

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

OATH Index No. 611/14 (Apr. 15, 2014)

Assistant civil engineer committed misconduct by leaving a training class early without authorization and by not paying attention during the class and instead engaging in other activity. However, petitioner's proof fell short of establishing that respondent was disruptive during the class or that he committed misconduct because he absented himself during the first two hours of the class to attend a meeting with a supervisor. Two-day suspension recommended.

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

*In the Matter of*  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
*Petitioner*  
*-against-*  
**ALEXANDER FRENZEL**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**FAYE LEWIS**, *Administrative Law Judge*

This employee disciplinary proceeding was referred by petitioner, the Department of Environmental Protection ("DEP"), pursuant to Section 75 of the Civil Service Law. Petitioner charges that Alexander Frenzel, an assistant civil engineer employed by DEP within the Bureau of Wastewater Treatment, absented himself from his assigned work location by failing to attend a mandatory training class for two hours at the beginning of the class and 25 minutes at the end of the class (charge one). Petitioner further alleges that when respondent was present for the training, he neglected his duties because he was engaged in another activity and did not pay attention to the instructor (charge two), and that his conduct interfered with the agency's activity because it was disruptive and distracting (charge three).

Petitioner presented two witnesses, Phillip Vassallo, the trainer, and Joseph Olewnicki, Chief of the Bureau of Wastewater Treatment's Engineering Division. Respondent testified on his own behalf. For the reasons below, I find that I recommend that respondent be suspended for two days.

### ANALYSIS

It is undisputed that respondent was scheduled to attend a technical writing class offered by Mr. Vassallo, an outside consultant, from 8:30 a.m. until 4:30 p.m. on June 18, 2013. Respondent arrived early for the class, signed in at 8:30 a.m., and departed before the class started. He returned several hours later, sat in the class with non-class materials in front of him on his desk, and finally left the class at 4:00 p.m., a half an hour before the class ended.

At issue is whether respondent committed misconduct. Petitioner contends that respondent was obligated to attend the entire class and to participate in it, and that he failed to do so. Petitioner also asserts that respondent was disruptive by replying in a circuitous and non-responsive manner to the instructor's questions. Respondent contends that he left the class in the morning because he had a mandatory meeting with Michael Quinn, a high-level supervisor, about biosolids contracts, that he told his immediate supervisors in advance about the meeting with Mr. Quinn, and that both of his immediate supervisors attended the meeting. Further, respondent denies that he was disruptive and contends that he proofread a biosolids contract during the writing class because Mr. Quinn had asked him to expedite his work on that contract. Finally, respondent argues that he left the class at 4:00 p.m. because that was when his workday ended and he did not have approved overtime.

In 2013, DEP arranged for Mr. Vassallo to provide a technical writing class to engineers in the Bureau of Wastewater Treatment. Mr. Vassallo developed the course materials in consultation with Mr. Olewnicki, who wanted the materials tailored for his staff's needs. The class was offered as a two-day program, spaced a week apart, so that participants could submit a piece of writing that would be reviewed and returned at the second session. Class size was limited to twelve. About 80 or 90 people took the class, with the supervisors taking the class first (Vassallo: Tr. 18-22; Olewnicki: Tr. 71-73).

At the time, respondent was employed within the Requirement Contracts Services Section. The Section Chief was Mohammed Saghati. The Section was divided into different areas. Respondent worked in the East Area, under the direct supervision of Damien Sadeghi (Pet. Ex. 3). On May 17, 2013, Mr. Olewnicki sent an e-mail to his Section Chiefs, including Mr. Saghati, stating that the technical writing class was "mandatory" for all staff within the Engineering Division (Pet. Ex. 4). Further, he indicated that any staff member who did not enroll in the class by the end of the day "will need to be reminded by their immediate supervisors

that they will be subject to disciplinary action” (Pet. Ex. 4). Respondent was not copied on the e-mail (Pet. Ex. 4).

On June 14, 2013, Catherine Sturm, the training coordinator, sent an appointment to nine people, including respondent, for the “technical writing essentials class” to be held on June 18, 2013 from 8:30 a.m. to 4:30 p.m. Ms. Sturm noted, “Your Division Chief has instructed his Section chiefs that all must attend and your Section Chief submitted your name to attend this 2 day class.” She indicated that the second day of the class would be on June 25, 2013, and that attendees would receive a notice for the second class. She also noted that this was the last writing class being offered and non-attendees would have their names submitted to their Division Chiefs. She closed by writing, “If there is any reason you cannot attend, I need to know immediately. Email or call me with any questions” (Pet. Ex. 5).

It is undisputed that respondent appeared on June 18, 2013 for the class prior to the scheduled start time (Vassallo: Tr. 27; Frenzel: Tr. 129). He noted his arrival on the sign-in sheet as 8:30 a.m. and then he left. Mr. Vassallo testified that respondent and he “exchanged pleasantries” and that respondent “seemed like a nice gentleman” (Tr. 28). According to Mr. Vassallo, respondent said that he would see Mr. Vassallo “in a moment,” but he did not return until 10:30 a.m. (Tr. 27). Mr. Vassallo testified that when respondent returned at 10:30 a.m., he circled respondent’s 8:30 entry and wrote 10:30 next to it, along with his initials, to document respondent’s absence (Tr. 29-30; Pet. Ex. 1).

It is further undisputed that respondent left the class at 3:55 or 4:00 p.m. (Vassallo: Tr. 32; Frenzel: Tr. 140). Mr. Vassallo testified that respondent did not sign out on the time sheet and Mr. Vassallo entered 3:55 as his time out (Tr. 32; Pet. Ex. 1).

**Charge one, specification one (absence from work location, June 18, 2013 - morning)**

At issue is whether respondent committed misconduct by absenting himself from his work location from 8:30 a.m. to 10:30 a.m. on June 18, 2013. It is undisputed that respondent missed the first two hours of the training class, even though Ms. Sturm’s appointment of June 14, 2013 advised that his attendance was mandatory and that he should contact Ms. Sturm if he could not attend the class for any reason.

However, petitioner did not establish that respondent was absent from “his work location” during this interval. There was no dispute that respondent attended a meeting with Mr. Quinn after he left Mr. Vassallo’s class (Olewnicki: Tr. 105; Frenzel: Tr. 127). At the time

respondent was involved in managing multiple contracts relating to biosolids and directly reported to Mr. Quinn on the biosolids contracts (Olewnicki: Tr. 100, 104; Frenzel: Tr. 126). Indeed, respondent testified that he had weekly meetings with Mr. Quinn on biosolids contract issues for at least a year before the June 18, 2013 training (Tr. 125). This testimony was corroborated by an e-mail appointment from Mr. Quinn for a reoccurring Tuesday morning meeting on biosolids (Resp. Ex. A), and by Mr. Quinn's testimony, at an Office of Collective Bargaining ("OCB") improper practice proceeding, that his calendar for June 18, 2013 reflected a meeting with respondent (Pet. Ex. 8 at 227). Respondent further testified that Mr. Saghati and Mr. Sadeghi attended the June 18, 2013 meeting with Mr. Quinn and that he told everyone at the meeting that he would attend the writing class after the meeting ended (Tr. 128).

Thus, there is merit to respondent's argument that he should not be found liable for being absent from his work location because on June 18, 2013, he was required to be at two work locations: one, the training session with Mr. Vassallo, the other, the biosolids meeting with Mr. Quinn. Clearly, respondent could not be in two places at the same time. Petitioner contends that respondent should have alerted his supervisors of the conflict in advance. This is reasonable. However, respondent testified that he told his supervisors prior to July 18 that he had both a writing class and a meeting with Mr. Quinn scheduled for the morning, although he was unsure as to precisely when he told them (Tr. 159-61). Respondent explained that he did not tell his supervisors that he had a conflict, because he did not feel that he had a conflict; rather, it was the agency that had a conflict. However, he told them that he had two assignments (Tr. 159, 163). This was similar to respondent's prior testimony at the OCB proceeding that he never told his supervisors or Mr. Quinn that he had a conflict and did not ask what he should do, but that the area engineer and director knew in advance that he was going to attend both the meeting and the training (Pet. Ex. 8 at 164, 166).

Petitioner's witnesses did not establish that respondent failed to contact his supervisors in advance of the meeting. Mr. Olewnicki testified that neither Mr. Sadeghi, Mr. Saghati, nor Ms. Sturm told him that respondent had prior permission to be absent from the class (Tr. 82, 84, 87). However, petitioner did not call any of these people as witnesses, and Mr. Olewnicki's testimony falls short of establishing what respondent may have said to them.

Indeed, Ms. Sturm's e-mail of June 20, 2013 to Mr. Olewnicki (Pet. Ex. 6) indicates that respondent told her in advance of the writing class about his meeting with Mr. Quinn. Ms. Sturm noted in the e-mail, relating to respondent's absence from the class for two hours in the morning:

“ . . . He [respondent] might have gone to Mike Quinn’s meeting, *but I told him* to speak with the instructor first, which it seems he didn’t do” (Pet. Ex. 6) (emphasis added). This e-mail is a near-contemporaneous account of what occurred and there is no reason to doubt its reliability. *See Taxi and Limousine Comm’n v. Ali*, OATH Index No. 998/14 at 5 (Dec. 11, 2013) (noting the reliability of contemporaneous statements) (citations omitted). Thus, it may be fairly concluded that Ms. Sturm knew of respondent’s pre-existing meeting with Mr. Quinn and told him to advise Mr. Vassallo of the conflict.

Petitioner did not establish that respondent failed to follow Ms. Sturm’s instructions. Respondent testified that he told Mr. Vassallo that he was going to a meeting and would return prior to leaving the writing class (Tr. 129). Ms. Sturm wrote in her e-mail that “it seems” that respondent did not speak with Mr. Vassallo prior to leaving the class (Pet. Ex. 6). That phrasing is ambiguous and suggests that Ms. Sturm may have drawn her own conclusions from speaking with Mr. Vassallo rather than recording specifically what he said. Mr. Vassallo acknowledged in his testimony that he did not remember if respondent told him where he was going when he left the class (Tr. 28-29).

There is no doubt that it would have been better had respondent gone to Mr. Olewnicki or Mr. Quinn about the scheduling conflict. However, the question before me is whether respondent committed misconduct by failing to report to his assigned location for two hours on the morning of June 18, as charged. The record demonstrated that respondent had two assigned locations on that morning -- Mr. Quinn’s meeting and the writing class. Respondent reported to one assigned location, the writing class, before he left for the second assigned location, the meeting. He notified Ms. Sturm in advance about the meeting with Mr. Quinn. Hence, petitioner did not establish respondent committed misconduct by absenting himself from the writing class between 8:30 a.m. and 10:30 a.m., as alleged in charge one, specification one. Charge one, specification one, therefore, should be dismissed.

**Charge one, specification two (absence from work location, June 18, 2013 - afternoon)**

The issue here is whether respondent’s departure from the training class at 4:00 p.m. constituted misconduct. Respondent testified that his usual work day was from 7:00 a.m. until 3:00 p.m., that he began his work day on June 18 at 7:00 a.m., and that he left the training at approximately 4:00 p.m. because he had only one hour of overtime approved (Tr. 142). Respondent’s time sheets confirm his arrival and departure times, as well as his use of an hour’s

overtime (Resp. Ex. C). It was undisputed that respondent told Mr. Vassallo at about 4:00 p.m. that he was leaving for the day (Vassallo: Tr. 56; Frenzel: Tr. 140). Respondent testified that he told Mr. Vassallo that his work day was over, while Mr. Vassallo did not recall whether respondent gave a reason for his departure (Vassallo: Tr. 56; Frenzel: Tr. 140). According to respondent, Mr. Vassallo did not reply when respondent told him that he was leaving (Tr. 142). Mr. Vassallo testified, however, that he asked respondent what he was doing and told him that he would be missing a “key activity,” as the class would be writing a second draft of a document and then breaking into small groups for feedback (Tr. 56). This was the “one time” that respondent would be able to get feedback from his group and respondent would be able after the class ended to e-mail the document to Mr. Vassallo for feedback (Tr. 56). Mr. Vassallo testified that respondent replied that he was going to leave (Tr. 56).

Respondent testified that he does not get paid if he works longer than his approved schedule. He asserted that he had submitted his overtime request the week before and that Mr. Sadeghi had approved it and had not told him he needed additional overtime. He believes that he is entitled to overtime weekly at one hour a day, three days a week (Tr. 142, 161).

Respondent acknowledged that he had not applied for an extra thirty minutes of overtime to cover the writing class (Tr. 161). He did not explain why, other than to suggest that to have asked for extra overtime would have been to “question [the] actions of the agency” (Tr. 161) and to comment that “[o]vertime is to do real work not to learn English” (Tr. 162).

Respondent’s testimony that his supervisor had not told him of his need to apply for extra overtime, even if credited, does not constitute a defense to the charge that he absented himself from his assigned work location between 4:00 and 4:30 p.m. on June 18. It might have been prudent for Ms. Sturm to inform the employees to whom she sent the appointment that they should request overtime if needed to cover the writing class, or for Mr. Sadeghi to tell respondent that he needed additional overtime. However, respondent was assigned to attend the writing class (as well as Mr. Quinn’s meeting). He had been advised that the writing class was mandatory. The class ended at 4:30 p.m. and Ms. Sturm’s appointment put respondent on notice that he should contact her if there were any issues with attendance. While respondent told Ms. Sturm in advance of his meeting with Mr. Quinn, there is no evidence that he told her that he would have to leave the class early because he did not have enough overtime to cover the hours.

There is no reasonable explanation for why respondent did not request an additional half an hour of overtime to cover the writing class, which Mr. Olewnicki testified he should have

done (Tr. 94). Indeed, timesheets for the other attendees at the class show that each of them received enough overtime to cover the training (Pet. Ex. 7). Despite respondent's testimony that he was entitled to only one hour of overtime, three days a week, four of the other attendees at the training received overtime in excess of an hour for the day (Pet. Ex. 7). There is no reason on this record to suggest that respondent would not have been granted an extra half an hour's worth of overtime, had he applied for it.

Accordingly, charge one, specification two, alleging that respondent committed misconduct by absenting himself from his work location from 4:00 p.m. to 4:30 p.m. on June 18, 2013, is sustained.

### **Charges two and three (neglect of duties and interfering with the agency's activity)**

In these charges, petitioner alleges that that respondent neglected his duties during Mr. Vassallo's writing class because he was involved in another activity and not paying attention to the instructor, and that his conduct in the class was disruptive and distracting, thus interfering with an activity of the agency.

It is not disputed that respondent spent at least part of his time during Mr. Vassallo's writing class looking at other material. Mr. Vassallo testified that respondent opened up some large binders, which were not part of his course materials. He believed the binders contained "clearly technical work" (Tr. 33, 45). Respondent testified that he brought a draft of a biosolids contract with him to the writing class because Mr. Quinn had asked him during their meeting to expedite the contract (Tr. 129). During the OCB proceeding, respondent testified that he told Mr. Vassallo that he had a deadline on the contracts and needed to work on them (Pet. Ex. 8 at 88, 89, 154).

Mr. Vassallo similarly testified that respondent told him that he had work to do, and that he continued to write and look at the binders even after Mr. Vassallo told him that he should focus on the class materials (Tr. 46, 47). However, Mr. Vassallo stopped short of testifying that respondent was actually working on the contracts. Indeed, after the class, he left a voicemail message for Mr. Olewnicki characterizing respondent as "very flagrantly . . . pretending" to do his own work (Pet. Ex. 2). Mr. Vassallo appeared to back away from this characterization during trial, indicating, "Maybe I was very upset when I left that message and that's why I said . . . flagrantly pretending" (Tr. 47). At the same time, when pressed about what respondent was doing, he retorted, "He could have been doodling, for all I know" (Tr. 47).

The parties differed in other ways about what respondent did during class.

Mr. Vassallo testified that he periodically tried to engage respondent by asking him to turn to a page in the training manual or by asking him a question about the training materials. He recalled asking respondent at about three different times to comment on the course material (Tr. 33). Respondent did not answer directly but replied, “. . . it is what the management says it is,” or words to that effect (Tr. 33, 49). Most of the time, when respondent gave “circuitous non answers,” the other students did not react. However, there “did come a point or two where people would say, ‘oh,’ there would be a moan in the room” (Tr. 35). In the afternoon, Mr. Vassallo “gave up” on trying to engage respondent, after someone else in the class said, “. . . will you leave him alone, you see he doesn’t want to participate” (Tr. 34).

Mr. Vassallo further testified that he talked to respondent privately at one point, telling him that he should not be working on non-course materials and asking if he wanted to leave the class (Tr. 35-36). Respondent replied that he would remain in the class but would continue to do his own work. In response, Mr. Vassallo said that he would prefer that respondent focus on the course work. Respondent answered that he needed to do the other work (Tr. 36).

By contrast, respondent testified that he paid attention in the class. He was able to listen to the instructor while also proofreading the contract. He also completed some of the exercises in the workbook (Tr. 138, 140). Respondent submitted his class materials into evidence (Resp. Ex. B). The materials consisted of an 82-page booklet titled, “Technical Writing Essentials,” containing 20 assignments to be completed. Mr. Vassallo did not testify as to how many assignments the class actually completed. However, respondent’s writing is only on two pages of the booklet, relating to two of the 20 assignments (Resp. Ex. B at 19, 52; Tr. 138, 140). Most of the pages were left blank and two pages contained another employee’s handwriting (Resp. Ex. B at 5, 12; Tr. 139, 150). This is consistent with respondent’s testimony during the OCB proceeding that he completed two or three pages of the workbook prior to working on proofreading (Pet. Ex. 8 at 88-89). Respondent also testified in the OCB proceeding that the only time he spoke during the class was when Mr. Frenzel made a joke about the union, which he found inappropriate. Other than that, he did not speak (Pet. Ex. 8 at 91).

Petitioner has established that respondent neglected his duties during the writing class, as alleged in charge two. Respondent acknowledged that he completed only two or three pages of the class materials. Moreover, Mr. Vassallo’s testimony that respondent had failed to participate in a meaningful way when asked questions about the class materials was unambiguous and

detailed. I credited this testimony over respondent's testimony in the OCB proceeding that he had spoken only once in class to protest a comment about the union. *See generally Dep't of Sanitation v. Menzies*, OATH Index No. 678/98, at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998) (factors to be considered in making a credibility determination 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). It may be, as respondent testified, that he was able to listen to Mr. Vassallo while also proofreading the contracts, but by respondent's own admission, he participated only minimally in the writing class. Respondent's testimony that Mr. Quinn had asked him to expedite work on the biosolids contract may provide some rationale for his behavior. However, respondent did not testify that Mr. Quinn had given him a specific deadline for the contract which would have necessitated his proofreading the contract during the writing class. Absent such testimony, respondent's belief that he was expected to expedite the contract does not constitute a defense to the charge that he neglected his duties by engaging in another activity during the mandated writing class. Accordingly, charge two is sustained.

However, petitioner has failed to establish that respondent engaged in disruptive and distracting behavior that interfered with agency activity, as alleged in charge three. Respondent's refusal to attend to the class materials and his circuitous non-answers were no doubt distressing. Indeed, after the class, Mr. Vassallo was so perturbed that he left a voicemail for Mr. Olewnicki stating that he would prefer that respondent not attend the next class and relating that respondent was "stonewalling any discussion," "was a terrible disruption in class," "slowed" the class down, and was "messing up the experience for everybody else" (Pet. Ex. 2). However, Mr. Vassallo admitted that he might have been "very upset" when he left the voicemail (Tr. 47), and his testimony during the hearing further suggests that he may have exaggerated the disruptive impact of respondent's behavior in his voicemail. Notably, Mr. Vassallo testified that even when respondent failed to answer his questions, his tone was not aggressive. He characterized respondent's general demeanor as "very polite," "very quiet," and "very respectful" (Tr. 32, 48). He failed to indicate how respondent's conduct was disruptive or slowed the class down, other than that some other class members moaned whenever respondent provided a non-answer and that another student finally asked Mr. Vassallo to stop asking respondent questions. Mr. Vassallo testified that he decided to ignore respondent after this and

the class continued (Tr. 34). This falls short of establishing that respondent caused a disruption to the workplace, as that term has been interpreted under the case law. *See, e.g., Fire Dep't v. Krasner*, OATH Index No. 2967/09 at 10-14 (Aug. 18, 2009) (use of profanity and threats in the workplace, in addition to reference to Virginia Tech shooting, caused disruption in the workplace); *Dep't of Transportation v. Jagdharry*, OATH Index No. 1702/04 at 15 (Nov. 24, 2004) (breach of peace charge dismissed where respondent was arrested in the workplace absent evidence that his conduct caused a general disturbance in the workplace).

Hence, charge three was not proven and should be dismissed.

### **FINDINGS AND CONCLUSIONS**

1. Petitioner failed to establish that respondent committed misconduct by being absent from a mandatory training class for two hours during the morning of June 18, 2013, as alleged in charge one, specification one.
2. Respondent committed misconduct by leaving the writing class early, at approximately 4:00 p.m., on June 18, 2013, as alleged in charge one, specification two.
3. Respondent committed misconduct by not paying attention to the instructor during the mandatory June 18, 2013 class and instead engaging in other activity, as alleged in charge two.
4. Petitioner failed to establish that respondent engaged in conduct that interfered with an activity of the agency, as alleged in charge three.

### **RECOMMENDATION**

Upon making these findings, I requested an abstract of respondent's personnel file. The information submitted indicated that respondent began his employment as an assistant civil engineer in 1998. He has no history of formal adjudicated discipline. There were no completed evaluations for respondent in 2011, 2012 or 2013. His 2010 performance evaluation rated him as "good."

Petitioner has requested a three-day suspension (Tr. 197). However, petitioner did not prove all the charges. Instead, petitioner proved that respondent committed misconduct by leaving the class half an hour early and by not paying attention to the instructor and engaging in other activity. The penalty imposed should reflect that only half of the charges were sustained.

Moreover, the penalty should take into consideration that respondent was not simply goofing off during the class; rather, he was proofreading a biosolids contract at the behest of a supervisor.

Considering the circumstances of the misconduct, respondent's lengthy tenure, and his lack of any disciplinary record, I recommend that respondent be suspended for two days. This is amply sufficient to impress upon respondent that he must comply with the requirements of his job, even if he does not like them. Should he engage in similar misconduct in the future, a more substantial penalty is likely.

Faye Lewis  
Administrative Law Judge

April 15, 2014

SUBMITTED TO:

**EMILY LLOYD**  
*Commissioner*

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