Triborough Bridge & Tunnel Auth. v. McAllister

OATH Index No. 1780/12 (Oct. 16, 2012), *adopted*, President's Dec. (Nov. 30, 2012), *appended*

Triborough Bridge and Tunnel Officer wrote and posted a profane and inappropriate note on the employee bulletin board in the Brooklyn Battery Tunnel Service lobby. ALJ recommended a 30-day suspension without pay.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY
Petitioner
- against -
MICHAEL McALLISTER
Respondent

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Triborough Bridge and Tunnel Authority, pursuant to section 75 of the Civil Service Law. The charges allege that respondent Michael McAllister, a Bridge and Tunnel Officer, posted a profane and inappropriate note on the bulletin board of the service lobby of the Brooklyn Battery Tunnel (ALJ Ex. 1).

Following a two-day hearing before me, I find that petitioner established the charges by a preponderance of the credible evidence and recommend that respondent be suspended for 30 days without pay.

ANALYSIS

It is undisputed that respondent took a scheduled and approved vacation between February 9 and 13, 2012 (Resp. Ex. B; Tr. 271-72). He returned to work on February 16, 2012, for the midnight tour, which is from 11:00 p.m. until 7:00 a.m., and was assigned to the C post on the Manhattan-side of the Brooklyn Battery Tunnel (Resp. Ex. C; 278-79). Respondent reported to his post as scheduled and returned to the facility on the Brooklyn-side of the tunnel during his relief break at 1:00 a.m. While he was in the service lobby, he noticed that someone

had posted his leave request status form for the paid holiday he had just taken on the employee bulletin board. The leave request status form has respondent's last name handwritten on it and indicates that on February 10, 2012, his leave for February 13, 2012, had been approved. The form is signed by General Manager Mark Mende, but the signature is illegible (Pet. Exs. 2, 19; Tr. 27-28, 46, 184-85, 255, 277, 279-81). Superintendent Sandrea Smith testified, however, that Mr. Mende's signature is recognizable because he typically signs posted documents (Tr. 47).

Respondent was "very upset and annoyed" about his leave form being posted, so he, in turn, wrote and posted the following note on the bulletin board next to his leave request form (Pet. Exs. 8, 9, 10, 15, 20; Tr. 153, 178, 196, 201, 282).[1] The note reads,

> YOUR MOTHER IS
> A BITCH FOR →
> WHO EVER PUT THIS
> HERE!! AND SHE
> WAS SUCKING MY DICK
> WHILE I WAS ON VACATION!!

(Pet. Ex. 3). The note was positioned on the bulletin board so that the arrow on respondent's note was pointing at his leave request status form. After posting the note, respondent left the facility and reported back to his post on the Manhattan-side of the Brooklyn Battery Tunnel. Several employees passing through the area noticed and read the note. Approximately one hour and fifteen minutes after respondent posted the note, Bridge and Tunnel Officer Daniel Fallon, read it, removed it, crumpled it up, and threw it in the nearest trash can (Pet. Ex. 5; Tr. 28-29, 114-15, 117, 124-25, 155-56, 183-84, 209, 303-04, 364-66, 384).

Bridge and Tunnel Officers submit their requests for leave to the clerk's office and either the operations superintendent or the general manager approves or denies it (Tr. 36-38, 258-59, 272-73, 379). Normally the approval or denial is left in the officer's mail slot (Tr. 260, 379). Respondent testified that he had previously submitted a request for a day off on February 13, 2012. His leave approval was not in his mail slot as is typically the case, but instead was posted on the bulletin board.

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[1] Although there was a two-day hearing on this matter, the charge was undisputed. Respondent admitted to posting the note. As a consequence, I will not be addressing the extraneous testimony in detail.

Respondent testified that earlier in the same month one of his leave request forms had also been posted on the bulletin board. Respondent spoke to Sergeant Canade about it, but he believed the sergeant did not take the matter seriously. Sergeant Canade told respondent that it was probably one of his fellow officers playing a prank on him. Respondent replied, "I don't play like this, Sergeant. I'm bringing this to your attention" (Tr. 261). The Sergeant again said that it was probably just a prank. Respondent requested that his paperwork not be posted on the bulletin board in the future (Tr. 212-14, 261-64). Respondent maintained that he memorialized his conversation with Sergeant Canade in his memo book (Resp. Ex. A). The entry in the memo book states, "Trip / spoke w/ Sgt Canade about post" (Resp. Ex. A). Respondent acknowledged that "trip" referred to his assigned post for the evening and that in general the word "post" refers to an officer's assignment. Nevertheless, he contended that "post" referenced in this memo book entry regarded his leave request being posted on the bulletin board (Tr. 262-64).

Respondent testified that the reason that he was "very upset and annoyed" about this leave form being posted on the bulletin board was because he believed he had taken proper steps to prevent it when he spoke with Sergeant Canade (Tr. 282). When asked what in particular annoyed or frustrated him about it, respondent testified that the form had his name and identification number on it and:

> [w]e have contractors and everybody coming in and out of the building, and my information is right there on display for them to see, and for everybody to see, and it's posted where it shouldn't be posted, as per being in an envelope with my name on it behind the desk or anything. But that's like very annoying to have your stuff just posted out there . . . and embarrassing.

(Tr. 283). Respondent ultimately acknowledged, however, that the only personal information on the form was his last name, which is also incidentally posted on the roll call lists, overtime assignments, and vacation relief schedules posted on the same board. He admitted that he does not mind his name being posted on the other lists on the board (Tr. 37, 55, 97, 312-13). Respondent testified that he regretted posting the profane note, and claimed that he was not thinking rationally at the moment. He intended on taking it down when he returned to the facility for his second relief at 5:00 a.m. (Tr. 207-08, 284).

Respondent testified that his handwritten note was not directed at anybody in particular. Although he did not know who posted the leave form, he "figured" that it was another bridge and

tunnel officer, who had taken it out of his box and put it on the board (Tr. 285, 335, 345). He maintained that he did not find out that Mr. Mende had posted the leave form until after his tour when Officer Peebles, his union delegate, called him at home to ask about the note (Tr. 296, 339). Respondent further denied knowing who had signed the approval form and stated that he did not recognize the signature. Initially, respondent admitted to knowing that either General Manager Mende or Operations Superintendent Smith approves or denies the leave requests, but later clarified that he only learned who did the approvals from witness testimony during this hearing (Tr. 273, 281, 314-16).

Respondent maintained that his handwritten note was not intended to be threatening or menacing, but in hindsight he would agree that it was poor judgment to write and post it. Indeed, he regretted posting the note 10 to 15 minutes afterwards, but he was already on his assigned post on the Manhattan-side of the tunnel (Tr. 286-87, 332, 341). Respondent contended that there was nothing that he could do about his note while he was on post but finally, reluctantly admitted that he could have asked for a personal relief break and gone back to the facility. But, instead he waited until 5:00 a.m. during his second relief break to go back. When he returned to the lobby, his note was no longer posted on the board (Tr. 288, 334, 349, 357).

During an official interview about the incident, respondent stated that he was frustrated that he was not given the same courtesy as other officers by having his leave forms placed in his mail slot and mentioned the prior incident when another leave form had been posted on the board (Pet. Ex. 15; Tr. 336). Mr. Mende maintained during an investigatory interview that he wanted to put the leave form in respondent's mail slot but he was unable to find one with respondent's name on it (Pet. Ex. 10; Tr. 198). Respondent contended that Mr. Mende singles him out and implied that that he put his leave form on the board on purpose (Pet. Exs. 6, 7, 11, 12, 13, 14, 16, 17, 18).

Respondent testified that although he has no problems with Mr. Mende, he believes that Mr. Mende has a problem with him. He recounted that during the summer of 2011, Mr. Mende ordered him to clean out his mailbox on three separate occasions, even though there was basically nothing in his mailbox (Tr. 274-75, 320). Respondent further asserted that in September or October 2011, Officer Peeples had warned him that Mr. Mende was watching him (Tr. 267). In addition, respondent referenced a situation that occurred on September 9, 2011, when respondent was working on the Manhattan-side of the Brooklyn Battery Tunnel. Mr.

Mende had instructed respondent to move some traffic cones. According to respondent, when he went to move the cones, Mr. Mende ran up behind him and was "screaming" at him "do you have a problem with that?" Respondent was "scared" and realized Mr. Mende had a problem with him (Tr. 210-11, 267-68, 327-29, 346-47, 355-56). In his written statement, respondent wrote that he thought Mr. Mende was going to hit him (Pet. Ex. 15; Tr. 328, 356).

I found respondent's testimony to be self-serving and incredible. In analyzing credibility, this tribunal may consider such factors as witness demeanor, consistency of 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 (Feb. 4, 1998), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Respondent's testimony was inconsistent and did not comport with common sense. He appeared to have two parallel theories about the leave form being posted. On one hand, he "figured" that it was another officer who posted it as a joke. Yet, he also maintained that he did not appreciate being treated by management differently than other officers. His first assertion that he believed it was a co-worker playing a prank sounds like a convenient fabrication to minimize his conduct by asserting that his note was intended for another officer, not for Mr. Mende. Respondent also highlighted an entry in his memo book regarding a prior conversation with a Sergeant. Yet, the entry appears to be alluding to his assigned post for the tour, not a posting on the bulletin board. His explanation of his entry is far-fetched and appears contrived to provide mitigation for his inappropriate conduct. In any event, even if he posted the note in response to what he thought was a prank, it would still be unacceptable.

Respondent testified that the note was not meant to be menacing or threatening and that it was not addressed to anyone. While he may have omitted a salutation, the arrow pointing at the posted form, with the phrase "who ever put this here" makes it pretty clear that the note was intended for the person who posted his leave approval form on the board. Respondent unconvincingly testified that he did not know who posted the form or who signed it. His reaction to the note would indicate otherwise. Apparently, respondent's perceived or actual conflict with Mr. Mende triggered his over-reaction to the posting. Respondent's testimony that he did not recognize Mr. Mende's scribbled signature, which is distinctly illegible, was unpersuasive. Moreover, approval of leave could only have come from one of two people, either Mr. Mende,

the general manager, or Ms. Smith, the operations superintendent. Since Mr. Mende signs most of the postings in the facility, it is difficult to believe that respondent was unaware of his signature. Also, respondent's vehement reaction reflects a personal antagonism towards Mr. Mende.

Respondent's testimony that he was embarrassed by having his personal information on the board was nonsensical. Rather than remove the "embarrassing" form, he kept it on the board and wrote and posted an objectionable note with an arrow pointing at the leave form. The fact that he drew more attention to it makes it difficult to believe that he was actually embarrassed by the posting. He was angry, perhaps, but not embarrassed.

It is well settled that whether an expression of disagreement amounts to misconduct in any given case is a factual determination to be made after reviewing the totality of the circumstances. *See, e.g., Dep't of Correction v. Blount*, OATH Index No. 1054/04 at 10 (Jan. 20, 2005), *modified on penalty*, Comm'r Dec. (May 12, 2005). As such, it is necessary to evaluate the substance of the disagreement, the tone of voice, and words used to express an opinion. *Health & Hospitals Corp. (Queens Health Network) v. Smith*, OATH Index No. 2019/08 at 2 (Oct. 17, 2008); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Calderon*, OATH Index No. 1341/04 at 3 (May 28, 2004).

Several witnesses testified that it is not uncommon for Bridge and Tunnel Officers to use profanity on the job, even in the service lobby. Furthermore, no one could recall an incident when someone was ever disciplined for using profanity (Tr. 78, 297, 382). "This tribunal has consistently held that language must be taken in its context, and we acknowledge that language that might be inappropriate in one setting might be acceptable elsewhere." *Dep't of Environmental Protection v. Sutton*, OATH Index No. 565/91 at 3 (Feb. 7, 1991). *See Dep't of Transportation v. Mooney*, OATH Index No. 1026/02 at 7 (Apr. 24, 2002) (holding, "that even assuming that some off-color language may have been used, common sense dictates that under the circumstances, where the words are exchanged between two deck hands at 1:00 a.m. on an empty ferry, some language which might be inappropriate in an office setting would be tolerated as a matter of course and would not be considered misconduct"); *Dep't of Sanitation v. Montagnino*, OATH Index No. 2174/01 at 10 (Jan. 7, 2002) (salty language not unexpected at sanitation garage); *Fire Dep't v. Donofrio*, OATH Index No. 2042/96 at 6 (Oct. 23, 1996) (it was

not misconduct for a firefighter to use mild vulgarity in response to a lieutenant's profane outburst towards the firefighter).

Nevertheless, we have never maintained that an employee is entitled to write and post an exceedingly profane and obscene note on an employee bulletin board. Indeed, prior case law distinguishes between the use of mild profanity that is pervasive in a "workshop" setting and inappropriate obscenities in an office setting which result in a public display and/or is directed at a supervisor. *See Health & Hospitals Corp. (North Bronx Healthcare Network) v. Wolfe,* OATH Index No. 2844/08 at 7 (Sept. 8, 2008) (an employee's use of profanity and calling his supervisor "stupid," "dummy," and "pussy" was found to be fundamentally disrespectful); *Dep't of Sanitation v. Tripplin,* OATH Index No. 1016/07 at 3 (Apr. 5, 2007), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 08-14-M (Feb. 25, 2008) (a computer associate sending his supervisor an e-mail, which was copied to others, calling his supervisor "a liar," was found to be abusive and disrespectful); *Dep't of Environmental Protection v. Golden,* OATH Index No. 1368/04 (Aug. 27, 2004) (laboratory associate failed to establish that inappropriate "shop talk" within the laboratory was so pervasive that it was routinely condoned by supervisors; calling his supervisor an "ass" while pointing to his posterior was considered misconduct); *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital) v. Ramsey*, OATH Index No. 724/04 at 5 (Apr. 16, 2004) (while a certain amount of mild profanity may be permissible and expected in a workshop environment, maintenance worker went too far when he told his supervisor that he did not "know what he is fucking doing"); *Dep't of Sanitation v. Mitchell*, OATH Index No. 1823/00 at 3, 7 (Nov. 3, 2000), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 01-60-SA (July 27, 2001) (sanitation worker found guilty of misconduct for telling his supervisor, "Fuck you. Who do you think you are? You're a piece of S-H-I-T"); *Dep't of Environmental Protection v. Sutton*, OATH Index No. 565/91 at 3 (Feb. 7, 1991) (although cursing may be common among construction laborers, respondent went too far when he referred to his supervisor as "this fucking guy" over the radio); *Dep't of Buildings v. Cortes*, OATH Index No. 577/90 at 8 (Feb. 9, 1990) (finding shop talk defense inapplicable where remarks were made outside a training classroom, not in a hardhat area, and were directed at a director, not a drinking buddy).

It is also necessary to note the context in which this occurred. This was not the result of provocation or a heated disagreement. Indeed, respondent admittedly posted the profane note because he was angry that his leave approval had been posted on the bulletin board. He was

"frustrated" and "embarrassed" because his "personal information" was on display. Yet, there was no social security number, employee identification number, date of birth, salary information, home address or telephone number listed on the form. The only identifying information was respondent's last name and the fact that his leave for February 13, had been approved. Respondent's reaction not only exceeds the bounds of decorum, it was an exceedingly excessive over-reaction tinged with rage.

Respondent testified that he was not thinking rationally at the moment. He implied that it was a temporary lapse in judgment and testified that he regretted posting it shortly after returning to his assigned post. The videotape, however, demonstrates that this was not a rash or impulsive act (Pet. Ex. 8). Respondent entered the service lobby at approximately 1:21:00 a.m. He looked at the bulletin board at 1:21:30 a.m. He appeared to be reading postings on the bulletin board and then moved over to look at some postings on the window next to the board. By 1:25:15 a.m. it was clear that he had seen the posted leave form, as he lifted up his arm and pointed at the board prior to walking away. He then walked across the lobby, turned and went back across the room to a ledge that had papers on it. He looked for a piece of paper and started writing the note at 1:26:06 a.m. He did not immediately scribble something in an explosive and uncontrolled way. Instead, he appeared to be contemplating what he was writing because he paused, looked up, and then went back to writing. He stopped writing the note at 1:28:26 a.m. Respondent read what he wrote and then walked over to the board and posted it at 1:28:33 a.m. before he left the area (Pet. Exs. 8, 9).

The note is fairly terse, only 22 words long with an arrow. Respondent took two minutes and twenty seconds to write the 22 words, draw an arrow, punctuate it with four exclamation points, and cross something out. This is not a momentary lapse, like profanity spewed out of someone's mouth in an instantaneous reaction. Respondent took time to craft and edit his work, electing to cross something out. Clearly, there was thought behind what was written. Unlike a verbal outburst, a profane writing remains after the anger has dissipated. Moreover, this was not a privately written note for one person's view. Respondent publically displayed his vulgar missive for anyone and everyone to see on an employee bulletin board that is frequently checked for overtime assignments and vacation relief listings.

The note remained on the board until 2:45:34 a.m., when Officer Fallon removed it. Respondent pointed out that the note was only posted for 77 minutes and very few people saw it

because it was during the midnight tour. He further asserted that those who had viewed it were not offended by it. It is true that the note was only posted for approximately one hour and fifteen minutes, but that was not due to respondent coming to his senses. It was merely fortuitous that Officer Fallon had the presence of mind to remove the inappropriate note. Officer Fallon testified that the note was "stupid" and should not have been posted, so he took it down (Tr. 122). Although he, himself, did not find the note offensive, menacing or threatening, Officer Fallon acknowledged that it "would be offensive to a boss" (Tr. 122). Office Fallon admitted that he did not believe that respondent meant to be humorous by posting the note (Tr. 119, 122, 126-28, 133, 138).

Respondent also testified that he regretted posting the note 10 to 15 minutes after returning to his post. Yet, he did nothing about it. He reluctantly admitted when pushed during cross-examination that he could have asked for a personal relief break and had someone cover his post while he went back to the facility to remove the note. He did not. Instead, he waited until 5:00 a.m., during his second scheduled relief break. The note, however, was already removed.

Remaining on the post and waiting to deal with the situation later, undermines his "regret" about posting it. It also deflates his contention that this was a momentary lapse of judgment. Regardless of how long the note was posted or how many people saw it the note became the subject of workplace gossip. Several witnesses testified that respondent's co-workers were discussing it by the end of the midnight tour. Respondent should not be commended for it being posted for only 77 minutes. To the contrary, he should be disciplined for writing and posting it to begin with.

I find respondent guilty of misconduct for writing and posting a profane and inappropriate note on an employee bulletin board in the service lobby of the Brooklyn Battery Tunnel on February 17, 2012.

FINDINGS AND CONCLUSIONS

Petitioner established by a preponderance of the credible evidence that respondent posted a profane and inappropriate note on the bulletin board located in the Brooklyn Battery Tunnel Service lobby.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record. Respondent was appointed to his position as a Bridge and Tunnel Officer on August 25, 2003. During his 9-year tenure with the Authority, he has never been formally disciplined.[2]

Petitioner requested that a 60-day suspension without pay be imposed if the charges were sustained. Despite the content of respondent's note, this penalty is excessive under the circumstances. In other profanity cases, the penalties have generally been in the five to ten-day range. *See Admin. for Children's Services v. Goldman,* OATH Index No. 985/12 (July 3, 2012), *adopted,* Comm'r Dec. (July 13, 2012) (10-day suspension for asking a supervisor, "what the fuck is your problem?"); *Dep't of Environmental Protection v. Ginty*, OATH Index No. 1627/07 (Aug. 10, 2007) (six-day suspension recommended for use of profanity towards a member of the public during an arrest); *Admin. for Children's Services v. Rodriguez*, OATH Index No. 264/06 (Mar. 7, 2006), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 06-129-M (Oct. 31, 2006) (10-day suspension reduced to five days by the Civil Service Commission due to employee's 16-year tenure; employee had one unauthorized absence and told a supervisor that "she needed a man" and "should just go fuck herself"); *Dep't of Housing Preservation & Development v. Saliba*, OATH Index No. 1577/06 (July 19, 2006), *adopted*, Comm'r Dec. (Mar. 22, 2007) (10-day suspension imposed on an employee for saying that one of her supervisors "had no balls," and that one of her other supervisors was a "faggot" whose "dick should fall off"; employee's disciplinary record included similar misconduct).

Higher penalties may be imposed based on aggravating circumstances, prior disciplinary history and/or multiple charges. *See Dep't of Sanitation v. Tripplin*, NYC Civ. Serv. Comm'n Item No. CD 08-14-M (Feb. 25, 2008), *modifying on penalty*, OATH Index No. 1016/07 (Apr. 5, 2007) (15-day suspension for e-mail sent to supervisor and copied to the deputy director, stating that the supervisor was a liar); *Health & Hospitals Corp. (North Bronx Healthcare Network) v. Wolfe*, OATH Index No. 2844/08 (Sept. 8, 2008) (25-day suspension recommended for employee who called his supervisor "stupid," "pussy," and "dummy," and asked him to "step

[2] Petitioner provided nine conduct memoranda that were placed in respondent's personnel file, none of which resulted in formal discipline. I did not consider these documents in making the penalty recommendation.

outside," and was insubordinate); *Dep't of Sanitation v. Scope*, OATH Index No. 2199/04 (Mar. 24, 2005) (20-day suspension imposed on a sanitation worker who told two supervisors "to go fuck themselves"; plus insubordination and two other minor charges); *Dep't of Correction v. Brown*, OATH Index No. 1789/01 (Dec. 18, 2001), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 03-33-SA (25-day suspension imposed on a correction officer who hung up the telephone on a captain, slammed the door in the captain's face, called the captain a "motherfucker," and tried to intimidate the captain; penalty exacerbated by respondent's disciplinary history).

This case is unique. The inappropriate use of profane, obscene or disrespectful language in most cases involves a verbal outburst usually in the heat of the moment. Other cases involving written profanity or disrespectful language have occurred in a private e-mail or note that is not widely distributed. Here, respondent's obscene missive, which profanely referenced someone's mother, was posted on an employee bulletin board. Although respondent denied addressing the note to a particular person, I found that it was more than likely intended for the general manager. Regardless of the intended recipient, respondent should never have written and posted it.

Given respondent's lack of a prior disciplinary record, the fact that this is a single instance, and the prior case law, a 60-day penalty is not warranted. However, a stern penalty is necessary. The note is particularly disturbing not only for its content but for respondent's excessively hostile reaction in the face of negligible provocation. Posting this note demonstrated more than a momentary lapse of judgment. It established that respondent has a lack of control and a volatile temper. Respondent needs to be mindful of his obligations as a bridge and tunnel officer. He should be not only vigilant in his duties but controlled and respectful. Respondent was neither controlled nor respectful. Despite respondent's unblemished disciplinary history, his bad judgment, and unrestrained hostility in writing and posting this note warrants a significant penalty.

Accordingly, I recommend that respondent be suspended without pay for 30 days.

Kara J. Miller
Administrative Law Judge

October 16, 2012

SUBMITTED TO:

JAMES FERRARA
President

APPEARANCES:

VICTOR MUALLEM, ESQ.
Attorney for Petitioner

LAW OFFICE OF STUART SALLES
Attorneys for Respondent
BY: JONATHAN FACTOR, ESQ.

President's Decision (Nov. 30, 2012)

THE CITY OF NEW YORK
OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
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In the Matter of

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY
Petitioner,

-against-

PRESIDENT'S DECISION

MICHAEL McALLISTER,
Respondent.
----------)(

I have received and reviewed the Report and Recommendation dated October 16, 2012, issued by the Honorable Kara J. Miller, Administrative Law Judge ("ALJ") of the City of New York Office of Administrative Trials and Hearings ("OATH"), the transcript of the hearing held before the ALJ and the exhibits introduced at the hearing. I have also reviewed the comments on the report submitted by Jonathan Factor, Esq., attorney for Bridge and Tunnel Officer Michael McAllister ("Respondent"). In the Report and Recommendation, the ALJ concludes that on February 17, 2012, Respondent posted a profane and inappropriate note on the bulletin board located in his workplace at the Brooklyn-Battery Tunnel, now the Hugh L. Carey Tunnel, and recommends that Respondent be subject to a 30 day suspension without pay for the misconduct proven at the hearing.

In determining the appropriate penalty, the ALJ carefully analyzed prior cases and determined that because the proven facts of this case were unique, a penalty of 30 days was appropriate. The ALJ determined that the proof demonstrated a number of aggravating factors that were considered in her penalty recommendation. Among these factors were the following; that it was more than likely that Respondent intended to address the profane note to his supervisor, the General Manager of the facility; that Respondent publicly displayed the offensive note in a common area of the facility for all to see; that the content of the note was disturbing and revealed Respondent's "…excessively hostile reaction in the face of negligible provocation", in addition to a "…lack of control and a violent temper." Also considered by the ALJ was the fact that Respondent's testimony at the hearing was self-serving and incredible. The ALJ took into consideration Respondent's lack of prior discipline, but further noted that:

> Respondent needs to be mindful of his obligations as a bridge and tunnel officer. He should be not only vigilant in his duties but controlled and respectful.

A hearing at OATH on the charges against the Respondent was held on July 31, 2012 and continued on August 20, 2012. Closing arguments were heard at the conclusion

of the case on August 20, 2012. I concur with the ALJ that the hearing record amply proves the charges against the Respondent. I also concur with the ALJ's reasoning in her determination that a suspension of 30 days is warranted under these facts.

On October 16, 2012, the ALJ sent a letter to the Authority and to Respondent's attorney, Jonathan D. Factor, Esq., instructing that Respondent's counsel is entitled to comment on the OATH report and recommendation prior to my final action and that the Authority should notify Mr. Factor of the time period permitted for such comment. The Authority complied in a letter to Mr. Factor dated October 18, 2012 and Mr. Factor submitted a typewritten, six-page comment for my consideration. I have reviewed the submission by Respondent's attorney wherein it is urged that I reject the findings of the ALJ and surprisingly contends, that despite the Respondent admitting to the misconduct alleged, the charges should have been dismissed by the ALJ. In the alternative, Mr. Factor requested that a penalty of 10 days would be appropriate in this case.

In the submission, Respondent's attorney asserts that the Respondent had a momentary lapse in judgment and that the charges only came into existence because the Respondent self reported it. The submission also questions whether the mere act of posting the note at the time it was posted, when the note was removed from the bulletin board by another bridge and tunnel officer some 77 minutes later, is actionable as employee misconduct. The submission also notes Respondent's nine years of employment without prior disciplinary charges.

I have considered all of the comments raised by Respondent's counsel, including those not cited in this decision. However, I cannot agree with the assertions raised, as the comments give me no reason to second-guess the credibility and proof determinations made by the ALJ who heard all of the evidence and witnessed the demeanor of the witnesses who testified. In sum, I do not find Respondent counsel's arguments persuasive and I support the recommendation of the ALJ.

As the President of the Triborough Bridge and Tunnel Authority I have the authority, pursuant to Section 75 of the New York State Civil Service Law, to accept or reject the recommendation of the OATH Judge. My review of the hearing transcript, the Report and Recommendation and the evidentiary exhibits in this case, finds that there exists substantial evidence for me to accept the recommendation of the OATH ALJ to require that the Respondent serve a 30 day suspension without pay.

The Respondent's actions involved poor judgment, conduct unbecoming his position, and exhibiting hostility and anger that was extremely disproportionate to any perceived slight he believes he experienced. After reviewing the transcript, it is clear that the Respondent has displayed little or no remorse for his conduct, nor taken responsibility for his misconduct. It is my hope that, going forward, Respondent will be mindful of the fact that, as a bridge and tunnel officer, he is employed as a peace officer of New York State, with all of the rights, duties and responsibilities attendant to this public office. A bridge and

tunnel officer must maintain a professional demeanor, be in control of his or her emotions and be respectful during his or her interactions with supervisors, fellow officers and the general public. Nothing less is acceptable, nothing more is required. The 30 day penalty imposed should chasten the Respondent to comport his behavior to that which is expected of him as a bridge and tunnel officer of the Triborough Bridge and Tunnel Authority.

Therefore, it is my determination, given the substantial evidence to support a finding that the Respondent is guilty of serious misconduct, that the penalty of a 30 day suspension without pay is appropriate and not shocking to one's sense of fairness.

I direct that Respondent be suspended from his employment without pay for 30 days.

Under the provisions of Section 75 of the Civil Service Law, the Respondent is entitled to appeal from this determination by application either to the Civil Service Commission or to a court in accordance with the provisions of Article 78 of the Civil Practice Law and Rules. If Respondent elects to appeal to the Commission, such appeal must be filed in writing within twenty (20) days of receipt of this determination. A decision of the Commission is final and conclusive.

Dated: November 30, 2012
New York, New York

James Ferrara
President

cc. OATH
Jonathan D. Factor, Esq.
Respondent, Michael McAllister