Taxi & Limousine Comm'n v. Alvarez

OATH Index No. 924/11 (Dec. 17, 2010), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-43-A (July 12, 2011), **appended**

Petitioner demonstrated that inspector negligently operated city vehicle when he failed to yield the right-of-way and collided with another vehicle in violation of agency rules. ALJ recommended that inspector be suspended for 20 work days.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TAXI AND LIMOUSINE COMMISSION
Petitioner
- against -
RAFAEL ALVAREZ
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Taxi and Limousine Commission (TLC) pursuant to section 75 of the Civil Service Law. Rafael Alvarez, an inspector, is charged with failing to yield the right-of-way to another vehicle and colliding with that vehicle in violation of agency rules (ALJ Ex. 1).

A hearing was conducted on November 17, 2010. Petitioner presented documentary evidence and called the driver of the other vehicle and three TLC witnesses. Respondent testified on his own behalf and called three TLC witnesses. The record was left open until November 24, 2010, for the filing of post-hearing submissions.

I find that respondent negligently operated his city vehicle as charged and recommend that he be suspended for 20 work days.

ANALYSIS

This matter concerns a two-car collision which occurred at approximately 6:40 a.m. on July 8, 2009, at the intersection of 90th Avenue and 138th Place in Queens. It was a clear day (Tr.

10). At the time Ms. Nwachuka was driving her 2001 Lexus four-door sedan west on 90th Avenue, a two-way street. Respondent was driving a 2009 Toyota Prius issued by the TLC and was heading south on 138th Place, a one-way street. At the intersection there is a stop sign on 138th Place for southbound traffic. There is no traffic control device on 90th Avenue to regulate east/west bound traffic (Pet. Exs. 1, 2, 12; Tr. 53-54).

Ms. Nwachuka testified that she is a registered nurse and was on her way to work at Jamaica Hospital, which is several blocks from the scene of the accident (Pet. Ex. 1). She usually leaves at 6:00 a.m. to be at work by 7:00 a.m., and the drive generally takes 45 minutes. Ms. Nwachuka testified that she was taking 90th Avenue, her regular route. The street goes through a residential neighborhood and at the time of the accident she was driving slowly, approximately 15 mph. As she crossed the intersection at 138th Place, she was struck by another car on the passenger side. The impact caused her car to spin around and hit a light pole. Ms. Nwachuka alleged that respondent ran the stop sign (Tr. 13, 17, 20, 23, 38-39, 42).

Respondent testified that when he reached 90th Avenue he stopped at the stop sign and looked both ways and saw no traffic coming. He also testified that "something was obstructing [his] view from the left side" (Tr. 137). He proceeded slowly and with caution into the intersection. A car struck the front driver's side of his vehicle and he lost consciousness for a few seconds. When he came to, respondent radioed TLC about the accident (Tr. 137, 148-49).

Respondent's partner, Inspector Romero testified that respondent came to a complete stop at the stop sign. When they proceeded through the intersection a car came at a "high rate of speed" and hit them. The car came so quickly that they did not have time to react (Tr. 120).

Following the collision, Ms. Nwachuka's vehicle came to stop by a residence located on the southwest corner of 90th Avenue and 138th Place. Her vehicle was on the sidewalk facing the wrong way on 138th Place, towards 90th Avenue. Respondent's vehicle went through the wire fence of the residence on the 90th Avenue side. Both vehicles were damaged beyond repair (Tr. 28, 101; Pet. Exs. 12, 16).

Ms. Nwachuka testified that upon impact her airbag was employed and she experienced severe chest and neck pain. People came out of their homes and to the scene. Ms. Nwachuka testified that when she got out of her car she was "hysterical" and asked respondent several times, "why did you hit me?" (Tr. 23, 26-27, 41).

The police arrived. No summonses were issued to either driver (Tr. 105). In addition, TLC personnel arrived to investigate, interview witnesses, and take pictures. Captain Ng arrived at 7:45 a.m. and testified that he did not observe any unusual factors which would have contributed to the collision (Tr. 53, 63-64). According to Inspector Martinez, Ms. Nwachuka gave several different versions about how the accident occurred (Tr. 125).

Ms. Nwachuka was taken to Jamaica Hospital by ambulance. She was treated for various injuries and was out of work for two months (Tr. 27-30). Respondent and his partner were also injured and out of work for two and three months respectively (Tr. 80, 138-39). Ms. Nwachuka filed a tort action against the City of New York relating to her personal injuries and property damages which is pending (Tr. 36-38).

In a disciplinary proceeding petitioner "has the burden of proving its case by a fair preponderance of the credible evidence." *Dep't of Correction v. Hall,* OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD08-33-SA (May 30, 2008). In order to sanction a civil service employee for misconduct, there must be some showing of fault on the employee's part, either that he acted intentionally or negligently. *Dep't of Sanitation v. Banton*, OATH Index No. 336/07 at 3 (Dec. 1, 2006).

Respondent is charged with failing to yield the right-of-way to another vehicle and colliding with the other vehicle in violation of agency rules 35 (reasonable care of agency vehicles) and 36 (compliance with laws and rules relating to use of agency vehicles). According to petitioner, respondent's actions constitute misconduct because this was a preventable accident.

Both drivers blame the other driver for the accident. At the hearing no expert testimony or other evidence was presented as to which car hit the other or how fast either car was going. It was undisputed that respondent had a stop sign and that Ms. Nwachuka had no traffic control device. Respondent claimed that he stopped at the stop sign and Ms. Nwachuka claimed that he did not.

In support of a finding of misconduct, petitioner cited *Mohammad v. Ning*, 72 A.D.3d 913 (2d Dep't 2010). This decision holds that a driver with the right-of-way is entitled to assume that the other driver will obey the traffic laws requiring him to yield and that a driver who fails to yield after stopping at a stop sign is in violation of Vehicle and Traffic Law (VTL) section 1142(a) and is negligent as a matter of law. *See also Bongiovi v Hoffman*, 18 A.D.3d 686, 687

(2d Dep't 2005) (a driver is negligent where an accident occurs because he fails to "see that which through proper use of [his] senses [he] should have seen").

The fact that respondent may be negligent as a matter of law in a tort action does not automatically demonstrate that he is guilty of misconduct in a disciplinary proceeding. Some unavoidable driving accidents may not be misconduct. *See Dep't of Sanitation v. Gentile*, OATH Index No. 1207/96 at 23 (Feb. 24, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-49-A (July 21, 1998); *see also Dep't of Sanitation v. Williams*, OATH Index No. 2175/01 at 19 (Oct. 26, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD02-63-SA (Sept. 11, 2002) (accident with sanitation truck caused by sudden movement of a parked car is not misconduct, even under the Department's high safety standards).

However, TLC inspectors are required to exercise "reasonable care" when driving a city vehicle, to follow the VTL, and to prevent accidents. The City Vehicle Driver Handbook provides in relevant part:

> **Preventable Accidents.** An accident that is not deemed chargeable by the police may still be assessed as preventable by the agency's Accident Review Committee. The committee shall recommend appropriate disciplinary action to be taken in connection with the violation of New York State Vehicle and Traffic Laws and the Agency's Code of Conduct. Preventable accidents may subject the driver to agency disciplinary proceedings if agency rules have been violated. Preventable accidents may occur because the driver:
>
> - Violated NYS Motor Vehicle Law, regardless of whether the police issued a summons;
>
> - Operated the vehicle inattentively, including failure to exercise defensive driving skills;

(Pet. Ex. 14). Respondent acknowledged that he received this handbook (Pet. Ex. 15).

TLC Deputy Commissioner Venezia testified that he is charged with reviewing accidents for the agency (Tr. 87) and determined that this was a preventable accident (Tr. 96). In addition, Deputy Commissioner Venezia testified that he prepared Interim Order 98-02 which provides in relevant part:

> Preventability refers to whether the driver took all reasonable actions to avoid the accident, including allowing for road conditions and improper practices of other drivers. Preventability is not limited to the violation of traffic laws. Preventable accidents include but are not limited to those in which the driver:
>
> - Failed to yield the right-of-way;
> - Failed to obey traffic signs and signals;

(Pet. Ex. 13). Deputy Commissioner Venezia testified that Interim Order 98-02 was approved by former TLC Commissioner McKechnie (Tr. 91) and is given to all inspectors during their initial training (Tr. 93). Respondent testified that he was not given a copy of the order when he was trained seven years ago (Tr. 139). It was undisputed that prior to this accident inspectors were not given any driver training.

To determine whether respondent engaged in misconduct, I need not make a finding whether either driver was speeding, who hit who first, or whether Ms. Nwachuka had the last clear chance to avoid the accident as alleged by respondent (Tr. 6, 152). Such questions are better left to the trier of fact in the tort action. Moreover, I need not decide whether respondent stopped at the stop sign. For purposes of this decision it will be assumed that respondent stopped before proceeding into the intersection as claimed by him and his partner. Finally, I need not determine whether respondent had knowledge of Interim Order 98-02 because he acknowledged receipt of the City Vehicle Driver Handbook.

At the hearing respondent essentially claimed that after coming to a complete stop, he observed that there was no traffic approaching but that there was something obstructing his view on the left. As a result, he proceeded slowly through the intersection and Ms. Nwachuka came out of nowhere and hit him. I did not find respondent's testimony credible. At the hearing respondent's partner made no mention of an obstruction and respondent was unable to identify what specifically was hindering his view (Tr. 149). Ms. Nwachuka testified that at the time of the collision there were no cars parked on the north side of 90th Avenue which would have blocked respondent's view from 138th Place (Tr. 32; Pet. Ex. 2). Moreover, Captain Ng, who arrived approximately an hour after the accident, testified that he did not observe any unusual factors which would have contributed to the collision (Tr. 53, 63-64). Respondent's trial

testimony was further undermined by three written statements he drafted following the accident wherein he made no mention of an obstruction and stated, "I look and observe it was clear to proceed" (Pet. Ex. 12 at 4, 6, 9). Respondent's explanation that the omission was made because no one asked him whether there was an obstruction (Tr. 145) was not credible.[1] Even if there was an obstruction, respondent had a duty to exercise defensive driving skills to make sure that no one with the right-of-way was approaching before he crossed the intersection.

It was undisputed that the collision occurred on a clear morning and that Ms. Nwachuka had the right-of-way. Moreover, 90th Avenue is only four blocks long (Pet. Ex. 1) and is a wide, two-way street. It seems unlikely that a vehicle travelling on 90th Avenue would be able to go very fast or that it would not be visible from the corner of 138th Place. Under the circumstances respondent's declaration that this was an accident that could not be prevented (Tr. 147) was unpersuasive. The more likely explanation is that respondent was inattentive and did not look carefully to see whether a vehicle was approaching before crossing the intersection. Therefore, petitioner demonstrated that respondent failed to exercise reasonable care resulting in a collision. *Dep't of Sanitation v. David*, OATH Index No. 766/07 at 4 (Jan. 25, 2007), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD07-101-M (Oct. 25, 2007) (sanitation worker's inattention, not a pothole, most likely caused truck to run off the road).

FINDING AND CONCLUSION

Petitioner demonstrated that on July 8, 2009, respondent failed to yield the right-of-way to another vehicle and collided with the other vehicle in violation of agency rules 35 and 36.

RECOMMENDATION

Upon making these findings, I obtained and reviewed an abstract of respondent's work history for purposes of recommending an appropriate penalty. Respondent was appointed to TLC as an inspector on September 1, 2003.

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[1] The photographs of the intersection from Google Maps (Pet. Exs. 2, 3) indicate that on the northeast corner of 90th Avenue and 138th Place there is a three to five foot high decorative brick wall surrounding the residence on the corner. Although not argued, it is conceivable that the wall could partially interfere with a driver's east view of 90th Avenue from the stop sign. However, the wall is along a sidewalk far enough away from 90th Avenue to permit a driver a clear view of traffic before entering the entering the intersection.

Respondent has a minor disciplinary record. On July 21, 2008, respondent accepted a two-day suspension for engaging in a car pursuit wherein he ran through several traffic control devices, stood in front of the fleeing vehicle once it was stopped, and failed to notify his supervisor during the pursuit. Respondent's overall evaluation ratings between 2007 and 2010 range from very good to conditional. Petitioner seeks a 20 work-day suspension (Tr. 263).

Here, respondent has been found guilty of failing to exercise reasonable care with an agency vehicle and failing to comply with rules relating to vehicle use including the duty to follow the VTL and yield the right-of-way. It is notable that this is the second time that respondent has failed to exercise reasonable care while driving a city vehicle.

"It is a well-established principle in employment law that employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it." *Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 13 (Feb. 6, 1990). The theory of progressive discipline is to modify employee behavior through increasing penalties for repeated same or similar misconduct. *Police Dep't v. Schaefer & McGrath*, OATH Index Nos. 1114/99 & 1169/99 (July 2, 1999), *aff'd, sub nom. Schaefer v. Safir*, 281 A.D.2d 163 (1st Dep't 2001). A fair penalty must also take into account the particular circumstances of the incident and individual mitigating factors, as appropriate. *Admin. for Children's Services v. Goodman*, OATH Index Nos. 986/05 and 1082/05 (Aug. 12, 2005) (respondent's lack of a prior disciplinary record is a mitigating factor).

Penalties imposed for accidents involving city vehicles have generally ranged from 8-day suspensions to termination depending on the seriousness of the accidents and other aggravating circumstances. *See e.g.*, *Dep't of Environmental Protection v. Buttacavole*, OATH Index No. 2502/08 (June 12, 2008) (termination for employee who was AWOL, hit a parked car with an agency vehicle, and failed to report the accident); *David*, Civ. Ser. Comm'n Item No. CD07-101-M (eight-day suspension for sanitation worker who drove truck off the road, was insubordinate, and obstructed traffic); *Dep't of Sanitation v. Monahan*, OATH Index No. 540/04 (Nov. 9, 2004) (termination for sanitation worker who lost control of a city vehicle on an exit ramp, flipped the vehicle on its side, and caused property damage); *Dep't of Sanitation v. Mullings*, OATH Index No. 1087/03 (May 20, 2003) (30-day suspension for negligent operation of sanitation truck

which caused two accidents, lying to the investigator regarding one of the accidents, failing to make himself available for a sick leave telephone call, and being AWOL on one occasion); *Dep't of Sanitation v. Guastafeste*, OATH Index No. 658/00 (May 1, 2000), *aff'd*, 282 A.D.2d 398 (1st Dep't 2001) (30-day suspension for negligent operation of heavy equipment that resulted in two accidents and running a stop sign); *Dep't of Sanitation v. Gentile*, OATH Index No. 1207/96 (Feb. 27, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD98-49-A (July 21, 1998) (40-day suspension for negligent operation of truck resulting in pedestrian fatality, given unintentional nature of misconduct and lack of prior record); *Dep't of Sanitation v. Corley*, OATH Index No. 1578/01 (May 31, 2002), *aff'd*, NYC Civ. Serv Comm'n Item No. CD03-02-SA (Feb. 5, 2003) (45-day suspension for four driving incidents including backing a truck through an intersection and crosswalk and hitting a vehicle, following too closely and clipping a tractor trailer, running a red light, and failing to yield to pedestrians in a crosswalk); *Fire Dep't v. Parker*, OATH Index No. 1698/96 (June 20, 1996), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD99-86-SA (Aug. 31, 1999) (termination for EMT who was injured after striking a parked vehicle with ambulance and refused to surrender his shield or submit to a drug test); *Transit Auth. v. Graves*, OATH Index No. 720/91 (June 19, 1991) (termination for transit officer who left post without authorization, drove to a bar while on duty, ran a stop sign while drunk, struck another vehicle and attempted to leave the scene of the accident).

In this instance, respondent's negligence caused a serious accident in which three people were injured and out of work for a period of time as well as significant property damage. Moreover, respondent's actions have left the City of New York subject to liability in a tort action. At the hearing respondent refused to acknowledge any possibility that he was negligent and sought to lay full blame for the collision on the other driver. Also, there is no indication that respondent's prior two-day penalty relating to unsafe driving has had any impact on his recent use of a city vehicle. Taking into consideration the principals of progressive discipline, the relevant case law, and the lack of any notable mitigating factors, the requested penalty of 20 work days (or 28 calendar days) is reasonable.[2]

[2] The Civil Service Law does not speak in terms of calendar or work days. This tribunal has interpreted the maximum suspension under section 75 to be 60 calendar days and usually issues its decisions using calendar days. *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Dorne*, OATH Index No. 1815/01 at 41 (Jan. 17, 2002).

Accordingly, I recommend that respondent be suspended for 20 work days.

Alessandra F. Zorgniotti
Administrative Law Judge

December 17, 2010

SUBMITTED TO:

DAVID YASSKY
Commissioner

APPEARANCES:

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Attorney for Petitioner

TODD RUBINSTEIN, ESQ.
Attorney for Respondent

NYC Civ. Serv. Comm'n Decision, Item No. CD 11-43-A (July 12, 2011)

THE CITY OF NEW YORK
CIVIL SERVICE COMMISSION

In the Matter of the Appeal of:

RAFAEL ALVAREZ
Appellant

-against-

NYC TAXI & LIMOUSINE COMMISSION
Respondent

Pursuant to Section 76 of the New York State Civil Service Law

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APPELLANT PRESENT

DAVID NIDA, ESQ.
REPRESENTATIVE FOR RESPONDENT

STATEMENT

On Thursday, May 26th 2011 the City Civil Service Commission heard oral argument in the appeal of RAFAEL ALVAREZ, Inspector, NYC Taxi and Limousine Commission (TLC), from a determination by the TLC, finding him guilty of charges of incompetency or misconduct and imposing a penalty of **20 DAYS SUSPENSION** following an administrative hearing conducted pursuant to Civil Service Law Section 75.

COMMISSIONERS' FINDINGS:

After a careful review of the testimony adduced at the departmental hearing and based on the record in this case, the Civil Service Commission finds no reversible error and affirms the decision and penalty imposed by the New York City Taxi and Limousine Commission.

NANCY G. CHAFFETZ, *Commissioner/Chair,* Civil Service Commission

RUDY WASHINGTON, *Commissioner/Vice Chair,* Civil Service Commission

MATTHEW W. DAUS, *Commissioner,* Civil Service Commission

CHARLES D. MCFAUL, *Commissioner,* Civil Service Commission

July 12, 2011