

Health & Hospitals Corp.
(Lincoln Medical & Mental Health Ctr.)
v. Lopez

OATH Index No. 300/13 (Mar. 12, 2013)

Petitioner established that an institutional aide at a hospital repeatedly punched his supervisor in the chest after threatening him. Considering the lack of provocation and type of force used, termination of employment is recommended.

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

In the Matter of
**HEALTH AND HOSPITALS CORPORATION
(LINCOLN MEDICAL & MENTAL HEALTH CENTER)**
Petitioner
-against-
ELLIOT LOPEZ
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Health and Hospitals Corporation (“HHC”), pursuant to section 7.5 of the Personnel Rules of the Corporation. Respondent Elliot Lopez, an institutional aide employed at Lincoln Medical and Mental Health Center (“the hospital”), is charged with threatening and assaulting his supervisor, Miguel Alvarez, on April 5, 2012, as well as refusing to complete a work assignment (ALJ. Ex. 1).

A hearing was conducted before me on two dates in January 2013. Petitioner presented four witnesses: Mr. Alvarez; Adriana Bridgers, a hospital police lieutenant; Jack Jimenez, Associate Director of Materials Management; and Gayle Lewis, Associate Executive Director of Purchasing. Respondent testified in his own behalf and also presented Miguel Falcon, a hospital aide and the shop steward for Local 420; Roberto Cosme, a housekeeping aide; and Frank Lambright, a hospital police officer.

As set forth below, I find that most of the specifications are sustained and recommend that respondent's employment be terminated.

ANALYSIS

It is undisputed that respondent and Mr. Alvarez were both working at the hospital on April 5, 2012, when they had a discussion concerning a work assignment. The parties differ sharply on whether anything else occurred. Since 2010, respondent has been an institutional aide in the Materials Management Division, Department of Central Stores. Mr. Alvarez has been the Coordinating Manager for Materials Management for approximately ten years. Central Stores, which is located in the hospital's basement, is where supplies and other materials are stored (Tr. 315). Respondent's duties include transporting supplies from the storage area to various areas within the hospital (Tr. 351; Pet. Ex. 4). His direct supervisors are Mr. Santana, Mr. Blazer, and Mr. Ricks; Mr. Alvarez is their supervisor (Jimenez: Tr. 54, 55; Alvarez: Tr. 142; Lopez: Tr. 350).

On April 5, respondent was assigned to deliver supplies to areas 7C and 10A (Resp. Exs. B, C). Mr. Alvarez testified that he learned in the early afternoon that area 10A had not received its supplies. He did not see respondent that afternoon until about 3:30 p.m., when respondent entered the Central Stores area. Central Stores is a large open area, behind a sliding grate, but it also has cubicles and offices. Mr. Alvarez was inside his office when he observed Mr. Santana question respondent about the 10-A assignment. Respondent's voice became loud (Tr. 149, 151). Mr. Alvarez testified, "I think he refused to do the job," and "I imagine that he didn't want to do the job" (Tr. 150, 151). He conceded, however, that he was "not sure what [respondent] was saying." In his written statement, taken on April 5 by hospital police, Mr. Alvarez wrote that he heard respondent tell Mr. Santana, loudly, that some one had taken his "paper" and he was not going to do any work (Pet. Ex. 3). The "paper" referred to the work assignment sheet that is given to institutional aides in Central Stores; it lists the jobs that aides are to do, for each location within the hospital (Resp. Ex. B).

Mr. Alvarez testified that, upon hearing the conversation between respondent and Mr. Santana, he approached respondent, holding the work assignment sheet for area 10A (Resp. Ex. B), and asked what the problem was. Respondent just walked away, talking loudly (Tr. 204).

Mr. Alvarez testified that he “thought” respondent was threatening him, but he also acknowledged that he could not hear everything respondent said and did not recall what respondent said (Tr. 151).

Respondent acknowledged speaking to Mr. Alvarez, but denied refusing to do the 10A assignment. He testified that he needs his work assignment sheet (Resp. Ex. B) to complete his deliveries. On that day, he had left his assignment sheet in one of the black bins which he uses to stack and transport supplies. He believed that one of his coworkers had taken the bin by accident (Tr. 352-53). He told Mr. Alvarez that if Mr. Alvarez gave him the assignment sheet, he could complete the job (Tr. 324). Respondent denied telling Mr. Alvarez that he did not want to do the work, but said Mr. Alvarez still threatened to write him up (Tr. 324).

Respondent also denied threatening Mr. Alvarez, or even speaking in a loud voice, although he acknowledged that he had a “deep voice,” which “might intimidate a person” (Tr. 327).

Mr. Alvarez and Mr. Santana alerted Mr. Jimenez of the situation. Respondent testified that Mr. Jimenez told him to go home, but when he realized that Mr. Cosme had overheard that directive, instead directed respondent to his office (Tr. 326, 327, 364). Similarly, Mr. Cosme testified that between 3:30 p.m. and 4:00 p.m., he was in Central Stores to pick something up and saw respondent asking for an assignment and the director telling him to go home (Tr. 279). Mr. Cosme did not hear anything else, because he kept walking (Tr. 279-80, 285).

Whatever the initial conversation between respondent and Mr. Jimenez, it was undisputed that respondent and the two supervisors met in Mr. Jimenez’s office, as directed. Mr. Alvarez testified that respondent threatened him on the way to Mr. Jimenez’s office, which respondent denied. According to Mr. Alvarez, respondent walked directly behind him on the way to the office. On the way, “that’s when he threaten me and saying that he was going to wait for me outside. He going to kick my behind” (Tr. 154). Asked whether respondent said this in English or Spanish, Mr. Alvarez said he was not sure, but believed it was in English (Tr. 154).

However, in his statement to hospital police, Mr. Alvarez wrote that respondent called him a “pendejito” and said that “he was going to wait for me outside and bust my behind, ass. ‘Rompe me el culito’” (Pet. Ex. 3). Further, in an e-mail to Mr. Jimenez, also written contemporaneously, Mr. Alvarez recalled these particular comments (Pet. Ex. 10). Mr. Jimenez

testified that he does not know Spanish, but that he heard the men speaking loudly in Spanish and believed they were arguing. He did not hear respondent make a threat in English (Tr. 67-69, 105-06).

Respondent denied threatening Mr. Alvarez during the walk, or at any time, and said he speaks Spanish “only a little bit” (Tr. 328). He did, however, indicate that he spoke Spanish when he submitted an application to Central Stores prior to his transfer there in 2010 (Tr. 360; Pet. Ex. 21). He testified that he did not know what “pendejito” means but that “rompeme el colito” means “break my ass” (Tr. 329).¹ He denied saying that to Mr. Alvarez, saying he does not use that type of language (Tr. 329).

By all accounts, when respondent met with Mr. Jimenez, he agreed to perform the work (Alvarez: Tr. 159; Jimenez: Tr. 72; Lopez: Tr. 327). Mr. Jimenez gave the most detailed account of the meeting. He testified that respondent told him that he did not do the assignment because his work request had been moved, along with the bin that respondent had put it in (Jimenez: Tr. 70, 97). Mr. Santana confirmed that employees in the service area had moved the bin so that they could clean the area, but he also asserted that respondent could have found the bin, along with the paperwork (Jimenez: Tr. 71). Both Mr. Santana and Mr. Alvarez told Mr. Jimenez that respondent had walked off the job after Mr. Santana told him twice to complete the assignment (Jimenez: Tr. 72). The meeting ended when Mr. Jimenez told respondent to complete the assignment and respondent said he would (Jimenez: Tr. 72; Lopez: Tr. 327). Respondent testified that he went to the basement to get the supplies and delivered them to the clinic in 10A, as required (Tr. 327, 331, 365). The assignment sheet shows that the task was completed at 4:26 p.m. (Resp. Ex. B).

Both Mr. Alvarez and Mr. Jimenez testified that, after the meeting, Mr. Alvarez stayed behind in the office and informed Mr. Jimenez of the threat (Alvarez: Tr. 159). Mr. Alvarez reported that respondent had threatened “to kick his ass when he gets outside” (Tr. 73), but Mr. Jimenez replied that he had only heard them “arguing in Spanish” and that he did not know what

¹ Mr. Jimenez confirmed that this is the meaning of the phrase (Tr. 107), which is consistent with several Spanish-English dictionaries. See <http://www.spanishdict.com/translation> (accessed Feb. 26, 2013); <http://spanish.dictionary.com/translation/romperme%20el%20culito?src=sp> (accessed Feb. 26, 2013). “Pendejito” does not appear as a word in the Spanish-English dictionaries, but “pendejo” has various meanings, including idiotic, coward and jerk, as well as pubic hair. See <http://www.spanishdict.com/translate/pendejo> (accessed Feb. 26, 2013); <http://spanish.dictionary.com/definition/pendejo>.

was said (Tr. 73). Mr. Jimenez told Mr. Alvarez that he should report the threat (Jimenez: Tr. 74; Alvarez: Tr. 159). Mr. Alvarez was reluctant to do so but said he would speak to Mr. Santana, who also told him to make a report (Jimenez: Tr. 74; Alvarez: Tr. 159-60).

At about 4:05 p.m., shortly after speaking to Mr. Santana, Mr. Alvarez telephoned Lieutenant Bridgers to report the threat (Bridgers: Tr. 35-36; Alvarez: Tr. 162). Lieutenant Bridgers dispatched Officer Miguel Jimenez to Central Stores. Officer Jimenez interviewed Mr. Alvarez and canvassed the area for respondent, whom he could not locate (Bridgers: Tr. 37; Alvarez: Tr. 60). Officer Jimenez left the area to get the correct complaint form, telling Mr. Alvarez he would return (Alvarez: Tr. 161). Officer Jimenez's crime and incident report, dated April 5, 2012, at 4:07 p.m., confirms that Mr. Alvarez said that respondent had been "verbally abusive" and "threatened to beat him up after work," and that respondent had then left the area (Pet. Ex. 3).

Mr. Alvarez testified that after Officer Jimenez left, he went into his office in Central Stores and began writing an e-mail to Human Resources ("HR") about the threat. But before he could finish it, respondent assaulted him (Tr. 164). Respondent denied any assault and testified that he was "not physically fit" to punch or push Mr. Alvarez because he had injured his back and shoulder at work in 2008, after which he was out on workers compensation prior to returning to work in 2010 (Tr. 312-14, 337, Resp. Ex. F). He testified that he still undergoes therapy three times a week and takes pain killers (Tr. 337, 339, 354).

Mr. Alvarez gave detailed testimony about the circumstances of the assault. He testified that he was alone in the area. Mr. Santos and Mr. Jimenez had already left for the day (Tr. 161-62). He saw respondent walking down the corridor, where his office was located (Pet. Exs. 7, 8), peering into Mr. Jimenez's nearby office and then leaving (Tr. 165). But after a few moments, respondent returned (Tr. 171-72). Respondent "just rushed in and like a football player . . . tackle[d]" him (Tr. 173, 174), and "threw" him against the wall (Tr. 175). When asked if respondent actually picked him up and threw him against the wall, Mr. Alvarez testified that respondent "came at" him and grabbed him and pushed him against the wall while he was still sitting in his chair; in the process the chair hit the wall and Mr. Alvarez's head also hit the wall (Tr. 175-76, 210, 224, 226, 227).

Then respondent punched him several times in his chest: “he came real fast and he went into my chest, boom, boom, boom, boom, real quick” (Tr. 175). Mr. Alvarez tried to get up so he could get away but could not. “. . . he grab me on my arm, real tight, and pin me down on my chair” (Tr. 176). Demonstrating, Mr. Alvarez indicated that respondent held him down with two hands, so he could not move (Tr. 176, 177, 209, 210). Mr. Alvarez said the punches did not hurt him. “He just hit me real – so fast that I even—boom, boom, boom, I didn’t even notice it. He just toom, toom, toom” (Tr. 188). Respondent kept talking during the attack; Mr. Alvarez testified that he could not recall everything that respondent said but “believe[d]” that respondent even said that he was going to kill him (Tr. 218). Mr. Alvarez told respondent that he had a pacemaker and that respondent could harm him if he hit him again; respondent held him for another few seconds and then let him go and left the room, heading down the corridor (Tr. 178). Mr. Alvarez testified that he had a pacemaker installed about five years ago after a heart attack, to control an irregular heartbeat (Alvarez: Tr. 147); respondent testified that he knew about Mr. Alvarez’s heart condition (Tr. 392).

Mr. Alvarez left his office, calling for help but finding no one there (Tr. 180). He walked around the cubicles until he arrived at the entrance to Central Stores, by the grate separating the secure area from its anteroom (Tr. 183, 219). There, he saw respondent, who was leaving with a friend, Tracy Harris, who had been waiting for him (Tr. 184). Mr. Alvarez did not say anything to them, and they did not speak to him (Tr. 220). Mr. Alvarez walked outside of Central Stores to see where they were going; then he returned and finished the e-mail that he had begun writing to HR and Mr. Jimenez, adding that respondent had attacked him. The e-mail is dated, April 5, 2012, at 4:35 p.m. (Tr. 185; Pet. Ex. 10). Mr. Alvarez also called hospital police and reported the attack to Lieutenant Bridgers (Bridgers: Tr. 37; Alvarez: Tr. 186). Lieutenant Bridgers dispatched Officer Lambright to Central Stores to escort Mr. Alvarez to the Human Resources Department (“HR”), at the direction of Nilda Carrasquillo, the Administrator on Duty (Bridgers: Tr. 32-33).

Mr. Alvarez and Officer Lambright had somewhat different recollections of their encounter. According to Mr. Alvarez, Officer Lambright told him to go to HR (Tr. 188). He told Officer Lambright that he needed to go to the emergency room, but then he decided to go to HR first, to report the incident, and to then to the emergency room (Tr. 188). He also testified

that he was a “little bit agitated” and “nervous” when he talked to Officer Lambright (Tr. 188, 189). Mr. Alvarez’s written statement is consistent with this testimony: “I told the hospital police that I was in pain and scare[d]. I told him that I needed to go to the hospital emergency. He told me to go to HR to report the incident that at that moment they were waiting for me” (Pet. Ex. 3).

Officer Lambright, however, testified that when he saw Mr. Alvarez at Central Stores, Mr. Alvarez looked “fine” and was “okay” (Tr. 294). Mr. Alvarez was walking around “like he was working or something” (Tr. 293) and he believed that Mr. Alvarez was about to conduct a fire safety patrol, since one of the fire safety directors had just arrived (Tr. 294). Officer Lambright acknowledged that when he said he was there to escort Mr. Alvarez to HR, Mr. Alvarez said that respondent had assaulted him and that he was having shortness of breath and chest pains (Tr. 294, 299). However, Officer Lambright said that it was Mr. Alvarez who insisted that they go to HR, even though he urged Mr. Alvarez repeatedly to go to the emergency room. Mr. Alvarez did not have any difficulty walking there (Tr. 294-96).

Mr. Alvarez arrived at HR at 4:40 p.m., as noted in Lieutenant Bridgers’ memo book (Bridgers: Tr. 35, 41). He testified that he was more “agitated” and “short of breath” (Tr. 191). Numerous people were there, including Gayle Lewis, Mr. Severe (the Labor Relations officer), Lieutenant Bridgers, and Ms. Carrasquillo (Bridgers: Tr. 38; Alvarez: Tr. 189, 233). After Mr. Alvarez said he was in pain and had a pre-existing heart condition, Lieutenant Bridgers called for a rapid response medical team, which arrived at 4:54 p.m. and by 5:00 p.m. was transporting Mr. Alvarez on a gurney to the emergency room (Bridgers: Tr. 39, 40). Mr. Alvarez was released several hours later after medical staff drew blood, administered an electrocardiogram, and took x-rays to confirm that his pacemaker was still in place (Tr. 190, 192). Hospital records show that respondent complained that he had been assaulted and punched to the chest. He did not have any “acute respiratory distress,” but complained of pain to the left upper chest and back. Mild bruising to the chest was noted. He declined pain medication and was advised to take Motrin if needed. The time of discharge was 6:24 p.m. (Pet. Ex. 1).

At 6:45 p.m., two NYPD officers arrived and interviewed Mr. Alvarez (Bridgers: Tr. 45). While the incident information slip that they prepared (Pet. Ex. 19) denotes the crime as “harassment,” a follow-up letter from the Bronx District Attorney’s Office to the 40th Precinct

indicates that after interviewing Mr. Alvarez, the District Attorney was prepared to prosecute respondent for assault as well as harassment and was referring the matter back to the precinct “for such attention” (Pet. Ex. 20).

Respondent testified that after the meeting in Mr. Jimenez’s office, he obtained supplies for the 10A clinic and delivered them (Tr. 327, 331, 365). He returned to the basement and time-stamped his work assignment sheet at the time clock next to the supervisor’s desk, located just behind the grate in Central Stores (Resp. Ex. B). The time-stamp shows 4:26 p.m. (Resp. Ex. B). Respondent testified that he punched out about 4:30 p.m., his regular time, at the same location (Tr. 331, 332; Resp. Ex. D). The supervisor’s desk is located near the corridor which Mr. Alvarez testified led to his office. However, respondent testified that Mr. Alvarez had his office elsewhere, in the print shop, and he also denied going into the office which Mr. Alvarez testified was his (Tr. 331-332). Respondent acknowledged that when he left Central Stores, his co-worker Mr. Harris was waiting for him in the anteroom beyond the grate, as they had decided to take the bus home together (Tr. 331, 368-70). He acknowledged that he did not typically take the bus with Mr. Harris, as they lived in different neighborhoods (Tr. 370-71). Respondent saw Mr. Alvarez standing by the grate when he left (Tr. 330).

The charges against respondent are best understood as alleging three sets of charges: respondent said he would not do his assigned work and did not do it; respondent threatened Mr. Alvarez; and respondent assaulted Mr. Alvarez.²

As to the insubordination, the evidence was equivocal. Mr. Alvarez acknowledged that he was not clear about what respondent told Mr. Santana, even though he thought that respondent had refused to do the job. In a similar vein, he testified that respondent walked away

² There are four different sets of charges, each with multiple specifications. Some of the charges are duplicative in that they allege the same misconduct, while citing a different rule. As noted previously by this tribunal, such duplicative pleadings are confusing and verbose. *Fire Dep’t v. Hardy*, OATH Index No. 1430/10 at 3 n. 1 (Jan. 21, 2010). The better practice is to plead misconduct as “a single factual allegation, with citation to the agency rules which are alleged to have been violated.” *Admin. for Children’s Services v. Hutchinson*, OATH Index Nos. 1157/07, 1533/07 at 2 n. 1 (May 31, 2007), citing *Admin. for Children’s Services v. Springer*, OATH Index No. 665/05 (Jan. 5, 2006), *modified on penalty*, Comm’r Dec. (Feb. 3, 2006), *modified on penalty*, NYC Civ. Serv. Comm’n Item No. CD 07-17-0 (Feb. 7, 2007); *Admin. for Children’s Services v. Rosenblatt*, OATH Index No. 1047/05 (Sept. 12, 2005); *Admin. for Children’s Services v. Papa*, OATH Index No. 1622/05 (Aug. 30, 2005), *modified on penalty*, Comm’r Dec. (Oct. 21, 2005); *Admin. for Children’s Services v. Hallman*, OATH Index No. 1269/05 (Mar. 16, 2005).

when he approached respondent with the work request, saying something that he could not hear. It was undisputed that respondent told Mr. Jimenez that he did not do the work because he did not have the assignment sheet, and that he would do the work if given the assignment sheet. Respondent ultimately delivered the supplies to the 10-A clinic, albeit at 4:26 p.m., four minutes before he left for the day.

It must be acknowledged that there is evidence which suggests that respondent did not complete the assigned delivery until ordered to do so by Mr. Jimenez. Indeed, Mr. Jimenez testified that Mr. Santana and Mr. Alvarez said respondent had walked off the job when ordered to deliver the supplies to 10-A. Mr. Alvarez did not go so far, but he testified that he did not see respondent in Central Stores all afternoon. Moreover, in Mr. Alvarez's written statement (Pet. Ex. 3), he indicated that respondent told Mr. Santana that he was not going to do any work, and that respondent walked away from him and said in a low voice that "he was not going to do anything" (Pet. Ex. 3).

However, Mr. Alvarez's testimony that he did not know what respondent said to Mr. Sanchez is inconsistent with his written statement that respondent affirmatively refused to do the work. And even that written statement indicates that respondent said that he could not find his assignment sheet, which lends some credence to respondent's assertion because he did not do the work because he did not have the assignment sheet (and thus, presumably, did not know what work he needed to do).

Given the unexplained discrepancies between Mr. Alvarez's testimony and his written statement, and the reference to the missing assignment sheet in the written statement, I find that petitioner has failed to establish that respondent told Mr. Sanchez or Mr. Alvarez that he was not going to do the assigned work, as alleged in charge one, specification two. *See Dep't of Environmental Protection v. Barnwell*, OATH Index No. 177/07 at 7 (Sept. 18, 2006); *Dep't of Juvenile Justice v. James*, OATH Index No. 847/06 at 4 (July 28, 2006), *app. dismissed*, NYC CSC Comm'n Item No. CD 07-90-D (hearsay must be sufficiently reliable and carefully evaluated before it is relied upon).

Similarly, I find that petitioner has failed to establish that respondent deliberately refused to complete his assignment from Mr. Alvarez, as alleged in charge two, specification one, and charge four, specification two. *See N.Y. County District Attorney's Office v. Johnson*, OATH

Index No. 265/08 at 3 (Sept. 21, 2007); *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007) (insubordination requires a finding that an employee willfully failed to obey an order).

Thus, the charges that relate to the insubordination are not sustained.

Resolution of the charges which allege the threat and assault require a credibility assessment of the witnesses, particularly of respondent and Mr. Alvarez. Factors to be considered in assessing credibility include “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, 1998).

I found Mr. Alvarez to be a more credible witness than respondent, for multiple reasons.

First, Mr. Alvarez was consistent throughout his testimony and prior statements that respondent had threatened and assaulted him. Although Mr. Alvarez was unsure over whether respondent had threatened him during their initial conversation about the work assignment, he expressed no doubt over whether respondent had threatened him on their way to Mr. Jimenez’s office. Indeed, Mr. Alvarez emphasized, “Now I heard him say that loud because he said it on my ear . . . He said clearly. Okay. I’m going to kick your behind. I wait for you outside” (Tr. 154). Mr. Alvarez noted these threats in his statement to the hospital police (Pet. Ex. 3), as well as in his e-mail to Mr. Jimenez (Pet. Ex. 10), although in both documents he indicated that respondent had made the threat in Spanish (using the phrases, “culito” and “rompeme el culito”).

It is of little consequence that Mr. Alvarez’s testified that he thought respondent made threats in English but he was not sure. It appears that Mr. Alvarez simply did not remember, nine months after the incident, whether respondent threatened him in Spanish or English, but he had no doubt that respondent threatened him. Significantly, Mr. Alvarez reported the threat to Mr. Jimenez right after their meeting and he also recorded the Spanish threats in two separate written documents, his police statement and his e-mail to Mr. Jimenez. Mr. Jimenez’s testimony is consistent with these written statements, as he did not recall hearing respondent threaten Mr. Alvarez in English, but he did recall hearing arguing in Spanish.

Respondent's testimony that he speaks only a little Spanish was not credible in light of the fact that he checked that he spoke Spanish when he when he submitted a job application in 2010, prior to his transfer to Central Stores.

Further, it is clear that respondent was often frustrated and angry with Mr. Alvarez, which may have precipitated his use of threatening and inappropriate language. Respondent denied being upset and angry with Mr. Alvarez on April 5 (Tr. 345), and testified that he doesn't hold anything "personal" against Mr. Alvarez and told Mr. Alvarez during lunches in the housekeeping locker room that he is "a nice person" (Alvarez: Tr. 148, 228; Falcon: Tr. 254-55; Lopez: Tr. 344, 391). Yet respondent also testified that Mr. Alvarez singles him out for time and leave issues, and that "he looks real down to me and treats me like the worst of the worst, with a smile, too" (Tr. 344). Along similar lines, he testified that Mr. Alvarez "does not now how to talk to me in a very proper and respectable way" (Tr. 340); for example, Mr. Alvarez has walked away after meetings without giving respondent the opportunity to speak (Tr. 340).

Moreover, respondent had previously filed a complaint against Mr. Alvarez (Tr. 343, Resp. Ex. E), alleging that he and other supervisors were abusing their time by arriving late to work, taking lengthy lunches, and allowing workers to do the same. Nothing ever came of his complaint (Tr. 343). He testified, "I like to write him [Mr. Alvarez] up. That's how I piss him off" (Tr. 329). Mr. Falcon, the shop steward for Local 420, confirmed that respondent felt that Mr. Alvarez constantly targeted him for time-related issues and unfairly denied him leave time (Tr. 255, 258).

I was not persuaded by respondent's contention that Mr. Alvarez should not be credited because he bore a vendetta against respondent, and that Mr. Alvarez had tried to get respondent fired by "bringing him up on bogus time and leave charges" (Summation: Tr. 409). Mr. Alvarez acknowledged having a concern with respondent's time and leave (Tr. 232). He acknowledged having completed respondent's performance evaluation for May through August 2011, which noted respondent's time and leave issues and rated him as "below standards" (Tr. 231; Resp. Ex. A). This evaluation also recommended that respondent be terminated, because he had not passed probation. Mr. Alvarez signed the evaluation, as did his Department head, as reviewer; Mr. Alvarez insisted that it was his supervisor who had recommended termination (Resp. Ex. A; Tr. 230). Yet respondent's contention that Mr. Alvarez brought him up on "bogus" time and

leave issues was not warranted, in light of respondent's acknowledgement that he pled guilty to two sets of time and leave charges in 2004 (Tr. 376-77; 381-82; Pet. Exs. 23, 24).³

Considering Mr. Alvarez's testimony and prior statements, Mr. Jimenez's testimony, and the relative credibility of Mr. Alvarez and respondent, I find that respondent threatened and used inappropriate language toward Mr. Alvarez, using the Spanish phrases referenced in the charges. Accordingly, I find that petitioner established charge one, specification three (as amended to conform to the proof that respondent used the word "pendejito," rather than "pende si to"); charge one, specification five; charge three, specification two (insofar as it alleges that respondent threatened the safety of Mr. Alvarez); and charge three, specification three, alleging that respondent intimidated and used intemperate or abusive language toward his supervisor. I also find charge one, specification four established, as amended to conform to the proof that respondent threatened Mr. Alvarez in Spanish, rather than English.

The most serious charges involve the alleged assault, about which Mr. Alvarez gave precise, detailed testimony. Indeed, on both direct and cross examination, Mr. Alvarez gave virtually the same account: respondent rushed in, pushed him (in his chair) against the wall, punched him, and then held him down so he could not get away, stopping only when Mr. Alvarez noted that he had a pacemaker and that respondent could hurt him (Tr. 173-76, 177, 209, 210, 225).

Mr. Alvarez reported the attack immediately to the hospital police, HR, and Mr. Jimenez. After telling HR staff that he was short of breath, he was transported to the hospital's emergency room, where he reported having been punched and in pain. The emergency room records corroborate Mr. Alvarez's account, because, in addition to recording Mr. Alvarez's allegations about having been punched, they indicate that he sustained slight bruising on his chest. It is also difficult to believe that Mr. Alvarez would spend hours in the emergency room if absolutely nothing had happened to him, as respondent posits. Rather, the immediacy with which he

³ As I noted during trial (Tr. 383-84), I am not considering evidence of prior discipline as evidence that might indicate a propensity to commit the charged misconduct. Rather, I am considering it solely for its impeachment value; here, to rebut the assertion that Mr. Alvarez was scapegoating respondent for non-existent time and leave issues. See *Dep't of Correction v. Gomez*, OATH Index No. 217/04 at 9 n. 5 (Mar. 22, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-32-SA (Apr. 27, 2005) (evidence of a prior disciplinary conviction permissible for purposes of impeachment); *Dep't of Housing Preservation and Development v. Thomas*, OATH Index No. 1175/99, at 7 n. 2 (June 10, 1999) ("... where prior violations have independent relevance, and where the fact-finder is an attorney and judge trained to consider potentially prejudicial evidence for limited purposes, the evidence may be admitted and considered") (citing cases).

reported the assault, complained of chest pain, and sought medical attention lends significant credence to his testimony that respondent assaulted him.

Additionally, Mr. Alvarez documented the assault in both the e-mail to HR and Mr. Jimenez (Pet. Ex. 3), and in his statement to hospital police (Pet. Ex. 3). Both the e-mail and the statement are consistent with his testimony. The e-mail, which appears to have been written quickly, states that respondent pushed him against the wall and hit him in the chest more than three times. Mr. Alvarez told him to be careful because he has a pacemaker, but respondent “kept pushing and hitting him” until Mr. Alvarez was able to get away (Pet. Ex. 10). The statement, which encompasses two handwritten pages, is far more detailed. In it, Mr. Alvarez wrote that while he was waiting for the HHC police officer to return with the complaint form, respondent returned to the office area, looked around, walked out, and then returned, “came rushing into my office, and attacked me. He pushed against the wall. He hit me multiple times on my chest and arms.” Mr. Alvarez noted that he tried to open the office door to escape, but respondent kept holding him down and hitting him, until he ultimately left. Mr. Alvarez reported pain in his back, neck, chest and arm, and said he could “hardly walk” (Pet. Ex. 3).

Mr. Alvarez also has a workers’ compensation claim against the city, with reported diagnoses including contusion to the chest wall, spine derangements, left shoulder sprain and anxiety (Pet. Ex. 2; Alvarez: Tr. 227). He testified that he has received therapy for his neck, shoulder, and back (Tr. 192, 193), and that he never had shoulder or neck problems prior to this incident (Tr. 198). His documented injuries and workers’ compensation claim further corroborate his testimony that respondent punched him in the chest and shoved his chair into the wall, causing his head to hit the wall.

I was also not persuaded by respondent’s argument (Tr. 405: summation) that Mr. Alvarez’s testimony that he hit his head against the wall should not be credited because the emergency room records indicate that he “denies getting hit in the head” (Pet. Ex. 1). Mr. Alvarez did not testify that respondent hit him in the head. Instead he testified that he hit his head as a result of respondent shoving his chair against the wall.

In addition to the animosity which respondent bore Mr. Alvarez, because of prior incidents involving time and leave, the circumstances of the day lend further support to Mr. Alvarez’s claim. Mr. Alvarez and respondent had an argument earlier on about one of

respondent's work assignments. The evidence established that respondent had threatened Mr. Alvarez with physical harm on their way to Mr. Jimenez's office. Although respondent denied assaulting Mr. Alvarez, it was undisputed that he was in the basement area immediately after the purported assault, time-stamping his assignment sheet at 4:26 p.m. and punching out four minutes later. Mr. Alvarez testified credibly that his office was at the end of the corridor near the punch-out area. Mr. Alvarez and Mr. Jimenez credibly rebutted respondent's testimony that Mr. Alvarez's office was in a different location (Jimenez: Tr. 92-94; Alvarez: Tr. 144-46; Lopez: Tr. 332, 335). While respondent's mere presence in the area does not establish that he assaulted Mr. Alvarez, it is additional circumstantial evidence which shows that the assault could have occurred at the time and in the place described by Mr. Alvarez.

Respondent has asserted in summation (Tr.406-08) that Officer Lambright's testimony indicates that Mr. Alvarez was not assaulted; that Gayle Lewis's testimony about seeing respondent in Central Stores further weakens petitioner's case; that respondent could not have physically attacked Mr. Alvarez due to respondent's prior on-the-job injury; and that the lack of video evidence compels a negative inference against petitioner. I found these arguments unavailing.

Officer Lambright testified that Mr. Alvarez looked "fine" and was walking around, about to do a fire safety patrol, and he also opined, based upon these observations, and Mr. Alvarez's decision to go to HR rather than the emergency room, that he did not believe that Mr. Alvarez had been assaulted (Tr. 296). During his career, he had never observed a person who complained of shortness of breath and chest pain decline medical attention (Tr. 306).

But Officer Lambright's conclusion ignored the fact that he told Mr. Alvarez to report to HR. Thus, it is entirely plausible, as Mr. Alvarez testified, that he told Officer Lambright that he was in pain and needed to go to the emergency room, but acceded to the directive to report to HR, where people were waiting. Officer Lambright's testimony that he strenuously urged Mr. Alvarez to go to the emergency room is less plausible, since that would amount to deliberately circumventing Lieutenant Bridger's instructions to escort Mr. Alvarez to HR. Similarly, Officer Lambright appears to have exaggerated when he testified that Mr. Alvarez was getting ready to conduct a fire safety patrol. The only basis for Officer Lambright's conclusion is that he saw the

fire safety director arrive in Central Stores (Tr. 307). He did not testify that Mr. Alvarez expected to participate in a patrol or knew that the fire safety director would be arriving.

Moreover, it was undisputed that respondent complained of chest pains and shortness of breath. Lieutenant Bridgers called a rapid response team to take Mr. Alvarez to the emergency room soon after he arrived at HR. Thus, Officer Lambright's conclusion that Mr. Alvarez declined medical attention is insupportable.

As respondent noted, there is a discrepancy between Ms. Lewis's testimony and Mr. Alvarez. However, that discrepancy is minor. Ms. Lewis testified that she responded to Central Stores with her assistant after Mr. Alvarez called her office and said that respondent had hit him. She described Mr. Alvarez as looking "shaken" and "pale" and said that she accompanied him to HR (Tr. 131). Yet Mr. Alvarez testified that Ms. Lewis did not meet him in Central Stores; rather, he was in HR when she walked in. He learned that she had gone to Central Stores to meet him but he had already left (Tr. 233). On this point Officer Lambright's testimony was consistent with Mr. Alvarez, as Officer Lambright testified that did not see a woman present with Mr. Alvarez at Central Stores (Tr. 307). Given both their testimony, it seems more probable than not that Ms. Lewis was mistaken in her testimony about when she first saw Mr. Alvarez, and that this occurred in HR, not Central Stores. Regardless, the point is inconsequential. It was undisputed that Ms. Lewis saw Mr. Alvarez after Mr. Alvarez complained that respondent had hit him. If anything, Ms. Lewis's testimony serves to further corroborate to Mr. Alvarez's testimony.

I was also not persuaded that respondent's prior on the job injury rendered him incapable of punching and shoving Mr. Alvarez. Respondent sustained the injury in 2008, four years before he allegedly attacked Mr. Alvarez. Respondent's injury was to his back and shoulder, not his wrist or hands (Tr. 358). Respondent testified that he was assigned to Central Stores when he returned in 2010, rather than Housekeeping, where he had worked previously, because the work in Central Stores is less strenuous (Tr. 315). Nonetheless, it was clear that his duties in Central Stores still involved physical exertion. In order to bring supplies to different areas of the hospital, respondent picks up supplies from where they are stored and loads them into large bins, which are on dollies with wheels. Sometimes he carries the supplies a short distance to the bins rather than "dragging" the bins wherever he goes (Tr. 353). While respondent later asserted that

he does not “drag,” but only “rolls” the bins (Tr. 356), he acknowledged that sometimes his back hurts from transporting the bins (Tr. 356-57).

Finally, respondent asserted that a negative inference should be taken against HHC because HHC did not produce a videotape of the Central Stores area. The anteroom to Central Stores contains a camera, which captures footage of the Central Stores warehouse area (Jimenez: Tr. 57, 58; Pet. Ex. 5). There is no camera in the secured area of Central Stores and the camera in the anteroom would not capture anything occurring in Mr. Alvarez’s office (Jimenez: Tr. 59, 60).

On April 5, 2012, NYPD checked the camera and determined that there was footage of Mr. Lopez in the Central Stores area (Bridgers: Tr. 45, 46). Thus, respondent asserted that if the videotape were produced, it would show that Mr. Lopez left Central Stores after punching out at 4:00 p.m. Yet this fact is not in dispute. It is uncontroverted that Mr. Lopez stamped his assignment sheet at 4:26 p.m. and punched out time-stamped at 4:00 p.m. before leaving. Thus, there is no reason to draw an adverse inference.

Respondent has also asserted that the footage, if produced, would have shown whether respondent walked down the passageway to the office that Mr. Alvarez testified he was using on April 5. However, the record did not support this contention. Mr. Jimenez testified that the camera would show the desk where workers sign in and out, but would not show the entrance to the interior office (Tr. 95-96).

In sum, petitioner established through the credible testimony of Mr. Alvarez, corroborated in part through medical records and other witness testimony, that respondent punched him, pushed him, and held him in his chair on April 5, 2012. Thus, the following charges and specifications are sustained: charge one, specifications seven, eight, and nine, and charge four, specification one. Charge one, specification one, which alleges that respondent loudly yelled in Mr. Alvarez’s office is not sustained, as it is unclear from the record whether respondent yelled during the attack. Charge one, specification six, is also not sustained. This specification alleges that respondent committed misconduct because he “rushed” into his supervisor’s office without authorization. It is not apparent that “rushing” into a supervisor’s office, without authorization, is by itself misconduct. Finally, charge one, specification ten, which alleges that respondent threatened to kill Mr. Alvarez, is not sustained. Although Mr.

Alvarez noted in his written statement (Pet. Ex. 3) that respondent had threatened to kill him during the attack, he was less certain about that at trial, indicating only that he “believe[d]” that respondent had threatened to kill him (Tr. 218). Given this unexplained inconsistency, this specification was not proven.

FINDINGS AND CONCLUSIONS

1. Petitioner failed to establish by a preponderance of the credible evidence that respondent was insubordinate and unprofessional, as alleged in charge one, specification two, charge two, specification one, and charge four, specification two.
2. Respondent threatened and used inappropriate language toward his supervisor, Mr. Alvarez, as alleged in charge one, specifications three and five, and charge three, specifications two and three. Charge one, specification four, was also sustained, as amended to conform to the proof that respondent threatened Mr. Alvarez in Spanish rather than English.
3. Respondent punched, pushed, and held Mr. Alvarez in his chair, as alleged in charge one, specifications seven, eight, and nine, and charge four, specification one.
4. Petitioner failed to establish by a preponderance of the credible evidence that respondent committed misconduct by rushing into Mr. Alvarez’s office, as alleged in charge one, specification six. Similarly, petitioner failed to establish by a preponderance of the credible evidence that respondent loudly yelled in Mr. Alvarez’s office, as alleged in charge one, specification one, or that he threatened to kill Mr. Alvarez, as alleged in charge one, specification ten.

RECOMMENDATION

Upon making these findings, I requested and reviewed information relating to respondent’s prior disciplinary history. The information submitted indicated that respondent began his employment with Lincoln Hospital in February 1991. He was separated from service in December 1, 2009, due to a work-related injury and was reinstated to employment as an institutional aide in August 2010.

Respondent has had three prior disciplinary cases. On April 1, 2004, he agreed to a 30 workday suspension for charges of excessive absenteeism and lateness. In September 2004, he agreed to a penalty of a 60 calendar day suspension and a one year probationary period limited to time and leave, to resolve charges of absenteeism without leave and lateness. In December 2004, he agreed to a 10 workday suspension to resolve charges of insubordination, job abandonment, and inappropriate conduct/threats.

Respondent's prior performance evaluations have been mixed. His latest evaluation, covering September through November 2011, rated him as satisfactory. The prior evaluation, covering June through August 2011, rated him as unsatisfactory due to time and leave issues, and the two evaluations before that, covering January through May 2011, rated him as needs improvement, again due to time and leave issues.

Petitioner has recommended that respondent's employment be terminated, citing his disciplinary record and urging that it needs to maintain a "violence-free workplace" (Tr. 420: summation).

Respondent's disciplinary history gives pause, particularly as it includes a 60-day suspension and a one-year probationary period. Yet these penalties were all clustered in 2004, and they all arose out of time and leave charges, except for the 2004 charges. And as respondent pleaded no contest to the 2004 charges, it would be inappropriate to infer, and I do not, that he previously committed insubordination or made threats, as alleged in those charges.

Thus, while the prior disciplinary record is of concern, it is not dispositive on the issue of penalty. In this case, what drives my penalty recommendation is the misconduct itself.

Here, respondent threatened his supervisor, Mr. Alvarez, shortly after Mr. Alvarez spoke to him about completing an assignment. But respondent went far beyond a verbal threat. Respondent completed the work assignment and then he rushed into Mr. Alvarez's office, where Mr. Alvarez was sitting down at his desk, pushed Mr. Alvarez's chair against the wall, punched him repeatedly in the chest, and held him to prevent him from leaving.

In prior cases involving workplace violence, this tribunal has recommended less than termination where the physical force was relatively minor, or where the physical force was provoked. *See Dep't of Housing Preservation & Development v. Saha*, OATH Index No. 434/12 (Mar. 27, 2012) (60-day penalty recommended for single punch to co-worker where evidence

showed that co-worker initiated physical contact); *Dep't of Sanitation v. Bacigalupo*, OATH Index No. 2091/07 (Jan. 25, 2008) (60-day suspension recommended for sanitation worker who punched supervisor in the eye, where supervisor and coworker “voluntarily agreed to put themselves in a position that was likely to lead to violence,” by agreeing to “take it outside” after exchanging harsh words with each other); *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Meyers*, OATH Index No. 1487/09 (Jan. 26, 2009), *aff'd*, NYC HHC Pers. Rev. Bd. Dec. No. 1349 (July 31, 2009) (10-day suspension recommended where employee intentionally chest-bumped a co-worker, causing her to stumble); *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Edinboro*, OATH Index No. 1867/10 (Apr. 28, 2010) (10-day suspension for intentionally pushing a swivel chair into another worker).

This case is far different. Mr. Alvarez was sitting at his desk, not engaging with respondent. Their verbal dispute had long since ended. Respondent had some time to “cool off” after the discussion in Mr. Jimenez’s office. He could simply have gone home, after completing his work assignment. Instead, he chose to confront Mr. Alvarez in his office. Indeed, it appears that he went, looked around, and then returned. Whether or not he intended to punch Mr. Alvarez or simply lost control in the moment is not clear, but what occurred was an unprovoked, intentional physical assault upon his supervisor, who was sitting at his desk, working. Respondent’s conduct was particularly egregious because he knew before the incident that Mr. Alvarez had suffered a heart attack and wore a pacemaker.

Although respondent’s actions may have been an aberration in a lengthy career otherwise free from violence, the hospital has a significant interest in maintaining a safe workplace. Indeed, the hospital is obligated under New York State Labor Law to implement a program to minimize the hazard of workplace violence (Pet. Ex. 13 – Workplace Violence Prevention Policy Statement). It is impossible to reconcile this obligation with respondent’s interest in continuing his employment. Indeed, in similar cases, involving unprovoked acts of physical violence, this tribunal has recommended termination of employment. *See Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Stafford*, OATH Index No. 519/04 (Jan. 27, 2004) (termination of employment recommended where respondent choked his supervisor, who was sitting at his desk, and threatened to kill him); *Dep't of Health & Mental Hygiene v. Edwards*, OATH Index No. 1076/03 (Mar. 4, 2003), *aff'd*, NYC Civ. Serv. Comm’n Item No. CD03-61-SA (Sept. 22, 2003)

(termination of employment recommended where employee engaged in a fight with a co-worker, and later, while the co-worker was standing in the front of an office, ran in and swung at his head with a wrench); *Dep't of Buildings v. King*, OATH Index No. 850/99 (Dec. 23, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-25-SA (Apr. 10, 2000) (termination of employment recommended where employee pushed and punched his supervisor for requesting that he hand in his completed work). As we noted in that case, "Supervisors should not be forced to live in fear of physical assaults for doing their job." *King*, OATH 850/99 at 9.

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

Faye Lewis
Administrative Law Judge

March 12, 2013

SUBMITTED TO:

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