

# *Dep't of Environmental Protection v. DeCoursey*

OATH Index No. 666/12 (Jan. 31, 2012)

Respondent charged with being insubordinate and speaking inappropriately to a supervisor. Judge found that petitioner failed to establish the charges by a preponderance of the credible evidence and recommended that the charges be dismissed.

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

*In the Matter of*  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
*Petitioner*  
*- against -*  
**BARRY DeCOURSEY**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**KARA J. MILLER**, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Environmental Protection, pursuant to section 75 of the Civil Service Law. The charges allege that respondent Barry DeCoursey, a sewage treatment worker, was insubordinate and spoke inappropriately to a supervisor (ALJ Ex. 1).

Following a hearing before me on December 15, 2011, I find that petitioner failed to establish the charges by a preponderance of the credible evidence and recommend that the charges be dismissed.

### **ANALYSIS**

Respondent, a 17-year employee of the Department, was assigned to work as a sewage treatment worker, in the dewatering building on Ward's Island on May 17, 2011. When respondent reported to work for his 7:00 a.m. shift that day, the facility was shut down due to a problem that had developed overnight involving the effluent water supply. Since effluent water

is a crucial component of the dewatering facility's operation, it was necessary to determine the cause of the problem and correct it before the facility could become functional. Charles Ray, a senior sewage treatment worker, was assigned to troubleshoot the problem. Mr. Ray directed respondent, who was assigned to work in the scale room, to clear the clogs that had developed in the drains while he and senior sewage treatment worker David Garcia investigated the situation (Resp. Exs. A, E; Tr. 42, 50-51, 102).

Sometime between 8:00 and 8:30 a.m. the underlying problem, a faulty valve in the Sharon Building, was corrected. The facility, however, was not operational for another two hours due to the accumulated debris that had built up while the system was down. Around 9:00 a.m., respondent went to the control room of the dewatering facility to submit his production totals from the previous day. Mr. Garcia, who had returned to the control room after accompanying Mr. Ray during the investigation, informed respondent that the effluent water problem had been corrected. While they were engaged in a discussion, Deputy Plant Chief Michael Glasgow entered the control room and questioned Mr. Garcia and respondent regarding the problem with the effluent water supply. Since Mr. Garcia had worked in the dewatering facility for only a short time, respondent answered Mr. Glasgow's questions. Unfortunately, their conversation devolved into a disagreement (Tr. 14-15, 52-53, 102).

Mr. Glasgow testified that he had gone to the dewatering facility to inform the dewatering personnel that the effluent water flow problem had been corrected. When he entered the control room, he was unaware that Mr. Garcia and respondent, who were engaged in a conversation, already knew that the problem had been resolved. Believing that they were not working and just chatting in the control room, he asked why they were not doing anything. Respondent told Mr. Glasgow that it was not his job to correct the problem and asked if he thought that they were not working. Mr. Glasgow testified that respondent "was being very smart" (Tr. 16). Annoyed with respondent's attitude, Mr. Glasgow retorted that he indeed thought that they were not doing anything. In his opinion they should not have been talking in the control room, instead they should have been trying to troubleshoot the problem (Pet. Ex. 2; Tr. 14-17).

Mr. Glasgow testified that he wanted Mr. Garcia and respondent to accompany him to the Sharon Building so that he could show them the problem with the valve in order to prevent it

from occurring again. Mr. Glasgow, who was only recently assigned to Ward's Island, was unaware that the sewage treatment workers union had entered into an agreement with management regarding the Sharon Building which prohibited the workers from entering the building until unsafe work conditions were corrected (Pet. Ex. 2; Tr. 12, 18-19, 28).

Mr. Glasgow testified that while he was trying to explain that he wanted them to be aware of the problem so that they can avoid it in the future, respondent said "I don't have to stay here for this" and walked towards the door (Tr. 17, 20). Mr. Glasgow maintained that he ordered respondent to stay in the control room because they were not finished with their discussion. He specifically said to respondent, "do not leave; come back," but respondent kept walking. Mr. Glasgow also stated to respondent, "I need you to come back to the control room" (Tr. 19). Mr. Glasgow testified that he directed respondent five to six times to come back but respondent disregarded his orders. In addition, he told Mr. Garcia to order respondent to stay in the control room, but respondent did not listen to Mr. Garcia either (Pet. Exs. 2, 3; Tr. 17, 19-20, 30).

Not surprisingly, respondent's version of events differed from Mr. Glasgow's. Respondent contended that Mr. Glasgow "harassed" him, "talked down" to him, and "belittled" him (Tr. 49). Respondent testified that Mr. Glasgow asked them about a valve in the Sharon Building. When neither Mr. Garcia nor respondent were able to answer his question, Mr. Glasgow became "irate" and complained that none of the operations workers in the dewatering facility knew about this valve (Tr. 53). Respondent tried to explain that a union agreement prevented them from entering the Sharon Building, but this further irritated Mr. Glasgow. Respondent testified that Mr. Glasgow became louder and accused them of "not having pride in [their] jobs" (Tr. 54). Mr. Glasgow further stated that if they had pride in their work, they would follow the contractors who were working on the effluent water problem around the entire property on Ward's Island to help troubleshoot the problem. Respondent stated that he did not think it was his job to follow the contractors and if his employer wanted him to troubleshoot these problems, he would need to be trained. According to respondent his comments only further angered Mr. Glasgow (Resp. Ex. A; Tr. 29, 53-54, 81, 102).

Respondent asked Mr. Glasgow for clarification to see if he was actually asking Mr. Garcia and him to leave their work stations to follow the contractors. According to respondent, Mr. Glasgow confirmed that was exactly what he was asking. Respondent maintained if he left

his station, he would be disciplined by his supervisor for leaving his post and if he stayed on his post, he would be disciplined by Mr. Glasgow. He felt he was in a “catch 22” and decided that he should have union representation (Pet. Ex. 3; Resp. Ex. A; Tr. 30, 55-57, 82-84).

Respondent testified that he knew that he was entitled to union representation during his conversation with Mr. Glasgow because he used to be involved in the union and had done research on line. Respondent contended that he is very aware of his “Weingarten rights.”<sup>1</sup> Respondent told Mr. Glasgow that he saw where their conversation was heading so he was going to leave to call his union representative. Mr. Glasgow started screaming at him “where are you going?” Respondent replied that if he stayed to continue this conversation, he knew he would be facing disciplinary charges. Respondent told Mr. Glasgow that he was invoking his Weingarten rights. Meanwhile, Anthony Obadeyi, another sewage treatment worker, entered the control room and, along with Mr. Garcia, observed the confrontation between Mr. Glasgow and respondent (Pet. Ex. 3; Resp. Ex. A; Tr. 19, 26, 30, 55-57, 82-84).

Respondent indicated that he felt intimidated by Mr. Glasgow because he was waving his arms and yelling at him. Respondent left the control room to use the telephone in the hallway to call the union. He testified that when he turned around, Mr. Glasgow was “literally in my face; I mean we couldn’t put a piece of paper between our noses” (Tr. 58). Respondent maintained that Mr. Glasgow chest bumped him three times. He told Mr. Glasgow to go away, but he refused. There was no one around to witness the confrontation, so respondent screamed out “this guy’s bumping my chest” and hung up the phone. Respondent immediately returned to the control room to tell Mr. Garcia what was taking place and Mr. Glasgow followed him, waving his finger in respondent’s face and “screaming” (Resp. Ex. A; Tr. 58-59, 86-87, 106).

According to respondent, Mr. Glasgow was incensed. He was yelling and cursing at him. Respondent told Mr. Glasgow not to talk to him in that tone but Mr. Glasgow said, “he will

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<sup>1</sup> The New York City Office of Collective Bargaining applied *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), to find that public employees are entitled, under the NYC Collective Bargaining Law, to union representation during an investigatory interview which may reasonably lead to discipline. See *Ass’t Deputy Wardens v. City of New York*, 71 OCB 9 (BCB 2003) (Feb. 26, 2003). In addition, similar rights are granted by statute to civil servants pursuant to section 75(2) of the Civil Service Law, which entitled employees to representation at the time of questioning if they are a potential subject of disciplinary action. Civ. Serv. Law § 75(2) (Lexis 2012). However, it is unlikely that respondent would have been able to invoke his “Weingarten rights” during this particular incident, since he was not being questioned for the purpose of being disciplined. Cf. *Dep’t of Environmental Protection v. Ebanks*, OATH Index No. 263/05 (Feb. 10, 2005) (respondent was entitled to union representation when summoned to a conference with several supervisors to discuss an earlier outburst).

fucking talk to [respondent] as he wishes, that this is still America” (Tr. 59). At about this point during the argument, Mr. Ray appeared in the control room. Respondent told Mr. Ray that Mr. Glasgow had chest bumped him three times. He complained that it was “workplace violence” and that he would be filing a complaint with management (Tr. 59, 88). Mr. Glasgow responded, “do whatever the hell you want to do . . . if you were a real fucking man, you would come outside and follow me” (Resp. Ex. E; Tr. 59).

Mr. Ray stepped in to intervene because Mr. Glasgow was making threatening gestures and taunting respondent. He separated them and guided Mr. Glasgow down the hallway to the elevator. When the elevator arrived, Mr. Glasgow looked at respondent and said, “go fuck yourself” (Resp. Exs. A, E; Tr. 126). During the ride in the elevator, Mr. Glasgow kept muttering to himself “fucking punk” (Resp. Ex. E; Tr. 126). As they exited the elevator, they saw the maintenance engineer. Mr. Glasgow started complaining about respondent and told him that respondent was “out of line” (Tr. 127). Mr. Ray intervened and said to Mr. Glasgow, “I just saw you call this man out and curse at him” (Resp. Ex. E; Tr. 127). Mr. Glasgow became even angrier and started “screaming” at Mr. Ray, accusing him of being on respondent’s side. Mr. Ray responded that he was not on anyone’s side but was only relating what had happened (Resp. Ex. E; Tr. 127).

Respondent filed a workplace violence complaint shortly after the incident. Because he did not receive a response, he followed up after attending a workplace violence training session. Respondent eventually re-filed the complaint. Less than a week after filing the complaint, respondent was served with disciplinary charges. Mr. Glasgow was also served with charges and was subsequently disciplined for challenging respondent to a fight (Resp. Exs. B, F; Tr. 63-66, 92, 145-149).

Respondent was charged with refusing to obey Mr. Glasgow’s order to return to the control room in violation of rule E.5 of the Uniform Code of Conduct, which requires employees to obey all lawful orders of their superiors (ALJ Ex. 1). In order to establish insubordination, the petitioner must prove, by a preponderance of the credible evidence, three elements: first, that an order was, in fact, communicated to respondent; second, that the order was clear and unambiguous in its content; and, third, that having heard a clear and unambiguous order, the respondent willfully refused to obey. *Health & Hospitals Corp. (Woodhull Medical & Mental*

*Health Ctr.) v. Muniz*, OATH Index No. 1666/05 at 8 (Oct. 17, 2005). *See also, Dep't of Sanitation v. Dobie*, OATH Index Nos. 2092-95/07 at 8 (May 2, 2008).

The question is whether or not Mr. Glasgow ever issued an order. While an order need not be made in definitive language containing the word "order," the language used should be clear and unambiguous. *Dep't of Environmental Protection v. Salinas*, OATH Index No. 1020/04 at 5 (Nov. 15, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-16-SA (Jan. 9, 2006), *citing Human Resources Admin. v. Aguirre*, OATH Index No. 1734/00 (Sept. 14, 2000); *Police Dep't v. McKeon*, OATH Index No. 736/90 (Mar. 29, 1990). Mr. Glasgow is the only one who contended that he ordered respondent to remain in the room. He testified that while respondent was still in the room, he said, "do not leave, come back" (Tr. 19). Mr. Glasgow maintained that he directed respondent to remain in the control room five or six times (Tr. 20).

Though respondent acknowledged that Mr. Glasgow asked him where he was going when he left to call his union representative, he denied that Mr. Glasgow had ever said, "stay here" or "do not leave the room" (Tr. 84). Indeed, respondent maintained that Mr. Glasgow never ordered him to stay in the control room (Tr. 84-85).

Mr. Obadeyi, who entered the control room during the confrontation, testified that he observed Mr. Glasgow and respondent arguing. Respondent walked out of the room, stating that it was a union issue and that he was calling his union representative. Mr. Glasgow said "I want you to come back; I'm still talking to you" (Tr. 30). Respondent did not return and kept walking. Mr. Obadeyi further testified that Mr. Glasgow said "I order you to come back, you can not walk out on me" but respondent had already left the room to call the union (Tr. 30).

Mr. Garcia, who was present in the control room during the entire incident, testified that when respondent left the control room to call his union representative, Mr. Glasgow said in an angry, loud voice, "where are you going," "I'm talking to you" (Tr. 105). Mr. Garcia testified that he recalled Mr. Glasgow asking where respondent was going and before he said anything else, respondent was already outside in the hallway. When respondent left the room, Mr. Glasgow "chased after respondent in an angry huff" (Tr. 105). Mr. Garcia overheard a loud argument in the hallway, but he did not see what took place (Resp. Ex. D; Tr. 104-06, 112-13). Mr. Garcia further testified that Mr. Glasgow never ordered him to direct respondent to stay in the control room (Tr. 114).

Mr. Ray was not present for the initial argument and only witnessed what occurred once Mr. Glasgow and respondent returned to the hallway. He did not see Mr. Glasgow chest bump respondent, but he testified that Mr. Glasgow was standing next to respondent when he accused him of chest bumping him and Mr. Glasgow never denied it (Tr. 126, 130).

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. *Department 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 has a very strong interest in the outcome of this case, yet his testimony was corroborated by Mr. Garcia and Mr. Obadeyi. Mr. Garcia candidly acknowledged that he had a problem with Mr. Glasgow in the past, when Mr. Glasgow ordered him to supervise someone in the same title as him. Mr. Garcia testified that he tried to explain to Mr. Glasgow why he could not supervise the other employee, but Mr. Glasgow would not listen to him. He stated that Mr. Glasgow "got up in his face," acting "thug-like" (Tr. 107). Mr. Garcia testified that he has worked for the Department for 26 years and that he had never had a supervisor approach him like that. Mr. Garcia was later served with disciplinary charges for insubordination, but the charges were eventually withdrawn (Tr. 106-08, 112). Although Mr. Garcia acknowledged that Mr. Glasgow had caused him some trouble in the past, he insisted that he was being truthful in describing what occurred between Mr. Glasgow and respondent (Tr. 110-13).

Despite having had a previous unpleasant encounter with Mr. Glasgow, for the most part Mr. Garcia appeared credible. Moreover, his testimony was for the most part corroborated by Mr. Obadeyi, who appeared to be a neutral eyewitness. Interestingly, Mr. Obadeyi was the only witness to hear Mr. Glasgow issue an order for respondent to return to the control room, but he emphasized that Mr. Glasgow said this after respondent had walked out of the room.

Mr. Obadeyi also testified that Mr. Glasgow stated at one point, "I want you to come back; I'm still talking to you." Mr. Obadeyi, however, also testified that he heard Mr. Glasgow order respondent to stay in the room only once and that was after respondent had already left. It is not clear whether Mr. Obadeyi was referring to two different statements, "I want you to come back" and "I order you to come back," made at two different points in the conversation, or if he

was paraphrasing only one statement that he heard after respondent had already left the room. The lack of clarity was exacerbated by Mr. Obedayi's thick accent which made it somewhat difficult to follow what he was saying. Furthermore, Mr. Obedayi's written statement differed from his testimony. In the written statement, Mr. Obedayi indicates that Mr. Glasgow said, "I am still talking to you, it is an act of disrespectful [sic] of you walking away from me" (Pet. Ex. 3). Mr. Obedayi's statement describes Mr. Glasgow's frustration with respondent, but it falls short of establishing that Mr. Glasgow ordered respondent to remain in the control room. A contemporaneous written statement tends to be more reliable than one's recollection months after the incident. Mr. Obedayi's statement was written two days after he observed the disagreement, in contrast to his testimony which was given seven months later. It is noteworthy that Mr. Obedayi's written statement does not indicate that Mr. Glasgow ever ordered respondent to remain in the control room.

Mr. Glasgow was far less credible than the other witnesses regarding this incident. He was evasive and vague while he was testifying. Despite numerous requests for him to speak louder, he continued to mumble his testimony. He looked very uncomfortable testifying and at times was non-responsive. It is of some consequence that Mr. Glasgow also has an interest in the outcome of the proceeding. He was disciplined for misconduct with respect to the same altercation. Notably, Mr. Glasgow initiated the confrontation and challenged respondent to a fight. In addition, he used profanity and lost his temper when he thought his authority was being challenged. Overall he was not a reliable witness and his credibility was negatively impacted by his aggressive role in this incident.

This was a disagreement borne out of miscommunication and arrogance. Both men were responding to perceived disrespect causing their conversation to escalate into a shouting match which unfortunately got out of hand. Petitioner failed to convincingly establish that Mr. Glasgow issued an order. Even if Mr. Glasgow did issue an order, it is unclear that respondent was still in the room when it was issued. The first element in establishing insubordination is to demonstrate that an order was in fact clearly communicated to respondent. This has not been established. Asking respondent "where are you going?" does not constitute an order. Accordingly, this charge should be dismissed.



Respondent was additionally charged with violating rule E.5 of the Uniform Code of Conduct, engaging in conduct prejudicial to good order and discipline by using improper language towards Mr. Glasgow. Specifically, respondent is charged with misconduct for stating that it was not his job to look for the cause of the effluent water problem (ALJ Ex. 1).

It is well settled that not every disagreement with a supervisor, or expression of discontent, is subject to discipline, even when voices are raised and emotions are vented. *Health & Hospitals Corp. (Woodhull Medical and Mental Health Ctr.) v. Freeman*, OATH Index No. 1399/06, at 9 (July 20, 2006). It is permissible to disagree with a supervisor so long as the disagreement remains within the bounds of decorum and discretion. *Health & Hospitals Corp. (Kings Co. Hospital Ctr.) v. Anatua-Bichotte*, OATH Index No. 1947/11 at 6 (Oct. 13, 2011); *Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Thomas*, OATH Index No. 531/04 at 6 (May 4, 2004).

Whether an expression of disagreement amounts to deliberate disobedience in any given case is a factual determination to be made after reviewing the totality of the circumstances. *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. *See Health & Hospitals Corp. (Queens Health Network) v. Smith*, OATH Index No. 2019/08 at 2 (Oct. 17, 2008); *Health & Hospitals Corp. (Woodhull Medical and Mental Health Ctr.) v. Calderon*, OATH Index No. 1341/04 at 3 (May 28, 2004).

Mr. Glasgow and respondent were arguing, but there is no evidence that respondent was making threats or using profanity. The same, however, can not be said of Mr. Glasgow, who was cursing at respondent and challenging him to a physical altercation. Indeed, respondent did not pursue the argument and actually walked away to make a telephone call. Unfortunately, walking away escalated the incident rather than diffused it. Considering the totality of the circumstances, respondent's statement that, "it is not my job," does not constitute misconduct. *See Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. McKenzie*, OATH Index No. 740/11 at 6 (Mar. 9, 2011). Accordingly, this charge should be dismissed as well.

**FINDINGS AND CONCLUSIONS**

1. Petitioner failed to establish by a preponderance of the credible evidence that respondent refused to obey an order from a superior to return to the control room on May 17, 2011.
2. Petitioner failed to establish by a preponderance of the credible evidence that respondent engaged in conduct prejudicial to good order and discipline by using improper language towards a supervisor on May 17, 2011.

**RECOMMENDATION**

I recommend that the charges be dismissed.

Kara J. Miller  
Administrative Law Judge

January 31, 2012

SUBMITTED TO:

**CARTER H. STRICKLAND, JR.**  
*Commissioner*

APPEARANCES:

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