off her face. Mr. Lopez entered the room right behind him and helped him pull the two women apart. Respondent told Mr. Lopez that Ms. Blacknall hit her in the face and he replied that, “nothing happened, she didn’t hit you, your glasses just fell” (Tr. 192). Mr. Davis further testified that respondent did not hit Ms. Blacknall (Tr. 190-94, 197-200).

In a disciplinary proceeding, petitioner bears the burden of proof by a preponderance of the credible evidence. Civ. Serv. Law § 75(2) (Lexis 2010). *See Foran v. Murphy*, 73 Misc. 2d 486 (Sup. Ct. N.Y. Co. 1973); *Antinore v. State*, 79 Misc. 2d 8, 12 (Sup. Ct. Monroe Co. 1974), *rev’d on other grounds*, 49 A.D.2d 6 (4th Dep’t 1975), *aff’d*, 40 N.Y.2d 921 (1976); *Osoba v. Bd.*

*of Education*, NYC Civ. Serv. Comm'n Item No. CD92-127 (Nov. 19, 1992). Among the relevant considerations in assessing credibility are: demeanor; consistency; supporting or corroborating evidence; and the degree to which testimony comports with common sense. *See Dep't of Correction v. Fulmore*, OATH Index No. 757/06 at 3 (Mar. 27, 2006); *Dep't of Correction v. Hansley*, OATH Index No. 575/88, at 24 (Aug. 29, 1989), *aff'd*, 169 A. D. 2d 545, (1st Dep't 1991). Applying those tests, I find that petitioner failed to meet its burden.

Ms. Blacknall and Mr. Lopez contended that respondent was the aggressor and punched Ms. Blacknall in the face. I found, however, that both these witnesses lacked credibility. Ms. Blacknall was hostile and defensive. Her testimony was self-serving, evasive, and inconsistent. Ms. Blacknall was not credible in contending that she had no idea at the time that respondent had gone to the main trailer to change her clothes, because she went directly to that location to seek her out and confront her. Ms. Blacknall also offered conflicting testimony regarding whether Mr. Lopez arrived before or after respondent had purportedly punched her in the face. Moreover, when asked if respondent was wearing her glasses, she became very defensive and said that respondent had to have been wearing her glasses because no one hit her in the face. It was almost as though she was trying to cover up the fact that she struck respondent in the face by denying it before she was even asked.

Mr. Lopez's testimony was similarly unreliable. He appeared very uncomfortable testifying and could barely mask his animosity towards respondent. His testimony regarding the other charges in this case gave the impression that he disliked working with respondent and felt that she challenged his authority. Moreover, with respect to this particular charge his testimony was suspect. He denied knowing that respondent entered the main trailer to change her clothes. Yet, respondent and Mr. Davis testified to the contrary, noting that respondent asked Mr. Lopez's permission to use the bathroom in the trailer to change. Similarly, while Mr. Lopez admitted that he saw Ms. Blacknall enter the trailer, he denied speaking with her. Ms. Major and Mr. Davis both testified, however, that Ms. Blacknall stopped at Mr. Lopez's door either to ask where respondent was or to make a threatening comment about respondent. Furthermore, Mr. Lopez testified that "fists" flew past his face, giving the impression that both women were struggling with each other, but changed his testimony shortly thereafter, stating that only respondent hit Ms. Blacknall.

I found Ms. Blacknall's and Mr. Lopez's version of events to be less than persuasive. Both insisted that Ms. Blacknall never touched respondent and that respondent punched Ms. Blacknall in the face. The record was re-opened for petitioner to provide additional information regarding the parties' stature. Both Ms. Blacknall and Mr. Lopez are five feet, seven inches, while respondent is five feet, three inches. Mr. Lopez is not a small man and if he were standing in between respondent and Ms. Blacknall, respondent would have had some difficulty reaching Ms. Blacknall, let alone punching her in the face. Ms. Blacknall described respondent as "jumping over" Mr. Lopez, which is literally what she would have had to have done to make contact with Ms. Blacknall's face. Moreover, Mr. Lopez acknowledged picking respondent's glasses off of the floor, but was unable to explain how they were knocked off her face. I find it highly unlikely that the events occurred exactly as portrayed by any of the witnesses.

Finally, with respect to credibility, petitioner's attempted to impeach Mr. Davis' testimony by pointing to purported inconsistencies between his written statement dated shortly after the incident and his testimony at the hearing. This was unpersuasive. Petitioner's line of questioning regarding inconsistencies (Tr. 201-02) would have been more effective had counsel actually submitted the statement into evidence. Unfortunately, without it, it was impossible to evaluate how it differed from Mr. Davis' testimony. For the most part, I found Mr. Davis' testimony quite credible. He did not appear to have an interest in the outcome of this proceeding.

Ms. Blacknall was clearly the aggressor in this situation. Respondent removed herself from the locker room to avoid a confrontation and went to the main trailer to change her clothes. Ms. Blacknall tracked her down and confronted her anyway. She was angry, hostile, and yelling at respondent. I was unpersuaded by Ms. Blacknall and Mr. Lopez's testimony that respondent struck Ms. Blacknall, but even if she did, it appears to have been in self-defense, either to protect her glasses or her face.

Voluntary participation in a physical fight with a co-worker has been found to be misconduct in most instances. *See Admin. for Children's Services v. Loney*, OATH Index No. 172/99 (Nov. 6, 1998); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Elter*, OATH Index No. 519/96 at 7 (Jan. 11, 1996); *Dep't of Correction v. Siddall*, OATH Index No. 617/91 at 9-10 (Apr. 10, 1991). It has also been held that an employee who acts in a way



that foreseeably leads to a physical altercation is guilty of misconduct, even if, in the actual fight, he acted only self-defensively. *Elter*, OATH 519/96 at 7-8 (citing cases). An employee has a duty to avoid a fight, to the extent that he has a reasonable chance to do so. *Id.*

In *Human Resources Administration v. Collazo*, OATH Index No. 1174/96 (Apr. 10, 1996), the respondent was similarly charged with engaging in a physical altercation with a co-worker. Judge Fraser found that based on the circumstances as a whole, the respondent had no way to foresee that the verbal argument would escalate to a physical altercation. There was nothing about their argument that was so provocative as to make the co-worker's physical violence predictable. Judge Fraser further found that when the co-worker attacked the respondent, the respondent acted only in self-defense and concluded that the respondent's participation in the fight was not misconduct. *See also Loney*, OATH 172/99.

Respondent had attempted to avoid a confrontation with Ms. Blacknall by leaving the locker room and going to the main trailer to change her clothes. Respondent was in the back, minding her own business, when Ms. Blacknall aggressively sought her out, confronted her and initiated an argument. Everyone, other than Mr. Lopez, testified that respondent told Ms. Blacknall to stay away from her or leave her alone. Moreover, when the fight was broken up, it was Ms. Blacknall who was pulled out of the trailer and was struggling to get at respondent, not vice versa.

More likely than not, there was a scuffle between respondent and Ms. Blacknall. It is possible that both Ms. Blacknall and respondent made contact with each other while Mr. Lopez and Mr. Davis tried to separate them. I find, however, that Ms. Blacknall was the aggressor, while respondent made a concerted effort to avoid a confrontation. While it is unclear whether respondent actually struck Ms. Blacknall, the preponderance of the evidence indicates that if she did, she acted in self-defense. Accordingly, I find that petitioner failed to establish that respondent's participation in the physical altercation was misconduct.

Finally, respondent was charged with speaking discourteously to Ms. Blacknall during their verbal argument. Respondent and Ms. Blacknall were arguing loudly, but the weight of the evidence demonstrates that respondent was defending herself and telling Ms. Blacknall to stay away from her or to leave her alone. Moreover, there is nothing in the record to indicate that respondent used profanity or made derogatory comments towards Ms. Blacknall. Indeed, Ms.

Blacknall testified that during their disagreement that “derogatory words” were not exchanged (Tr. 22). Ms. Major and Mr. Davis never mentioned that respondent used profanity or made derogatory comments towards Ms. Blacknall. In contrast, Ms. Major testified that she heard Ms. Blacknall use profanity and call respondent a bitch (Tr. 46) and Mr. Davis testified that Ms. Blacknall was “running her mouth” (Tr. 193) and called respondent a bitch (Tr. 198). Although Mr. Lopez indicated that one of the participants to the argument was “saying B words,” it was unclear whether he was referring to respondent or Ms. Blacknall (Tr. 57). In sum, the evidence establishes that it was Ms. Blacknall and not respondent who was making derogatory and profane comments. Accordingly, petitioner failed to establish that respondent was discourteous during her encounter with Ms. Blacknall or that her participation in the verbal altercation was misconduct.

### ***May 20, 2010***

Respondent was charged with insubordination and improperly or inefficiently performing her duties by failing to follow her supervisor’s directive to complete additional pothole assignments on May 20, 2009. Mr. Lopez testified that he was assigned to supervise respondent as the acting district supervisor, but respondent took issue with his supervision. Mr. Lopez maintained respondent informed the district supervisor that if Mr. Lopez was going to be her supervisor she was going to go home for the day. The district supervisor ultimately convinced her to stay (Tr. 59).

Respondent was assigned to be the crew supervisor for a pothole gang, which was comprised of Hugh Williams, Frank Cucuzza, and Jose Taveras. The crew departed from the yard at 7:48 a.m. and proceeded to their assigned locations. Mr. Lopez testified that he spoke with respondent in person at 11:00 a.m., when he went into the field to check on the pothole gangs. He directed respondent that if she had any problems during the day to contact him. Similarly, if the crew had unused asphalt when they completed their route she should notify him so that he could give her another location to use the material. He told her that he did not want her to return to the yard to dump extra asphalt. Mr. Lopez testified that respondent did not react well to his directives and told him that if he did not leave her alone, she would go home. Since

he did not want operations interrupted, he walked away. Mr. Lopez testified that as he was leaving, he heard respondent and Mr. Cucuzza laughing at him (Pet. Ex. 1; Tr. 60-62).

At approximately 2:00 p.m. that day, Mr. Lopez called respondent to find out the crew's location. She informed him that she was on West Street and that they were returning to the yard to dump their asphalt. Mr. Lopez told her that he had instructed her earlier not to dump the crew's leftover asphalt in the yard and to call him to obtain another location to fill potholes. He told her not to come back in and directed her to go to "Avenue B between 10th and 7th Streets." Respondent told him that she was coming in and going home early instead. Mr. Lopez called Mr. Messina, deputy director of Manhattan Roadway Maintenance, and apprised him of the situation. Mr. Messina in turn called respondent directly and convinced her to take the crew to the additional location (Tr. 62-65, 80).

Mr. Lopez called respondent approximately an hour later at 3:00 p.m. to find out her crew's location, she informed him that she was on "Avenue A, between 10th and 7th Streets," as directed by Mr. Messina, and that there were no potholes. Mr. Lopez testified that he told respondent that she was in the wrong location and should be at Avenue B. Respondent replied that Mr. Lopez should speak with Mr. Messina because he told her to go to Avenue A. Mr. Lopez told respondent to "stop playing games" (Tr. 87) and go to the correct location on Avenue B. Approximately 25 minutes later, Mr. Lopez called respondent again to check the status of the crew's work and she told him that they were finishing up their asphalt (Tr. 65-66, 80-81, 87).

Mr. Messina corroborated Mr. Lopez's testimony regarding this charge. He testified that Mr. Lopez had initially called him at approximately 2:25 p.m. after respondent had called in the crew's location to say that they were done for the day. Since their shift ends at 3:30 p.m., Mr. Messina was surprised that the crew was finished so early. Mr. Lopez informed Mr. Messina that respondent was not following his orders and insisted on coming back to the yard. Mr. Messina asked Mr. Lopez if he had another location for the crew to work so that they could finish up their asphalt and avoid dumping it at the yard. Mr. Lopez replied affirmatively and provided him with the address. As a courtesy to Mr. Lopez, Mr. Messina called respondent directly and asked her to go to the new location because it was relatively nearby and the crew would still get back to the yard to punch out on time. Mr. Messina testified that he does not

normally call a crew supervisor to request them to complete an assignment, but the “situation was a stalemate” (Tr. 95) and he had a meeting to go to. He thought it would be more expeditious to simply make the call himself (Tr. 92-95, 100).

Respondent testified that she was in charge of a pothole gang that day. She reported to Gary George, the district supervisor, to discuss the hot box assigned to the crew. Respondent testified that the assigned hot box was not working properly. Respondent was concerned that it would be difficult to work with. Despite this problem, respondent was instructed to take the hot box out in the field. She noted the problem on the gang sheet. When Mr. Lopez came out to the job site to check on the crew, respondent asked him to sign off on her notation that the liquid cement was not at the correct temperature (Pet. Ex. 1; Tr. 153).

Respondent testified that she told Mr. Lopez while he was checking on the crew that they were going to proceed with the list of addresses on her route. He told her that he would call her later in the day and if she had leftover asphalt, he would provide her with an additional area to go to. At approximately 2:10 p.m., Mr. Lopez called respondent on the radio with another location but the communication broke off so she did not hear the address. Respondent unsuccessfully tried to call Mr. Lopez back on the radio to find out the location and asked Mr. Williams to move the truck to improve the radio’s reception. As she was trying to reach Mr. Lopez on the radio, her cell phone started ringing in her bag. She was surprised when she answered it that Mr. Messina was calling her directly. He asked if there was a problem. She explained what had happened with the radio, so he provided her with the address for the next location. Respondent testified that she told Mr. Messina that it would “take a little bit of time” to complete that assignment and asked if he knew that they are supposed to finish for the day at 3:30 p.m. Mr. Messina told her not to worry about the time because he needs them to go to that location. She agreed, but Mr. Williams, who was listening to the conversation, grabbed her cell phone to speak with Mr. Messina because he did not want to stay late. Mr. Williams told Mr. Messina that he had already worked late two days that week and had not been paid for the overtime. Mr. Messina ultimately convinced Mr. Williams to cooperate (Tr. 154-56, 171-76).

Mr. Williams testified that generally the crew heads back to the yard from the field between 2:30 and 2:45 p.m., depending upon how much asphalt is left over in the truck. If there is a substantial amount of asphalt left, it takes a while to dump the asphalt at the yard and clean

out the truck (Tr. 128-29). He recalled that at sometime between 2:20 and 2:30 p.m., they were directed to go to another location so that they could finish their asphalt. He believed that it was cutting it close to the end of their shift because they usually start heading back to the yard at about 2:30 p.m. Mr. Williams further testified that he spoke directly with Mr. Messina to complain about the late assignment because he had worked past the end of his shift on two prior occasions that week and had not been paid for the extra time. He did not want to have it happen a third time. Mr. Messina asked him to cooperate and go to the additional location to avoid wasting the asphalt. Mr. Williams agreed, but told Mr. Messina if he worked past the end of his shift, he expected to be paid overtime. Mr. Messina told him that it would not be a problem (Tr. 126-28).

The crew proceeded to the new location and it took approximately 45 to 50 minutes to set up a safe work environment and complete the work. It took longer than expected because they had to block off two intersections and there was a school on the block, which was letting the children out. There was a lot of traffic because the school buses were picking up the children (Tr. 157-58). Mr. Messina told Mr. Williams that it would take only 15 to 20 minutes to fill the potholes at Avenue B. Mr. Williams asserted, however, that Mr. Messina does not realize how long it takes to set up a secure work area at that time of the day in a busy area. Mr. Williams testified that "traffic was horrendous" (Tr. 130).

The crew had to secure a two block radius by cutting off the intersection at both ends of the block with barrels and detour traffic to ensure that the crew and the public were safe while the pothole work was being performed. Mr. Williams estimated that it took approximately 15 minutes to secure the area before they could begin the work (Tr. 129-31, 138-39). Respondent testified that she called Mr. Messina back to let him know how busy the location was and that it would take longer than expected but the receptionist told her he was in a meeting and could not be interrupted. She continued to do the job as directed by Mr. Messina and arrived back at the yard at 3:55 p.m. Mr. Williams dropped respondent off by the office and he and the rest of the crew went to park the trucks about four or five blocks away (Tr. 157-58).

Mr. Williams testified that they left the area about 3:45 p.m. and returned to the yard around 4:00 p.m. (Tr. 139). Mr. Cucuzza's testified similarly that when they arrived at Avenue B, it took between 30 and 45 minutes to fill two potholes at that location because it was a busy

street, with a lot of traffic. As a result, it took time to secure the area by setting up barricades and cones to make a safe work environment. After finishing the job, they returned to the yard around 3:45 p.m. They went to the locker room to change their clothes and reported to the office trailer to punch out (Tr. 120-21).

Mr. Lopez testified that he had no reason to doubt that the work documented on the gang sheet was completed by respondent and her crew that day. Moreover, he acknowledged that the gang sheet indicated that the crew went to Avenue B between East 7th and East 10th Streets pursuant to Mr. Messina's directive, arriving at 2:43 p.m. and departing at 3:30 p.m. Mr. Lopez estimated that the type of potholes that respondent's crew was working on Avenue B could take anywhere between 10 and 30 minutes to fill (Pet. Ex. 1; Tr. 80-81). Mr. Messina similarly acknowledged that the crew completed their assignments and ultimately went to Avenue B and completed the additional location as directed (Tr. 100).

Respondent is charged with insubordination and improperly or inefficiently performing her duties by failing to follow her supervisor's directive to complete an additional pothole assignment. Respondent denied refusing to comply with Mr. Lopez's directives and argued that she and her crew completed their original assigned locations, as well as the additional pothole assignment.

As discussed above, Mr. Lopez's animus towards respondent affected his overall credibility. In this instance, however, Mr. Lopez's testimony was corroborated by Mr. Messina and comported with common sense. In contrast, respondent's assertion that she was cooperative and willing to do the additional assignment was incredible and unsupported by the other witnesses' testimony.

Respondent testified that she was ready to go the other location and was waiting to be given the address when the radio communication was cut off. However no one else mentioned faulty radio communications, including Mr. Williams, who was sitting next to respondent when this supposedly occurred. Indeed, Mr. Williams, who testified in great detail, never mentioned respondent's problems with the radio or that she asked him to move the truck in order to get better reception. Respondent's testimony regarding the radio was unbelievable.

Moreover, by respondent's own admission Mr. Messina, a deputy director, called her on her cell phone to find out what the problem was. It is highly unlikely that he was asking her

what was wrong with the radio. To the contrary, he was most likely inquiring why she was refusing to go to the additional location. Mr. Lopez credibly testified that he was so frustrated by respondent continually challenging his authority and refusing to follow his directives that he called his supervisor to apprise him of the situation. Mr. Messina corroborated that Mr. Lopez called him to complain about respondent and because he was short on time, he decided to handle the situation directly by calling respondent himself. If it was merely a problem with the radio, as respondent contended, Mr. Lopez could have called respondent on her cell phone just as easily as Mr. Messina to give her the address. The fact that Mr. Messina felt that he had to intervene lent credence to Mr. Lopez's version that respondent was refusing to go to the new location.

Respondent argued that this charge should be dismissed because the crew ultimately completed not only the work on their gang sheet but the additional assignment at Avenue B. I disagree. While the work was eventually completed, it was only undertaken after respondent's supervisor's supervisor intervened. Respondent should have followed the directives of her immediate supervisor without having to be coaxed into doing her job by a deputy director. It was obvious from the testimony that respondent does not respect Mr. Lopez and questions his leadership ability. Regardless of respondent's impression of Mr. Lopez, she is required to follow his orders and directives. Respondent does not have the prerogative of selecting her supervisor and her personal feelings regarding his leadership capabilities are irrelevant.

In a similar case, *Department of Buildings v. Cortes*, OATH Index No. 577/90 (Feb. 9, 1990), Cortes, an engineer for the Department of Buildings, refused to comply with an assignment that he was unhappy with. He ended up accepting the assignment only after the disagreement was forwarded to a higher supervisor. Judge Fraser held that "[a]lthough the respondent's insubordination was substantially mitigated by his quick change of heart and ultimate obedience to the reassignment order, his initial prospective refusal of that order was nonetheless misconduct." *Cortes*, OATH 577/90 at 5. See also *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital) v. Ramsey*, OATH Index No. 724/04 at 5 (Apr. 16, 2004). Here, respondent did ultimately complete the assignment after initially refusing to do so. Respondent's ultimate obedience does not negate her initial refusal.

While I credit the testimony that filling the potholes at the new location took longer than anticipated due to heavy traffic, if respondent had followed Mr. Lopez's instructions to contact

him if they had leftover asphalt, the crew would have probably had time to complete the additional assignment and return to the yard without incurring overtime. Respondent's delay and initial refusal to comply with the assignment led the crew to return to the yard later than they should have. Accordingly, I find that respondent was insubordinate and inefficiently performed her duties by initially failing to follow her supervisor's directive to complete an additional pothole assignment on May 20, 2009.

Respondent was additionally charged with refusing to follow Mr. Messina's order not to punch out at the conclusion of her work shift on May 20, 2009, and instructing the crew not to punch out as well. Portions of the testimony regarding this charge were confusing and contradictory, making it difficult to determine a timeline of the events.

Respondent's crew returned to the yard at approximately 3:45 p.m. Respondent reported to the office while the crew returned the truck and hot box. Mr. Lopez testified that the crew's assigned shift was from 7:00 a.m. to 3:30 p.m. and that it would have been permissible for them to return to the yard anytime between 2:30 and 3:30 p.m. After a crew returns to the yard, they are customarily given 30 minutes to put their tools away, wash up, and change their clothes, before punching out for the day. Mr. Lopez testified that by returning at 3:45 p.m., the crew incurred overtime, which was not pre-approved or authorized (Tr. 65-67, 80-82, 87).

Mr. Lopez further testified that he was instructed by Mr. Messina to inform the crew that they had to punch out at 4:00 p.m. According to Mr. Lopez, Mr. Taveras punched out at 4:00 p.m. as directed, but the rest of the crew ignored him and went to the locker room to change. Mr. Lopez testified that at approximately 4:30 p.m., respondent informed him that Mr. Messina told her that she should not punch out because Mr. Messina planned on handwriting the crew's departure time on their time cards. Mr. Lopez told her that he had no knowledge that the orders had been changed. He called Mr. Messina again to report that the crew was not following his instructions and to ask if respondent was correct that they should not punch out. During this call, Mr. Messina told Mr. Lopez that he had instructed him earlier that the crew should not punch out. Mr. Lopez testified that he did not recall Mr. Messina telling him that previously (Tr. 71-73, 82-84).

Mr. Lopez maintained that while he was on the phone with Mr. Messina during this 4:30 p.m. telephone call, he informed the crew, who were now present in the office trailer that they



should not punch out. Mr. Lopez testified that respondent started “screaming” that this was a legal document and that the crew needed to punch out to verify their overtime. According to Mr. Lopez, respondent told the two remaining crew members, Mr. Cucuzza and Mr. Williams, to punch out in contravention of his directive. Mr. Taveras and respondent had already punched out prior to Mr. Lopez directing them not to punch out. Mr. Lopez maintained that despite the confusion about when the crew was to punch out, everyone’s pay was manually adjusted so that they were paid for a full hour of overtime, from 3:30 to 4:30 p.m. (Tr. 73-74, 84-85)

Mr. Messina testified that after his meeting concluded at approximately 3:45 p.m., he called Mr. Lopez to see how everything worked out. He was surprised to learn that the crew was just getting back to the yard and asked Mr. Lopez who had authorized their overtime. Mr. Lopez told him that the crew was not listening to him and that respondent was “giving orders for them to basically stick around in the yard until 4:30 p.m.” (Tr. 96). Mr. Messina further testified that he could hear a heated argument between Mr. Lopez and respondent’s crew over the Nextel radio, which he described as “getting kind of ugly” (Tr. 96). Mr. Messina requested that the gang sheet be faxed to him immediately for his review of whether a late return to the yard was justified. He saw a discrepancy in the return time on the first page, where it indicated that the crew returned to the yard at 3:55 p.m., and the second page, where it indicated that they returned at 4:03 p.m. (Pet. Ex. 1; Tr. 92, 95-97, 102).

Mr. Messina testified that he directed Mr. Lopez to have the crew punch out at 4:00 p.m. because he thought that they were trying to take advantage of the situation in order to obtain additional overtime. Mr. Messina testified that the crew refused and he heard respondent in the background telling the crew, “do not punch out, do not listen to John, don’t listen to Miguel, we’ve got to stay here until 4:30 p.m., and we’re going to get paid until 4:30 if nobody punches out” (Tr. 97). Mr. Messina believed that one of the crew members listened to Mr. Lopez and punched out at 4:00 p.m., but the remaining crew members refused (Tr. 97). Mr. Messina maintained that initially he was going to permit them to punch out at 4:00 p.m. because they did not return to the yard until 3:45 p.m. and had already worked 15 minutes of overtime. If he allowed them 15 minutes additional time to clean up, it would be 30 minutes of allotted overtime, which would mean that the crew needed to punch out at 4:00 p.m. Mr. Messina testified that in the end, all of the crew members were paid until 4:30 p.m. (Tr. 98, 102, 105).

Mr. Messina had difficulty recalling exactly what occurred. He had trouble pinpointing when he spoke to Mr. Lopez and what his orders were during those conversations. Despite initially testifying that at 3:45 p.m. he told Mr. Lopez that the crew should punch out at 4:00 p.m., upon further reflection, Mr. Messina was unable to recall what he told Mr. Lopez during this conversation (Tr. 104). When pressed on the time frame, Mr. Messina could not recall exactly when he spoke to Mr. Lopez a second time but believed that it was anytime between 4:15 and 5:00 p.m. Mr. Messina contended that it was during this second conversation that he told Mr. Lopez not to have the crew punch out. Mr. Messina subsequently testified that he told Mr. Lopez during their 4:00 p.m. conversation that the crew should not punch out because there was a lot of yelling and shouting in the background during that telephone call (Tr. 104). It is unclear whether Mr. Messina's reference to a 4:00 p.m. conversation with Mr. Lopez was actually a third telephone call or one of the other calls.

Respondent testified that she arrived back at the yard at 3:55 p.m. Mr. Williams dropped her off by the office and he went to park the trucks about four or five blocks away (Tr. 157-58). Respondent testified that when she got out of the truck, Mr. Lopez was standing outside "screaming" at her, Mr. Cucuzza and Mr. Taveras to go inside and punch out immediately (Tr. 158). Respondent told Mr. Lopez that she was not finished with the paperwork and was entitled to paperwork time. Mr. Lopez told her that she had to punch out right away because Mr. Messina said that they had to punch out as soon as they arrived back at the yard. According to respondent, Mr. Taveras and Mr. Cucuzza went and punched out immediately (Tr. 158-59).

Respondent admitted that she tried to stall a little bit because she had to complete the paperwork. She testified that she punched out shortly after the crew at around 4:20 p.m. After she completed the gang sheet Mr. Lopez wrote on the first page "as per John 4PM clock out" and signed his name by his notation (Pet. Ex. 1; Tr. 158-60)

Respondent testified that she spoke with Mr. Messina directly at some point after she returned to the yard. He told her that he had instructed Mr. Lopez to tell the crew not to punch out. Respondent told him that Mr. Lopez had said the opposite and that she and the rest of the crew had already punched out. According to respondent, Mr. Messina told her that there must have been some miscommunication (Tr. 159-60).

Mr. Cucuzza testified that after finishing the job, they returned to the yard around 3:45 p.m. He went directly to the locker room to change his clothes and reported to the office trailer to punch out (Tr. 120-21). He further testified that when he arrived in the office at about 4:00 p.m., Mr. Lopez told him to punch out or he would be in trouble. So, he used the City Time hand scanner to clock out and went home. He testified that he did not see what the other members of the crew did (Tr. 121).

Mr. Williams testified that he was having some trouble recalling exactly what took place when they returned to the yard. He believed that the crew was told by Mr. Lopez not to punch out because it would be taken care of. He remembered washing up in the locker room and punching out anyway. Mr. Williams testified that he always follows the same routine and punches out regardless of what he is told so that his time is accurately reflected in the system (Tr. 139-40). On that day, he could not recall exactly when he punched out but believed that it was sometime between 4:00 and 5:00 p.m. He further testified that he did not recall respondent directing him to either punch out or not to punch out (Tr. 140-42).

Mr. Taveras testified that they returned to the yard late that day because a supervisor called them and told the crew to go to another location to finish their asphalt. He recalled that Mr. Lopez told him to punch out at 4:00 p.m., so he did. Mr. Taveras testified that respondent never told him to punch out or not punch out nor did he see her discuss punching out with any of the other members of the crew. After he punched out, he went to the locker room to change his clothes and left the yard between 4:15 and 4:20 p.m. (Tr. 144-46).

The most credible and least confusing testimony regarding this charge was from Mr. Cucuzza and Mr. Taveras. It appears from their testimony that they arrived back at the yard at approximately 3:45 p.m. and were told that they had to punch out at 4:00 p.m. and did so. Mr. Williams' recollection was slightly different because he recalled being told by Mr. Lopez not to punch out but did so anyway sometime between 4:00 and 5:00 p.m.

The testimony from Mr. Lopez and Mr. Messina regarding this particular charge is inconsistent and unsupported by the crew's time and payroll records<sup>1</sup> (Resp. Exs. C, D, E, F). Mr. Lopez testified that he initially told the crew to punch out at 4:00 p.m. pursuant to Mr.

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<sup>1</sup> The crew's time and payroll records were not provided to respondent during discovery. Petitioner was directed at the conclusion of the hearing to provide the documents to respondent's counsel, who was given the option of submitting these records as evidence post-hearing once he had an opportunity to review them.

Messina's directive. Respondent informed him at about 4:30 p.m. that Mr. Messina had told her she should not have punched out. When Mr. Lopez called to confirm this information, he was surprised to hear Mr. Messina say that he had already told Mr. Lopez that the crew should not punch out and that Mr. Messina would adjust the time manually himself.

The crew's time records further add to the confusion regarding this charge. The records reveal that respondent punched out at 4:26 p.m., which was approximately when everyone said she punched out. Respondent was paid for one hour of overtime. Interestingly, Mr. Cucuzza's and Mr. Williams' time records reveal that both of them punched out at 4:00 p.m. and were paid for 30 minutes of overtime. Yet, Mr. Lopez and Mr. Messina testified that Mr. Taveras was the only crew member to punch out at 4:00 p.m. Mr. Taveras' time record, however, indicates that he punched out at 4:30 p.m. It is also of some note that Mr. Taveras' time record was called a Daily Timecard Report and was different than the City Time printouts for the other crew members. It is impossible to determine if Mr. Taveras punched out at 4:00 p.m. and his records were later adjusted or if everyone was wrong and he actually punched out at 4:30 p.m. (Resp. Exs. C, D, E, F).

Respondent was charged with refusing to follow Mr. Messina's order not to punch out and directing the other crew members to punch out. However, the only thing that is clear from the testimony is that respondent was given conflicting orders. At 3:45 p.m. she was told to punch out at 4:00 p.m. by Mr. Lopez. She waited to punch out until she completed the paperwork at 4:26 p.m. Respondent was subsequently ordered not to punch out by Mr. Messina. Yet, respondent and Mr. Messina both testified that she had already punched out by the time she spoke to Mr. Messina. The evidence seems to indicate that respondent disregarded Mr. Lopez's initial directive to punch out at 4:00 p.m., but she is not charged with that. Instead, she was charged with refusing to follow Mr. Messina's order not to punch out. The evidence presented does not support this charge since Mr. Lopez and Mr. Messina acknowledged that respondent had punched out prior to Mr. Messina issuing a directive not to punch out.

In a disciplinary proceeding, petitioner bears the burden of proof by a preponderance of the credible evidence. *Foran v. Murphy*, 73 Misc. 2d 486 (Sup. Ct. N.Y. Co. 1973); *Antinore v. State*, 79 Misc. 2d 8, 12 (Sup. Ct. Monroe Co. 1974), *rev'd on other grounds*, 49 A.D.2d 6 (4<sup>th</sup> Dep't 1975), *aff'd*, 40 N.Y.2d 921 (1976); *Osoba v. Bd. of Education*, NYC Civ. Serv. Comm'n

Item No. CD92-127 (Nov. 19, 1992). A preponderance has been defined as "the burden of persuading the trier of fact that the existence of a fact is more probable than its non-existence." Prince, *Richardson on Evidence*, 3-206 (11<sup>th</sup> ed. 2008). See *Dep't of Correction v. Tavaréz*, OATH Index No. 1273/02 at 5 (Nov. 21, 2002).

In order to establish insubordination, the petitioner must prove, by a preponderance of the credible evidence, three elements: first, that an order was, in fact, communicated to respondent; second, that the order was clear and unambiguous in its content; and, third, that having heard a clear and unambiguous order, the respondent willfully refused to obey. *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Muniz*, OATH Index No. 1666/05 at 8 (Oct. 17, 2005). See also *Dep't of Sanitation v. Dobie*, OATH Index Nos. 2092-95/07 at 8 (May 2, 2008).

Respondent received two sets of conflicting orders. Mr. Messina was unclear and changed his mind, causing Mr. Lopez to either mishear or misinterpret the order. The orders issued regarding punching out were anything but clear and unambiguous. Moreover, the documentary evidence was inconsistent and conflicting. The Department failed to establish by a preponderance of the credible evidence that respondent refused to comply with Mr. Messina's order not to punch out.

With respect to the allegation that respondent instructed the crew to disregard Mr. Messina's order not to punch out, the Department failed to meet its burden. Mr. Messina testified that when he spoke to Mr. Lopez at 3:45 p.m. he directed him to tell the crew to punch out at 4:00 p.m. During this conversation, he heard a heated argument in the background and respondent was yelling that the crew should not punch out until 4:30 p.m. Mr. Lopez similarly testified that respondent was yelling and causing a scene, but he contended that the argument took place at 4:30 p.m., not at 4:00 p.m. Mr. Lopez further maintained that respondent was directing the crew to punch out despite Mr. Messina's instructions not to punch out. They both characterize respondent as being loud and argumentative but according to them the disagreement took place at different times and respondent was either instructing the crew to punch out or not to punch out.

In some instances the exact time that an order is issued may have little relevance. Here, however, it is particularly significant because this charge is about time. Specifically, when did

the crew return, when were they told to punch out, when did they punch out, and when were they told not to punch out. Mr. Lopez's and Mr. Messina's inability to establish an accurate timeline of the events as they unfolded undermined their ability to establish misconduct.

Although respondent is charged with instructing the crew to punch out in contravention of Mr. Messina's order not to punch out, none of the crew members recall respondent telling them to either punch out or not punch out. Both Mr. Taveras and Mr. Cucuzza testified that they followed Mr. Lopez's order to punch out at 4:00 p.m. Mr. Williams, on the other hand, testified that he has a routine and that regardless of what the supervisor tells him, he always punches out to maintain a proper timekeeping record.

While it is possible that there was a heated discussion regarding punching out and overtime at some point while Mr. Lopez was on the telephone with Mr. Messina, the Department failed to meet its burden on this charge. It is unclear when the disagreement took place and what was said. Mr. Lopez's and Mr. Messina's testimony was negatively impacted by their inconsistent and conflicting recollections. In contrast, the crew's testimony was universally consistent that respondent did not instruct them to ignore Mr. Messina's directive regarding punching out. Accordingly, petitioner failed to establish by a preponderance of the credible evidence that respondent instructed the crew to ignore Mr. Messina's directive.

### **FINDINGS AND CONCLUSIONS**

1. Petitioner failed to establish by a preponderance of the credible evidence that respondent committed misconduct by engaging in a physical altercation with a co-worker on December 9, 2009.
2. Petitioner failed to establish by a preponderance of the credible evidence that respondent committed misconduct by engaging in a verbal altercation with a co-worker on December 9, 2009.
3. Petitioner failed to establish by a preponderance of the credible evidence that respondent was discourteous to a co-worker on December 9, 2009.
4. Petitioner established by a preponderance of the credible evidence that respondent improperly and/or inefficiently

performed her duties by initially refusing to follow the directives of her supervisor to complete additional pothole assignments on May 20, 2010.

5. Petitioner failed to establish by a preponderance of the evidence that respondent refused to follow the order of an assistant director not to punch out at the conclusion of her work shift and instructed co-workers to violate the order as well on May 20, 2010.

### **RECOMMENDATION**

Upon making these findings and conclusions, I requested and reviewed a copy of respondent's personnel file in order to make an appropriate penalty recommendation. Respondent has worked for the Department since November 5, 1990. During her 21-year tenure with the Department, she has been formally disciplined on two prior occasions. Respondent forfeited one day of annual leave on October 17, 2007, for threatening and embarrassing a co-worker and was suspended for one day on September 2, 2009, due to a conviction for driving under the influence.

Petitioner requested that respondent be terminated if the charges were sustained. The only charge that was sustained, however, was respondent's insubordination and improper or inefficient performance of her duties by initially refusing to follow the directives of her supervisor to complete an additional pothole assignment on May 20, 2010. Respondent's initial refusal to comply with Mr. Lopez's orders constituted misconduct. Although she ultimately complied with the order, she did so only after Mr. Messina became involved and telephoned her directly. It is clear from the testimony that respondent does not have a high regard for Mr. Lopez's leadership style. Respondent, however, does not have the prerogative to select her supervisor. Even if she dislikes Mr. Lopez or disagrees with him, she must still comply with his directives.

In similar cases where a respondent initially refused an order, but ultimately complied the penalties have ranged between four and thirty days, depending on the respondent's disciplinary history and whether additional charges were sustained. *See Dep't of Sanitation v. James*, OATH 593/08 (Jan. 4, 2008) (sanitation worker with a minor disciplinary record suspended for eight days for initially disobeying an order from two supervisors, but later complying with the order);

*Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 (Aug. 30, 2007) (community assistant with lengthy tenure but substantial history of prior discipline suspended for 30 days for an unauthorized absence, being disrespectful, and initially refusing to obey an order followed by eventual compliance); *Dep't of Sanitation v. Smyth*, OATH Index No. 2178/05 (Feb. 14, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-122-SA (Nov. 14, 2006) (sanitation supervisor suspended for eight days for being insubordinate when he engaged in a heated argument with his supervisor and failed to follow orders; penalty was mitigated by respondent's long and unblemished record); *Health & Hospitals Corp. (Coler Goldwater Specialty Hospital and Nursing Facility) v. Ramsey*, OATH Index No. 724/04 (Apr. 16, 2004) (maintenance worker, with a prior disciplinary history for similar misconduct, suspended for 21 days for two instances of disobeying an order, one of which he eventually complied with); *Dep't of Housing Preservation & Development v. Tulloch*, OATH Index No. 512/03 (May 13, 2003), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-45-SA (Aug. 11, 2005) (clerical worker with lengthy tenure but prior disciplinary history for similar misconduct suspended for 30 days for using disrespectful language towards a supervisor plus failing to promptly obey an order because she delayed too long before ultimately complying).

In this instance, considering all of the circumstances, including respondent's lengthy tenure and limited prior disciplinary record, I recommend that respondent be suspended for eight days.

Kara J. Miller  
Administrative Law Judge

January 26, 2011

SUBMITTED TO:

**JANETTE SADIK-KHAN**  
*Commissioner*

APPEARANCES:

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