

***Dep't of Finance v. Smyth***  
OATH Index No. 1285/11 (Mar. 9, 2011)

Deputy sheriff charged with embezzling \$13,000 in union funds. Administrative law judge found evidence sufficient to establish that employee endorsed and negotiated eight checks totaling \$13,000 on union bank accounts into his own bank account and that this constituted theft. Termination recommended.

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

*In the Matter of*  
**DEPARTMENT OF FINANCE**  
*Petitioner*  
*- against -*  
**JAMES SMYTH**  
*Respondent*

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**REPORT AND RECOMMENDATION**

**JOHN B. SPOONER**, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Petitioner, the Department of Finance, charged that respondent James Smyth, a deputy sheriff, stole \$13,000 in union funds.

A hearing on the charge was conducted before me on February 16, 2011. Petitioner presented the testimony of the current union president, who described in detail his discovery of irregularities for eight union checks signed by respondent in 2008. Respondent did not testify or offer any evidence.

For the reasons provided below, I find that the evidence was sufficient to sustain the charges and recommend that respondent be terminated.

**ANALYSIS**

This case concerns allegations that respondent, acting as treasurer of his union, stole \$13,000 of union funds by endorsing and negotiating eight checks from the union bank accounts to his personal bank account. The Department's primary evidence in support of these allegations

was the testimony of the current union president, James Davis, also a deputy sheriff. Mr. Davis described how he came upon eight checks signed by respondent which he knew were not authorized by either him or the union board.

Mr. Davis testified that he has been president of the City Deputy Sheriffs' Association, with respondent as treasurer, since 2004 (Tr. 10). Respondent was the previous president (Tr. 13). Mr. Davis explained that union funds are deposited in three union checking accounts, with signatures of both the president and treasurer required on all checks. Mr. Davis testified that, because he resided on Long Island and respondent resided in Brooklyn, he and respondent signed some 25 to 30 otherwise blank checks and exchanged them. Each of them was in possession of a number of checks already signed by the other, so that they could pay bills more efficiently by adding only their own signature (Tr. 22).

Around January 19, 2009, Mr. Davis was reviewing the check stubs at the union offices and noticed checks made out to a lobbyist that Mr. Davis remembered recently paying. Mr. Davis called the lobbyist, who informed him that they had received only the check sent previously by Mr. Davis. The next day Mr. Davis went to the union's bank and, along with the bank manager, examined the bank records of the union checking accounts. He found three or four checks written out to respondent which appeared to be unauthorized. Among these checks were one written on February 15, 2008, for \$1,500 "to purchase a laptop" (Pet. Ex. 2) and one written on April 22, 2008, for \$2,100 for "office furniture" (Pet. Ex. 4). Mr. Davis telephoned respondent and asked him about the two checks. In a heated exchange, Mr. Davis told respondent that he had not authorized either of these checks and that Mr. Smyth would have to pay the money back. Respondent told Mr. Davis he would pay nothing back and was "not working for nothing" (Tr. 18-20, 28).

Over the course of the next few days, Mr. Davis worked with the bank to identify eight checks written on union accounts to respondent which, according to Mr. Davis, were unauthorized. The checks totaled \$13,266:

<b>Ex No</b>	<b>Check No</b>	<b>Date</b>	<b>Account</b>	<b>Amount</b>	<b>Memo</b>
<b>2</b>	<b>2158</b>	<b>2/15/08</b>	<b>Dues Acct</b>	<b>\$1,500</b>	<b>To Purchase a laptop for accounting of union fund</b>
<b>3</b>	<b>2214</b>	<b>4/19/08</b>	<b>Dues Acct</b>	<b>\$741</b>	<b>Supplies/ Stamps/ Stipend Mar/April</b>
<b>4</b>	<b>2215</b>	<b>4/22/08</b>	<b>Dues Acct</b>	<b>\$2,100</b>	<b>Office Furniture</b>
<b>5</b>	<b>2217</b>	<b>5/8/08</b>	<b>Dues Acct</b>	<b>\$1,325</b>	<b>Stipend – April/May/June Phone/ Misc</b>

6	2216	5/10/08	Dues Acct	\$1,800	Reimbursements/Stipend Misc
7	1651	11/11/08	Sec Benefits Acct	\$1,500	Admin Fees for Treas Yr 2008
8	2158	12/27/08	Sec Benefits Acct	\$2,300	Reimbursements Dec/Nov/Jan/Feb Admin Fees Jan-June 2009
9	2157	11/10/08	Sec Benefits Acct	\$2,000	Printing/ Office Supplies/ Misc

All eight checks were made out to “James Smyth” and deposited, within a day or two, into another bank account under the name of “James Smyth.”

After discovering the eight unauthorized checks, Mr. Davis notified the union’s attorney, Ronald Kliegerman. Mr. Kliegerman contacted respondent and demanded that he reimburse the union for all of the \$13,000 in funds. Respondent refused (Tr. 43). Respondent also did not provide receipts for any of the alleged union expenses such as the laptop, supplies, or office furniture (Tr. 71). Respondent also refused to repay the money after a request was made at a meeting of the union membership (Tr. 58).

According to Mr. Davis, he searched the union offices for the check stubs for the eight checks made out to respondent, but was unable to find them (Tr. 53).

Mr. Davis testified that union officers were not paid a salary of any kind, either under the union constitution (Pet. Ex. 1) or by past practice (Tr. 10-11). Mr. Davis and other officers were reimbursed for union-related expenses upon presentation of a receipt (Tr. 54). The union Board had approved paying a retiree representative \$125 per month (Tr. 62-63).

Respondent did not testify and offered no evidence.

Even though the charges allege that respondent was arrested and indicted for petit and grand larceny, the hearing evidence focused, not on respondent’s arrest, but upon proof that he stole money from the union. The discussions during the hearing left no doubt that respondent’s attorney had been made aware that, at the hearing, petitioner would put forward proof of the underlying theft. Respondent’s attorney did not assert surprise or object to going forward on this basis.<sup>1</sup> Under these circumstances, where respondent was made aware both before and during the hearing that the alleged misconduct consisted of stealing union funds not of merely being arrested for this theft, the charges should be conformed to the proof that respondent stole funds belonging to the union. *See Law Dep’t v. Lawrence*, OATH Index No. 1312/10 at 10 (Mar. 30,

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<sup>1</sup> Respondent’s request for an adjournment, which was denied, was based upon the pending criminal proceedings and not upon a need for further preparation (Tr. 4-5).

2010); *Dep't of Correction v. Bovell*, OATH Index No. 1910/99 at 2, n.1 (Aug. 13, 1999) (respondent not prejudiced by conforming charge to proof presented at hearing when given opportunity to defend substantive charge).

The hearing evidence amply supported a finding that respondent's undisputed transfer of these funds to himself was for his own benefit, not the union's. As testified to by Mr. Davis, when confronted with the unauthorized checks, respondent admitted that he took the money as compensation for his work as union treasurer. The current union president also testified that neither he nor any other union officer authorized respondent to take this money. The president's testimony further established that none of the funds taken by respondent were used to buy the items noted on the checks, such as a laptop or office furniture, for the union.

There was also no support for the credibility challenge of respondent's attorney, suggesting that the blowup of the friendship between respondent and Mr. Davis in January 2009 provided a motive for Mr. Davis to falsely deny authorizing the payments. While Mr. Davis was unquestionably angry at respondent for stealing from the union, there was no indication from respondent or any other evidence that Mr. Davis approved any of the purchases referred to in the checks.

Respondent's failure to testify provides further justification to sustain the charges. Petitioner accurately noted that, based upon respondent's failure to testify, it was entitled to "the strongest inference against him that the opposing evidence in the record permits." *Comm'r of Social Services v. Philip De G.*, 59 N.Y.2d 137, 141 (1983); *see Dean v. Bradford*, 158 A.D.2d 772, 774 (3d Dep't 1990) (in a disciplinary case, employee's failure to testify allows the hearing officer "to draw all adverse inferences which the evidence permits"); *Dep't of Finance v. Rodriguez*, OATH Index No. 430/10 at 7 (Mar. 5, 2010). The inference is appropriate even for an employee, like respondent, who is facing pending criminal charges. *See Marine Midland Bank v. John E. Russo Produce Co*, 50 N.Y.2d 31 (1980) (inference for failure to testify in civil lawsuit properly invoked even where defendants' silence based upon ongoing FBI investigation). Respondent's failure to provide any explanation or evidence that the eight checks he endorsed and deposited to his personal account were authorized or used for union expenses provides further support for a finding that the checks constituted a deliberate theft of union funds.

I therefore find that, based upon the evidence presented, respondent stole \$13,266 from the union bank accounts for his own benefit, in violation of Department rules 1 (D) and 3 (1.a).

**FINDING AND CONCLUSION**

Both charges should be sustained in that in 2008 respondent stole \$13,266 of union funds, as described above, in violation of Department rules 1 (D) and 3 (1.a).

**RECOMMENDATION**

Upon making the above findings, I requested and received summaries of respondent's personnel history in order to make an appropriate penalty recommendation. He was appointed as a deputy sheriff in 1995. In 2005 he was reprimanded for allowing non-City personnel to use his sheriff's badge, but otherwise has no prior disciplinary record.

There can be little question that any City employee found to have stolen money should be terminated. This is especially true for an employee like respondent, entrusted with significant law enforcement responsibilities. *Dep't of Correction v. Bivens*, OATH Index No. 2088/10 (Aug. 20, 2010) (correction officer terminated for falsifying income in order to receive subsidized housing); *Dep't of Correction v. Santiago*, OATH Index No. 2163/09 (Aug. 4, 2009) (correction officer terminated for stealing \$100,000 of insurance proceeds from step-daughter).

Accordingly, for the misconduct which was found to have occurred here, I recommend that respondent be terminated.

John B. Spooner  
Administrative Law Judge

March 9, 2011

SUBMITTED TO:

**DAVID M. FRANKEL**  
*Commissioner*

APPEARANCES:

**ARI LIEBERMAN, ESQ.**  
**NANCY GOODMAN, ESQ.**  
*Attorneys for Petitioner*

**RICHARD WOJSZWILO, ESQ.**  
*Attorney for Respondent*