Dep't of Sanitation v. Bongiardina

OATH Index No. 1971/11 (Nov. 4, 2011), *modified on penalty*, Comm'r Dec. (Jan. 19, 2012), **appended**

Termination of employment recommended for sanitation worker who accepted a gratuity from an undercover investigator posing as a homeowner. Commissioner reduced the penalty to a 30 work day suspension plus the loss of 4 weeks vacation.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
JEREMY BONGIARDINA
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Sanitation ("the Department"), pursuant to section 16-106 of the Administrative Code. Petitioner alleges that respondent, Jeremy Bongiardina, a sanitation worker, pled guilty to accepting an unlawful gratuity due to his solicitation, acceptance, or agreement to accept $80.00 from an undercover investigator in return for taking construction debris. Petitioner alleges that, in doing so, respondent violated Mayoral Executive Order No. 16 ("MEO 16") and the Department's Code of Conduct, General Order No. 2002-06, rules 3.2 (prohibiting conduct which tends to bring discredit upon the City or the Department), 4.2 (requiring employees to report corruption or criminal activity), and 4.9 (prohibiting criminal activity while on duty). Petitioner withdrew that portion of the amended complaint that alleged that respondent took a bribe or accepted trade waste (ALJ Ex. 1).

At a two-day trial, petitioner presented the Certificate of Disposition from respondent's criminal case (Pet. Ex. 1) and the transcript from respondent's plea allocution (Pet. Ex. 2).

Respondent presented the testimony of Mr. Laino, his co-worker on the date of the incident, and various supervisors; he also testified on his own behalf, and presented documentary evidence. The record was left open until September 20, 2011, for the submission of post-trial memoranda.

As set forth below, I find that the charges are sustained in large part and recommend that respondent's employment be terminated.

ANALYSIS

On November 8, 2010, respondent pled guilty in Kings County Supreme Court to receiving an unlawful gratuity, in violation of Penal Law section 200.35, a class A misdemeanor (Pet. Ex. 2). During his plea allocution, respondent admitted that on September 6, 2007, while aiding sanitation worker John Laino, he did "solicit, accept, or agree to accept any benefit for having engaged in official conduct which [h]e was required or authorized to perform and for which [he] was not entitled to any special or additional compensation" (Pet. Ex. 2 at 9-10). This admission tracks the language in section 200.35 of the Penal Law, prohibiting the acceptance of an unlawful gratuity. Penal Law § 200.35 (Lexis 2011). When the judge asked specifically what he and Laino did, respondent answered, "Accepted a gratuity." (Pet. Ex. 2 at 10). Respondent also said that he was picking up garbage at the time, which was his job (Pet. Ex. 2 at 10). Respondent was sentenced to a conditional discharge with a $1,000 fine and was provided with a certificate of relief from civil disabilities (Pet. Exs. 1, 2; Resp. Ex. A).

Both respondent and Mr. Laino testified that on September 6, 2007, they were assigned to fill in for sanitation workers James Filosa and Joseph Rotola, who regularly serviced the block (Laino: Tr. 15, 18; Bongiardina: Tr. 52-53). As the senior worker, Mr. Laino was in charge (Laino: Tr. 16, 20). According to Mr. Laino, while collecting garbage, an individual put something in his hand which he later realized was a few dollars (Tr. 16-17, 20). He stuck it in his pocket and did not mention it to respondent, who was not around at the time and did not see it happen (Tr. 17, 20).

Respondent testified that the homeowner did not offer him a gratuity (Tr. 80). Nor did Mr. Laino give him any money that day (Tr. 50). He did not recall the homeowner ever telling him that he had given money to Mr. Laino (Tr. 80, 82). Instead, respondent testified that while Mr. Laino was talking to the homeowner, he was busy loading the truck (Tr. 88). Mr. Laino and the homeowner continued to talk even as respondent moved the truck up the block to the next

house (Tr. 90, 91). Respondent testified that he suspected, but did not know for sure, that a gratuity was given because they were talking for so long (Tr. 79, 84-85, 93). He thought one possibility was that Mr. Laino was talking to the homeowner because he knew the person (Tr. 79, 96). He was new on the job and "just kept his mouth shut" because he "didn't know for sure" (Tr. 79). If he had known "for 100 percent" that Mr. Laino had taken money, he would have said something to Mr. Laino, like "give it back or don't do that" (Tr. 80). Respondent averred that he never intended to disrespect or tarnish the Department or any of his co-workers (Tr. 78).

Respondent also denied that the trash that he picked up was trade waste (Tr. 84). He said that it consisted of household garbage, three bags of sheetrock, and a mattress (Tr. 90-91). He recalled the homeowner saying that he was doing the work himself and that there was not a lot of garbage (Tr. 82). Finally, he recalled the homeowner asking where the regular workers were, and his replying that they were on vacation or out sick (Tr. 80).

Respondent was arrested on January 30, 2008, and charged with accepting an unlawful gratuity, bribery, extortion, and official misconduct (Tr. 40, 42). Respondent, Mr. Laino, Mr. Filosa, and Mr. Rotola were charged as a group (Bongiardina: Tr. 43; Laino: Tr. 19, 28). They would see each other approximately every six weeks for court appearances (Tr. 43). According to respondent, when he saw Mr. Filosa and Mr. Rotola at those court appearances, they expressed anger and fear about the possibility of losing their pensions and health coverage (Tr. 44, 46). According to Mr. Laino, Mr. Rotola had a reputation at work for being a "slouch" and being aggressive (Tr. 21). Respondent testified that Mr. Rotola is a shop steward and is approximately 6'5" tall and weighs around 260 pounds (Tr. 44-45).

Respondent testified that he did not feel he had a choice about taking the plea offer as the District Attorney would not sever his case and he was afraid of how Mr. Filosa and Mr. Rotola would react if he caused them to go to trial (Tr. 47-48). According to respondent, Mr. Rotola and Mr. Filosa would say, "somebody's going to pay if I lose my pension" (Tr. 44). Respondent inferred from that that he would be the one "to pay" if the group went to trial or if he was the reason that Mr. Rotola and Mr. Filosa lost their health benefits and pensions. He thought that Mr. Rotola and Mr. Filosa might retaliate against him, his girlfriend, and maybe his brother who also works for the Department, perhaps vandalizing one of their cars (Tr. 45-46). He testified, "It starts with a flat tire and ends with broken windows and then, it accelerates. I don't know

what the end result is. But I know that somebody that angry over losing health coverage and money that they've worked their whole life for, I don't put anything past anybody, especially a family man, who has a family and that's what he's angry about. He has everything to lose . . . And Filosa's the same. He goes right along with [Rotola]." (Tr. 46).

Respondent's testimony that he did not know that the homeowner gave Mr. Laino a gratuity and that he did not speak to the homeowner about the gratuity was contradicted by a letter from the Department of Investigation ("DOI") to the Department of Sanitation, written by Inspector General Tim Crowe. According to the letter (Resp. Ex. D), DOI conducted a covert operation at the homeowner's address on September 6, 2007. An undercover agent posed as the new owner of the premises. A collection truck arrived to service the location. Respondent and Mr. Laino were on the truck. Mr. Laino told the undercover that Mr. Rotola was on vacation and Mr. Filosa was sick. The undercover told Mr. Laino and Mr. Bongiardina that his contractor had left behind a lot of construction debris. Mr. Laino responded, "you take care of us we take care of you," and collected all the debris at the property (Resp. Ex. D at 2). According to Mr. Crowe, the undercover then gave Mr. Laino $80 and walked over to respondent and told respondent that he had given Mr. Laino the money (Resp. Ex. D at 2). Mr. Crowe did not explain how he knew these details, nor did he allege that the undercover saw Mr. Laino give any of the money to respondent.

With his and Mr. Laino's testimony, respondent essentially sought to re-litigate his criminal charges, arguing that he did not commit the crime he pled guilty to and only pled guilty because of coercion. However, respondent waived any claim that he did not commit the crime of official misconduct by his guilty plea. Under the principles of collateral estoppel, his guilty plea and conviction conclusively establish the underlying elements of the criminal charge. *See S. T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 305 (1973); *Dep't of Correction v. Bivens*, OATH Index No. 2088/10 at 2 (Aug. 20, 2010); *Dep't of Buildings v. Benlevi*, OATH Index No. 395/09 at 2 (Jan. 9, 2009). By entering a guilty plea, an individual forfeits the right to renew arguments which could have been made prior to the plea, including arguments regarding coercion by co-defendants and denials of severance motions. *People v. Welcome*, 184 A.D.2d 916, 916 (3d Dep't 1992); *see also People v. Cotton*, 219 A.D.2d 836, 837 (4th Dep't 1995).

Even considering respondent's testimony that he felt coerced or intimidated by Messrs. Rotola's and Filosa's statements that somebody would "pay" if they lost their pension and health

benefits, it was not persuasive. First, there was no evidence presented to explain why Mr. Rotola or Mr. Filosa would lose their benefits and pensions if they went to trial rather than entering guilty pleas. Second, respondent did not cite any concrete reason for believing that Mr. Rotola or Filosa would actually retaliate against him, his brother, or family member. All he said was that Mr. Rotola was a shop steward and a big man. Mr. Laino said only that Mr. Rotola was known to be "aggressive," but he did not indicate how, or suggest that Mr. Rotola or Mr. Filosa had at any time previously past retaliated against or bullied junior sanitation workers. As a whole, respondent's testimony was insufficient to establish coercion, even if respondent may have felt more comfortable going along with the plea than going to trial. *Compare People v. Baret*, 11 N.Y.3d 31, 33, 34 (2008) (finding vague statements by co-defendant that the defendant "better do the right thing and plead guilty or he would make sure he did the right thing," "that his life was on the line," and that he would "do what he had to do" insufficient to establish coercion as no basis was given for defendant's belief that he would carry out the threat, and the allegations were "too flimsy to warrant further inquiry"); *People v. Lopez*, 2006 NY Slip Op 50656U at *6 (Crim. Ct. N.Y. Co. 2006) (finding verbal taunting, as opposed to physical abuse or threats of physical abuse, insufficient to establish defendant was coerced into entering a guilty plea) *with People v. Flowers*, 30 N.Y.2d 315 (1972) (finding plea coerced by "barbarous prison abuses" where defendant was sexually abused and beaten, the warden, the captain and several guards at the jail stated that he was in potential danger of his life, and a month before his plea the jail was the scene of riots and a take-over by inmates).

Furthermore, there was significant evidence that respondent's plea was voluntary. Respondent was represented by an attorney during his plea and he was fully allocuted. Respondent's court appearances occurred over a period of approximately three years, during which he had ample time to consider the pros and cons of going to trial. Moreover, when asked by the sentencing judge if anybody threatened or forced or coerced him into taking the plea, he replied in the negative (Pet. Ex. 2 at 11). *See People v. Fiumefreddo*, 82 N.Y.2d 536, 546 (1993) (finding defendant not coerced by a connected plea where the plea had been the subject of negotiation for several months and there was a lengthy and detailed colloquy during the plea allocution).

The charges against respondent are sustained in part and dismissed in part. Respondent's plea to accepting an unlawful gratuity establishes that he engaged in criminal conduct which

tends to discredit the City, in violation of rules 3.2 and 4.9 of the Department's Code of Conduct. Respondent's conviction for official misconduct is also sufficient to establish his violation of MEO 16, which prohibits City employees from being "convicted of a crime relating to their office or employment, involving moral turpitude or which bears upon their fitness or ability to perform their duties or responsibilities." Mayoral Exec. Order No. 105 § 5(b) (Dec. 26, 1986) (amending Mayoral Exec. Order No. 16 § 5(c) (July 26, 1978)).

As the First Department has noted, MEO 16 is drafted somewhat ambiguously:

> it is not clear whether this Executive Order allows dismissal to be based on any of three categories of conduct (namely, a crime relating to one's employment, a crime involving moral turpitude, or a crime bearing upon fitness to perform), or whether the crime must be related to the employment and involve either moral turpitude or fitness to perform.

Maldarelli v. Doherty, 40 A.D.3d 470, 471 (1st Dep't 2007). In *Malderelli*, however, the Court found this ambiguity of little consequence because Mr. Maldarelli was convicted of insurance fraud, based upon his submission of forged documents on DOS letterhead. The Court therefore held that his conviction not only related to his employment, but also involved moral turpitude or at least his fitness to perform his job.

This case is similar. Respondent pled guilty to accepting an unlawful gratuity, on the job, for doing his work. There is no doubt that this crime related to his employment and was a corrupt act which bears on his fitness to perform his duty. *See Pesale v. Beekman*, 81 A.D.2d 590 (2d Dep't), *aff'd*, 54 N.Y.2d 707 (1981) ("The purpose of Section 200.35 of the Penal Law [barring the receipt of unlawful gratuities] is to prohibit 'Tipping' a public servant which undermines the integrity of governmental administration."). *See also Human Resources Admin. v. Vega*, OATH Index No. 652/92 at 2-3 (Apr. 22, 1992) (MEO 16 violation established by respondent's conviction for conspiracy to receive bribes); *see also Dep't of Sanitation v. Carannante*, OATH Index No. 792/07 (Mar. 8, 2007), *adopted*, Comm'r Dec. (Mar. 20, 2007) (respondent's criminal conviction for on-duty conduct violated MEO 16); *Dep't of Sanitation v. Anderson*, OATH Index No. 2157/00 (Aug. 21, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 01-75-SA (July 27, 2001) (MEO 16 violation established by criminal conviction for on-duty conduct). Accordingly, that portion of the charges which alleges that respondent pled guilty to accepting an unlawful gratuity, in violation of Departmental rules and MEO 16, is sustained.

However, the charge is not sustained to the extent that it alleges that respondent pled guilty to soliciting, accepting, or agreeing to accept $80 from an undercover posing as a homeowner in exchange for taking construction debris that the undercover told him came from a contractor.[1] Inspector General Crowe's February 12, 2008 letter asserts that the undercover told Messrs. Laino and Bongiardino that his contractor had left behind a lot of construction debris (Resp. Ex. D). However, the plea allocution is entirely devoid of any reference to construction debris or trade waste. Indeed, respondent admitted accepting a gratuity in connection with picking up garbage, which the Court noted "was what [his] job was anyway" (Pet. Ex. 2 at 10). As a matter of law, moreover, the crime of receiving unlawful gratuities requires that a benefit be conferred upon a public servant "for having already engaged in official conduct which he was required or authorized to do for which he was not entitled to additional compensation." *People v. Hendy*, 64 A.D.2d 407, 409 (lst Dep't 1978). Thus, as a matter of both fact and of law, respondent pled guilty to accepting a gratuity, not to accepting a gratuity for picking up trade waste. Therefore, to the extent that the charge alleges that respondent pled guilty to accepting a gratuity for picking up trade waste, that was not proven and should be dismissed.

Moreover, petitioner failed to present any evidence in support of the charge that respondent failed to report corruption or criminal activity, in violation of rule 4.2 of the Department's Code of Conduct. Accordingly, that portion of the charge was not proven and should be dismissed.

FINDINGS AND CONCLUSIONS

> Respondent was convicted of the misdemeanor of accepting an unlawful gratuity, which is a crime relating to his employment that bears upon his fitness to perform his job. Based on that conviction, petitioner established that respondent violated Mayoral Executive Order 16, and Rules 3.2 and 4.9 of the Code of Conduct, General Order 2002-06, as alleged in the amended complaint. However, petitioner failed to prove that respondent's conviction related to trade waste. Petitioner also did not prove that respondent failed to report corruption or criminal activity, as further alleged in the amended complaint.

Thus, the charges against respondent are sustained in part and dismissed in part.

[1] It may have been an oversight for petitioner to have retained this portion of the narrative in the amended charges, while withdrawing the allegation that respondent violated Rule 6.1 of the Code of Conduct by accepting trade waste.

RECOMMENDATION

Upon making these findings, I requested a copy of respondent's disciplinary abstract. It shows that respondent was appointed as a Sanitation Worker on May 31, 2005. Three recent performance evaluations rated him "satisfactory" in every category. He has no prior disciplinary record.

MEO 16 calls for the dismissal of any City employees "convicted of a crime relating to their office or employment, involving moral turpitude or which bears upon their fitness or ability to perform their duties or responsibilities . . . absent compelling mitigating circumstances . . ." In addition, where an employee has been found guilty of any legal or criminal offense or a violation of Department rules, the Administrative Code empowers the Commissioner to forfeit or withhold the employee's pay for a period not exceeding thirty days, suspend the employee for a period not exceeding thirty days, or dismiss the employee. Admin. Code § 16-106(a) (Lexis 2011).

Petitioner has requested that I recommend that respondent be terminated. Petitioner maintains that termination is appropriate as it is required by MEO 16 absent compelling mitigating circumstances, which, petitioner contends, are not present here.

In most circumstances, this tribunal has recommended termination for employees found to have violated MEO 16 by being convicted of a crime related to their employment and/or involving moral turpitude. *See Dep't of Sanitation v. Ragone,* OATH Index No. 1970/11 (Aug. 9, 2011) (termination for petit larceny conviction, despite character testimony from eight of respondent's co-workers touting his work ethic, willingness to accommodate other workers, reliability, and good sick leave record); *Human Resources Admin. v. Palmer-Davis,* OATH Index No. 2968/10 at 6 (Dec. 2, 2010) (termination recommended for supervisor convicted of petit larceny for defrauding NYCHA by submitting fraudulent documents and failing to disclose she was a city employee; letters from co-workers and supervisors, and certificate of relief from disabilities, did not outweigh the Department's legitimate concerns); *Dep't of Sanitation v. Rosario,* OATH Index No. 2301/10 (June 11, 2010) (termination recommended for sanitation worker convicted of theft of public funds for falsifying application for section 8 housing); *Dep't of Environmental Protection v. Barnwell,* OATH Index No. 177/07 at 15-16 (Sept. 18, 2006) (termination recommended for water inspector convicted of official misconduct for soliciting bribes from customers); *Dep't of Sanitation v. Maldarelli,* OATH Index No. 1495/05 at 6 (Dec. 13, 2005), *aff'd,* 40 A.D.3d 470 (lst Dep't 2007) (termination recommended for sanitation

worker convicted of committing insurance fraud despite 15 years of service with the Department).

There have been two recent cases involving sanitation workers in which compelling mitigation has been found to justify a penalty other than termination for MEO 16 violations, *Department of Sanitation v. Iocovello*, OATH Index No. 195/09 (Dec. 10, 2008), *adopted*, Comm'r Dec. (Jan. 15, 2009), and *Department of Sanitation v. Carannante*, OATH Index No. 792/07 (Mar. 8, 2007), *adopted*, Comm'r Dec. (Mar. 20, 2007). Both cases involved convictions relating to illicit gambling. In *Iocovello*, the sanitation worker was convicted of conspiracy to defraud the United States by participating in an illegal gambling operation. OATH 195/09 at 2. In *Carannante*, the sanitation worker was convicted of official misconduct for accepting an illegal $50 bet while at work. OATH 792/07 at 3. In both cases, the administrative law judges found mitigation in the nature of the offenses. *Iocovello*, OATH 195/09 at 11; *Carannante*, OATH 792/07 at 15. Other mitigating factors found to be compelling were the workers' long tenures, acceptance of responsibility for the convictions, exemplary disciplinary records, and testimony and letters from supervisors in support of the workers, OATH 195/09 at 11; OATH 792/07 at 15. Also compelling were awards issued to the workers by the Commissioner: in *Iocovello*, OATH 792/07 at 10, a commendation issued after his guilty plea "in recognition of exceptional performance of duty" and in *Carannante*, OATH 195/09 at 12, the Bronze Medal of Honor and a plaque for an "outstanding act of heroism and for [his] continued dedication to duty to the residents of New York City." Also notable was that the federal court judge who sentenced Mr. Iocovello, Judge Hellerstein, made clear on the record his belief that respondent should not lose his job as a result of the conviction. OATH 195/09 at 10.

Here, respondent has presented some mitigation. Like the respondents in *Iocovello* and *Carannante*, respondent introduced evidence attesting to his strong worth ethic and good character. Superintendent Michael Lorenzo, Superintendent Rosario Marrone, Supervisor Luis Otarola, Supervisor Charles Lanzaro, Supervisor Vincent Mammolito, and former Supervisor Joseph Bonatakis all testified that they had supervised respondent in some capacity. They characterized respondent as a hard worker who would perform extra duties when asked, and described his work performance as excellent (Lorenzo: Tr. 99-100, 106; Marrone: Tr. 115, 116; Otaorola: Tr. 135-36; Lanzaro: Tr. 142; Mammolito: Tr. 157; Bonatakis: 165). They stated that respondent always completes his tasks, never gives anyone a hard time, and is eager to help

workers on other routes or sections (Morrone: Tr. 115; Mammolito: Tr. 157; Bonatakis: Tr. 164, 166). They also stated that respondent is an asset to the Department (Lorenzo: Tr. 100; Otarola: Tr. 135-36; Mammolito: Tr. 157-58) who should not lose his job because of his conviction (Tr. Lorenzo: Tr. 100; Morrone: Tr. 116; Otarola: Tr. 136; Lanzaro: Tr. 145, 146; Mammolito: Tr. 157-58; Bonatakis: Tr. 166).

I found their testimony to be sincere and found it striking that the Superintendents, in particular, were willing to state that respondent should not be terminated for his conviction. I also credited respondent's testimony that he loves and is proud of his job and never intended to show disrespect for or tarnish the Department or his reputation as a sanitation worker (Tr. 78-79). In sum, respondent has produced credible evidence that he is a hard worker and valued employee. High-level supervisors have urged that he be permitted to keep his job. Respondent's conviction is four years old and there is no suggestion that he has engaged in any other misconduct since that time. Moreover, respondent appeared to be the least culpable of the four sanitation workers involved in his criminal case.

It is also notable that respondent's conviction for taking a gratuity was related to his picking up of garbage, not trade waste. The Department elected not to proceed with its original charge that respondent violated the trade waste directive. Nor is there any evidence that respondent solicited the gratuity. Indeed, even the letter from Inspector General Crowe states that the undercover gave the gratuity to Mr. Laino, not respondent. And while respondent pled to accepting the gratuity, there is no evidence that his actions were premeditated: *i.e.*, that he appeared at the house with the sanitation truck with a plan to extort money from the homeowner for picking up his garbage. Thus, this case is distinguishable from cases in which sanitation workers were fired because either they solicited bribes for removing construction materials or garbage, or because their actions in picking up debris or receiving gratuities were premeditated. *See, e.g., Dep't of Sanitation v. Norris*, OATH Index No. 2352/08 (Aug. 11, 2008) (termination recommended for respondent sanitation worker who solicited money from two homeowners to collect bulk material); *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) (termination for sanitation worker who accepted gratuities three times, once involving trade waste, where all instances were prearranged between the employee and the undercover investigator); *Dep't of Sanitation v. Wall*, OATH Index No. 127/03 (Oct. 24, 2002), *aff'd*, NYC Civ. Serv. Comm'n

Item No. CD 03-86-SA (Sept. 29, 2003) (termination recommended for sanitation worker who solicited and received a bribe to remove construction material).

As a whole, however, the mitigation presented by respondent fell short of the compelling mitigation required under MEO 16 for a penalty other than termination. Like Mr. Iocovello and Mr. Carannante, respondent does not have a disciplinary record and has submitted considerable character evidence. However, unlike them, he does not have a lengthy tenure and has not received any awards from the Commissioner. Indeed, respondent started on the job about slightly over 26 months before the incident on September 6, 2007. The three performance evaluations that were submitted all evaluated him as satisfactory. Mr. Iocovello, by contrast, had a fifteen-year tenure with the Department, and Mr. Carannante had a seventeen-year tenure. Both received awards or medals for outstanding or exceptional performance. Moreover, while respondent presented both testimony and letters from his supervisors attesting to his strong and helpful work ethic, this character evidence was not as compelling as that presented in the *Iocovello* or *Carannante* cases. Indeed, in *Iocovello*, the testimony and letters about the respondent's excellent work performance was accorded great weight as it was supported by evaluations rating him as "superior" and describing him as an "asset." OATH 195/09 at 9. Similarly, in *Carannante*, the character evidence was given great weight as, in addition to testimony from supervisors, the respondent presented letters from such high ranking officials as Deputy Chiefs and a Director. OATH 792/07 at 12-13.

This case is also dissimilar to *Iocovello* or *Carannante*, most significantly in the nature of the underlying conviction. In both of those cases, the underlying conviction was for gambling. Here it is for accepting a gratuity. Where gambling has only a limited nexus to a worker's performance of his duties, OATH 792/07 at 15, accepting a gratuity "bears directly on [an employee's] fitness to perform his duties and responsibilities." *Dep't of Environmental Protection v. Barnwell*, OATH Index No. 177/07 at 15 (Sept. 18, 2006). As the Second Circuit has noted, "[t]he awarding of gifts thus related to an employee's official acts is an evil in itself… because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees… for those who give gifts as distinguished from those who do not." *United States v. Irwin*, 354 F.2d 192, 196 (2d Cir. 1965) (discussing Congress's purpose in enacting a similar federal statute).

This is particularly true for sanitation workers, who work largely without direct supervision, in teams of two, and who potentially can have multiple interactions with members of the public on any given day.

Respondent notes a recent case which, though not involving a conviction, involved the acceptance of a gratuity and did not result in the employee's termination from employment. In *Department of Sanitation v. Kruszewski*, Comm'r Dec. (Jun 1, 2011), *modifying*, OATH Index No. 469/11 (Apr. 6, 2011), this tribunal had recommended termination of employment for a sanitation worker who was videotaped accepting $30 from a homeowner in exchange for picking up bags of yard debris. The Commissioner instead imposed a penalty consisting of a 30-day suspension, a loss of half of the employee's 2011 vacation days, and the employee's transfer from his Queens location to a district in the Bronx for a five-year period. The Commissioner explained that he was modifying the penalty based on the letters submitted on Mr. Kruszewski's behalf from former supervisors and a deputy chief, Mr. Kruszewski's good disciplinary, attendance and sick leave record, and his belief that Mr. Kruszewski understood that his actions not only put his career in jeopardy, but also tarnished the reputation of the Department. Comm'r Dec. at 1 (June 1, 2011).

In another non-termination case, which respondent contends is analogous to his case, this tribunal recommended, and the Department imposed, a 30-day suspension against a sanitation worker for accepting trade waste and a gratuity. *Dep't of Sanitation v. King*, OATH Index No. 295/04 at 8-9 (Feb. 2, 2004). In making this recommendation, this tribunal credited the sanitation worker's testimony that he feared retribution from his partner, the more senior sanitation worker on the route, if he did not follow the partner's instructions regarding picking up the trade waste. *King*, OATH 295/04 at 8. More specifically, the employee testified that there had been incidents before in the Department where sanitation workers who did not go along with their partner's instructions had had their cars vandalized, with windshield broken or tires slashed. He was afraid this might happen to him, as his partner had been in the Department a long time and knew lots of people. *King*, OATH 295/04 at 5.

There are significant differences between this case and the cases relied on by respondent. Unlike the sanitation workers in both *King* and *Kruzewski*, respondent did not accept responsibility for his actions, although he did testify that he never intended to bring discredit or disrespect upon the Department. Despite having pled guilty to accepting a gratuity, respondent

maintained steadfastly that the homeowner never gave him any money, although he suspected but did not know for sure that that Mr. Laino had received a gratuity. If he had, respondent testified, he would have told Mr. Laino not to take the money or to give it back. However, although respondent attempted to deny that he ever took a gratuity, that testimony can not be credited or given mitigatory weight because of his guilty plea to accepting a gratuity. By contrast, Mr. Kruzewski admitted to accepting a gratuity in exchange for picking up excess yard debris without authorization, expressed remorse for his actions and apologized. OATH 469/11 at 1, 3. Mr. King, similarly, did not deny accepting trade waste or taking a gratuity from the undercover detective. He also admitted that the transaction was wrong. OATH 295/04 at 4. This is an important distinction as we have found that the acknowledgement of responsibility may mitigate a penalty. *See Dep't of Sanitation v. Mackay*, OATH Index No. 1725/04 at 8-9 (Sept. 2, 2004) (penalty mitigated since respondent accepted responsibility); *Dep't of Sanitation v. Miller*, OATH Index No. 1608/00 at 3 (May 24, 2000) (penalty decreased due in part to "respondent's admirable willingness to accept responsibility").

Moreover, while respondent asserts that he is similar to the sanitation worker in *King* because he acted out of fear for his safety, the intimidation here is not analogous to that in *King*. Unlike the sanitation worker in *King*, respondent does not assert that he was intimidated into taking a gratuity; rather, he alleges that he was intimidated into pleading guilty. This does not mitigate his underlying action of taking a gratuity.

In sum, while respondent presented some mitigation, I did not find the mitigatory evidence in this case to be compelling. The nature of respondent's conviction -- taking a gratuity from the member of the public for doing his job -- weighs heavily against respondent. Respondent's guilty plea collaterally estopps him from asserting that he did not "solicit, accept, or agree to accept" a gratuity. Respondent's receipt of a certificate of relief from disabilities does not preclude the Department from relying on his criminal conviction "as a basis for the exercise of its discretionary power to terminate his employment." *Barreto v. Gunn*, 134 A.D.2d 495, 496 (2nd Dep't 1987); *see also Calloway v. Glass*, 203 A.D.2d 800, 802-03 (3d Dep't 1994); *Zazycki v. Albany*, 94 A.D.2d 925, 927 (3d Dep't 1983). Nor was it outweighed by the testimony of respondent's supervisors.

Accordingly, I recommend that respondent's employment be terminated.

Faye Lewis
Administrative Law Judge

November 4, 2011

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

APPEARANCES:

CARLTON LAING, ESQ.
Attorney for Petitioner

FAUSTO ZAPATA, ESQ.
Attorney for Respondent

Comm'r Decision (Jan. 19, 2012)

A copy of the November 4, 2011 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 Jeremy Borgiardina violated Mayoral Executive Order 16 and DSNY Code of Conduct, Rules 63.2 and 4.9. However, I find the proposed penalty of Termination to be inappropriate.

I want to thank Administrative Law Judge Faye Lewis for her work in rendering a decision based on the evidence provided and past Trade Waste violation penalties.

The final decision on the case rests with me and I have serious concerns with terminating SW Jeremy Bongiardina. There is no question that he violated department rules, which usually means termination.

My concern with the OATH decision is that due to the case going to criminal court first it delayed it getting to OATH. During the delay, three of the sanitation workers retired with full pensions. This to me is not fair justice.

On September 6, 2007, the date of the violation, SW Bongiardina had just 2 years with the Department. SW James Filosa had 19 years and Joseph Rotola had 18 years with the Department. They were the ones that should have been terminated, along with SW Laino, Bongiardina's partner, who had 17 years on the job. SW's Filosa and Rotola were assigned to this route on a regular basis and were the ones who first demanded gratuities for collection of the garbage. SW Laino accepted the gratitude on September 6, 2007 while SW Bongiardina stood by and said nothing. He was wrong, but only having 2 years on the job and undoubtedly feeling peer pressure from the senior workers, he kept quiet. He freely admitted his guilt at a criminal court hearing and probably didn't know what to do when the others pleaded guilty.

My decision not to terminate is not an easy one. Four years have passed since the Trade Waste violation occurred, and SW Bongiarclina has received only one disciplinary complaint. His District Superintendent and supervisors have praised him for his work performance and dedication. I believe he 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 S W Bongiardina's prior disciplinary record, it is my decision that the appropriate penalty for the proven misconduct is: a 30 work day suspension which shall be served over a period of 8 weeks (he shall be suspended 4 consecutive work days

during Weeks 1 to 7 and 2 consecutive work days during Week 8); a loss of 4 weeks of his 2012 vacation days (160 hours).