

Dep't of Sanitation v. Venning

OATH Index Nos. 763/11 & 764/11 (Jan. 28, 2011)

Sanitation workers found guilty of willfully failing to complete their route, for which the ALJ recommends a five-day penalty. Sanitation Worker Glover also found guilty of pulling away in the collection truck while the supervisor stood in the doorway. ALJ recommends an additional 30-day suspension.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of

DEPARTMENT OF SANITATION

Petitioner

- against -

THYRON VENNING and RICHARD GLOVER

Respondents

REPORT AND RECOMMENDATION

TYNIA D. RICHARD, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Sanitation ("Department"), pursuant to section 16-106 of the Administrative Code. Respondents are charged with violating Department rules by working at a slow pace and failing to complete their route on January 6, 2010. Respondent Glover is separately charged with refusing an order to pick up two stops, directing profanity toward his supervisor, and speeding away in the collection truck and causing her injury on March 15, 2010.

A five-day hearing was conducted before me that concluded on December 8, 2010. Petitioner presented the testimony of three witnesses, including Superintendent Bugliaro who oversees the Brooklyn North District. Respondents testified in their defense and presented the testimony of two witnesses.

Based upon the record of the proceeding, I find respondents guilty of failing to complete their route and recommend a five-day penalty for each. I also find respondent Glover guilty of refusing his supervisor's order, using profanity toward her, and recklessly pulling away in the garbage truck as the supervisor retreated from the doorway. For this misconduct, I recommend a suspension of 30 days.

ANALYSIS

Respondents are sanitation workers assigned to Brooklyn North District 8. They are charged with violating Code of Conduct sections 3.1 and 3.6 by failing to complete their route on January 6, 2010 (ALJ Exs. 1, 2). Sanitation Worker Glover is additionally charged with violating Code of Conduct sections 3.1, 3.18, 3.22, and 5.4 by disobeying his supervisor's order to collect two stops, directing profanity at her, and then speeding away in the collection truck causing her to injure her shoulder (ALJ Ex. 3). Respondents deny the charges.

Failure to Complete the Route

It is not disputed that respondents failed to complete their route on January 6, 2010. They are steady partners on Route 1, which is the only route collected in Section 81 of the district during the day shift on Wednesday. Until January 2010, Route 1 consisted of 11 lines. January 6 was the first day that a 12th line was added to the route (Pet. Ex. 3; Tr. 357, 429). The new line was comprised of three city blocks on Lincoln Place from Bedford Avenue to Washington Avenue.

Supervisor Lisa Cabrera, respondents' immediate supervisor, is responsible for overseeing their collection of Route 1 (Tr. 43-44). With only one collection truck to supervise, Wednesday is a light day for her. Respondents were given the normal cut-off times to complete their work that day. Generally, sanitation workers who complete their route by 12:30 must dump the truck and return to the garage by 1:30; if they complete the route after 12:30, they must return to the garage by 1:30 but do not dump (Tr. 47).

Cabrera testified that she was familiar with the route and with respondents' pace of work and she observed them several times that day working at a slower pace than usual (Tr. 60-61, 74, 200). They even drove at a slower pace (Tr. 139). She noted that Venning, who collected as Glover drove the truck, walked slowly and walked rather than rode inside the truck as they proceeded from stop to stop. This was not unusual for blocks with steady house-to-house stops, but it was unusual for blocks in which residential stops were separated by commercial or unoccupied space, as their blocks were (Tr. 145-49).

The Department requires that sanitation workers complete (or "clean") their routes by the end of each shift. *See* Code of Conduct § 3.6 ("Employees shall promptly and properly perform their assigned duties, and complete all assigned tasks."); § 3.1 ("Employees must obey all Rules, Regulations, Orders, messages, and direct orders given them by their superiors."). The

Department's Operations Order 2006-02 provides instructions to be given to sanitation workers when a supervisor suspects a route will not clean by the end of the shift. The Order instructs the supervisor to: (1) approach the crew to ascertain if there are any problems causing them to work slowly; (2) document on the DS332 and DS350 cards that the crew has been counseled about their slow pace and told they are required to complete the route, along with the time the counseling took place; (3) make periodic checks of the crew and repeat the procedure above, if necessary; and (4) write up a complaint if the crew fails to complete their route by the end of the shift. Operations Order 2006-02 (Mar. 13, 2006). Crews are not issued complaints when a legitimate problem on the route prevents them from cleaning it (Tr. 391). I credited Supervisor Cabrera's testimony that she followed these required steps.

She stated that she followed respondents' truck several times during the day, noting their progress and work speed, and made a report to the superintendent. She and the sanitation workers left the garage at 6:29 a.m. She followed their truck continuously until stopping them at 7:50 a.m., just before their 8:00 a.m. break (Tr. 61, 70). She spoke to them both at the same time: she asked if they were having any problems and why they were working at a slow pace, and reminded them they were obligated to clean the route (Tr. 61-62, 69). She did not recall where they were when she spoke to them that morning, but she said they should have been at least halfway through their route by that time (Tr. 63). Superintendent Bugliaro confirmed that she reported to him around 9:30 a.m. that she had a "truck out," which meant the route would not clean due to a slow work pace (Tr. 76, 206-07, 388). Bugliaro received no reports of problems from any other routes in the district, all of which cleaned that day.

As respondents went to break, Supervisor Cabrera drove around to see if the route "was heavy" and she noted there was an average amount of material out for collection (Tr. 70-73). She observed no impediments on the route, such as police actions, emergencies, double parking, traffic, or utilities working on the route, and at no time that day did respondents complain to her that the route was too long or too heavy, or that they were experiencing problems with the truck or other equipment (Tr. 57, 77; Pet. Ex. 1-a). She said the weather was clear and there was no snow on the street (Tr. 137-38, 241). She did not recall if there was snow on the curbs from a prior storm.

Supervisor Cabrera approached respondents again at 12:30 p.m., told them they were working at a slow pace, asked if they were having any problems, and notified them of their

obligation to clean the route (Tr. 80). By that time of day, respondents were normally on their last line. She followed them until they completed line 7, at approximately 1:24 p.m. (Tr. 79, 220).

Supervisor Cabrera documented her encounters with and instructions to respondents on the DS350 and DS332 cards (Pet. Exs. 1, 2). The cards indicate that respondents reported no problems to her. She testified that, when she counseled respondents about their slow work pace, they did not respond to her (Tr. 80-82, 390). They asked no questions and made no statements to her. They did not even look at her. They just stood there. She noted this on the DS350 card (Pet. Ex. 1). She said this was their normal reaction to her and that, as a matter of course, respondents refused to speak to her when she spoke to them or gave them direction (Tr. 94). She said they told her on two or three occasions that “they don’t take orders from a woman” (Tr. 94, 226-27, 379), which they both denied at the hearing. Supervisor Cabrera denied having similar problems with other sanitation workers (Tr. 135).

Supervisor Cabrera also noted on the DS350 card that she observed Venning talking on his cell phone at 1:00 p.m. when he should have been servicing the route (Tr. 84, 218). When he ended the conversation, he began taking photos of her with his cell phone as she sat in her vehicle behind the truck. She did not speak to Venning about these acts, she said, because he frequently walks away from her and she considers confrontation an ineffective means of supervising him (Tr. 85). Venning denied taking pictures of her with his cell phone, explaining that he was calling his union to report her “harassing” him, which he explained she did by insulting his effectiveness as a shop steward (Tr. 583). He said that he might have been holding the phone up to read it (Tr. 617). This conduct was not separately charged, so I have not reviewed it for that purpose.

Although routes are to be collected line by line in the sequential order set forth on the route sheet, respondents often collect their route in an order of their own choosing (Tr. 63-64, 68). Supervisor Cabrera had no problem with this because, other than this day, they always cleaned the route irrespective of which order they chose. They collected the route in the proper order on January 6, she said (Tr. 135-36).

Respondents testified that they worked at a normal pace that day, and Sanitation Worker Venning denied that Supervisor Cabrera counseled them about working at a slow pace (Tr. 581), even though the DS350 card records her counseling them at 7:50 that morning and at 12:50 that

afternoon (Pet. Ex. 1). Sanitation Worker Glover did not recall her counseling them about a slow work pace and denied seeing her make notations on the DS350 card (Tr. 658, 668, 675). He said he was unaware the entire day that they were behind in collection (Tr. 672). Venning said he read the counseling notations for the first time at trial; he accused Cabrera of writing them after the card was returned to the garage that evening (Tr. 615).

According to Venning, sometime after their morning break, Cabrera instructed him to collect the route in order (Tr. 575-77). He asked her to write it on the DS350 card but she did not. He said she then left without saying anything else to him. Venning later denied she told him to collect the route in order (Tr. 630-31). He then recalled he had earlier testified that she had, and insisted that he did collect it in order but did so due to “the conditions.” He then stated he did not do the route in order (“not exactly”). Contradictions of this sort tended to make his testimony unreliable. The record contains discrepancies about whether Cabrera ordered respondents to collect the route in order and whether they did so, but it was neither charged nor proven as misconduct.

Venning also testified that, later that day, she approached him again and “said something,” and he asked her to write whatever she wanted him to do on the DS350 card (Tr. 579-80). His characterization of her saying “something” suggests that he did not bother to listen to her, in accordance with his insistence that she write her instructions on the DS350 card. Rather than hand her the DS350 card, Venning stated that Cabrera has to go into the truck to retrieve the card from the clipboard where it is kept (Tr. 602).

Venning denied engaging in an intentional slowdown on January 6 (Tr. 586). He listed several factors that led to their failure to clean the route that day: the extra line added to the route which they learned about only a few days earlier,¹ snow that had fallen days before, and ice on the ground (Tr. 582). He testified that the ice “slowed” them down and they got tired and “slowed it down” in order to be safe (Tr. 582). He later denied making any admission that they slowed down their work (“I never said we slowed it down”) and would admit only that they had emphasized safety over speed (Tr. 632). Venning also said they are delayed on Wednesdays when there is no alternate side of the street parking, because more vehicles are parked on the street, blocking the garbage sitting on the sidewalks (Tr. 632). When counsel pointed out they had routinely cleaned the route on previous and subsequent Wednesdays, Venning emphasized

¹ He later denied having any advance knowledge of the additional line (Tr. 621).

the snow on the sidewalks (Tr. 633). Respondents offered no corroborating evidence that there had been significant recent snowfall. Venning conceded he never told Cabrera that there was any impediment to completing his work that day, including snow on the ground (Tr. 611, 634), and he said he would tell her if an impediment had existed (Tr. 612).

Glover did not recall being told to pick up the route in order that day (Tr. 653). He denigrated the notion of ever doing the route in order, emphasizing the length of some routes that “would take you four days” to finish if you went “house to house” (Tr. 654). Glover denied working at a slow pace and said he encountered no impediments to cleaning the route, such as equipment failure or illness (Tr. 666-67). He did not recall whether there was rain or snow that day (Tr. 652). He stated, however, that they work harder on Wednesdays because alternate side of the street parking rules are suspended (Tr. 654). Glover said Supervisor Cabrera never talks to him, even about work, so he does not speak to her (Tr. 653). He later conceded that she does speak to him to issue work instructions (Tr. 682-84). He said she did not speak to him at all on January 6 (Tr. 659).

It was undisputed that Route 1 was successfully collected on five of six Wednesdays preceding January 6 (November 25, December 2, December 9, December 16, and December 30) (Tr. 61, 86).² Therefore, the Department contends, it is reasonable to infer that the route should have cleaned on January 6 as well, absent evidence of an impediment, and respondents reported none. According to Bugliaro, the routes are designed to equalize work and to clean by the end of the shift and the routes in his district normally cleaned (Tr. 387, 419). He said no problems were reported on the other routes in the district on January 6 and there was no residual garbage left from a recent holiday (Tr. 407).

The record established that Route 1 normally cleans and collects an average of eight tons of refuse on Wednesdays, yet respondents picked up only 5.63 tons on January 6, completing only eight of 12 lines on the route (Tr. 87-88, 393, 619). The citywide target weight for each sanitation truck is 10.6 tons (Tr. 397). According to the productivity report, the route collected the following weights on the preceding Wednesdays: 6.34 tons (December 30), 8.89 tons (December 16), 6.65 tons (December 9), 8.60 tons (December 2), and 9.86 tons (November 25)

² Route 1 failed to clean on Wednesday, December 23, which was believed to be a snow day because every route in the district failed to clean that day (Tr. 86, 417; Pet. Ex. 4 at 5).

(Pet. Ex. 4; Tr. 355).³ All routes in Brooklyn North District 8 cleaned on all five dates (Pet. Ex. 4). A year earlier on January 9, 2009, the route cleaned and collected 7.93 tons (Resp. Ex. B-4).⁴

Respondents also contend that the route was not completed because it was particularly heavy on January 6 and, in fact, it was heavier than usual. Supervisor Cabrera reported that a “half load” remained uncollected on the route at the end of the shift, estimated on the DS350 to be seven tons (Pet. Ex. 1). In fact, 7.28 tons were collected on January 6 on Route 1’s evening shift (Tr. 394, 467; Pet. Ex. 4 at 2). Adding the day and evening collections, 12.91 tons were collected on Route 1 on January 6, an amount that significantly exceeds the average Wednesday collection (Tr. 436). Superintendent Bugliaro testified that the evening collection included whatever was left uncollected from the day shift, plus any additional garbage residents put out after the day truck passes – an amount that cannot be measured but that he estimated could have been as much as one and a half tons (Tr. 506, 528). Even reduced by a ton and a half, to 11.41 tons, the route exceeded the average.

Credibility

The ultimate fact in issue here is whether respondents intentionally slowed their work resulting in a failure to complete their route, which is generally established by circumstantial evidence, *i.e.*, by reliance on inferences drawn from the collateral facts testified to at the hearing. What must be determined, as an initial matter, is the credibility of the witness testimony: Supervisor Cabrera’s testimony that respondents worked at a slow pace and respondents’ testimony that they intended to complete their routes but were hindered from doing so. *Dep’t of Sanitation v. Dobie*, OATH Index Nos. 2092/07, 2093/07, 2094/07 & 2095/07 at 10 (May 2, 2008), *adopted*, Comm’r Decision (May 9, 2008), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD08-60-SA (Nov. 20, 2008). In making its credibility determinations, the tribunal considers “witness demeanor, consistency of a witness’ testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness’ testimony comports with common sense and human experience.” *Dep’t of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 4, 1998), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 98-101-A (Sept. 9,

³ Route 1 collected 8.21 tons on Wednesday, December 23 (Resp. Ex. B-3).

⁴ The tribunal denied respondents’ request for the production of a year’s worth of computer data indicating whether the route had been cleaned and the amount of tonnage collected on each Wednesday route in the district (Tr. 268, 270, 277). This request, which I regarded as unlikely to produce evidence relevant for comparison, was denied as unnecessarily broad. A similar request was denied in *Department of Sanitation v. Amato*, OATH Index Nos. 2092/07-2096/07, mem. dec. (Aug. 2, 2007) (Tr. 309).

1998). An assessment of credibility must, therefore, consider the parties' assertions of motive and bias. For example, petitioner contends that respondents are motivated by a resistance to Supervisor Cabrera's authority, and respondents contend that Supervisor Cabrera is biased and has been abusive toward them.

Supervisor Cabrera is a recent manager, having been assigned as the supervisor of Section 81 in June 2007 (Tr. 40-41). Respondents are long term employees with the Department and were already assigned to Route 1 when she arrived. Glover, a sanitation worker for 27 years, is the most "senior man" in the district and can pick any route assignment he chooses (Tr. 645, 650). He said he could choose to work in another section in the district if he wanted, but he chooses Section 81 where he has worked for 20 years ("I'm not going nowhere") (Tr. 684-85). Venning has been a sanitation worker for 20 years, and Glover has been his steady partner on Route 1 for more than 10 years (Tr. 553-54). Venning has been a shop steward for some number of years that he did not recall (Tr. 556).

Supervisor Cabrera testified that Route 1 is one of the lighter routes in the section, a privilege accorded to Venning as shop steward (Tr. 239). She and Bugliaro both testified that, as shop steward, Venning attends labor-management meetings and has input into decisions about route assignments and route composition (Tr. 234, 398-99). Bugliaro attends such meetings; Cabrera does not (Tr. 375, 400). Generally, Bugliaro explained, management decides on the number of trucks available for collection and the shop stewards divide up the routes to accompany the number of trucks approved by the city (Tr. 425-26). In this case, the line added to Route 1 originated from a management decision to cut a half truck from the district. Thus, the lines previously assigned to the half truck that was eliminated were divided among the remaining routes. Routes 2 and 3 in Section 81 also received additional lines (Tr. 428). He said there were no complaints that Route 1 was too heavy and that Venning had approved the additional line (Tr. 402). Venning denied there was any truth to the notion that he influences the composition of routes, including his own (Tr. 566). He said the routes were made up before he started work with the Department, and his route was assigned to him by management with no input from him (Tr. 568). Since it is only reasonable that routes change over time as conditions change, I was unconvinced by his total denial of any knowledge or input into this process, particularly given his responsibility as shop steward.

Respondents both denied telling Supervisor Cabrera that they did not take orders from a woman (Tr. 560, 648). Venning said he had no problem working for a woman and testified that women “bring some light and . . . beauty” to an otherwise dirty job (Tr. 560). There was no evidence that he or Glover had regularly reported to a female supervisor before this. To support their contention, respondents called as a witness Superintendent Burgis, president of the women’s association within the Department. She acknowledged that the Department employs perhaps 30 female supervisors out of 1,000 (and a total of four female superintendents) and that these women sometimes experience difficulty having men take orders from them (Tr. 546-48, 550). She testified that she had supervised respondents and never had a problem with them, though she admitted this occurred on only a few occasions when she worked overtime because she worked a different shift than they did (Tr. 535, 544-45).

Supervisor Cabrera’s contention that respondents sometimes do not follow her orders, do not speak to her, and told her they would not take orders from a woman, are central to her complaint about disrespect and shed some light on the motives of these parties. I found her testimony on the matter to be credible. It was corroborated by Superintendent Bugliaro who testified that Supervisor Cabrera reported to him that respondents did not follow her orders (Tr. 227, 447, 507-08). He decided to “take care of it” by speaking to respondents, rather than allowing her to charge them with insubordination. Bugliaro stated that, at the time, he had a good “man to man” relationship with Venning who responded positively to his direct instructions (Tr. 508-09).⁵ Although Cabrera also reported to him that respondents said they would not take orders from a woman, Bugliaro admitted he never raised it with them (Tr. 509-11). He said he did not consider the complaint serious because ultimately the men would respond to his instructions, after refusing to follow Cabrera’s instructions (Tr. 513). Despite his good intentions, these actions may have further eroded Supervisor Cabrera’s authority with the respondents because they could ignore her orders with impunity so long as they followed Bugliaro’s orders.

Although respondents denied these allegations, their denials were undermined by their own admissions about their interactions with Supervisor Cabrera and by their courtroom demeanor. For example, Glover who reluctantly answered questions put to him admitted he does

⁵ Venning testified that Bugliaro was disrespectful to him, once telling him at a meeting to “shut the fuck up shop stupid” (Tr. 558-59). He claimed to have lodged a complaint with the union, but not the Department, about Bugliaro. There was no evidence of a complaint.

not talk to Supervisor Cabrera and tried to blame her for this by saying she is “not a nice person” and insisting there was “no reason to” speak to her while on the job (Tr. 648, 688). Irrespective of whether she is a nice person, he is obligated to speak to her because it is integral to working as her subordinate. See *Health and Hospitals Corp. (Coler-Goldwater Specialty Hospital and Nursing Facility) v. Ramsey*, OATH Index No. 1248/05 at 21-22 (Nov. 9, 2005) (“Ramsey II”) (employee terminated for engaging in numerous acts of insubordination and discourtesy, including repeated refusal to respond to or acknowledge supervisors); *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital and Nursing Facility) v. Ramsey*, OATH Index No. 724/04 at 9 (Apr. 16, 2004) (“Ramsey I”) (employee’s refusal to respond to supervisor’s page was “not only insubordinate but potentially dangerous”). Although Venning denied that he refuses to speak to her (Tr. 581), he admitted demanding that she issue directives to him in writing on the DS350 card, rather than verbally, and described his own refusal to pay attention to her verbal orders. Respondents saw nothing wrong with this behavior, failing to recognize it as potentially sanctionable misconduct, perhaps because they have normalized it and Superintendent Bugliaro tends to reassert orders previously given by Supervisor Cabrera.

Respondents’ complaint that Supervisor Cabrera had a reputation for speaking abusively to sanitation workers – aside from a single example – was unproven. Supervisor Cabrera admitted telling a sanitation worker to “kiss her Puerto Rican ass” in an unrelated incident (Tr. 96) but denied using foul language when speaking to respondents (Tr. 95). Notably, respondents alleged none. Moreover, she denied knowing of any complaints lodged against her by sanitation workers about the way she speaks to them (Tr. 97). None were made a part of this record. Venning said she supervised with a “dictatorship presence” (Tr. 560) and “said something very abusive” to him on January 6 which he refused to repeat (Tr. 627-29). He eventually said she “belittled me as a shop steward” but he did not recall the words she used (Tr. 643). Despite the complaints voiced at trial, respondents confirmed they had never filed complaints against their supervisor, although Venning claimed to have made verbal complaints to the union (Tr. 634). Respondents called no union witnesses and offered no corroboration. Glover said his complaint to Bugliaro about Cabrera had fallen on “deaf ears,” and he made no complaints to the union (Tr. 647, 680). He stated, incredibly, that he was unaware of the channels for making a formal complaint (Tr. 681). Bugliaro denied that respondents complained to him about Cabrera (Tr. 515). Counsel even argued that Supervisor Cabrera harbored racial bias against respondents

because they are African-American (Tr. 290), but neither Venning nor Glover offered testimony to support this allegation. Supervisor Cabrera denied any racial bias (Tr. 378) and I found no evidence of it in this record.

In the end, respondents' claims of harassment were unsubstantiated. There was no evidence that Supervisor Cabrera's supervisory actions were aberrant or oppressive. Venning's claim that she was abusive by virtue of "belittling" his position as shop steward did not suggest harassment or paint the picture of a "dictator." Glover's complaint that she was "trying to whip us into shape" (Tr. 687), conduct that he likened to the actions of another of his previous supervisors with whom he had no issue (Tr. 686), appeared to be nothing more than her attempts to exercise supervisory authority over them.

On the other hand, while I found no hint of bias, Supervisor Cabrera sometimes displayed a stubborn reluctance to admit difficult truths. For example, she repeatedly denied that Route 1 was larger on January 6 than previously (Tr. 55-57, 86-87, 121) and she speculated that the route would have contained the same amount of weight even if several lines had been added to it (Tr. 124), both claims that she should have known were false. She said she knew that Route 1 was revised, but she thought it happened after January 6 and she was unaware whether the revision involved adding or subtracting lines (Tr. 125). Though she later admitted the route was enlarged by the revision (Tr. 357), her credibility suffered as a result of these initial denials.

Respondents contend that Supervisor Cabrera undermined her credibility with estimates she offered of the amount of time it would take for respondents to pick up their route. This occurred during a lengthy cross examination in which counsel sought particularized estimates of the composition of each residential block of the route, the number and kind of stops on each block, and the amount of time (in minutes) necessary to service each stop (Tr. 163-94). Once added up, Supervisor Cabrera's spontaneous estimates exceeded the normal time necessary to service the route, which respondents would argue proves they were not working slowly that day. When she realized her own testimony had disserved her position that respondents should have cleaned the route in a shorter time, she changed her prior estimates in testimony that was obviously self-serving. Respondents argue that this proves that she is an unreliable and untruthful witness.

In the end, I found this interrogation to be unhelpful to petitioner's or respondents' positions. Supervisor Cabrera's estimates were mere guesses offered spontaneously during her

testimony (Tr. 227-28). She made poor guesses likely because the Department does not require the collection of such information (minute-by-minute calculations of time spent at each stop) and she was not in the habit of timing the sanitation workers' stops. I found the entire line of questioning objectionable on relevance grounds, though not objected to by the Department. Nevertheless, her self-interested attempt to revise her estimates must be considered in an assessment of her credibility. The question is whether her offering of these self-serving statements makes it more likely to the trier of fact that she was untruthful about having ordered and counseled respondents about completing their route that day. I find that it does not. The evidence that she gave the proper instructions to the sanitation workers is corroborated by her contemporaneous report to Superintendent Bugliaro and her written orders on the DS350 card, which was in their possession as they serviced the route. I found their denials that she told them they were working too slowly to clean their route self-serving. Moreover, the claim that they were unaware the entire day that they were behind in collecting their route is utterly lacking in credibility given their combined 47 years of experience as sanitation workers and 10 years working the same route. It is not believable that these long term employees were so unaware, particularly since they regularly completed the route. The recent addition of three city blocks to the route does not change my analysis. At a minimum, they would have known they were not close to completing the 11 lines they normally finished.

The willful failure to complete a route has been upheld as misconduct. *See Dobie*, OATH 2092/07 at 8. Three elements are required to prove such insubordination: (i) that an order was communicated to a subordinate by a superior; (ii) that the order was clear and unambiguous; and (iii) that, having heard a clear and unambiguous order, the employee willfully refused to obey. *Dep't of Transportation v. Mendez*, OATH Index No. 384/05 at 5 (Jan. 19, 2005). The willfulness of a failure to obey may be inferred by the circumstances. *Human Resources Admin. v. Johnson*, OATH Index No. 637/01 at 9 (July 12, 2001). There need not be an "outright refusal" to comply with a superior's request; a "passive but deliberate failure to comply" is sufficient evidence of insubordination. *Dep't of Environmental Protection v. Gellman*, OATH Index No. 347/84 at 28 (Jan. 14, 1985); *Johnson*, OATH 637/01 at 12-14 (insubordination established where respondent failed to follow directive to prepare certain reports but did not explicitly refuse to do so). In the absence of outright refusal, the question is whether the

evidence creates an inference that respondents committed misconduct by intentionally failing to complete their route.

Just as guilt can be established in a criminal action solely by circumstantial evidence, so can it be established in a civil service disciplinary proceeding, where a much lesser standard of proof is required. *See Foran v. Murphy*, 73 Misc.2d 486 (Sup. Ct. N.Y. Co. 1973); *Dep't of Sanitation v. Guastafeste*, OATH Index No. 658/00 at 16 (May 1, 2000), *aff'd*, 282 A.D.2d 398 (1st Dep't 2001). Circumstantial evidence is evidence of a collateral fact, a "collateral fact" being defined as "a fact other than a fact in issue, from which, either alone or with other collateral facts, the fact in issue must be inferred." *People v. Vitalis*, 67 A.D.2d 498, 503 (2d Dep't 1979), citing Richardson on Evidence § 145 (J. Prince 10th ed. 1973) (renumbered Richardson on Evidence §4-301 (11th ed. 2008)); *see also Dep't of Transportation v. Mascia*, OATH Index No. 403/85 at 7 (May 30, 1986). Thus, where a collateral fact is established, the tribunal may draw a reasonable inference from that collateral fact to establish that the relevant disputed fact is more likely than not to be true. *Dep't of Sanitation v. Ivy*, OATH Index No. 2376/00 (May 3, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 02-07-SA (Mar. 22, 2002); *Sherman v. Concourse Realty Corp.*, 47 A.D.2d 134, 137 (2d Dep't 1975) (tenant's testimony, if credited by the jury, that landlord's removal of lock from lobby door rendered the building's security system inoperative constituted sufficient circumstantial evidence from which the jury could have reasonably inferred that the assailant was an intruder who entered the lobby by pushing open the lockless lobby entrance door). If the probabilities are evenly balanced, no inference as to the fact in dispute may be drawn. *Ivy*, OATH 2376/00 at 16-17. The charge is not sustained where petitioner cannot prove that the failure to complete the route was respondent's fault. *See Dep't of Sanitation v. Venegas*, OATH Index No. 379/04 (May 7, 2004) (charge dismissed where evidence showed that respondent had mechanical difficulties with the truck that prevented him from completing the route).

I find that the weight of the evidence established at trial clearly warrants the inference that respondents intentionally slowed their pace on January 6 thus causing them to fail to complete their route. Respondents are experienced sanitation workers with at least 10 years of experience collecting this route who routinely completed it during the Wednesday shift. There was even evidence that Route 1 was one of the lighter routes in the district and that other workers

collected the route even faster than respondents did.⁶ The credible evidence established that Supervisor Cabrera observed them working slowly and twice instructed them to complete their route and they failed to do so. The undisputed evidence shows they collected only 5.63 tons of garbage, despite regularly collecting an average of 8 tons on the same Wednesday shift. Respondents offered no credible response to their failure to collect the route, and offered no convincing evidence that impediments existed that slowed them down. Their assertions that Wednesday suspension of alternate-side-of-the-street parking rules presented an obstacle did not explain their failure on January 6 to collect the route, in light of their success in finishing the route on prior and subsequent Wednesdays. Venning's claims that there was snow and ice were unsubstantiated and unconvincing. Respondents' charge that they were being victimized by the supervisor did not ring true and their claim they did not complain about it because no one would have listened to them was similarly hard to believe, particularly given their status as "senior man" and shop steward in the district. I have noted the inconsistencies in Mr. Venning's testimony and the abrasiveness demonstrated by Mr. Glover at the hearing, both of which diminished the credibility of their explanations. The fact that their route had undergone a new (and perhaps undesired) expansion and their open hostility to Supervisor Cabrera's authority offered motives for their decision to slow down collection that day. In spite of the portions of her testimony that undermined her credibility, I found Supervisor Cabrera credible in the facts that mattered and saw no evidence of bias on her part. In any event, bias could not have caused the objectively low tonnage that respondents collected that day, which is the most potent evidence that misconduct occurred here. The fact that the route was heavy that day offered no excuse for their having collected so little tonnage, much less than they normally collected. *See Dobie*, OATH Index Nos. 2092/07 at 9-13 (the inference that sanitation workers' failure to complete their routes was reasonable given the lack of plausible explanations offered by

⁶ Petitioner points out that, although respondents routinely clean their route, they never dump at the end of the day. Venning confirmed that he "never" dumps and has not dumped the route in 10 years (Tr. 588, 593). He seemed to suggest that working the route any faster than he does would be hazardous (Tr. 565-66). Supervisor Cabrera recalled respondents dumping only once since she has supervised them (Tr. 244). Venning said that, although he and Glover were never told they had to dump, it was "implied" by certain people who would "antagonize" them on the route in order to get them to finish earlier (Tr. 564). Glover agreed that no one had ever said anything to them about it, but stated "you know the symptoms" (Tr. 662). Although sanitation workers are not required to dump their routes and are paid extra to do so (Tr. 692), all the other routes in the district routinely clean and dump (Tr. 94, 240, 358, 444, 649). In fact, other sanitation workers regularly clean and dump Route 1 when respondents are absent (Tr. 128). Conceding that other workers had cleaned his route in four hours, Glover stated "everybody don't work the same" (Tr. 662-63). He became agitated during this line of questioning and had to be reminded to answer the questions posed to him (Tr. 665, 682-83).

respondents; among other things, respondents had completed the routes in recent past, had a motive not to clean, and failed to prove there were impediments to cleaning).

Contrary to respondents' contention, the reasoning in *Department of Sanitation v. Longmire*, OATH Index Nos. 1303/06, 1304/06 (June 12, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-42-SA (Apr. 17, 2007), does not call for a contrary result. In *Longmire*, sanitation workers were charged with inefficient performance for failing to complete their route, on the basis of evidence consisting of little more than observations that they were using one hand to pick up garbage bags rather than two. Judge Spooner noted that sustaining disciplinary charges "based upon subjective critiques alone would be tantamount" to punishing an employee whenever the supervisor believes their performance is "inefficient" even when no specific rule or direction has been violated. *Longmire*, OATH 1303/06 at 9. He dismissed the charge, noting evidence that the workers were delayed by equipment problems and the lack of evidence of how much of the route remained unserviced when they stopped. *Longmire*, OATH 1303/06 at 9. Here, petitioner supplied objective proof missing in *Longmire*: the weight of the collection on January 6 when the route failed to clean, and the weights on comparable Wednesdays when the route did clean; proof that no impediments prevented respondents from cleaning; and proof that 4 of the 12 lines remained uncollected at the end of the shift. Moreover, petitioner proved that respondents received periodic reminders that they were slow and of their obligation to complete the route, according to written procedures.

Here, the circumstantial evidence, much of it objective evidence, was sufficient to create the inference that respondents' failure to clean the route was willful misconduct. I therefore find that petitioner established the charge.

Speeding Away and Disobeying an Order

Respondent Glover is separately charged with misconduct for his actions during a dispute with Supervisor Cabrera on March 15, 2010. Specifically, he is charged with disobeying her order to collect two stops, directing profanity at her, and speeding away in the collection truck and causing her to injure her shoulder.

March 15 was a Monday and the first day that two new buildings were assigned for collection on Route 1, Glover's regularly assigned route (Tr. 730). Sanitation Worker Jean Donovan was assigned to work the route with Glover that day (Tr. 728). Although she knew about these new stops a week earlier (Tr. 807), Supervisor Cabrera did not inform the sanitation

workers about them in advance.⁷ Instead, she told them at approximately 12:40 p.m., shortly before the end of their shift as they were finishing the route. Sanitation workers normally complete their routes between 12:30 and 1:30 p.m., when they are required to return to the garage.

Supervisor Cabrera testified that she found Glover and Donovan working on St. Marks Street between Grand and Classon Avenues, a block away from the new stops which were at the end of the route (Tr. 751, 768, 831). She said she approached Mr. Donovan who was sitting on the passenger side of the truck and told him there were two new “bag stops” to be picked up in the block ahead on St. Marks between Classon and Franklin Avenues (Tr. 741-42, 843, 971-74). A “bag stop” is a large pick-up containing 20 to 25 bags (Tr. 738-39). At that point, respondent was collecting garbage. Donovan told her they had passed by the buildings earlier in the day, unaware they were authorized for pick-up, and asked if she had told Glover about them (Tr. 978, 983). She said she had not and noted that telling one member of the crew was sufficient (Tr. 742-43). She then drove to the next block, double parked in front of the two bag stops, and waited for the truck to meet her there (Tr. 744).

Donovan largely confirmed this portion of her account (Tr. 978-81). He testified that he conveyed Cabrera’s message to Glover who wanted to know why she had not informed them earlier (Tr. 981-82, 984). Since Glover was the senior man, Donovan told him he would defer to his decision about how to proceed. Glover decided they would not pick up the stops, got into the driver’s side, and drove past Cabrera and the two stops.

According to Supervisor Cabrera, the truck passed her and stopped at the red light on the corner of St. Marks and Franklin (Tr. 744, 746, 850). What happened next is a matter of some dispute. She testified that she drove up to the truck and parked behind it (Tr. 747). She again approached the passenger side of the truck where Mr. Donovan sat, opened the door, and held it open with her hand on the outside door handle (Tr. 855). She asked what happened and Donovan shrugged his shoulders (Tr. 853). She told them “you have to service those stops” (Tr. 747, 770). Glover, who was driving, told her he was not “fucking servicing shit” (Tr. 748). She issued a direct order to service the two stops. At that point, the red light turned green and Mr.

⁷ The buildings had applied for and received approval for collection by submitting forms required by the Department in a process that Cabrera facilitated (Tr. 806, 923-24). Buildings that put out garbage prior to approval will be issued a summons but, according to Superintendent Bugliaro, the workers are still required to pick up the garbage (Tr. 925-26).

Glover pulled off (Tr. 748, 856). Cabrera testified that she was still holding onto the open door with her right hand and she felt her muscle pull as the force of the truck's movement "yanked" her arm, leaving the door swinging in the air (Tr. 750, 752). She contended that Glover has driven off before while she was talking to him, but never when she was holding the door (Tr. 756).

Cabrera said she went to her car and reported the incident to Bugliaro. When she returned to the garage, she saw Superintendent Bugliaro and Supervisor Dueno waiting for Glover and Donovan to return in the truck. She sat in Bugliaro's office as he held discussions with the union about having the workers sent out to finish the route (Tr. 754). When her arm began to hurt and swell, she decided to go to the hospital for an examination as a line of duty injury ("LODI") (Tr. 755-57, 772).

Mr. Donovan's testimony about the incident, though similar in some respects, differed from Cabrera's account as to certain facts. He admitted they drove past Supervisor Cabrera and stopped at the traffic light at St. Marks and Franklin (Tr. 984-85). But he said she then drove past them and parked in front of the truck, not behind it. She approached his side of the truck, opened the door and stepped inside, and held the door open with her back and shoulder (Tr. 986, 1046). He denied that she held the door open with her hand. He said she began "screaming" at them, and she and Glover engaged in a "screaming match" (Tr. 987). He confirmed that she ordered them to pick up the stops, while respondent complained that he was not told about the stops earlier – either at roll call that morning, at lunchtime, or on the DS350 card – and did not know what they were. Glover said he needed "further confirmation" before picking them up (Tr. 988-90). Donovan said the screaming contest ended suddenly and, "almost simultaneous[ly]," Supervisor Cabrera backed out of the truck and Glover drove off (Tr. 990-92, 1048). He said they "took off" but did not "gun" it (Tr. 991). He looked in the rearview mirror and saw Cabrera "standing up against the car" making a call on the radio. He denied the truck made any physical contact with her.

Donovan also described another encounter that occurred slightly later, when the truck was stopped at the next red light on the corner of St. Marks Street and Rogers Avenue (Tr. 993). He stated that Supervisor Cabrera reappeared, at Glover's door this time, and started arguing with him again. As Mr. Glover turned to get out of the truck, she slammed the door on him,

hitting him on his shoulder and arm, and then “stormed” off (Tr. 994). Donovan said this could have caused Glover to be hit by a passing car if he had stepped into the street.

Respondent’s recollection of the encounter in some respects departed from Cabrera’s and Donovan’s testimony. He said the entire incident occurred while the truck sat in front of a house he had just serviced on St. Marks near Classon (where Cabrera first told Donovan about the new stops) – not at the traffic light at St. Marks and Franklin (Tr. 1109, 1146). Glover recalled Supervisor Cabrera approaching Donovan and having a conversation that he could not hear (Tr. 1102, 1148). Donovan later told him she was instructing them to pick up the two bag stops in the next block (“two humongous stops”) (Tr. 1104). Glover saw her pull in front of the stops (Tr. 1144) but objected that he had passed that block earlier in the day and was never told to pick them up (Tr. 1133). He said he did not know if the bags contained trade waste so he was not picking them up; instead, he drove off and went to the garage. He recalled stopping at the traffic light at Franklin Avenue but did not recall anything happening there (Tr. 1146).

Much of his recollection was sketchy but Glover did recall one interaction with Supervisor Cabrera: after talking to Donovan about the stops, Cabrera walked to Glover’s side of the truck and ordered him to pick up the two stops; he refused and she slammed his door and walked off (Tr. 1107, 1149, 1151).⁸ He then pulled off, headed toward the garage (Tr. 1108). Glover denied that he pulled off as Cabrera held the door open. He did acknowledge, however, that his own account was inconsistent in that he initially testified that Cabrera drove away after speaking to Donovan on the passenger side of the truck, and he later said that Cabrera came to his side of the truck and talked to him after speaking with Donovan, then slammed the driver’s side door and left (Tr. 1149-51).

Credibility

An assessment of witness credibility is crucial in every case, particularly where the sides are in as much conflict as they are here. I questioned the veracity of critical aspects of each of the witnesses’ offerings.

Sanitation Worker Donovan forthrightly stated that he had “no issues” with Supervisor Cabrera but said she usually does not speak to him unless she has instructions for him (Tr. 964-66). He said Cabrera has a reputation for being difficult, and that she is “short” with the workers

⁸ Glover claimed that a “guy and a lady” in a car witnessed this and he asked them to be witnesses but they would not (Tr. 1110). It is unclear what he alleges they witnessed since he did not testify that Cabrera slammed the door on him, as Donovan did. I did not find this account believable.

and has a “nasty” attitude. He said she and Glover have a very poor relationship, which was known in the garage.

Because of the seriousness of the charge and the potential for a significant penalty if sustained, respondent’s testimony was burdened by self-interest. Whether due to lack of memory or intentional evasiveness, respondent claimed not to recall specific details about the incident and was unable to explain why parts of his testimony clashed even with that of his own witness, Mr. Donovan. Glover admitted his relationship with Cabrera was not good; he stated that she did not talk to him, and he did not have much to say to her (Tr. 1090). However, the halting nature of his testimony suggested a deeper dislike for her.

Although I credited parts of his testimony, Mr. Donovan was not an entirely disinterested witness either. For example, his description of Supervisor Cabrera slamming the door on Glover’s arm and shoulder was not believable. Glover, who claimed she slammed the door on his side of the truck, did not say that she slammed the door *on him* – not a detail he would likely forget. In addition, this account was incompatible with Cabrera’s demeanor at trial, which showed no sign of physical aggression.

I noted the similarity in the statements written by the sanitation workers that day. Glover’s written report states in its entirety: “She slammed the door and I pulled off” (Pet. Ex. 14; Tr. 1115-16). Donovan’s written report states in its entirety: “Supervisor Cabrera opened the passenger side door of the truck and spoke to us, when she was done she closed the door and we drove off” (Resp. Ex. D). The few words that the workers chose to write in their statement suggest they knew the focus of inquiry was on Supervisor Cabrera’s retreat from the truck, despite their claims that they did not know what had happened. Donovan said he refused to write a report until he could speak to Glover (Tr. 1000) and that he and Glover wrote their statements in the garage office at the same time (Tr. 1025), which indicates they were in a position to make joint decisions about what to write. Glover testified that Bugliaro asked him “what did you do to Lisa?” and that he heard she went to the hospital (Tr. 1117). Yet, he stated that he never asked what he was accused of doing – not when asked to write a statement, not when sent for drug testing, and not even when he was suspended that day.⁹ He said he did not ask because “nothing happened” (Tr. 1159-60, 1164, 1166). Glover sought to deflect responsibility, stating that once

⁹ When Cabrera reported being injured to Bugliaro, he called Chief Bonacorsa who ordered that Glover and Donovan be sent to the borough office for drug testing (which was negative) and that respondent be placed on an immediate five-day suspension (Tr. 919, 922).

he learned about the allegation, he was “almost certain” that Bugliaro “put her up to it” (Tr. 1158). Glover added that the sanitation worker who drove Cabrera to the hospital told him there “ain’t nothing wrong with that bitch” and volunteered to be his witness if needed (Tr. 1167), but he did not call him as a witness.

Donovan denied that the document produced by the Department is his full statement. He claimed that his statement contained at least another full page of information but did not indicate what was missing (Tr. 1002).¹⁰ The Department was unable to rebut it, but I suspected his assertion was false after a claim he made about Glover’s statement was disproved. Donovan stated that Glover’s statement was longer than the statement placed in evidence (and that it had not been written in all caps, as was the exhibit), but Glover contradicted him, admitting that the exhibit produced by the Department was his entire statement (Tr. 1116). This discrepancy was a blatant indictment of Donovan’s credibility. It, along with other evidence of his considerable loyalty to Glover (his insistence upon waiting for Glover before writing his statement and his admitted willingness to defer to Glover’s decision about whether to disobey the order), demonstrated he was not a disinterested witness.

Issues of credibility arose in Supervisor Cabrera’s testimony about her injury, as well. Cabrera described a significant impact when the truck pulled away, yanking her arm. Yet, she did not report it to Bugliaro when she called him from the field. Cabrera testified as follows about her phone call to the superintendent:

Q: And what did you tell Bugliaro?

A: I told him the stops that are out, Mr. Glover refuses to service. He’s acting irate, he pulled off and he’s heading back to the garage.

Q: Anything else?

A: No.

(Tr. 859). Bugliaro’s testimony was similar. He said he received a phone call from Supervisor Cabrera from the field reporting that the men refused her order to pick up the stops and then drove off (Tr. 913-14). He first learned about her injury in his office, when he noticed that she

¹⁰ The original statement was not produced, despite the tribunal’s request (Tr. 1077).

looked upset and asked her what was wrong (Tr. 917-18, 946-47). When she reported being in pain, he had someone drive her to the hospital.

Thus, the evidence shows that Cabrera called Bugliaro from the field but failed to report an injury. By all accounts, Bugliaro and Dueno were waiting in the garage for the sanitation workers to return so they could order them back into the field to pick up the stops, not because of an assault on their supervisor. It was clear from their testimony that they had not heard about this allegation as they waited. Cabrera's failure to immediately report an assault to Bugliaro supports an inference that her contention that her arm was "yanked" by the truck was exaggerated. I came to this conclusion after also considering the absence of objective evidence of the kind of injury that would arise from the impact she described.

Cabrera testified that she was taken to the Methodist Hospital emergency room by Department personnel, where she was diagnosed with a muscle spasm and released with prescriptions for a muscle relaxer and ibuprofen (Tr. 756, 773-76). The hospital discharge papers identify "shoulder pain" and "swelling" as her chief complaint (Pet. Ex. 5). Follow-up instructions indicate she should see her private doctor in one to two days. The LODI medical report filled out that day by a hospital physician notes "right shoulder pain" as her subjective complaint but does not mention swelling and states that her shoulder had no bruising, was "non-tender" and had "full, painless ROM" (range of motion) (Pet. Ex. 6 at 2). It notes a diagnosis of "shoulder/neck sprain." Cabrera visited the Department's medical division the next day and was referred to the Employee Assistance Unit counselor due to her emotional state (Tr. 758, 760, 780). The medical division also referred her to an orthopedist (Pet. Ex. 9). She testified that after this incident she was an "emotional wreck," upset that she could have fallen under the wheel of the truck and been crushed under its weight, and that respondent had shown no regard for her life (Tr. 758-59, 781). She had stood in a three-foot space between the truck and a parked car as she held the door open so there was little room for her to maneuver (Tr. 886). She said she completed several sessions with the counselor related to stress (Tr. 791-92).¹¹

Cabrera was on medical leave from March 16 to March 26, when she was returned to restricted duty with no driving and no use of her right arm (Tr. 788). She returned to full duty on

¹¹ She said her counselor recommended she be reassigned to a new section. The Department offered a transfer but it would have prevented her from being able to pick up her children from school (Tr. 793, 892, 906). Alternatively, she asked that Glover be transferred out of her section but was told by the union that he had seniority to choose whatever route he wanted (Tr. 793-94, 894). The Department rejected her request by letter (Pet. Ex. 13).

April 6, after a previously scheduled vacation from March 29 to April 3 (Tr. 790). She saw the medical division physicians for required monitoring but was not examined by them, and she never visited a physician for treatment of her shoulder (Tr. 784).

Cabrera testified that she received physical therapy for her shoulder twice a week for approximately six sessions, but this was not proven by the record (Tr. 796-97). She admitted under cross examination that at the time of the incident she was already receiving physical therapy for a herniated disk in her neck and was authorized to receive physical therapy for that injury only. She claimed that the physical therapy for her shoulder was added on, but she failed to produce any doctor's order for physical therapy on her shoulder, despite a request by the tribunal (Tr. 1068-69, 1079). I found it significant that Supervisor Cabrera did not volunteer during questioning that her physical therapy commenced before this incident, and I noted that she created the unfair perception that she had ongoing therapy for her shoulder when she did not (Tr. 875). In the absence of a doctor's authorization for shoulder therapy, there was no way to prove she had any such therapy, except by her own testimony which was greatly undermined by her omissions. Similarly, she avoided admitting under direct examination that she never visited the orthopedist she was referred to as a result of this incident, answering "I went to physical therapy" when asked "did you go see an orthopedic?" (Tr. 796-97). She later admitted she never visited an orthopedist (Tr. 864) and saw no doctor after her emergency room visit for the shoulder injury she said she suffered (Tr. 866, 871).

I was unpersuaded by the record (given Cabrera's nonspecific and unremarkable report of a "muscle spasm," her failure to seek medical care for the shoulder, and the hospital's failure to find bruising, tenderness or pain during its examination) that a significant injury resulted from the incident with Sanitation Worker Glover. Petitioner did not call a medical witness to augment the record. Assuming that being yanked by a moving garbage truck would have caused some visible proof of impact to her rather slight frame, I did not think it unreasonable to expect more compelling evidence of injury.

Inferences to support Cabrera's claim of impact might arise from evidence of injury but also from the testimony about the sequence of events and time elapsed between Cabrera's retreat from the truck and the truck pulling away. The most neutral evidence available on this matter was offered by Mr. Donovan, in an interview conducted by the Department on July 15, 2010. In the interview, Donovan described the encounter at the truck and the moments following the end

of the argument between Cabrera and Glover this way: there was silence and “I took it that, okay they’re finished screaming at each other, finished having the back and forth, the door, she was inside the door, she started to back out and he took off” (Pet. Ex. 12 at 34). He denied Cabrera was holding the door when they drove off (*Id.* at 35). But he also admitted that the door was not closed when they drove off, rather it “was closing” (*Id.* at 35), and that Glover did not wait for her to get out of the door “altogether” when he drove off (*Id.* at 36). The door was still open when he took off, but she was not inside the door, he said (Tr. 1055). He testified that he knew Glover was going to take off because the argument had ended (Tr. 1055), yet he stated in the earlier interview that he was “surprised” when Glover took off (Pet. Ex. 12 at 38). He said, “as she was backing out, the door was starting to close and he took off” (*Id.* at 38). I credited these statements which were largely consistent with his testimony; they were not an exoneration of respondent’s behavior, yet they were consistent with Cabrera’s claim that something inappropriate happened.

I found it highly plausible that, in accordance with these statements, Supervisor Cabrera had not safely and completely withdrawn from the vehicle at the time that Glover drove away, but he did not pull away so abruptly as to “yank” her arm, as Cabrera testified. Nevertheless, respondent’s decision to drive away before Cabrera had safely withdrawn from the vehicle was reckless and constitutes sanctionable misconduct. *Bd. of Education v. Castrignano*, OATH Index No. 205/83 (Aug. 12, 1983) (employee who recklessly kicked a stack of aluminum plates in anger causing them to fall onto and injure a co-worker committed misconduct, even though he did not intend the plates to fall on his co-worker). I find that a preponderance of the credible evidence shows that Glover is guilty of recklessly driving away in the collection truck as his supervisor retreated from the doorway and before she had completely done so.

Disobeying Order

Respondent Glover did not dispute disobeying Supervisor Cabrera’s order to service the stops, which she twice delivered to him on the route. In fact, he offered a number of justifications for his refusal, arguing that she should have informed him earlier in the day, she should have written the order on his DS350 card, and he needed to “confirm” the nature of the garbage. None of these excuses were a valid basis to refuse a lawful order of his supervisor. His insubordination persisted after he returned to the garage.

Superintendent Bugliaro met the sanitation workers when they returned to the garage and ordered them to return to the route and pick up the stops ((Tr. 913-14, 994-95). Both workers refused his direct order, with Glover stating “I’m not fucking going to get it” (Tr. 915). He ordered them a second time and warned they could be suspended for refusing. When they again refused, he went to his office and called Borough Chief Bonacorsa and made a report (Tr. 916, 918). Bugliaro’s testimony about their refusals was not disputed (Tr. 995).

Glover admitted he refused (Tr. 1155-56). Donovan said that Bugliaro gave the order to Glover twice and warned he would receive a complaint, and Glover stated, “Give me the complaint” (Tr. 995). Bugliaro turned to Donovan and gave him an opportunity to return and pick up the stops and Donovan refused, telling him he also would take the complaint (Tr. 996). Bugliaro walked away and the men left the area to prepare to go home for the day. Donovan said he later changed his mind after Glover called and told him that his union representative advised him to go out and pick up the stops (Tr. 996-97). They went out and picked up the stops, and Donovan was not issued a complaint for his initial refusal (Tr. 960-61).

An employee is obligated to obey the lawful order of a supervisor and, if he disagrees with it or feels it to be improper, to grieve it at a later time through available procedures. *See Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855 (1984); *Strokes v. City of Albany*, 101 A.D.2d 944 (3d Dep’t 1984); *Dep’t of Sanitation v. Pulliam*, OATH Index No. 1976/08 at 4 (Oct. 20, 2008). The purpose of the “obey now, grieve later” rule is to promote orderly and efficient relations between supervisors and subordinates and to help maintain a smoothly functioning workforce. There are narrowly applied exceptions to the rule that are not present here, and that were not asserted by Glover. *See Pulliam*, OATH 1976/08 at 4 (employee must obey a lawful order that is indisputably within the supervisor’s authority to give that poses no imminent threat to health or safety). Where the employer’s evidence establishes that the employee disobeyed an order, the burden of proof is upon the employee to demonstrate that one of the exceptions to the rule applies. Respondent failed to do that.

Clearly the elements required to prove insubordination are established here: clear and unambiguous orders were communicated to Glover, and having heard them, he willfully refused to obey. *Mendez*, OATH 384/05 at 5. He offered no permissible basis for ignoring Cabrera’s orders.

Moreover, it was not disputed that Glover directed profanity at Cabrera when ordered to pick up the stops. I credited Supervisor Cabrera's testimony that he told her that he was not "fucking servicing shit." Directing this language toward his supervisor is inappropriate in any context. *Dep't of Buildings v. Cortes*, OATH Index No. 577/90 at 7-8 (Feb. 9, 1990) (profanity directed by an employee at a supervisor is arguably misconduct per se). It certainly aggravates his disobedience of her order.

Although Cabrera's failure to timely communicate the order to collect the two new bag stops does not excuse respondent's aggression, offering the information before the start of the tour would have saved everyone time and energy. Whether Cabrera was merely avoiding an unpleasant task by delaying the conversation with Glover or was intentionally sowing discord is not clear on this record. What is clear is that her failure to notify the workers in advance stirred up a hornet's nest of suspicion and hostility that had been simmering for some time. As well, it was a poor exercise of her supervisory authority. First, Cabrera knew that this was Glover's steady route and that he often worked it out of order (Tr. 810, 824), so it was quite possible that she would be causing them to re-work an area they had already collected. Second, she saw the workers several times that day and had several opportunities to tell them (Tr. 811, 822, 933). Finally, Cabrera admitted that the addition of new stops is something a supervisor would normally apprise the workers of (Tr. 732, 800, 822). Her claim that she had informed Glover's steady partner about the new stops days earlier and had expected him to tell Glover could not explain her conduct entirely (Tr. 734). Most telling was her later admission that she did not tell Glover because he tends to walk away and ignore her (Tr. 769). As a supervisor, she has the obligation to ensure the work gets done, and she cannot shirk that responsibility because of a surly employee. Though Cabrera downplayed the need to notify the workers at all, arguing they should pick up any garbage they see, such communication not only fosters a better working relationship but also better efficiency in working the route.

FINDINGS AND CONCLUSIONS

1. Respondent Venning willfully failed to complete his route, as alleged in Charge No. 12075.
2. Respondent Glover willfully failed to complete his route, as alleged in Charge No. 12076.

3. Respondent Glover disobeyed Supervisor Cabrera's order to collect two stops, directed profanity at her, and recklessly drove away in the collection truck as she retreated from the doorway, as alleged in Charge No. 13920.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed a summary of respondents' work history and disciplinary record for purposes of recommending an appropriate penalty. Respondents Venning and Glover were appointed to their positions as sanitation workers on June 4, 1990, and June 15, 1983, respectively. Mr. Venning has a substantial disciplinary history, with several penalties dating from 1993. His most significant penalty is a 34-day pay fine which was imposed in 1999 for drug use. He has not had any discipline since 2007. His performance evaluations for the years 2007, 2008 and 2009 were all satisfactory. Mr. Glover has a relatively minor disciplinary history, having received in years 2004 to 2007 three reprimands and two pay fines (1 day and 3 days). His performance was rated satisfactory for the years 2007, 2008, and 2009, except that the 2007 evaluation was "conditional" because of excessive complaints.

Respondents have been found guilty of willfully failing to complete their route as directed. The Department has requested a five-day penalty for each of them. I find that penalty to be appropriate.

Past cases involving insubordination have resulted in suspensions of as many as 10 days. *See Pulliam*, OATH 1976/08 (10-day suspension for disobeying order and an additional five-day penalty for using Department vehicle without authorization); *Dep't of Sanitation v. James*, OATH Index No. 593/08 (Jan. 4, 2008) (eight-day suspension for sanitation worker who refused two orders to remove items from his truck and place them into the hopper); *Longmire*, OATH 1303/06 (five-day penalty for worker who refused order to return to work until after the police arrived); *Dep't of Sanitation v. Alves*, OATH Index No. 1301/06 (May 4, 2006) (five-day suspension for worker who refused to explain why a stop on her route was not serviced); *Dep't of Sanitation v. Neal*, OATH Index No. 1318/05 (June 16, 2005) (six-day suspension for worker who refused to tow disabled truck). In a prior case involving a willful failure to complete the route, the ALJ recommended three-day suspensions because of respondents' minor disciplinary history. *Dobie*, OATH 2092/07 at 14.

Here, I find that the five-day penalty requested by the Department is within the appropriate range for the misconduct proven, and I so recommend. I would add that the record of interaction between Supervisor Cabrera and Sanitation Workers Venning and Glover should give the Department reason to pause. It is clear that a degree of influence accompanies a long tenure with the Department and these respondents are in open rebellion against the authority of a relatively inexperienced supervisor. Their contempt for her authority, which they appeared to wear as a badge of honor even in the courtroom, is a recipe for disaster and something the Department should not delay to mitigate decisively, either by reassigning them or splitting them up as partners.

Under a separate charge, respondent Glover has also been found guilty of recklessly driving away in the collection truck as Supervisor Cabrera retreated from the doorway but before she had completely done so. He did so while disobeying her order to collect two bag stops and just after directing profanity at her. For his misconduct, the Department seeks his termination.

My recommendation is for a penalty short of termination. The most serious part of the Department's charge accuses respondent of speeding away in the collection truck and causing injury to his supervisor. However, based on my finding that evidence of a shoulder injury was lacking, I concluded that the record did not establish that respondent sped away, "yanking" his supervisor's arm as she held onto the door, which was a significant part of petitioner's case. Thus, finding this important distinction between the facts alleged and those proven, I am recommending a lesser penalty.

I have concluded that respondent acted recklessly, fueled by anger, when he drove away from Supervisor Cabrera as she was stepping away from the door. His conduct was rash and had the potential to cause significant injury, even though proof of harm was equivocal. For this serious misconduct, a serious penalty is warranted. For all of the misconduct proven in this incident, including respondent's refusal to obey his supervisor's order and his use of profanity, I recommend a 30-day suspension, the highest penalty that can be imposed under section 16-106 of the Administrative Code short of termination.

Tynia D. Richard
Administrative Law Judge

January 28, 2011

SUBMITTED TO:

JOHN J. DOHERTY

Commissioner

APPEARANCES:

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