

Dep't of Sanitation v. Ambrosino

OATH Index No. 1572/13 (Oct. 7, 2013)

Petitioner did not prove that respondent vandalized or failed to maintain Department equipment. Dismissal of charges recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
THOMAS AMBROSINO
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner brought this employee disciplinary action under section 16-106 of the New York City Administrative Code, alleging that respondent, a sanitation worker, failed to maintain Department equipment on April 13 and April 14, 2012, and intentionally damaged a truck and committed a crime while on duty on April 14, 2012 (ALJ Ex. 1).

At a nine-day hearing, which concluded on August 9, 2013, each side presented eight witnesses and offered documentary evidence, photographs, and video recordings.

For the reasons that follow, I find that petitioner failed to prove that respondent committed misconduct and recommend dismissal of the charges.

Introduction

The charges stem from allegations that respondent, the garage utility worker (GU) on the midnight to 8:00 a.m. shift at the Queens West 3 (QW3) broke the mirrors of a Department truck at about 3:15 a.m. on April 14, 2012. Petitioner's case rested primarily on the testimony of two investigators who were watching a Department parking lot at night from the rooftop of an adjacent building. Respondent denied any wrongdoing and consistently maintained that he was at a local 7-Eleven when the vandalism occurred.

Both sides relied on video evidence. Petitioner's video, recorded by one of the investigators, showed a collection truck parked in a lot. Though the sound of breaking glass can be heard on the recording, nobody is visible on the recording because it was too dark.

In contrast, respondent's video evidence, copied from the 7-Eleven's security system, showed him inside the store for ten minutes. Petitioner challenged the accuracy of the time stamp on the video and the manner in which the copy of the recording was obtained.

Based on the evidence presented, including credible testimony from respondent's former supervisor and the 7-Eleven owner, who both supported respondent's alibi, petitioner failed to meet its burden of proof. Thus, the charges should be dismissed.

THE EVIDENCE

Petitioner's Evidence

From November 2011 to March 2012, several GPS devices were stolen from QW3 collection trucks (Tr. 193-94, 370). In March 2012, the Department of Investigation (DOI) received an anonymous telephone call reporting that a sanitation worker with 23 years' experience, who worked on the midnight to 8:00 a.m. shift at the QW3 garage, had stolen nine GPS devices from collection trucks (Pet. Ex. 1c). The tipster further stated that "multiple Department chiefs" knew the culprit and did nothing about it (Pet. Ex. 1c).

DOI referred the tip to petitioner's Field Investigation and Audit Team (FIAT) and Chief Durrell assigned the matter to two investigators, Superintendent Tinkler and Superintendent, now Deputy Chief, Lojan (Tr. 183, 187, 374). After determining that respondent was the only sanitation worker with 23 years' experience who worked on the midnight shift at QW3, they arranged to conduct surveillance during one of his shifts (Tr. 57, 703, 774-75).

At 10:00 p.m. on April 12, 2012, Lojan and Tinkler went to the rooftop parking lot of the Police Department's fleet services building, adjacent to the parking lot where QW3 and QW6 collection trucks were parked (Tr. 54, 139, 204). The QW3/QW6 parking lot is on 53rd Avenue, across the street from a facility referred to as the Central Repair Shop (CRS), a block-long complex that houses four of petitioner's garages: QW2, QW3, QW4, and QW6 (Tr. 105, 189, 196-97, 202, 704). Tinkler, Lojan, and another superintendent took two vehicles to the roof of the fleet services building (Tr. 235, 411, 712-13). They parked parallel to a three-foot guardrail

on the rooftop, which enabled them to look down to the QW3/QW6 parking lot, twenty-five to forty feet below, and across the street from the QW3 garage (Tr. 206, 208, 212, 230, 834).

Five or six lampposts on top of the fleet services building illuminated the rooftop and shed some light below onto the QW3/QW6 parking lot (Tr. 710, 794). On the other side of the QW3/QW6 parking lot, there was a parking lot used by QW6 employees for their personal vehicles. Between the QW3/QW6 truck lot and the employee-lot, there were four or five lampposts that shed light on both lots (Tr. 210-11). Not all of the lampposts worked, but the investigators testified that the lighting was good enough for them to recognize Department employees, including QW6 GU Rudy Hartell, who moved some collection trucks in the parking lot for approximately 45 minutes (Tr. 217, 418, 722). Without binoculars, the investigators read truck numbers; with binoculars, they read license plates (Tr. 212-14, 427, 430, 486).

Shortly after midnight, on the early morning of April 13, the investigators saw a few sanitation workers driving trucks out of the parking lot to go on routes where they serviced collection baskets (Tr. 215). The investigators also saw sanitation worker Fleming, who was on medical duty assignment, or light duty, parked outside the QW3/QW6 parking lot, where he was supposed to provide security for the parking lot and periodically check the collection trucks (Tr. 232, 234). At 1:00 or 1:30 a.m., Fleming walked into the lot and inspected trucks (Tr. 233, 730). During the evening, the investigators also spotted a sanitation worker driving a car out of the QW3 garage in an erratic manner (Tr. 728, 894).

At about 2:00 a.m., respondent walked to the QW3/QW6 parking lot (Tr. 219, 473, 507). Lojan, who was a sanitation worker in QW6 for three years and a supervisor in QW4 for four years, said that he knew respondent because of a 2006 incident in which respondent accused a supervisor of stabbing him and the supervisor was arrested (Tr. 380-81, 716-17). After that incident, another supervisor pointed respondent out to Lojan (Tr. 882). Lojan had never met or spoke to respondent, but he occasionally saw him in the QW3 garage (Tr. 886-88).

Tinkler watched through binoculars (Tr. 474). He had never met respondent, but he had a copy of his employment photo. Using that 10-year old photo, Tinkler compared the photo to the man that Lojan had identified (Tr. 220-22, 470, 473; Pet. Ex. 5).

After respondent entered the parking lot, the investigators saw him driving collection trucks from the parking lot to the garage, where he appeared to refuel them (Tr. 225, 230, 510). He also lined up trucks in the parking lot for the next shift, which began at 6:00 a.m. (Tr. 226).

Most of the trucks were parked facing the parking lot entrance, to make it easier for sanitation workers to drive them out in the morning (Tr. 226-27, 502, 537). However, a few trucks were parked facing away from the entrance (Tr. 225, 535).

The investigators noticed that, after respondent drove truck 25DC068 to the garage, he returned it to the parking lot five minutes later and parked it in the back of the lot, facing away from the entrance, keeping the truck's "hopper" open, leaving on the headlights and parking lights, and turning the engine off (Tr. 226-27, 524, 530, 533). After moving a few more trucks and parking two of them head-first behind 25DC068, respondent left the lot (Tr. 229).

According to the investigators, respondent returned to the lot at about 4:30 a.m. and turned off the lights on 25DC068 (Tr. 239, 251, 538, 541, 726). The investigators left the rooftop at 4:45 a.m. (Tr. 239, 251, 538). Though they had a video camera, they did not record anything that night (Tr. 244, 542-43). They later reported their findings to Durrell and he told them to resume surveillance for another night (Tr. 60, 66, 240, 544).

At 10:00 p.m. on April 13, Lojan and Tinkler returned to their rooftop surveillance post (Tr. 259, 261, 734). Supervisor Lewis, respondent, Fleming, and four other sanitation workers were assigned to QW3 for the midnight to 8:00 a.m. shift (Tr. 141, 306; Pet. Ex. 6). Two crews took trucks out of the lot shortly after midnight (Tr. 311). At about 12:30 a.m. on April 14, sanitation worker Fleming parked outside the lot (Tr. 124, 263, 496, 503, 568, 734). He walked into the lot to inspect collection trucks (Tr. 264, 277). Without binoculars, the investigators saw the license plates of Fleming's personal car, parked on 53rd Avenue (Tr. 264, 266, 496, 499-500). They also saw GU Hartell servicing QW6 trucks (Tr. 270-71).

According to the investigators, respondent walked into the lot at about 2:00 a.m. (Tr. 267, 570, 574, 723, 736). He moved trucks around and drove some of them across the street to the QW3 garage for refueling (Tr. 268, 575, 724). The investigators testified that they watched respondent move trucks for about an hour (Tr. 577, 731). Shortly after 3:00 a.m., he drove truck 25DC068 from the garage to the lot (Tr. 580, 583, 736, 852, 1048, 1054). At 3:13 a.m. he left the lights on truck 25DC068 after parking it in the back of the lot, facing away from the entrance, leaving the "hopper" open, and turning the engine off (Tr. 270, 272, 279, 583, 588-89, 725, 738).

The investigators claimed that they saw respondent walk around the back of truck 25DC068 with a shovel that he used to strike the truck's passenger side mirrors (Tr. 275, 600, 737, 819, 1057). Lojan turned the video camera on and, by the time it started recording,

respondent had walked out of view around the front of the truck (Tr. 245, 276, 606, 738, 824). Tinkler watched through binoculars (Tr. 279). They heard glass breaking on the driver's side of the truck (Tr. 278, 603). For the next five minutes, respondent parked a few more trucks head first, behind 25DC068, before he walked back to the garage (Tr. 245, 279, 661, 837, 842, 1067).

Tinkler called Durrell at 3:18 a.m. (Tr. 67, 165, 280, 669). After Tinkler reported what he saw, they discussed and rejected the idea of confronting respondent in the lot (Tr. 67-69, 168-70, 281). At 3:20 a.m., the investigators left the roof to speak with a police supervisor, before gathering their equipment and going across the street to the QW3 garage (Tr. 739-41, 1069).

At 3:45 a.m., the investigators entered the garage office (Tr. 290-91). They found supervisor Lewis sleeping, woke him up, asked him to find respondent (Tr. 282, 313, 621, 743-44, 859, 861, 1075). Lewis rang a bell and respondent arrived in the office within two to five minutes (Tr. 284-85, 744, 862). Respondent introduced himself and the investigators told him to sit down as they phoned Durrell and other officials (Tr. 72, 285, 294, 621, 631-33, 745, 1076).

At 4:14 a.m., the investigators, accompanied by the acting Queens Superintendent, walked to the parking lot and inspected the damage to truck 25DC068 (Tr. 287, 623, 634, 669, 671, 745, 753, 866, 1068). With the aid of a flashlight and the light on the video camera, they recorded the smashed mirrors on the passenger and driver sides of the truck, and they also took video of a shovel leaning against a wall (Tr. 287, 673, 757, 1069, 1072-73). Because the truck was parked facing a two or three foot high cement block, without much room to squeeze through, the investigators walked around the back of the truck (Tr. 675-76).

At 4:25 a.m., the investigators returned to the garage and asked respondent if he saw anything unusual. He replied that he went to a 7-Eleven and bought a salad (Tr. 291, 331-33, 635-36, 746, 869-71). Tinkler accused respondent of breaking the mirrors and he replied, "I moved the truck from here to there, I didn't break any mirrors" (Tr. 291, 637, 746, 869). In the five-minute interview, respondent repeatedly denied breaking any mirror (Tr. 292, 639). Asked if he had any problems with co-workers, respondent replied, "I don't like anybody" (Tr. 638). When the investigators told respondent that they caught him smashing the mirrors on video, he asked to see the video. They ignored that request and suspended him (Tr. 637, 746, 870).

The investigators asked no follow-up questions about the 7-Eleven (Tr. 331-32, 639). Though the 7-Eleven was only a five-minute drive away, the investigators did not go there to

check respondent's alibi (Tr. 747, 899-900). Lojan said that he did not need to go the 7-Eleven because he knew where respondent was from 2:00 to 3:20 a.m. that morning (Tr. 331, 334, 748).

At 4:30 a.m., the investigators questioned supervisor Lewis (Tr. 293). He told them that he had been the night supervisor of QW3 for several years and he had no problem with respondent (Tr. 294). Lewis also said that truck 25DC068 was regularly assigned to sanitation worker Mann (Tr. 293). The investigators claimed that Lewis mentioned a possible grudge between Mann and respondent (Tr. 293, 684, 686, 749). Respondent reportedly believed that Mann had filed a complaint accusing him of stealing GPS devices (Tr. 293, 749, 873).

Fleming, who was supposed to be watching the lot and checking the trucks, entered the garage between 4:30 and 5:00 a.m. (Tr. 299, 572). The investigators did not question Fleming and they left the garage at about 5:10 a.m. (Tr. 295, 573, 681, 749).

In April 2013, Tinkler returned to the QW3/QW6 parking lot with petitioner's counsel and Richard Distefano, another FIAT supervisor (Tr. 336, 915). They went to the roof of the police building from 10:00 to 11:00 p.m. (Tr. 336, 917). According to Tinkler, the lighting conditions at that time were similar to the lighting conditions at 3:15 a.m. on April 14, 2012 (Tr. 337). Tinkler and Distefano claimed that, from the rooftop, they could clearly identify petitioner's counsel, another supervisor, and a sanitation worker in the adjacent parking lot (Tr. 339, 343, 920).

Petitioner's witnesses reviewed the ten minutes of video that Lojan recorded on April 14, 2012. Five minutes of the video was recorded from inside a vehicle, over a guard rail, on the rooftop adjacent to the parking lot and the other five minutes were recorded in the parking lot as the investigators inspected the damaged truck (Tr. 348, 490, 650; Pet. Ex. 16). Petitioner's witnesses conceded that respondent did not appear on any of the video (Tr. 363, 583-84, 825, 829). However, Lojan claimed that, as he recorded from the rooftop, he saw respondent in the camera's display screen (Tr. 826, 800, 1059-63). Lojan blamed the poor quality of the camera for the difference between what he saw on the screen and what was recorded (Tr. 1058, 1060).

On the portion of the video that was recorded from the rooftop, truck numbers on some collection trucks were visible (Tr. 692). The video showed that the truck was parked with the front end facing the back of the parking lot, which appeared to be the darkest part of the parking lot (Tr. 1070). The sound of breaking glass is audible on the recording (Tr. 348; Pet. Ex. 16). One investigator can also be heard saying something like "We both saw him break the mirror on

the other side,” but it is unclear exactly what was said (Tr. 354; Pet. Ex. 16). Tinkler’s 3:18 a.m. call to Durrell was also audible on the recording (Pet. Ex. 16).

The video also showed that when the investigators went into the parking lot, the area around truck 25DC068 was dark (Pet. Ex. 16). As they inspected the damage to the truck, the investigators relied on a light from a video recorder and a flashlight (Pet. Ex. 16).

Respondent’s Evidence

Respondent testified that he has worked for the Department for 24 years and has been the midnight GU at QW3 for 15 years (Tr. 1213-14). He denied removing GPS devices, parking collection trucks facing away from the entrance, leaving lights on trucks in the parking lot, or breaking mirrors (Tr. 1237-39, 1260, 1268, 1273, 1294). Respondent noted that, as a GU, he rarely drove collection trucks on the street and, thus, he had little reason to be upset by GPS devices in collection trucks (Tr. 1226-27). He also said that he had no reason to damage trucks, run down their batteries, or park them incorrectly, because such actions would have made more work for him before collection crews began their 6:00 a.m. shifts (Tr. 1239-41, 1273-75, 1301).

Typically, respondent began his shift by bringing trucks to garage mechanics for repairs (Tr. 1223, 1304). His duties included sweeping the garage floor, changing tires, checking fluid levels, cleaning truck cabs, and lining up trucks for the next day’s shift (Tr. 1215-17, 1226, 1278, 1311). He noted that one key could be used to operate multiple trucks (Tr. 1222). Respondent could not recall which tasks he performed between 2:00 and 2:30 a.m. on April 13 or 14, 2012, and he did not notice anything unusual before 3:30 a.m. on either night (Tr. 1274, 1303, 1311-12). Referring to scrap notes that he kept, respondent identified four collection trucks that were in the garage on April 13 and five trucks that were there on April 14 (Tr. 1263-64; Resp. Ex. F). He changed flats or performed other work on two QW3 collection trucks (Tr. 1265-67). He had no recollection or record of driving or working on truck 25DC068 on either night (Tr. 1270-71). According to the garage’s fuel log, three trucks were refueled on the midnight to 8:00 a.m. shift on April 13 and no trucks were refueled on April 14 (Resp. Ex. C).

Respondent does not have a fixed time for taking his meal break (Tr. 1224). On April 14, 2012, he took his meal break at 3:00 a.m. (Tr. 1242, 1312). He told Lewis that he was going to lunch and he drove a Department pick-up truck for at least five minutes to a local 7-Eleven on Queens Boulevard near 66th Street (Tr. 1244-45, 1312, 1315-18). After using the bathroom,

respondent bought coffee and food (Tr. 1244, 1319). He left the 7-Eleven at 3:23 a.m., and drove back to the garage (Tr. 1244).

Respondent returned the pick-up truck keys to the supervisor's office and he ate lunch (Tr. 1244-45, 1326). He was in the garage for 15 to 20 minutes before he heard Lewis ring the bell (Tr. 1245). It was unusual for Lewis to ring the bell; he normally called respondent's cell phone if he needed him (Tr. 1246, 1326).

After a few minutes, respondent went to the office where he saw Tinkler and Lojan (Tr. 1246, 1327). Having never met them before, respondent introduced himself and they identified themselves as FIAT investigators (Tr. 1247-48, 1306-07). Tinkler asked respondent if he knew why they were there and he stated that it may have had something to do with missing or damaged GPS devices (Tr. 1248, 1328). They asked him if anything unusual happened that night and respondent told them that he went to the 7-Eleven, which was unusual for him (Tr. 1248, 1327).

The investigators asked respondent about broken mirrors on a truck and he said that he knew nothing about it (Tr. 1249). When they said that they had him on video, respondent replied, "No way" and asked to see the video (Tr. 1249, 1329). The investigators said that they were going to call the police and respondent said, "Go ahead" (Tr. 1250, 1329). The investigators, Lewis, and another supervisor went out to the parking lot (Tr. 1250, 1330). When they returned, they made some phone calls and Lewis told respondent that he was suspended (Tr. 1250, 1330). Respondent asked, "For what?" and Lewis said, "I don't know" (Tr. 1250).

Later that day, respondent went to the 7-Eleven and asked to see the store's security camera video (Tr. 1253). The clerks told him that the video was in a locked office and the owner was on vacation in Italy (Tr. 1253). They gave respondent the owner's cell phone number (Tr. 1253, 1331). Respondent called the cell phone and left a message (Tr. 1253-54).

A few days later, the store owner called respondent back (Tr. 1254). Respondent explained his situation and asked the owner to look at the April 14, 2012 video between 3:00 and 3:30 a.m. (Tr. 1339). As they continued to talk on the phone, the owner located the relevant video and told respondent, "Oh, yeah, now I recognize you, I know who you are" (Tr. 1254, 1336, 1338). Respondent asked for a copy and the owner said, "No problem" (Tr. 1254, 1339).

When respondent went back the next day, the owner did not know how to make a copy off of the security system's DVR player because the requested day's video had been automatically "looped over" after ten days (Tr. 1254-55). A fellow sanitation worker, who had

owned an audio/video store, explained to respondent that the “looped over” video was on the DVR’s hard drive which could be removed and replaced (Tr. 1255, 1339-42).

Respondent borrowed the DVR from the 7-Eleven and took it to Stone Computers on Northern Boulevard, where he had previously taken his sons’ computers for repairs and upgrades (Tr. 1342). For \$300, Jimmy Xu at Stone Computers replaced the hard drives from the DVR with two new, larger hard drives and respondent returned the DVR to the 7-Eleven (Tr. 1255-56, 1346-48). Xu was unable to read any data from the old hard drives that had been removed from the 7-Eleven DVR (Tr. 1412-13).

Respondent contacted data recovery specialists in Manhattan and learned that it would cost \$6,000 to \$10,000 to read the old hard drives and there would be no guarantee that the relevant video could be recovered (Tr. 1257, 1259, 1349-50). Respondent’s counsel arranged to provide the hard drives to petitioner’s IT unit but petitioner’s staff was unable to read the drives (Tr. 1403-06). According to respondent, he went back to Stone Computers and Xu suggested that they try to purchase the same model DVR player as used by the 7-Eleven (Tr. 1414-15).

After respondent watched Xu find a similar DVR on eBay, Xu ordered the DVR player for \$100 and he charged respondent \$157 (Tr. 1709-12). When Xu received the DVR player a few days later, he called respondent who told him to look for April 14, 2012, between 3:00 and 3:30 a.m. (Tr. 1416). Xu made two DVD copies of the relevant video and played it for respondent on a laptop at Stone Computers the next day (Tr. 1420-22). Respondent took the DVD copies and told Xu that he could keep the hard drive and the DVR player because he had no use for them (Tr. 1423).

The DVD offered by respondent in evidence appeared to be a video camera or cell phone recording of a computer monitor showing the 7-Eleven’s 16 security cameras (Tr. 1434-35). The video showed respondent arriving in the store’s parking lot at 3:12 a.m., entering the store, making some purchases, and leaving at 3:22 a.m. (Resp. Ex. E).

At a few points on the video, an analog clock can be seen on a wall inside the 7-Eleven (Tr. 1436, 1439, 1445; Resp. Ex. E at 3:16:35, 3:17:55, 3:18:08, 3:19:22). The clock, which was enlarged when the video was played during the hearing, was very difficult to see. Under cross-examination, respondent agreed with petitioner’s counsel that one hand was near the “5” and another hand was near the “12” (Tr. 1441-42). Because it was impossible to see which hand was

shorter, respondent agreed with petitioner's counsel that the time on the wall clock could have been 3:55, 4:55, or 12:20 (Tr. 1442).

Francesco Amorelli, the owner of the 7-Eleven on Queens Boulevard in Woodside, testified that he installed a 16-camera surveillance system shortly after he bought the store in 2006 (Tr. 1143-44). The system has a back-up battery and did not turn off, even during Hurricane Sandy (Tr. 1150). Occasionally, police detectives reviewed his surveillance video to investigate accidents on Queens Boulevard (Tr. 1145, 1173). Recordings can be viewed on a monitor in the store office but they are automatically transferred to the DVR hard drive after nine to ten days (Tr. 1150, 1158-60).

In April 2012, Amorelli was in Italy when he received a message from respondent (Tr. 1148-49). Amorelli did not recognize respondent's name or phone number (Tr. 1154). When Amorelli returned to New York, he phoned respondent on April 21 or 22 (Tr. 1150). As they spoke on the phone, Amorelli reviewed the time and date of the video that respondent requested and he recognized respondent "right away" (Tr. 1150, 1154, 1163).

By the time respondent arrived at the store, a day or two later, the relevant portion of the video was on the hard drive (Tr. 1166, 1171). Amorelli allowed respondent to take the DVR temporarily but he needed to keep the surveillance system operating (Tr. 1164, 1171-72, 1179). Respondent took the DVR and replaced the new hard drive (Tr. 1151).

Amorelli conceded that he could not recall exactly what time frame respondent requested, but he believed that it was approximately 3:00 a.m. (Tr. 1169-70, 1181). He also acknowledged that he did not pay much attention to the time shown on his security system video; he was more concerned that the system kept running (Tr. 1176). Thus, Amorelli never changed the time on the security system and he did not know whether it changed automatically during daylight savings time (Tr. 1174-75).

Retired supervisor Robert Lewis testified that he was the night supervisor at QW3 for twelve years (Tr. 976-77). He described the lighting in the QW3/QW6 parking lot as "non-existent" (Tr. 993, 1026). Lewis also noted that respondent normally took his meal break at 4:30 a.m. but that time was flexible (Tr. 988-89).

Lewis recalled that respondent left the garage to get lunch on April 14, 2012, no earlier than 3:00 and no later than 3:30 a.m. (Tr. 1008-09, 1034-35, 1042). According to Lewis, respondent returned to the garage "a good 15 to 20 minutes" before the FIAT investigators

arrived (Tr. 1035, 1042). Respondent ate a salad in the garage office and he spoke with Lewis five minutes before the investigators entered the garage (Tr. 1034).

Conceding that he had his head down when the investigators arrived, Lewis said that respondent arrived within a minute when the bell was rung (Tr. 996, 1000). Lewis accompanied the investigators to the parking lot where they showed him the broken mirrors (Tr. 1003-04).

According to Lewis, respondent never said that he had been suspected of stealing GPS devices (Tr. 1039). And Lewis could not recall telling the investigators that truck 25DC068 was usually assigned to sanitation worker Mann (Tr. 1037-39, 1041).

Peter Palmese, a sanitation worker on the midnight to 8:00 a.m. shift at QW3, testified that the lighting has improved in the parking lot since April 2012 (Tr. 1136-37). Supervisor Nicholas Fiolet, who has worked the QW3 midnight shift since April 2012, also testified that the parking lot was “pretty dark” in April 2012 and, since then, more lighting has been installed around the lot (Tr. 1092-93). Fiolet described respondent as an “excellent” worker and wished that he had “10 of him” (Tr. 963).

Other sanitation workers testified on respondent’s behalf. Cesar Barreiro, who was assigned to a basket route on the night of April 14, 2012, recalled that truck 25DC068 was parked the wrong way when he began his shift and he told respondent about it (Tr. 1105, 1109, 1111, 1113, 1115). Dominic Butera, the day shift GU at QW3, testified that it was not unusual for trucks to be damaged in the parking lot and such damage, including broken mirrors, continued after respondent’s suspension (Tr. 944, 946, 949). Christopher Mann, assigned to the day shift in QW3, denied making an anonymous complaint about missing GPS devices (Tr. 955).

Petitioner’s Rebuttal Evidence

Jimin “Jimmy” Xu, general manager of Stone Computers, testified that he first met respondent in April 2012 (Tr. 1605, 1608). Respondent brought the DVR from the 7-Eleven to Xu, who replaced the hard drives with newer, larger hard drives (Tr. 1609, 1615, 1651, 1658, 1668, 1670; Pet. Ex. 19). Respondent left the old drives at Stone Computers, but Xu was unable to retrieve any data from them (Tr. 1610-11, 1669). According to Xu, the drives operated on the manufacturer’s proprietary software. Xu recalled that he explained to respondent that he needed a similar model DVR to read the hard drives and he might have suggested to respondent to search for a comparable DVR on eBay, but Xu did not order a DVR for respondent or make

copies of a DVD for him (Tr. 1611-12, 1669). According to Xu, respondent may have come back for one or two consultations, but neither Xu nor anyone else at Stone Computers performed any more work for respondent (Tr. 1616, 1618).

Xu was a reluctant witness. He was subpoenaed by petitioner and when investigator Tinkler served the subpoena, Xu was “startled” and said that he did not know if he would be available. Tinkler recorded a statement from Xu on video (Tr. 1523). Xu failed to appear on the subpoena’s return date and said that he was in California (Tr. 1559). Contacted by this tribunal by phone, he agreed to appear on August 9, 2013 (Tr. 1560).

According to Xu, respondent went to Stone Computers on August 8 and asked him if he was going to testify (Tr. 1621-22). Xu said yes and told respondent, “You got me into this” (Tr. 1678). Xu claimed that respondent suggested that he did not have to appear because it was only an administrative hearing and the charges would be dismissed if he did not testify (Tr. 1624, 1678, 1688). After consulting with a lawyer, Xu attended the hearing (Tr. 1624).

At the hearing, Xu testified, “I’m involved because of him. I got the subpoena because he mentioned my name in whatever the matter in the court ... my personal life has been disturbed by this. I’m not very happy about it, that I had to be here” (Tr. 1623).

Tinkler recalled that, when he served the subpoena on Xu on July 15 to testify the next day, Xu said that he did not think that he would appear (Tr. 1523). The next day, Tinkler again met with Xu, who said that he had to work in the store (Tr. 1523). During the video interview with Tinkler, Xu said that he could not remember buying a DVR for respondent, “probably because I didn’t do it” (Tr. 1536-37). He did not order or purchase a DVR on eBay and had no record of such an order (Tr. 1537). Xu also claimed that he never took possession of the 7-Eleven’s DVR, but he knew the name of its manufacturer (Tr. 1538, 1542, 1548-50).

Howard Grund, the Department’s IT support person who received the hard drives in April 2013, testified that he could not read the files because it was a proprietary system (Tr. 1493). He called the manufacture and learned that the drives could only be read by the manufacturer’s DVR machines (Tr. 1494). He checked within the Department and could not find that type of device, but he did not contact DOI for assistance (Tr. 1495, 1508, 1516).

Erskine Fleming, director of DOI’s digital forensic unit, examined the DVD introduced into evidence by respondent and testified that it was created on May 31, 2013 (Tr. 1571, 1593). It appeared to be a video recording of a video shown on a computer monitor (Tr. 1573). He

discussed the possibility of “time drift,” where two computers are set at the same time and gradually end up with different times (Tr. 1576). To verify the accuracy of the time shown on the underlying surveillance video, Fleming needed to examine the DVR at its location to see whether the time was set manually (Tr. 1574-75). He opined that, a few weeks after the surveillance video was recorded, there was “no way” to verify the time (Tr. 1577). Fleming also noted that DOI does not have the type of DVR player used by the 7-Eleven but it could obtain one if necessary (Tr. 1597).

Neil Gallagher, the Department’s director of building maintenance, reviewed records of lighting repairs at the QW3/QW6 lot and testified that there were no repairs or light bulbs changed from April 13, 2012 to date (Tr. 1185-86). There was one work order on June 25, 2013 to “repair lighting in the truck parking lot” and four out of five light posts were not working on that date (Tr. 1187; Pet. Ex. 17). Gallagher conceded that, at least one of those lights could have been out since January 2012 and nobody noticed, complained, or filled out a work order (Tr. 1191-93).

Investigator Tinkler spoke to a police department sergeant who stated that he spoke to “someone in maintenance” and there was no additional lighting on the roof of the fleet services building since April 2012 (Tr. 1206). The sergeant said that light bulbs were “probably changed” but he had no records for that (Tr. 1206). And there was no evidence of what, if any records, were reviewed by the person with whom the sergeant spoke (Tr. 1219).

ANALYSIS

Petitioner alleged that respondent failed to maintain Department equipment on April 13 and 14, 2012, by leaving a collection truck unattended with its lights on in the parking lot, and he vandalized Department equipment on April 14, by breaking the side view mirrors (ALJ Ex. 1). Though the evidence proved that the truck was misused and vandalized, petitioner failed to prove that respondent was the culprit.

Petitioner “has the burden of proving its case by a fair preponderance of credible evidence.” *Dep’t of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007). To prevail, petitioner must persuade the trier of fact “that the existence of a fact is more probable than its non-existence.” *Richardson on Evidence* § 3-206 (Lexis 2008). If the evidence is equally balanced, or if it leaves the fact finder in such doubt as to be unable to decide the controversy

either way, the charge must be dismissed. *Id.*; *Health & Hospitals Corp. (Metropolitan Hospital Ctr.) v. McCaskey*, OATH Index No. 2195/08 at 9 (Sept. 29, 2008); *see also Dep't of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010).

Resolution of this case turns on credibility. The investigators insisted that they saw respondent leaving the truck lights on both nights and breaking mirrors on the second night. Respondent denied the allegations. When analyzing credibility, relevant factors include demeanor, consistency of a witness's testimony, supporting evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience. *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).

Though the investigators may have believed that they saw respondent committing misconduct, the weight of credible evidence does not support their belief. From their rooftop vantage point – inside a car, behind a three foot guardrail – the investigators had a limited opportunity to view the person who drove truck 25DC068 to the back of the parking lot.

There was conflicting evidence regarding the overall lighting conditions in the parking lot. But petitioner's video evidence proved that it was very dark in the back of the parking lot. It was so dark that no one is visible on petitioner's video recording even though the camera was pointed directly at truck 25DC068. The video also showed that the investigators needed light from the camera and a flashlight when they went to the back of the lot to inspect the truck.

When the investigators went to the front of the truck, they discovered that it was parked facing a concrete barrier. To get from the passenger's side to the driver's side, the investigators walked behind the truck. Yet they both claimed that they saw respondent walk around the front of the truck after he broke the passenger side mirror. Because of the concrete barrier, that was unlikely. It is more likely that whoever broke the passenger side mirror walked around the back of the truck and the investigators could not see that person because it was too dark.

The investigators stated that, in the darkness, they saw respondent driving truck 25DC068 on both nights and on the second night they watched him continuously from 2:00 to 3:18 a.m., including 3:13 a.m. when they saw him break the passenger side mirror. I did not credit that claim. It is more likely that, beginning at 2:00 a.m. on both nights, the investigators saw respondent moving QW3 trucks. They assumed that he parked truck 25DC068 in the back of

the parking lot each night, without considering the possibility that someone else drove truck 25DC068 and a few other trucks after respondent left the lot.

The investigators' assumption may have been influenced by the anonymous tip which made respondent the target of the investigation into the theft of GPS devices at QW3. And the investigators knew that, several years earlier, respondent had accused a supervisor of threatening him with a knife. Such factors may have caused the investigators to suspect that respondent was capable of vandalizing Department property, but that was not proof that he did so.

Petitioner argued that respondent had the burden of proving his alibi (Tr. 1477, 1489). That was incorrect. Respondent did not have the burden of proof and he was under no obligation to present a defense. But he did offer a plausible alibi supported by other witnesses and video evidence. From the night of the incident, and throughout the hearing, respondent has been consistent. He said that he went to the 7-Eleven and he did not vandalize Department property. When first confronted by investigators on the morning of April 14, respondent did not know that they had been on the roof with a video camera. They asked him if he had done anything unusual and he immediately replied that he had been to the 7-Eleven.

When the investigators revealed that they had made a video recording, respondent continued to deny any wrongdoing and he asked to see the video. His reaction was consistent with that of a person who had done nothing wrong. *Cf. Dep't of Sanitation v. Kruszewski*, OATH Index No. 469/11 at 2 (Apr. 6, 2011), *modified on penalty*, Comm'r Dec. (June 1, 2011) (sanitation worker denied wrongdoing when confronted by investigator accusing him of trade waste violation, but then asked for leniency after investigator told him that the violation was caught on video).

Respondent's later actions bolstered his defense. He went to the 7-Eleven, persuaded the owner to let him replace the hard drives, took the DVR to Stone Computer, explored the possibility of paying exorbitant fees to a data recovery service, gave the hard drives to the Department, and eventually obtained a copy of the security camera footage. Though petitioner raised some questions about how respondent made a copy of the security camera recording, it appears that respondent went to great lengths to obtain this evidence. He would not have been so persistent unless he genuinely believed that the evidence supported his defense.

Lewis, a retired supervisor, further supported respondent's alibi. Confirming that respondent went out on an early meal break that night, Lewis credibly testified that respondent

returned to the garage at least 15 to 20 minutes before the investigators walked in at 3:45 a.m. (Tr. 1245). Allowing for ten minutes of travel time (five minutes each way) and ten minutes spent inside the 7-Eleven, Lewis's testimony supports a finding that respondent was not continuously in the GW3/QW6 parking lot from 2:00 to 3:18 a.m., as the investigators claimed.

Amorelli, the 7-Eleven owner, was an especially credible witness. I fully credited his testimony that he checked the security video for the time that respondent requested, approximately 3:00 a.m. on April 14, and he spotted respondent "right away" (Tr. 1150, 1154, 1163).

The video evidence confirmed the testimony of respondent, Lewis, and Amorelli. It showed respondent driving a Department vehicle into the 7-Eleven parking lot at night. According to the time stamp on the recording, respondent entered the 7-Eleven at 3:12 a.m. and he left at 3:22 a.m., after using the restroom and purchasing food and coffee.

Conceding that the video showed respondent went to the 7-Eleven on April 14, petitioner questions about accuracy of the time stamp (Tr. 1746). Petitioner's arguments were unpersuasive. For example, petitioner elicited from Amorelli that he did not set the clock on the security system's DVR device. That may be so, but the evidence showed that Amorelli was a business owner who relied on his security system's cameras. And the Police Department also relied on the security system recordings while investigating accidents on Queens Boulevard. Notably, when respondent asked him to check the recordings for a specific time frame, Amorelli did not express any doubt about his system's timekeeping accuracy. Instead, he checked the recording for the relevant time frame and immediately saw respondent.

Petitioner's expert witness suggested that it was possible that the timekeeping on the 7-Eleven surveillance system had "drifted," but there was no evidence that such drifting had occurred. Petitioner's witness also suggested that it would be impossible to test the accuracy of the system's timekeeping stamp even if he had received the hard drive a few weeks after the incident. That seemed to be an impossibly high standard that would prevent the Department or other agencies from relying on surveillance system videos in any employee disciplinary case.

The wall clock shown on the 7-Eleven recording did not rebut respondent's alibi. A review of the video evidence, even when enlarged, showed that the time on the wall clock was not nearly as visible as petitioner suggested. At best, respondent was guessing when he agreed with petitioner that the time on the wall clock was 3:55, 4:55, or 12:20.

Xu's testimony that he did not make a copy of the video for respondent and that respondent told him that he did not have to honor the subpoena, was cause for concern. But there are multiple possible explanations for this testimony. To begin with, Xu made very clear that he resented having to testify and he blamed respondent for "getting him involved." Thus, he may have suffered from selective recall. Indeed, when questioned by Tinkler on video, Xu denied that he ever had the 7-Eleven's DVR, but at the hearing he conceded that he replaced the hard drives on that machine. It was also possible that Xu's eBay transaction for respondent was an off-the-books exchange that he did not wish to acknowledge. Or, it may be that Xu told the truth and someone else, such as one of respondent's relatives, friends, or co-workers made the recording of the surveillance system video. No matter how respondent obtained a recording of the security camera video, there was no evidence that he had the ability to alter the underlying surveillance video which showed the time on the screen of the security cameras.

It is also noteworthy that petitioner missed several chances to rebut or confirm respondent's alibi. Though the investigators were on the rooftop with a video camera they only recorded five minutes of video from that vantage point and none of it showed respondent. When they first confronted respondent and he said that he had been to the 7-Eleven, the investigators asked no follow-up questions. When they finished the interview they did not go to the 7-Eleven, which was five minutes away. Finally, when respondent provided the Department with the hard drives, petitioner's IT staff only made minimal, unsuccessful efforts to retrieve the data. They did not even bother to contact DOI, which has a digital forensic unit that could have provided additional technical expertise.

Petitioner suggested that it was under no duty to conduct an additional investigation because the investigators considered their case overwhelming (Tr. 671). For comparison, petitioner argued, if two attorneys who knew each other met in the hallway outside the hearing room, there would be need to check this tribunal's security cameras to confirm their identities (Tr. 1744). That analogy is inapt. Here, petitioner relied on the nighttime observations of two investigators, only one of whom knew respondent in passing. The viewing conditions were so bad that petitioner's surveillance video did not record any people. In this context, the investigators should have made some effort to check respondent's alibi when they had the opportunity to do so. Indeed, Chief Durrell conceded that it would have been a prudent step for

the investigators to go to the 7-Eleven on the morning of April 14 to see if respondent had been there (Tr. 118-19).

Having presented credible evidence that he was elsewhere when someone vandalized the collection truck, respondent is entitled to dismissal of the charges. He did not have to prove who committed the misconduct. Petitioner suspected respondent because of the anonymous tip and the fact that moving trucks in the parking lot was one of his duties during the midnight to 8:00 a.m. shift. But there are others who had the opportunity to commit misconduct in the back of the darkened parking lot. The acts could have been committed by an off-duty sanitation worker or an on-duty worker at one of the four garages located on the same block as the parking lot. Also, the sanitation worker who was working on a security detail, supposedly watching the lot, was away from his post when the misconduct occurred. Finally, despite the uncertainties in this case, one thing is certain. Somebody made a tip that triggered an investigation. That tip implicated respondent and alleged that Department officials knew about it. The tipster obviously harbored ill will toward respondent and was capable of making outlandish claims against Department officials. That is the sort of person who is also capable of breaking a mirror with a shovel.

FINDING AND CONCLUSION

Petitioner failed to prove that respondent failed to maintain or vandalized Department equipment.

RECOMMENDATION

I recommend dismissal of the charges.

Kevin F. Casey
Administrative Law Judge

October 7, 2013

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

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