

Dep't of Sanitation v. Ferguson

OATH Index No.1571/13 (Oct. 17, 2013), *modified on penalty*, Comm'r Dec. (Nov. 14, 2013),
appended

30-day suspension recommended for violation of the trade waste directive, including acceptance of a gratuity, considering respondent's secondary role in the transaction.

Commissioner increased penalty, in addition to 30-day suspension, respondent transferred from current work location for five years.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
-against-
RAYMOND FERGUSON
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding brought by the Department of Sanitation pursuant to 16-106 of the New York City Administrative Code. Petitioner alleges that on May 13, 2010, respondent, sanitation worker Raymond Ferguson, accepted a \$40 gratuity from undercover investigators in exchange for disposing of trade waste (ALJ Ex. 1).

Over a two-day trial, petitioner presented four witnesses: Deputy Inspector General Yves Desire; Special Investigator Kenneth McGrail; Supervisor Juan Fernandez, and Detective Robert Galindo. Respondent testified in his own behalf and called two witnesses: Superintendent Miguel Capella and Supervisor Fernando Velasquez.

As set forth below, I find that respondent accepted a gratuity in exchange for disposing of material that he had reason to suspect constituted trade waste, in violation of the trade waste directive. Considering that respondent played a secondary rather than a primary role in the transaction, I recommend that respondent be suspended for 30 days. .

ANALYSIS

It is undisputed that on May 13, 2010, the Department of Investigation (“DOI”) conducted an integrity test in the Queens West 3 district, section 3-3. During that investigation, two undercover detectives, Robert Galindo and Robert Desina, posed as construction workers driving a pickup truck. They came into contact with respondent and sanitation worker Thomas Pezzino, who were picking up garbage on 39th Avenue in Woodside, Queens. Respondent, who became a sanitation worker, in 2004, was the junior sanitation worker; Pezzino had been on the job for 20 years (Resp. Ex. B). They were not regular partners.

It is further undisputed that Galindo and Desina unloaded a number of black garbage bags from the truck onto the sidewalk or street, that respondent unloaded one garbage bag from the pickup truck, and that after Galindo and Desina drove away, respondent and Pezzino loaded a number of black bags from the sidewalk or street into the hopper of the sanitation truck. There is a video recording and an audio recording of the incident. Investigator McGrail, who operated the video equipment, testified that the bags were not see-through, and that there was no building material that was visible (Tr. 188, 191), which the video recording confirms. While the audio recording is to a large degree inaudible and the video recording does not capture the alleged monetary transaction, the parties do not dispute that somebody on the audio recording asked, “How much?” and somebody else said, “Forty,” prior to Desina and Galindo leaving the scene.

The parties dispute whether it was respondent who talked to Galindo about the money, whether Galindo gave respondent forty dollars to dispose of the material in the pickup truck, and whether this material constituted trade waste. Galindo and respondent each gave differing versions of what occurred. Desina, who is retired (Tr. 578) did not testify,¹ and neither did sanitation worker Pezzino, who was terminated from employment in 2011 (Velazquez: Tr. 307), while he was on Commissioner’s probation (Resp. Ex. B).

Early in the morning on May 13, 2010, the undercover team, which included Galindo and Desina, met to prepare for the integrity test. McGrail was assigned to film the operation with a video camera and a digital camera (McGrail: Tr. 71). Galindo and Desina were to drive a pickup

¹ Although respondent asked that I draw a negative inference against petitioner because it had failed to produce Desina as a witness, a negative inference is not appropriate as Desina had retired and was not within the control of the Department. Had respondent wished to subpoena Desina to testify, respondent could have done so. *See Dep’t of Correction v. Jackson*, OATH Index No. 134/04 at 6 (May 5, 2004), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD05-67-SA (Sept. 14, 2005) (declining to draw adverse inference where witness had retired and therefore was not within control of the Department); *Dep’t of Correction v. Lawrence*, OATH Index No. 1294/03 at 4 (Aug. 12, 2003) (same), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD06-123-SA (Nov. 14, 2006).

truck that had been previously loaded with bags of construction material and debris (Desire: Tr. 13; McGrail: Tr. 193). The day before, McGrail and Deputy Inspector General Desire had driven the truck to lower Manhattan and used debris from a construction site to fill the bags, along with material that was already in the truck from a construction site on Long Island (Desire: Tr. 13; McGrail: Tr. 69, 191-93).

After first conducting an integrity test at a location which had been the subject of a prior complaint, and finding no evidence of wrongdoing, the team proceeded to do a “grid search” of other areas in Queens, looking for sanitation trucks to approach (McGrail: Tr. 73, 151). The truck that respondent and Pezzino were assigned to on May 13 was spotted on 39th Avenue in Woodside (McGrail: Tr. 150-51). The truck was doing “normal collection,” driving down 39th Avenue, which is a one-way street (McGrail: Tr. 76, 171). McGrail parked his vehicle across the street from the truck, slightly behind the hopper, so that he had “a good enough view to observe the truck while collecting” (Tr. 75). Galindo and Desina pulled up in a pickup truck, several minutes later (McGrail: Tr. 76). Pezzino was driving the sanitation truck (Galindo: Tr. 323), while respondent was either in front of the sanitation truck (Galindo: Tr. 395), or behind the sanitation truck (Ferguson: Tr. 518).

It was undisputed that one of the undercover operatives first spoke to respondent and then went to speak to Pezzino. Accounts of the initial encounter with respondent varied. Galindo testified that he asked respondent if he would take the garbage from the pickup truck, that respondent gestured toward Pezzino and then walked towards the sanitation truck and talked to Pezzino, after which Pezzino gestured toward Galindo to move the pickup truck ahead of the sanitation truck (Tr. 323-24, 421-426). Galindo then moved the pickup truck so that it was parked in front of the sanitation truck; both trucks were parallel to a lane of parked cars. Galindo acknowledged that he could not hear the conversation between Pezzino and respondent, but it looked like they were talking (Tr. 424).

Respondent, on the other hand, testified that somebody in the pickup truck “said something” to him that he could not understand, given the noise from the pickup truck (Tr. 519, 531). He “waved” at the person to go talk to sanitation worker Pezzino (Tr. 519). The person from the pickup truck then spoke to Pezzino (Tr. 535).

Respondent and Galindo gave vastly differing accounts of what happened next. Galindo testified that respondent moved towards the curb and told him and Desina to put the garbage

bags from the pickup truck onto the curb. There were already garbage bags on the curb. Galindo said that he and Desina began unloading bags from the pickup truck onto the curb; respondent moved one bag from the pickup truck as well and put it on the curb (Tr. 325, 428, 430- 431, 440-41, 433, 504). There were 12 bags in the pickup truck; all 12 bags were unloaded (Tr. 325). Pezzino never got out of the sanitation truck (Tr. 325, 443). While they were unloading the bags, respondent asked how many bags there were; Galindo said “about two more,” and asked if that was a problem, and respondent said, “no” (Tr. 439). Galindo testified that he asked respondent how much this would cost. This conversation occurred between the sanitation truck and the pickup truck; this area was not visible to McGrail, who was operating the video recorder.

According to Galindo, respondent did not reply immediately. Instead, he walked over to Pezzino, who was still in the truck, and returned “moments later,” after what appeared to be a conversation with Pezzino (Tr. 326, 444). At that point Detective Galindo asked, “what do you think,” and respondent said “40” (Tr. 326). Galindo then handed respondent forty dollars and he and Desina pulled away in the pickup truck (Tr. 327). By the time he paid the money, the bags had all been offloaded. Pezzino never got out of the truck, nor did he speak to Galindo (Tr. 443). Galindo had been given \$200 prior to the integrity tests for use in the integrity tests, and at the end of the day, he handed over \$160, indicating that \$40 had been paid in covert funds (McGrail: Tr. 86, 87; Galindo: Tr. 329; Pet. Exs. 1e, 1i).

Respondent acknowledged that he approached the front of the sanitation truck and saw Pezzino on the street. Pezzino was helping the undercovers remove bags from the pickup truck onto the street, between the parked cars (Tr. 537, 539). Because respondent saw Pezzino picking up the bags, he went to unload as well, taking one bag out of the pickup truck. He did not ask Pezzino any questions before taking the bag (Tr. 537, 538). However, after he put the bag down, he looked at Pezzino quizzically (Tr. 542), and Pezzino told him that it was “fine” and this was someone that he missed on a collection the previous day (Tr. 521, 542). There were no markings on the pickup truck (Tr. 528) and all respondent saw were “black bags” (Tr. 520). Respondent testified that “every house has black bags” and that he was not going to “have an argument on the street about what bags are good and what bags are not” (Tr. 520). Further, he did not want to receive a complaint for not taking the garbage, which could happen if someone complained about a missed collection (Tr. 524). Respondent further testified that after this, he turned away

to pick up other bags on the street; Pezzino was still with the undercover in a cluster, even though all the bags had been offloaded from the pickup truck (Tr. 555).

Respondent denied asking for forty dollars and testified that he never heard Pezzino ask for forty dollars. Pezzino was not his regular partner and he did not recognize Pezzino's voice on the audio recording, although he did acknowledge hearing someone say "40" (Tr. 526, 547). He denied that Galindo asked him, "how much?" and that he stepped away to consult with his partner (Tr. 527). The only conversation that he had with Galindo was when he asked Galindo, "Is that all there is," or "Is this all of it," and Galindo said, "Yeah" (Tr. 525, 527, 545).

It was undisputed that after Galindo and Desina left in their pickup truck, respondent, who was on the street, gestured to Pezzino to back up the sanitation truck, and Pezzino, who was driving, did so. Both Pezzino and respondent put the black bags from the pickup truck into the sanitation truck (McGrail: Tr. 80; Ferguson: Tr. 557). When they were done, there were no black bags left on the curb or street (McGrail: Tr. 80).

Resolution of this case requires an examination of the relative credibility of respondent and Galindo. In general, factors to be considered in assessing credibility include witness demeanor, consistency of a witness's testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). Here, the audio recording (Pet. Ex. 2) is particularly important.

While the audio recording is not entirely audible, the following can be heard. At about 1:51 and 1:53 elapsed time, a voice is heard asking or saying, "Two more." At about 1:55, another voice is heard saying, "Yeah, Yeah, take them all out." At about 2:08, and 2:10 elapsed time, a voice asks, "How much more do you got in there?" At about 2:11, a voice replies, ". . . is that too much?" and another voice replies, "No, alright." At about 2:16, a voice asks, "How much is that going to?" After this, the noise of the truck is heard on the audio until approximately 2:25 elapsed time, when voices are again heard, including, "That's the last one" at 2:37 elapsed time. At about 2:54, somebody asked, "What do you think?" and at 2:55, somebody replies, "40."

Both respondent and Galindo were played the audio recording during trial. Galindo's testimony about the audio recording was straightforward. He testified that he and respondent

had the exchange at about 1:51-1:55, “Two more,” and “Take them all out.” Further, he identified his voice as the speaker who asked “How much it is that going to cost” and “What do you think?” and he said that it was respondent who replied, “40.”

Respondent’s testimony about the audio recording was more nuanced. He first testified that the only time he heard his voice on the audio recording was when he asked, “Is that all there is? Or is that all?” (Tr. 525, 527, 545). Respondent appears to be referencing the same exchange at 1:51-1:55 that Galindo testified to, because, after hearing the audio recording respondent testified to having been told that there were only two remaining bags to take (Tr. 550). Respondent further testified that he turned away to retrieve the rest of the bags after this exchange (Tr. 525).

On cross-examination, however, respondent was played the audio recording and identified the voices on a portion of the tape at about 2:11, indicating that one of the undercovers had asked him, “Is that too much?” and he had said, “No, all right” (Tr. 550). Thus, respondent identified his voice on the audio recording just five seconds before a voice is heard asking, “How much is that going to?” (at 2:16). Respondent testified that he did not hear the undercover ask, “How much,” because he had already turned away to get the remainder of the bags that he had missed (Tr. 551).

I did not credit this explanation. Respondent testified that, “Two or three seconds is a turn and a step away” (Tr. 551), and that there was truck noise, but two or three seconds is so short a time interval that it is more likely that respondent in fact was present and heard Galindo ask, “How much is that going to cost?”

However, questions remain. It is unclear whether Pezzino was also present during this exchange, and it is unclear whether it was Pezzino or respondent who replied, “40.” McGrail debriefed Galindo and Desina about forty-five minutes after the incident occurred (McGrail: 82, 83; Galindo: Tr. 328; Pet. Ex. 1h). His debriefing notes (Pet. Ex. 1h) are inconsistent with portions of Galindo’s testimony, because they indicate that it was Pezzino, rather than respondent, who asked for forty dollars, and that both Pezzino and respondent were helping to unload the pickup truck when Galindo asked how much money this would cost. The notes do not contain the names of the sanitation workers, but instead refer to SW1, identified as a “male black,” and SW2, identified as the “white/fat/male” (Pet. Ex. 1h). Respondent is African-

American, while Pezzino, who is also visible on the video, is white and somewhat stocky. Hence, SW1 refers to respondent, and SW2 to Pezzino.

The notes indicate that Galindo (UC1) asked the “male black,” “Can you take some bags,” and that he replied, “talk to that guy” (SW2). Galindo then “asked” SW2, who pointed to him to pull over in front of the truck. Galindo pointed to the curb and SW2 (Pezzino) nodded, “yes.” The notes further indicate, “SW1 started unloading UC vehicle – and so did UC1/UC2/ & SW2.” The notes continue, “while all were unloading, UC said, “How much \$ does it look like” & SW2 replied, “40,” and as all were finishing loading UC1 gave \$40 cash to SW1” (Pet. Ex. 1h).

When asked about the notes, Galindo testified that he told McGrail during the debriefing that he asked the black sanitation worker how much it would cost and that the black worker went over to the white worker in the truck, returned moments later, and said, forty dollars. He denied ever telling McGrail that Pezzino said, “Forty” (Tr. 472, 473). He testified that perhaps it was Desina who told this to McGrail (Tr. 473). McGrail, on the other hand, testified that his notes reflect what the detectives told him (Tr. 83). On cross-examination, McGrail testified that he wrote that SW2 (Pezzino) replied “40” as shorthand for respondent saying “40” after consulting with Pezzino (Tr. 221, 262). Galindo prepared a police complaint report later that day, in which he stated that he asked respondent how much and that respondent said “40” after first consulting with Pezzino (Pet. Ex. 1k).

The audio recording indicates that there is a delay between the time that Galindo asked how much it would cost (approximately 2:16 elapsed time) and the time when Galindo asked, “What do you think” (about 2:54 elapsed time) and somebody else said, “40.” This suggests that it is plausible that the events transpired as Galindo testified. However, the debriefing notes are a near-contemporaneous account of what transpired. They are the earliest written document about the incident. The notes state that it was Pezzino, not respondent, who said “40” when asked about the money. There is no mention in the notes about respondent going to ask Pezzino and then returning and saying “40.” We have generally been reluctant to credit documentary evidence offered by an agency which conflicts with other documentary evidence offered by that agency. *See Police Dep’t v. McIntosh*, OATH Index No. 1448/11, mem. dec. at 4 (Jan. 19, 2011) (“Where the documentary evidence offered by the Department conflicts with itself, this tribunal has generally found such evidence to be unreliable.”). Here, a major discrepancy exists between

the debriefing notes and the complaint report. Thus, any conclusion as to who responded, “40” to the inquiry about money would be speculative. This is particularly the case because Galindo acknowledged not recalling many of the details about the operation, stressing that he goes “through hundreds of operations” and this operation was three years ago (Tr. 362).

The other major discrepancy between Galindo’s testimony and the debriefing notes are that Galindo testified, consistently, that Pezzino never got out of the sanitation truck, while the debriefing notes indicate quite clearly that both “SW1” and “SW2” were engaged in unloading the sanitation vehicle, including during the time when Galindo asked about the money.

Moreover, respondent testified that he is a junior sanitation worker, who has been on the job only since 2004, and that this was not his regular route; it was Pezzino’s route. Respondent explained that he had been “bumped” off his assigned route and assigned to work with Pezzino because the sanitation worker originally assigned to work with Pezzino on May 13 did not want to work with Pezzino, who had a bad reputation among his colleagues (Ferguson: Tr. 512; Fernandez: Tr. 298; Capella: Tr. 303; Velazquez: Tr. 307).² This context makes it likely that it was Pezzino, nor respondent, who was the more active participant in the negotiations over money.

The only consistent thread between the notes and the testimony is that Galindo testified that he gave the money to respondent, which is reflected in his notes. The video recording (Pet. Ex. 2) provides limited clarification, because it does not capture the exchange of money, nor does it show any discussion between Desina, Galindo, respondent and/or Pezzino. In part, this is because McGrail, who was the video recorder, positioned himself behind and to the right of the sanitation truck, so that he was unable to film anything that occurred between the pickup truck and the sanitation truck, or to the front passenger side of the sanitation truck. The video recording does show the following: the pickup truck’s position parked in front of the sanitation truck; the undercover detectives picking up garbage bags from the pickup truck; respondent picking up one bag from the back of pickup truck; and both respondent and Pezzino loading bags

² While he did not provide specifics, Supervisor Velazquez noted that several sanitation workers had transferred out of the district because they did not want to work with Pezzino (Tr. 307) and that “guys would avoid working with him because they were afraid of getting caught in his, like in the mess that he would create” (Tr. 308). Superintendent Capella testified that he heard “rumors” that Pezzino was doing side jobs, taking garbage and asking people for money, but that he never knew of anything “definitive” (Tr. 308). He acknowledged that apart from a charge arising out of the incident with respondent, he was not aware that Pezzino had ever been charged with a trade waste violation (Tr. 310). Pezzino was placed on Superintendent’s probation in June 2010 because of time and leave issues (Resp. Ex. B).

from the street into the garbage truck after the pickup truck pulled away. More specifically, the video recording shows that after respondent picked up a bag from the pickup truck, he walked from the back of the pickup truck, passenger side, between the pickup truck and the sanitation truck (Pet. Ex. 2, approximately: 48 elapsed time). The video recording does not show respondent in frame until after the pickup truck leaves. It is unclear from the video recording where he went.

Similarly, while the video recording shows Desina and Galindo walking back and forth to the pickup truck, getting bags of garbage from the truck, there is an interval where Galindo walks behind the pickup truck (approximately 1:03 elapsed time) and is not seen in the frame again until about 40 seconds later (approximately 1:39 elapsed time). After this Galindo is seen approaching the rear of the pickup truck, where Desina is taking out a broom; the sanitation truck inches slowly forward (approximately 1:43 elapsed time) and then halts (approximately 1:50 elapsed time); feet are visible between the pickup truck and the sanitation truck. At about 1:58 elapsed time, a black Jeep, unrelated to the integrity test, pulls up and parks behind the sanitation truck, somewhat obstructing the view from the video camera. Desina comes back into the frame at approximately 2:08 elapsed time, on the side of the pickup truck, and at approximately 2:32 elapsed time, gets into the passenger side of the pickup truck, which pulls away at approximately 2:40. Galindo is not shown again on the videotape, and therefore it appears that he entered the pickup truck from the front passenger side, beyond the range of the video camera.

Several seconds after the pickup truck leaves, the sanitation truck moves forward (at approximately 2:42 elapsed time), and respondent is visible on the street, behind the sanitation truck. This is the first time he has been visible on the video since he was seen taking the black garbage bag from the pickup truck. The video recording shows respondent gesturing the driver of the truck backwards, after which both Pezzino and respondent are shown picking up about 16 black garbage bags from the street or curb and throwing them into the hopper of the sanitation truck.

Respondent's counsel argued that Galindo deliberately chose to position himself between the pickup truck and the sanitation truck, so that the exchange of money would not be captured on video, making it more likely that the detective's testimony would be credited over the respondent's (Tr.138-45). I considered counsel's argument but ultimately was not convinced by it.

I was not persuaded that Galindo set out to deliberately frame respondent. This was the last integrity test of the day. It is the only one on which misconduct was reported. It appears that when other sanitation workers turned down the undercovers' request to pickup their garbage, they simply moved on. There was also no evidence that Galindo knew or disliked respondent prior to this time. Moreover, Galindo expressed some sympathy for respondent, acknowledging that it is "kind of like ugly to do an integrity test on a working man" (Tr. 481).

Moreover, it appeared that Galindo was not overly concerned with whether McGrail would be able to film the receipt of the money. On cross-examination, Galindo stressed that he did not "play to the camera," that he played "for safety and objective and the goal at the end," which was to accomplish the integrity test (Tr. 479), and that he was trained "to work off audio" and does not "rely on equipment" (Tr. 480-81).

In any event, the video recording shows that respondent took one garbage bag from the pickup truck, and it indicates that he was not in frame from that time until the time that the undercover detectives drove away. The video recording further shows that Galindo was not visible for a significant period of time. Thus, the video recording is consistent with my finding that respondent was present when the money was discussed.

What the video recording does not demonstrate whether Galindo gave respondent the forty dollars, as is alleged. On this record, because of conflicting documentary evidence, petitioner failed to establish whether it was respondent or his partner who engaged in a discussion about the money. However, both the debriefing notes, taken forty-five minutes after the incident, and the follow-up criminal complaint, indicate that Galindo gave forty dollars in cash to "SW1" (respondent). While respondent denied taking any money, he also denied being present during any discussion of the money. This negatively impacted my assessment of his credibility.

Considering all the evidence, I find that petitioner established that it is more likely than not that Galindo handed respondent forty dollars in exchange for disposing of material from the pickup truck. Petitioner also established that the material in the pickup truck, which respondent helped to remove, was construction debris, which would normally constitute trade waste under the Department Order on Trade Waste, General Order 2001-19.

Petitioner failed to establish that respondent knew the materials in the truck constituted construction debris. Although Galindo testified that the bags were heavy and dusty (Tr. 352),

and that there is “debris all the time in the back of the flatbed . . . construction debris, dust and rocks and bricks” (Tr. 353), he did not specifically address petitioner’s counsel’s question, as to whether the pickup truck contained any other material, such as construction debris, dust, rocks, and bricks (Tr. 353). Moreover, McGrail testified, and the video recording confirmed, that the bags were not see-through and that construction material was not visible inside of them.

Nonetheless, respondent violated the trade waste directive, General Order 2001-19, by helping to dispose of at least twelve black bags from the truck without supervisory approval, which is required before a worker can dispose of six or more bags. Moreover, respondent either knew or should have known that it was unlikely that the twelve bags in the pickup truck contained ordinary household debris. Common sense and experience demonstrate that residential homeowners do not ordinarily drive around in pickup trucks looking for sanitation trucks to dispose of their household garbage bags.

Respondent acknowledged that he does not usually pick up material from a vehicle on the street. It appears that he deliberately closed his eyes to what was going on because this was Pezzino’s route, he was the “junior” sanitation worker with less seniority, and Pezzino, who had a bad reputation among the workers, had already agreed to pick up the bags. Respondent’s desire not to engage in a confrontation with Pezzino may be understandable, but he nonetheless violated Departmental rules and the trade waste directive by disposing of materials from the pickup truck.

FINDINGS AND CONCLUSIONS

Petitioner established by a preponderance of the credible evidence that respondent accepted a \$40 gratuity in exchange for disposing of approximately 12 black bags from the back of a pickup truck, in violation of the trade waste directive.

RECOMMENDATION

Upon making this finding, I requested and received an abstract of respondent’s personnel record. The information submitted indicated that respondent was appointed a sanitation worker in 2004. His prior disciplinary record is minimal. In 2007, he accepted a written reprimand for two violations of Rule 7.5, which requires employees on sick leave to remain at home except when otherwise authorized. In 2012, he accepted two days suspension for violations of the rules

relating to safety orders and equipment and unauthorized use of a Departmental vehicle. His last two performance evaluations were satisfactory.

Petitioner has requested that I recommend that respondent be terminated from employment, because his misconduct involved a trade waste violation. In light of the particular facts of this case, as well as recent precedent, I disagree and find a thirty-day suspension to be more appropriate.

Termination has often been the penalty for trade waste violations, particularly when there is proof that a worker has accepted a gratuity. *See, e.g., Dep't of Sanitation v. Norris*, OATH Index No. 2352/08 (Aug. 11, 2008), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD-08-63-SA (Dec. 12, 2008), *aff'd sub nom. Norris v. Burges*, Index No. 401420/09 (Sup. Ct. N.Y. Co. June 26, 2012); *Dep't of Sanitation v. Lowe*, OATH Index No. 1499/06 (Sept. 22, 2006); *Dep't of Sanitation v. Davenport*, OATH Index No. 1501/06 (Oct. 17, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-43-SA (Apr. 17, 2007).

Recent cases, however, have resulted in dispositions of less than termination. For example, in *Department of Sanitation v. Kruszewski*, OATH Index No. 469/11 (Apr. 6, 2011), *modified on penalty*, Comm'r Dec. (June 1, 2011), this tribunal recommended termination of employment where a long-term sanitation worker was found to have accepted a gratuity in return for picking up yard debris, in violation of the trade waste order. The Commissioner rejected the penalty, instead imposing a 30-day suspension, the loss of 80 vacation hours, and a transfer. In so doing, the Commissioner noted the letters sent on respondent's behalf by former supervisors and a Deputy Chief attesting to his character and work performance, as well as the fact that respondent had only minor disciplinary infractions in the past.

Similarly, in *Department of Sanitation v. Bongiardina*, OATH Index No. 1971/11 (Nov. 4, 2011), *modified on penalty*, Comm'r Dec. (Jan. 19, 2012), this tribunal recommended termination of employment for a sanitation worker who had pleaded guilty in Supreme Court of receiving an unlawful gratuity, in relation to picking up garbage from an undercover investigator posing as a homeowner. The Commissioner reversed, imposing a 30-day suspension plus the loss of four weeks vacation, noting the respondent's excellent reputation among coworkers and supervisors, and that four years had passed since the trade waste violation, in which respondent had only one disciplinary complaint.

For several reasons, a similar sanction, short of termination, should be imposed on this respondent. First, respondent enjoys a stellar reputation. Superintendent Capella, who has been on the job since 1989 and a superintendent since 2003, testified that he has known respondent for a number of years and characterized him as an “excellent” worker (Tr. 302). Supervisor Juan Fernandez, who is the supervisor at respondent’s garage, similarly characterized respondent as an “excellent” worker and his “go-to guy.” If he ever needs assistance in fixing a problem on the route, respondent is the first person that he would ask to help (Tr. 297). Supervisor Fernando Velazquez, who has worked in Queens West 3 since 2005, also described respondent as an excellent worker and a “go to guy” who “does whatever’s necessary” to get the work done (Tr. 307). If Supervisor Velazquez ever has extra work that needs to be done, he will ask respondent (Tr. 306-07).

Second, respondent played a supporting rather than dominant role in the interaction with the undercover operatives. It was undisputed that Galindo did not move the pickup truck in position in front of the sanitation truck until Pezzino gestured affirmatively to Galindo (by Galindo’s account), or spoke to Galindo (by respondent’s account). Further, while respondent was present during the discussion about the money, there was no suggestion that respondent initiated the conversation about the money and petitioner did not establish that respondent answered Galindo when the latter asked how much. The evidence on that issue is inconclusive. The debriefing notes indicated that it was Pezzino, the senior sanitation worker, who participated in the negotiations. However, even if Galindo’s account is credited, when he asked how much it would cost, respondent had to go ask Pezzino before replying. Thus, even by Galindo’s rendering of events, it was Pezzino, not respondent, who was making decisions about this transaction.

It is, of course, deeply troubling that respondent participated in loading the bags from the pickup truck into the hopper and that Galindo handed respondent the money. However, this is similar to the situation in *Bongiardina*, OATH 1971/11, where, as noted in the Commissioner’s decision, the respondent was the “junior” sanitation worker who seemed to be following the lead of the much senior worker, feeling some pressure to do so. In this respect the comments of respondent’s supervisors and the Superintendent are instructive, as they confirmed respondent’s testimony that he was assigned to work with Pezzino that day because he lacked seniority and the sanitation worker previously assigned did not want to work with Pezzino.

Moreover, respondent is unlike the sanitation workers in many trade waste cases who actively solicit money. Indeed, in *Kruszewski*, 469/11, a case which was ultimately resolved for a suspension and loss of vacation days, the respondent was the first to bring up money once the homeowner asked him to pick up debris. Similarly, in *Norris*, OATH Index No. 2352/08, the respondent, when approached about picking up garbage and offered twenty dollars, indicated that twenty dollars was not enough, and when offered forty dollars, indicated that that was still not enough and the homeowner had to do better. In *Davenport*, OATH 1501/06 at 4, when an undercover detective posing as a contractor telephoned the respondent to make arrangements to pick up construction debris, the respondent told the undercover to “bring plenty of money with you.” And in *Lowe*, 1499/06 at 4, when asked by the undercover to throw some material from a pickup truck from a “job” that he was just finishing up into the hopper, respondent said yes and then asked the undercover to “buy us lunch or something.” Here, on the other hand, respondent played a limited role, while Pezzino, a 20-year veteran, was the more active participant in the transaction.

Thus, considering the circumstances of this case as well as recent precedent, I believe that termination is excessive. Trade waste probation would be desirable in addition to a suspension, but probation is not a penalty that is available to me. Of the penalties available to me under the Administrative Code, a thirty-day suspension, the maximum permissible, is the most appropriate. Therefore, I recommend that respondent be suspended for thirty days.

Faye Lewis
Administrative Law Judge

October 17, 2013

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

APPEARANCES:

CARLTON LAING, ESQ.
Attorney for Petitioner

KIRSCHNER & COHEN, P.C.
Representative for Respondent
BY: ALLEN COHEN, ESQ.

ACTION OF THE COMMISSIONER

November 14, 2013

NEW YORK CITY DEPARTMENT OF SANITATION

against

Raymond Ferguson

Respondent

A copy of the October 17, 2013 Report and Recommendation submitted by OATH Administrative Law Judge (ALJ) Faye Lewis was forwarded to this office following a disciplinary proceeding pursuant to Section 16-106 of the Administrative Code of the City of New York (“Section 16-106”), which governs the discipline of uniformed employees of the Department of Sanitation.

After reviewing the evidence, hearing transcript and report and recommendation, I agree with the specific findings that the Department has met its burden of demonstrating that Sanitation Worker ***Raymond Ferguson*** violated DSNY Code of Conduct, Rules 3.2, 4.3, 5.2, and 6.1, General Order 2001-19 and Operations Order 1998-07. However, I find the proposed penalty of only a 30 days suspension to be inappropriate.

My review of his disciplinary, sick and his attendance record show only minor infractions in the past. However, during a Department of Investigations integrity test, SW Ferguson knowingly loaded questionable materials from a pick-up truck into the hopper of Department truck. I believe he now understands the that his actions not only jeopardized his employment but tarnished the reputation of all the Sanitation Workers who go out each day and earn the respect of the public for the great work they do.

Therefore, the recommendation of ALJ Lewis’s recommendation is modified. Based on the severity of the misconduct and a review of SW Ferguson’s prior disciplinary record, it is my decision that the appropriate penalty for the proven misconduct is: a **30 work day** suspension; an immediate transfer from his current work location, **Queens West 3**, to **Queens East 7** for a period of **five (5) years**; and SW Ferguson cannot submit any request for transfer from **Queens East 7** to any other DSNY work location for a period of **five (5) years**.

John J. Doherty, *Commissioner*

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