Dep't of Sanitation v. Nieves

OATH Index No. 1683/07 (Sept. 19, 2007)

Respondent is charged with failing to perform supervisory duties, many of which pertain to record keeping responsibilities, insubordination, making a false entry on an official Department record and negligence for ordering a sanitation worker to operate a salt spreader on a flat front tire. Eleven of the fifteen charges are sustained, and four should be dismissed. Administrative Law Judge recommends a 41-day suspension without pay with additional training in supervisory work if deemed appropriate in the agency's discretion. Alternatively, demotion in lieu of suspension is recommended if parties stipulate that demotion is a more appropriate penalty for respondent's proven difficulties in completing supervisory tasks.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
RAMON NIEVES
Respondent

REPORT AND RECOMMENDATION

JOAN R. SALZMAN, *Administrative Law Judge*

This is an employee disciplinary proceeding referred by petitioner, the Department of Sanitation (the "Department"), pursuant to section 16-106 of the Administrative Code. Petitioner has charged respondent, Ramon Nieves, a supervisor, with fifteen separate violations of the Department Code of Conduct (ALJ Ex. 1). Respondent is charged with failure to complete various tasks, mostly related to recordkeeping duties, as well as insubordination and making a false entry on an official Department record.

A hearing was held on May 18, June 5 and June 15, 2007, and the record was closed on June 25, 2007, when agency counsel provided a final email showing respondent's attendance in June 2005, a fact necessary for one of the charges (ALJ Ex. 2). Petitioner presented testimony from Deputy Chiefs Albert Durrell, Myron Priester, Chi Dong, and John Adair, Supervisor Glenn Carlson, Superintendents Richard G. Moffatt, Michael Gonzalez, and Thomas Hughes,

and Sanitation Workers/Superintendent's Clerks Jackson Quinones and Linda Brown. Clerk Alfredo Sigcha and Supervisor Nick Marone testified for respondent, who also testified on his own behalf.

ANALYSIS

In most of the fifteen charges, petitioner alleges that respondent failed to perform his supervisory duties with respect to a variety of assignments, including making timely and correct computer entries regarding truck allocations, signing off on fuel and lubrication records, issuing parking violation stickers, cleaning a reported litter condition, closing out the collection functions for Manhattan District 3, and causing damage to a garbage truck. Additionally, petitioner alleges that respondent knowingly and intentionally made a false statement on the DS 350 time card for a sanitation crew under his supervision, the charge the Department contends is the most serious in this case.

Most of the hearing did not focus on whether respondent made the mistakes alleged, but "whether the individual mistakes rose to the level of misconduct and warranted a disciplinary penalty. In order to sanction civil service employees for mis-conduct under Civil Service Law section 75, or in this case, the Administrative Code, there must be some showing of fault on the employee's part, either that he acted intentionally (*see Reisig v. Kirby*, 62 Misc.2d 632, 635, 309 N.Y.S.2d 55, 58 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008, 299 N.Y.S.2d 398 (2d Dep't 1969)), or negligently (*see McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951, 425 N.Y.S.2d 61, 62 (1979)). Mere errors of judgment, lacking in willful intent and not so unreasonable as to be considered negligence, are not a basis for finding misconduct. *See Ryan v. New York State Liquor Auth.*, 273 A.D. 576, 79 N.Y.S.2d 827, 832 (3d Dep't 1948); *Dep't of Correction v. Messina*, OATH Index No. 738/92 (July 9, 1992)." *Dep't of Sanitation v. Rizzo*, OATH Index No. 1423/06, at 2 (Sept. 26, 2006). In order to prevail, petitioner must prove that respondent intentionally violated a Department rule or was careless or negligent in his duties. As to allegations of negligence, the degree of carelessness must be more than *de minimis*, since minor and inconsequential errors do not rise to the level of misconduct. *See Dep't of Sanitation v. Frank*, OATH Index No. 465/03, at 8 (Feb. 28, 2003); *Dep't of Sanitation v. Williams*, OATH Index No. 386/03, at 19 (May 29, 2003).

As discussed below, I find that eleven of the fifteen charges should be sustained and four should be dismissed.

Charge 120988: False Entry on a DS 350 Card and Failure to Complete Form Correctly

Respondent has been charged with making a false entry on the DS 350 card as to the time his crew of sanitation workers returned to the garage from the field, in violation of Department rules 3.6, 4.4, and 8.1. I find that respondent did not make a deliberately false entry, but he was negligent in keeping records that were inaccurate, incomplete, and unverified.

On August 8, 2005, Deputy Chief Adair ("Adair") was working the 6:00 a.m. to 2:00 p.m. shift, and was in charge of Manhattan Districts 6 and 8. At approximately 11:00 a.m., Adair went to Manhattan 8 Garage to sign time books. Upon arriving, Adair noticed four loaded collection trucks parked at the garage (Tr. 293-95). Two of the four trucks were assigned to District 8, section 83. Respondent was the supervisor for section 83 that day. According to Adair, a collection truck working the 6:00 a.m. to 2:00 p.m. shift should not have been back at the garage and loaded that early. Adair testified that the earliest time a truck in this section should be back at the garage is the cut-off time, which is 11:10 a.m. If the truck is not finished with the cleaning and pick-up route by 11:10 a.m., the crew is to remain in the field, complete its route, and leave the field at 1:10 p.m. If the truck finishes its route before the cut-off time of 11:10 a.m., the crew is supposed to go to the dump and empty the truck before returning to the garage. Thus, Adair thought it strange that two loaded trucks from section 83 were at the garage before 11:10 a.m. The trucks were full, so they should have been taken to the dump prior to returning to the garage (Tr. 295-98).

Adair asked Superintendent Douse to investigate the situation. Superintendent Douse informed Adair that the route assigned to one of the section 83 trucks was complete, and, therefore, that the truck should have proceeded to the dump (Tr. 297). Adair then ordered Superintendent Douse to discipline the supervisor responsible for the incident. Surmising that someone had made a false entry on the time card, Adair requested the DS 350's for two of the trucks (Pet. Ex. 19, 20; Tr. 301-02). He reviewed them and found that on the DS 350 for truck 25-CN-519, the "depart" section of the card, which is supposed to indicate what time a truck leaves its section in the field, reported that the truck was out in the field until 11:45 a.m. (Tr. 299). According to Adair, he had seen that same truck fully loaded and parked in the Manhattan 8 Garage at 11:00 a.m., and section 83 was approximately seven miles from the garage, so that the truck could not have been at the garage at 11:00 a.m. and back in the field at 11:45 a.m. (Tr. 304-05). Adair's estimate of the travel time was not disputed. I find it unlikely that the truck

went to the garage at 11:00 a.m., only to return to the field by 11:45 a.m., and then make a round-trip to the garage.

Petitioner asserts that respondent made a false entry on the DS 350 as to the time that truck 25-CN-519 left section 83. The testimony from both Adair and respondent established that although it is generally the sanitation worker driving the truck who fills out the DS 350, it is the supervisor's job to initial and sign off on all times and other information written on the card. The Department contends that because respondent signed off on the time card for truck 25-CN-519, and the information was not true, he must have falsified the document.

This tribunal has previously ruled that to prevail on a charge of making false statements or entries, it is not enough to show that respondent's statements were inaccurate; rather, petitioner must prove that respondent made false statements with the intent to deceive. *Dep't of Sanitation v. Chaudhuri*, OATH Index No. 1231/07, at 3 (May 3, 2007); *Dep't of Environmental Protection v. Martinez*, OATH Index No. 734/06 & 1486/06, at 5-6 (May 24, 2006) (petitioner must show intentional false entry rather than mere inaccuracy). Thus, the issue here is whether respondent initialed and signed off on the incorrect time on the DS 350's for truck 25-CN-519 with intent to deceive the Department.

Respondent's defense is that because the sanitation worker is the only one who knows exactly what time he arrives and departs a section, it is the sanitation worker's responsibility to fill out the form accurately. He stated that because section supervisors must oversee an entire section, it is impossible for them to know precisely what time each truck enters or leaves a section (Tr. 501). Respondent argues that he did not intentionally initial a false time, but that he trusted the sanitation workers to fill in the correct time. I credit respondent's testimony in this respect. Petitioner presented no evidence that would lead to a conclusion that respondent initialed the incorrect time purposefully, with intent to deceive the Department. Rather, the evidence suggests that respondent was careless in that he did not verify the departure time for this particular truck before signing off on the DS 350's. The record supports a conclusion that respondent simply relied on the sanitation worker's notations, but under the Department rules 3.6 and 8.1, he remains accountable and must make efforts to verify what subordinates are telling him. Under Department rule 8.1, "[s]upervisory personnel shall be responsible and accountable for carrying out all of their assigned tasks." Under Department rule 8.6, "[s]upervisory personnel shall be responsible and held accountable for following the proper procedures and

complying with Department Orders, Rules and Regulations on the preparation and maintenance of Department files, records, reports and forms."

There is a paucity of evidence here that respondent had something to cover up or to gain by recording incomplete and incorrect information, except perhaps to avoid the added work of checking and completing the forms. I find his conduct negligent, not intentional. It is more likely that he was simply careless as to truck 25-CN-519. Similarly, truck 25-CN-097 began in section 84 and then was diverted to section 83, but respondent failed to sign the DS 350 for that truck and failed to complete its arrival and departure times when the truck entered and left his section (Pet. Ex. 19; Tr. 302-04).

Consequently, I find that petitioner did not prove by a preponderance of the evidence that respondent made a false entry on a DS 350 with intent to deceive the Department. This charge should be dismissed in part as to the alleged false statement, but sustained insofar as respondent is accountable for his paperwork and failed to complete his assigned tasks and supervisory duties properly, in violation of Department rules 3.6 and 8.1.

Charge 115160: Improperly Ordering a Salt Spreader to be Driven on a Flat Front Tire, Causing the Tire to be Destroyed

Respondent has been charged with ordering a sanitation worker to operate a sanitation truck on a flat front tire, destroying the tire, in violation of Department rules 5.11, 5.12, and 8.1.

On March 1, 2005, Superintendent Hughes ("Hughes") was working the 7:00 a.m. shift in Manhattan District 3. Upon reporting to work, Hughes did a standard equipment check, as it had been snowing that day and it was customary to check the snow equipment to make sure it was in working condition. During inspection, Hughes noticed that a salt spreader vehicle had a flat front tire. This particular vehicle had been assigned to and used during the midnight to 8:00 a.m. shift on March 1, 2005. Respondent was the garage supervisor for District 3 during that shift (Tr. 144-46).

After discovering the flat tire, Hughes asked respondent what snow equipment was available and if there were any vehicles that were not up and running (Tr. 146). Respondent told Hughes that a salt spreader was down because it had a flat front tire (Tr. 147, 5). Hughes examined the tire and concluded that it could not be repaired, "it was completely destroyed" and had to be replaced (Tr. 147, 150-51). Hughes asked respondent how the tire had been destroyed,

and respondent replied that he had ordered a sanitation worker to drive it into the garage from the field after the worker had reported to respondent that the vehicle had a front flat tire (Tr. 147-48; Pet. Ex. 10).

At trial, Hughes testified as to the procedures to be used if a sanitation worker encounters a flat tire on his vehicle while out in the field. According to Hughes, an order from the Department mandates that when a worker gets a flat tire in the field, he is to call the garage foreman for his district, and the garage foreman should then call the field supervisor to go into the field and investigate (Tr. 148). Hughes recalled that it is a violation of a Department order to drive an agency vehicle on a front flat unless the vehicle is on a highway and the worker is in danger (Tr. 149). Even though the truck was near the garage, Hughes understood the order to prohibit driving on a flat front tire (Tr. 160-61). Respondent did not have any field supervisor investigate the flat before he ordered the sanitation worker to drive the truck to the garage (Tr. 150). Petitioner did not offer this order into evidence and counsel represented that it could not be located (Tr. 438), but respondent was not charged with insubordination; rather he was charged with failure to safeguard the Department's equipment.

The Department contends that respondent's decision to order the vehicle to be driven into the garage was misconduct. It is settled law that not all mistakes in judgment constitute sanctionable misconduct. Rather, proof of misconduct under Civil Service Law section 75 or the Administrative Code requires some showing of fault on an employee's part, such as intentional and willful misconduct, or negligent or reckless behavior. *See, e.g., Dep't of Sanitation v. Gentile,* OATH Index No. 1207/96, at 22-23 (Feb. 27, 1997), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 98-49-A (July 21, 1998). A reasonable degree of care is required of any motor vehicle operator. The Department imposes an even higher standard of care upon its workers who operate Department vehicles due to the inherent danger associated with driving heavy equipment. Sanitation workers must exercise the "highest degree of care" in the operation or guidance of sanitation vehicles. *Gentile,* OATH 1207/96, at 24; *Dep't of Sanitation v. Mullings,* OATH Index No. 1087/03, at 9-10 (May 20, 2003). Thus, the issue here is whether respondent engaged in any intentional or willful misconduct or acted negligently or recklessly with respect to his decision to order Sanitation Worker Larson ("Larson") to drive the truck into the garage on a flat tire, or if he simply made an error in judgment. Although respondent was not actually

driving the vehicle, he issued the order to Larson to drive it, and thus it was respondent's decision that caused the damage to the salt spreader.

Although the Department's inability to locate the order about which Hughes testified casts doubt on his testimony that such an order was actually issued, the testimony nonetheless established that there are certain procedures that supervisors and sanitation workers know they must follow in the case of equipment malfunction[1] (Tr. 148). The fact that Larson did not drive the truck in on his own authority, but rather contacted the respondent, who was the garage supervisor during this shift, is consistent with the procedures articulated by Hughes, and indicates that there are certain procedures to be followed in the case of an equipment malfunction in the field, regardless of whether there is an order codifying them. Thus, I believe the evidence presented by petitioner proved that respondent was negligent in his decision to order the salt spreader to be driven on a flat tire. Respondent certainly did not exercise the "highest degree of care" in guiding this sanitation vehicle. The acceptable and most cautious course of action would have been to wait for a field supervisor to investigate the vehicle.

In response to this charge, respondent's defense was that he made the determination that it was appropriate to order the salt spreader to be driven based on several factors. First, respondent believed that since the vehicle was only two blocks from the garage and there was snow on the streets, the damage to the tire would be minimal. Additionally, respondent argued that because it was a heavy snow day, his main concern was to get the vehicle back into the garage and repaired as quickly as possible so it could return to spreading salt on the icy streets (Tr. 435-38; 439-42).

The legitimate safety concern respondent cites does not excuse his ill-advised decision to drive a heavy and expensive piece of equipment on a flat tire. Moreover, because the vehicle was in such close proximity to the garage, it is not likely that it would have taken much time to wait for a field investigator to inspect the vehicle. Respondent knew, because Larson so informed him, that the flat tire was a front tire (Tr. 439-41), which would have been more easily

[1] Similarly, that the Department conceded that there was no entry in the mechanics' book assessing damage to the tire in question (Tr. 157-58) does not persuade me that Hughes' clear, credible, first-hand observation of the destroyed tire was inaccurate.

damaged than a rear, tandem tire if driven flat.[2] Respondent also knew Larson was not driving the truck on a dangerous highway (Tr. 440), and respondent could have waited for an inspection of the tire, only two blocks away before ordering Larson to drive on the flat. Respondent also conceded he could have sent a wrecker to haul the truck in (Tr. 440). Sanitation vehicles are complex, heavy, and potentially dangerous pieces of equipment. This is precisely why the Department requires such a high degree of attention and care from those who are operating or guiding these vehicles. Here, respondent did not go into the field to investigate the flat tire himself before ordering Larson to drive the truck back to the garage (Tr. 435). I credit Hughes' testimony that in ordering Larson to drive the truck, respondent ignored the high likelihood of damage that would occur to the vehicle as a result of being driven on the flat tire. This is especially true given the fact that the tire in question was a front tire.

Accordingly, I find that petitioner established by a preponderance of the evidence that respondent was negligent in his decision to order the salt spreader to be driven on a flat tire.

Charge 122135: Insubordination for Failing to Locate and Remedy a Litter Condition

Respondent has been charged with insubordination in violation of Department rule 3.1. The Department alleges that he refused to obey an order from Deputy Chief Adair to investigate and clean up a garbage condition on East 23rd Street between Park and Lexington Avenues.

On September 29, 2005, at approximately 2:10 p.m., Deputy Chief Adair was traveling east on 23rd Street between Park Avenue and Lexington Avenue, in Sanitation District Manhattan 5. As Deputy Chief, one of Adair's responsibilities was to monitor the districts to which he was assigned. Adair was not assigned to Manhattan District 5 on this particular day, but was driving through the area to return to the Borough office when he noticed a large litter condition on the south side of East 23rd Street, which he described as "a large pile of debris on the sidewalk, in a bus stop" (Tr. 293, 312-314). He further described the condition as resembling "the sleeve of an air conditioner" (Tr. 315). Adair attempted to contact the Manhattan overtime officer by radio, but received no response. Adair subsequently called the Manhattan 5 Garage by cell phone and

[2] The two back wheels of a salt spreader are in tandem, meaning there are two tires on each side in the back of the vehicle. There is only one tire on each side in the front. As Hughes testified, if one of the rear tires had been flat, it would have been possible to drive the vehicle in without causing too much damage, as the other tires in the back could support the weight of the truck. However, with a front flat, extensive damage to the tire or vehicle is probable, as the single, front tire must bear much of the weight of the truck (Tr. 151-52).

spoke to Supervisor Dellario ("Dellario"). Adair testified that he asked Dellario to find the overtime officer and ask him to go to the litter condition at East 23rd Street between Park and Lexington Avenues on the south side of the street and clean it up, and if necessary to write a summons to the building. Dellario informed Adair that Supervisor Nieves was the overtime officer working in that section. Adair did not inquire further about the condition after relaying this information to Dellario (Tr. 314-15; 322-23). Adair's testimony about the south side of the street was confusing because at one point he testified that he told Dellario the condition was on the south side of *Park Avenue* (Tr. 322). Even though I read his testimony, taken in its entirety, to be a complaint about a condition on East 23rd Street, this confusion in his testimony leads me to question whether his message was clearly conveyed to respondent, especially because it went through a middleman on the telephone.

Four days later, on October 4, 2005, Adair was driving the same route he had been driving on September 29 and came across the same garbage condition on the south side of East 23rd Street. The litter condition in the air conditioner sleeve that remained in place had worsened (Tr. 315). Adair exited his vehicle and took pictures of the condition (Tr 317; Pet. Ex. 21). Adair concluded that his instructions were ignored (Tr. 318). He then called the District Superintendent of Manhattan 5, Superintendent Capella ("Capella"), gave him a copy of the picture of the litter condition, and inquired as to why the garbage was still there when he had given an order four days before to have it cleaned up. Adair instructed Capella to write a complaint to the supervisor who had been ordered to remedy the litter condition. Adair then telephoned Supervisor Dellario on October 4th and asked him if he had relayed his message to Supervisor Nieves the previous Thursday, to which Dellario responded that he had (Tr. 328). Dellario told Adair that respondent had said he "could not find the condition" to which Adair had been referring (Tr. 316-324).

After lodging the complaint, Adair became aware that respondent had actually cleaned up a litter condition on the north side of East 23rd Street and issued a summons to the 7-Eleven store at 105 East 23rd Street (Pet. Ex. 22). At this point, the testimony provided by petitioner's witnesses contradicts respondent's version of the events, and shows gaps in communication at the agency. First, according to Adair, Dellario told him that respondent had said he "could not find the condition" to which Adair had been referring. However, respondent did clean up a litter condition and he issued a summons to a 7-Eleven on the north side of 23rd Street (Tr. 324).

Adair testified on cross-examination that he thought it "unusual" that Dellario never told him, when Adair asked if Dellario had given Adair's instructions to respondent, that respondent had reported to a condition on the north side of 23rd Street and issued a summons and cleaned up a different litter condition on that same street, instead telling him only that respondent could not find the condition (Tr. 328). Moreover, Adair apparently was not even aware that this summons had been issued on that block until he heard about it from agency counsel[3] and never saw the summons until the hearing. Adair never spoke to Nieves on September 29th and October 4th (Tr. 326), and was not a party to Dellario's conversation with respondent (Tr. 327).

As a result of respondent's failure to locate and remedy the litter condition, he is charged with violating Rule 3.1 of the Department's Code of Conduct. This rule requires employees to obey all "Rules, Regulations, Orders, messages, and direct orders given them by their superiors." Petitioner contends that respondent deliberately refused to obey the order from Deputy Chief Adair to clean up the litter condition. In order to find respondent guilty of insubordination, the Department must prove by a preponderance of the evidence "1) that an order was communicated to respondent which he heard; 2) that the content of the order was unambiguous; and 3) that respondent willfully refused to obey the order." *Dep't of Environmental Protection v. Schnell*, OATH Index No. 2262/00, at 6 (Oct. 25, 2000).

The Department failed to present sufficient evidence showing that the order to remove the litter condition was clearly communicated. The Department presented hearsay testimony that Supervisor Dellario told Adair that he had conveyed Adair's instructions to respondent, including, in theory, the exact location of the condition, and specifically, that it was located on the south side of the street. The Department did not call Dellario as a witness to testify to this fact. This hearsay leaves some doubt as to whether the order was clearly communicated for purposes of an insubordination charge. *See Dep't of Correction v. Hipp*, OATH Index No. 337/00 (Dec. 3, 1999) (insubordination charge dismissed where petitioner failed to prove captain clearly communicated to subordinate when she was supposed to appear at the administrative office); *Dep't of Correction v. Segree*, OATH Index No. 340/02 (Apr. 11, 2002) (insubordination charge dismissed where petitioner did not prove supervisor clearly communicated demand to respondent.)

[3] Perhaps if Adair had known that a summons had been issued, he might have concluded that respondent had simply mistakenly identified and cleaned up an entirely different litter condition in a good faith effort to comply with Adair's orders.

Further, I credit respondent's testimony that he drove to the location given to him, East 23rd Street between Park and Lexington Avenues, and made a good faith effort to follow the order to find and clean up a litter condition. Respondent testified that the only information given to him by Supervisor Dellario was to report to East 23rd Street between Park and Lexington Avenues to remove a litter condition (Tr. 475-86).

Even assuming that the correct information was conveyed to respondent about the location of the litter condition, the Department did not establish by a preponderance of the evidence that respondent willfully refused to obey the order. To the contrary, the fact that respondent removed a litter condition from the north side of the street and issued a summons appears to be a good faith effort to comply with the order. Upon arrival to the site, respondent testified that he noticed a large and unsightly litter condition in front of a 7-Eleven store, promptly cleaned it up, and issued a summons (Tr. 475-76). Respondent testified that he had not been given a description of the particular litter condition he was to remedy, and Dellario was not called to clarify the communications in question. Respondent indicated on cross-examination that most of the time, the supervisors convey the side of the street on which a condition was found when ordering an officer to clear the condition if that information is known (Tr. 480-82, 484), but Dellario's exact words were not offered by the Department. Additionally, respondent contended that because the litter condition was located next to a bus stop, and East 23rd Street is a busy thoroughfare, respondent would have had a difficult time seeing the litter condition because trucks and other vehicles were blocking his view (Tr. 477-78).

As previously noted, an insubordination charge can only be proved if the petitioner shows by a preponderance of the evidence that respondent intentionally refused to obey an order. It seems clear that even if the Department gave respondent the exact location of the condition nearly two years ago, he simply went to the first large, noticeable garbage condition of black bags he saw on the relevant block, figured he was done, and did not stop to consider whether this was the site he was asked to investigate. The record supports a conclusion that respondent did not intentionally refuse to obey the order to investigate and remove the litter condition, but rather made an incorrect assumption that a litter condition he noticed and cleaned up was in fact the same condition he had been ordered to remedy. Absent a willful and intentional refusal to comply with an order, an insubordination charge cannot be sustained.

Accordingly, I find that the Department did not establish by a preponderance of the evidence that respondent refused to obey a direct order to find and cure the litter condition at East 23rd Street and was thus insubordinate. Therefore, the charge is dismissed.

Charge 118913: Insubordination for Failing to Report Timely to the Department Personnel Management Division as Ordered

Respondent has been charged with failing to comply timely with an order issued from the Borough Office to report to the Personnel Management Division ("PMD") at 125 Worth Street on August 9, 2005, to meet with Chief Williams, despite prior notice, in violation of Department rule 3.1. District Superintendent Richard G. Moffatt ("Moffatt"), testified for the Department as follows.

On August 9, 2005, Moffatt was assigned to the Manhattan 5 Garage as District Superintendent for the day (Tr. 106-08). That day, he worked the 6:00 a.m. to 2:00 p.m. shift. Moffatt knew respondent because respondent was working at this time as a rotating officer at the Manhattan 5 Garage (Tr. 107). Moffatt testified that approximately five to seven days prior to August 9, 2005, he received an order from the Borough Office that respondent was to report to PMD at 8:30 a.m. for a meeting with Chief Williams, Director of Personnel (Tr. 107, 109). Upon orders from the Manhattan Borough Command, Jackson Quinones, the Superintendent's Clerk, informed respondent by phone on August 8 of the August 9 meeting (Tr. 108, 277). In addition, Moffatt testified that he personally notified respondent five to seven days prior to August 9th, "at least one or two times personally" of the meeting with Chief Williams (Tr. 107-08). Respondent admitted that he knew about the order to report to PMD (Tr. 397). Moffatt also stated that Quinones noted the meeting in the "Telephone Order Book", which Quinones maintained as Superintendent's Clerk (Tr. 108).

Respondent, as a rotating officer, reported to Manhattan 11 Garage that morning to work the 6:00 a.m. to 2:00 p.m. shift (Nieves: Tr. 398-99). Between 8:30 a.m. and 9:00 a.m., Moffatt received a telephone call from Deputy Chief Mike Murphy ("Murphy") of the Manhattan Borough Office. Murphy informed Moffatt that respondent had not reported to his meeting and inquired as to his whereabouts (Tr. 109). Moffatt informed Murphy that respondent had been assigned to Manhattan 11 that day, but that respondent should have reported to PMD at 8:30 a.m. per the order Moffatt had communicated to Nieves several days before (Tr. 110).

Moffatt testified credibly as to the procedure a Sanitation employee must follow if given an order to report to a meeting away from his assigned post for that day. According to Moffatt, an employee is to report to his assigned post at the proper time and inform the District Superintendent that he has been given an order to report elsewhere during his shift. The District Superintendent would then verify that a meeting had indeed been scheduled and release the employee from his regular duties to allow him to attend his meeting (Tr. 110-11). If an employee is given conflicting orders regarding where he is to report, it is the employee's responsibility to inform the appropriate supervisors that he has another obligation within the Department and must report elsewhere, so that the supervisor or superintendent can verify the meeting, the employee can fulfill his obligations to attend the function he had been ordered to attend, and his duties may be reallocated in the employee's absence (Tr. 111-13). In this case, respondent had been ordered to meet with a two-star Chief (Tr. 111). Moffatt implied strongly that it was both peculiar and unacceptable to ignore such an order, but respondent denied that he knew he was to meet with a Chief or that the subject of the meeting was an evaluation of his work. He said he was given the address and room number, not the participants (Tr. 412, 418).

After learning that respondent was working in the field in District 11, Murphy reached out to respondent on the Department radio and ordered him to report to PMD immediately (Tr. 110-112). Respondent promptly left his section in District 11 and reported to PMD about 10:30 a.m. (Tr. 112, 118). At approximately 11:30 a.m.-12:00 p.m. on August 9, Chief Murphy told Moffatt to write a complaint against respondent for not following orders to report to PMD at 8:30 a.m. (Tr. 111).

Petitioner asserts that the agency issued to respondent an order to appear at PMD at 8:30 a.m. on August 9, and that respondent was insubordinate and thus should be liable for this charge. As noted, to prevail on an insubordination charge, petitioner must prove by a preponderance of the evidence "1) that an order was communicated to respondent which he heard; 2) that the content of the order was unambiguous; and 3) that respondent willfully refused to obey the order." *Schnell*, OATH 2262/00, at 6. I think it clear that the Department has successfully established the above elements. First, Moffatt testified that he told respondent more than once, in advance, about his obligation to report to PMD. Additionally, Moffatt testified that Quinones informed respondent of the meeting and wrote it in the Telephone Order Book. Although petitioner could not locate the Telephone Order Book to present as documentary

evidence verifying that Quinones noted respondent's meeting, I believe the Department's inability to locate this book is a function of the long time that has passed between the incident and these proceedings. Respondent's counsel urges that an adverse inference be drawn against petitioner for failure to locate the Telephone Order Book. However, I do not believe this failure warrants any adverse inference against the Department. In the absence of the Telephone Order Book, Moffatt testified credibly that the order was written. Moreover, Moffatt testified that he inquired as to the whereabouts of this particular Telephone Order Book, but because the incident occurred two years ago, the garage had since discarded this book because all the pages had been utilized (Tr. 118-19). Respondent also admitted that he received the order from Moffatt and Quinones, the week prior to August 9th, about the scheduled meeting (Tr. 402-03). Further, as respondent fully understood that he was to report to PMD at 8:30 a.m., according to his own admission, the order was unambiguous.

The issue is whether respondent willfully disobeyed the order given to him. I find respondent's defense unconvincing in light of Moffatt's credible testimony, general Department procedure and common sense. Respondent asserts that he was issued an order to report for duty to Manhattan 11 several days after he was ordered to report to PMD, so he believed that the second order was an intervening, superseding order, meaning that he was no longer required to attend the meeting at PMD (Tr. 409-10). Thus, in his view, he did not disobey an order because he believed there was no longer a standing order. However, respondent knew that he had been given conflicting orders, one of which was markedly different from his usual commands to report to various garages and work in a supervisory capacity. It was not reasonable for respondent to assume that the previous order to report to PMD was superseded by a routine order to report for duty at a certain garage. Respondent should have inquired of his supervisor about the conflicting orders if he was confused or uncertain as to whether he was still required to appear at PMD, or at least made an effort to verify whether he was really free to ignore the order rather than simply avoiding the issue altogether. His lackadaisical reaction to the minimal complexity of having to answer two orders simply did not reflect the kind of mature judgment the Department should expect from its supervisors.

I find that petitioner established by a preponderance of the evidence that respondent did not timely comply with an order to report to PMD for a meeting with Chief Williams, and the charge is sustained.

Charge 107131: Insubordination for Failing to Submit Proof of Purchase of the Newly Issued Department Raincoat

Respondent has been charged with failing to provide timely proof of purchase of a newly required component of the Department uniform, a raincoat, in violation of Department Code of Conduct rules 3.1, 3.6, 3.9, and 8.1.

On January 1, 2005, the Department issued a new policy requiring all officers holding ranks from supervisor to chief and director to purchase a new raincoat that became part of the mandatory uniform (Tr. 40). This order amended Department Order 99-02, which lists the required items that make up the official uniform (Tr. 41; Pet. Ex. 1). According to petitioner's witness, Deputy Chief Durrell ("Durrell"), the Department sent out frequent messages to superintendents and the various garages reminding supervisors they must have the newly required raincoat (Tr. 40-41).

During the time this order was issued, Deputy Chief Durrell was assigned to Manhattan District 3. As a way to implement the new uniform requirements, Durrell required all supervisors and superintendents to produce the raincoat or a receipt for purchase as a way to verify that each had procured the new coat (Tr. 41-42). The Department order mandated that the coat be purchased by January 1, 2005. Durrell testified that he gave the supervisors and other officers until May to make their purchases (Tr. 42). Durrell also testified that after several weeks of receiving updates regarding which officers had purchased their coats, he eventually gave a final date by which all officers must have acquired the uniform, May 28, 2005, though he could not recall the exact date except by reference to the complaint (Tr. 43). Durrell told Superintendent Hughes to write a complaint against any officer who had not shown proof of purchase by this date (Tr. 43).

As the alleged deadline to make the purchase neared, Superintendent Hughes told Durrell that respondent had not produced his proof of purchase by way of receipt or raincoat (Tr. 43). Durrell testified that he gave respondent an extra few days to get the coat. However, on May 28, 2005, Superintendent Callan ("Callan"), who on this date filled in for Hughes, told Durrell that respondent still had not produced a receipt for the coat (Tr. 44). Durrell ordered Callan to write a complaint against respondent.

Petitioner contends that respondent did not provide proof of purchase of the raincoat to his Superintendent as he was ordered to do, and was thus insubordinate. However, to prove an

insubordination charge, the Department must show by a preponderance of the evidence "1) that an order was communicated to respondent which he heard; 2) that the content of the order was unambiguous; and 3) that respondent willfully refused to obey the order." *Schnell*, OATH 2262/00, at 6. The Department was unable to produce any documentary evidence that would have fixed the events in time, such as an order memorializing the extended, final date by which all officers must submit proof of purchase of the new raincoat. I find that the Department failed to establish by a preponderance of the evidence that Durrell's order to submit a proof of purchase for the raincoat was unambiguous and clearly communicated.

Further, respondent testified that he purchased the required raincoat on December 27, 2004, because he had to have it by January 1, 2005, and provided a receipt that documents the date the coat was indeed purchased (Tr. 36; Resp. Ex. D). Respondent contended that he showed Hughes a receipt of purchase before the May 28, 2005 deadline, and did so in Hughes' office in the presence of his shop steward, Supervisor Marone ("Marone") (Tr. 367-68). Marone, a 17-year veteran of the Department, corroborated this fact (Tr. 337-38). Marone could not recall the exact date that he witnessed respondent's having shown Hughes his receipt of purchase, but respondent was fairly certain that he had timely produced this receipt to Superintendent Hughes. In the absence of any contrary testimony from Hughes, who testified on numerous other complaints, I credit respondent's corroborated account that he complied with the order to prove timely that he bought the raincoat on time. More likely than not, respondent bought the raincoat, kept the receipt and proved his compliance after his timely purchase that he credibly testified he made in late December 2004 to meet the impending January 1, 2005 amendment to General Order 99-02. At the crucial moment, Callan reported respondent delinquent, in Hughes' absence, thereby interjecting some doubt as to whether there was a missed communication due to a change in respondent's supervision. For all of these reasons, I find that the Department also failed to prove that respondent willfully disobeyed a departmental order.

Therefore, I find that petitioner failed to prove by a preponderance of the credible evidence that respondent disobeyed an order to submit proof of purchase of the newly issued raincoat to Superintendent Hughes by an imposed deadline. It seems that with the passage of time, this charge suffers from competing and imprecise recollections. The charge should be dismissed.

Charge 117320: AWOL on May 12, 2005

The Department has charged respondent with being AWOL in that he did not report for a scheduled shift on May 12, 2005, in violation of Department Rules 1.1, 1.4, and 1.6. Respondent contends that he believed he had been authorized to take excused leave with pay for the day in question.

On May 12, 2005, Deputy Chief Chi Dong ("Dong") was working the 12:00 a.m. to 8:00 a.m. shift as a Night Borough Superintendent for the Manhattan Borough. In that capacity, Dong was responsible for overseeing all of the twelve districts in the borough of Manhattan during the nighttime shifts (Tr. 64). Dong reported to work at approximately 11:30 p.m. on the night of May 11th. Dong received a telephone call from Night District Superintendent Glenn Carlson ("Carlson") of Manhattan District 3, stating that respondent had not reported to work at midnight for his scheduled shift (Tr. 65-66). Respondent's name appeared on the "set-up board" at the District 3 Garage, a board that lists the assignments for every employee during that shift in that particular district. Respondent had been scheduled to work as the 12:00 a.m. to 8:00 a.m. Garage Supervisor (Tr. 66-67).

After learning that respondent had not reported for work, Dong checked the corresponding set-up board in the main Borough office, which specifically lists the various officers and supervisors working that shift. After verifying that respondent was indeed scheduled, Dong told Supervisor Carlson to call respondent and tell him to report to work. Carlson telephoned respondent, then reported back to Dong that respondent had said he was not coming into work because he had excused leave with pay for that day (Tr. 68).

According to Dong's and Carlson's testimony, when a supervisor or sanitation worker wishes to request leave with pay, he must submit a DS 1005 form, which is a request for leave. The employee submits the form to the superintendent and to the superintendent's clerk, and the request gets forwarded to the Borough to await approval (Tr. 68). Generally, the Borough office needs the request at least forty-eight hours prior to the time period the employee wishes to take his paid leave, so that his request may be timely processed (Tr. 69). As the district superintendent is also the timekeeper for his supervisors, when he is presented with a DS 1005, he documents the balance prior to leave, the amount of time requested, the balance that will remain after the leave, and then signs the form with either a recommendation for approval or disapproval (Tr. 69). The superintendent's signature does not authorize the leave; it merely

signals that he saw the DS 1005. The superintendent makes only a recommendation for approval. Authorization can only be issued from the Borough office, by the Borough Superintendent or a Deputy Chief (Tr. 70, 80).

After a DS 1005 has been turned in, the superintendent's clerk notes the request as "XWP," meaning excused with pay, in the "Red Book," a daily reminder book that aids in the scheduling of employees (Tr. 75). A leave request entered into the Red Book does not mean the leave will be authorized, but rather that the request is pending and will be taken into account when formulating the upcoming schedules (Tr. 69-70); it is merely a reminder to the "set-up" clerk to set up the next day's preliminary board, which is not final until about 1:30 p.m., the day before the scheduled work (Tr. 77).

After hearing that respondent asserted that he had excused leave with pay, Dong looked in the "leave box," which contains all the leave requests, and found none for respondent for May 12, 2005 (Tr. 70). However, the Red Book indicated that a DS 1005 had been received from respondent for May 12, 2005 (Resp. Ex. B). The testimony from Dong, Carlson, and respondent established that an entry would not have been made in the Red Book unless a DS 1005 had been filled out and submitted (Dong: Tr. 75; Carlson: Tr. 90-91; Nieves: Tr. 377). Therefore, it is immaterial here that respondent's DS 1005 for May 12, 2005, could not be located, or that Dong did not find it on May 12, 2005, because Chief Dong would not necessarily see a leave slip submitted in advance by respondent by checking the leave box on May 12th (Tr. 74-79).

Dong ordered Carlson to write in the Telephone Order Book that respondent was AWOL and to issue a disciplinary complaint against him (Tr. 70). Respondent was listed in the Official Timebook as absent and in the Absence and Lateness Report as a no-show (Pet. Exs. 5, 7). Dong went on to testify that an employee does not usually know whether his leave has been approved until the day before he wishes to take the leave. The Department operates 24 hours a day, so leave is either denied or approved on a tentative day-to-day basis, and one can never assume the leave is granted simply by submitting form DS 1005. There is no guarantee of leave time (Tr. 71, 73-74). Further, the set-up board, which lists each employee's assignment, is not configured until the day before a shift, usually about 1:30 p.m. (Quinones: Tr. 276). Preliminary assignments are sent out to the districts about 11:00 a.m. (Carlson: Tr. 87), but are subject to change and are not finalized until 1:30 p.m. Because the entries in the Red Book are not authorizations, but merely reminders of pending leave requests, an employee must call the day

before his requested day off to confirm that his leave was authorized. If he calls before the schedule is finalized at approximately 1:30 p.m. the day before his shift, he will be told preliminarily that his leave is approved, even though it is still pending (Tr. 77-81). "The setup changes minute-by-minute" because staff must follow "orders from downtown" (Tr. 78).

Respondent was on the 12:00 a.m. to 8:00 a.m. shift in May 2005 (Tr. 88). He received one phone call from Carlson on May 12, 2005, and he told Carlson that he was not going to work because he had been authorized for excused leave with pay. Respondent testified credibly that he telephoned the district at 11:00 a.m. on May 11th to confirm that his leave had been authorized. As of that time, his leave had been approved as far as he knew at that time (Tr. 378).

Petitioner asserts, and Dong's and Carlson's testimony establishes, that authorized leave can be revoked at any time prior to the start of the employee's shift. Accordingly, the Department's evidence was clear that it is the employee's responsibility to call and confirm that his leave is still approved, up until the time the schedule is finalized at 1:30 p.m., even if he has already called prior to that time for a tentative answer (Tr. 77, 82, 92). While this seems to be true, based on the testimony of both Dong and Carlson, it also appears that the Department generally gives a "courtesy call" if feasible to the employee, letting him know that previously approved leave has been revoked. Supervisor Carlson's testimony supports this contention, as he testified anecdotally that on one occasion he had been approved to take excused leave with pay, but received a call from the garage as he was driving out of town on the New York State Thruway, informing him that his leave had been revoked (Tr. 102-03). On another occasion, he testified, his July 4th leave was revoked or "knocked down" (Tr. 102). Respondent admitted that such revocations occur frequently (Tr. 379). Superintendent's Clerk Quinones corroborated Carlson's testimony. Even someone preliminarily excused with pay must come to work if the leave is denied at the last minute, even if the employee is on a highway with his family for a day off (Tr. 283-86).

Carlson called Deputy Chief Dong at the Borough Command to tell him that respondent had not shown up for his shift on May 12, 2005. Under orders from Dong, Carlson phoned respondent and ordered him to work, but respondent refused. Carlson told respondent he was being ordered in by the Borough, but respondent said he was excused with pay (Tr. 90). Carlson documented the call and respondent's failure to appear for midnight roll call in the Telephone Order Book (Tr. 101; Pet. Ex. 6) as a late entry the following day because he forgot to note it on

the 12th (Tr. 98-99). As a result of respondent's absence, a function, the monitoring of relays to New Jersey, was curtailed that day (Tr. 93).

Respondent testified that he filed his leave request two weeks in advance and the Superintendent signed it (Tr. 377). Respondent telephoned the garage at 11:00 a.m. and was informed that he was excused with pay (Tr. 379). However, respondent did not telephone the garage again after 1:30 p.m. to confirm that his leave had not been revoked in the final set-up. Respondent testified that he did not receive a courtesy telephone call from the Department informing him of the change (Tr. 378-80). Respondent's defense to this charge is that he reasonably relied on the information given to him when he telephoned the garage at 11:00 a.m., and that the Department should have called him about the change (Tr. 388). The Department's own witness initially supported this assertion -- Carlson testified that it is reasonable for a worker on a steady tour at a particular district to rely on the information given to him regarding his leave status as early as 11:00 a.m., as that is the time that orders and schedules for the following day's shift are usually transmitted (Tr. 101), but he immediately added that there was no guarantee before the schedule was finalized (Tr. 102). Respondent also asserts that he should have been notified of the change in his leave status before the start of his shift.

Respondent conceded that under union rules, the Department cannot revoke vacations selected at the beginning of the year, but it can unilaterally change individual leave days, even at the last minute (Tr. 81-82). Vacation is treated differently from such leave requests because vacations are blocked out specially. Superintendent's Clerk Linda Brown testified that she entered respondent's request for leave in the Red Book (Tr. 289), but she was not at work on May 11, 2005, and did not take respondent's call (Tr. 289-90). She testified that the Board is set by 1:45 p.m., when she leaves work (Tr. 289). Her testimony that the Department makes an effort to reach out to a sanitation worker to notify him that leave is revoked (Tr. 291), is not inconsistent with Dong's and respondent's testimony that the Department is not required to do so. Perhaps she would have called respondent back had she been on duty on May 11, 2005. I credit the testimony from petitioner's witnesses that it is the employee's responsibility to call and verify that his leave is still approved after the 1:30 p.m. final schedule is set. All employees who work for the Department are aware that the final schedule for the following day is not set until approximately 1:30 p.m.; this is "standard practice" (Dong: Tr. 81). Respondent admitted that he knew that his authorized leave is subject to revocation and that it is based on staffing needs. It

was his responsibility to verify the approval until the last minute, after final work orders (Tr. 382-86). Respondent also conceded that he made only one call at 11:00 a.m. on May 11th, and did not verify his schedule after the board was finally set about 1:30 p.m., though he knew that orders are changed at the last minute (Tr. 387-88). Respondent conceded further that at 11:00 a.m., the orders on the board were only preliminary (Tr. 389). And he conceded that the call he expected about denial of leave would have been a courtesy, not an obligation of the Department (Tr. 389). Respondent was out sick on May 11th and could not himself see the final board, so he was required to call to check his orders (Tr. 378, 390-91). In any event, once Carlson specifically ordered respondent to come to work at midnight and respondent refused, he was AWOL and in violation of attendance rules that required him to report.

In *Department of Sanitation v. Silberzweig*, OATH Index No. 1805/06 (Dec. 11, 2006), the respondent put in three requests for excused leave without pay in order to appear at three separate court dates. His requests were put into the Red Book, and to his knowledge, all were approved. When the respondent did not show up for his scheduled shifts, however, he was marked AWOL because his leave requests had not been authorized. The ALJ dismissed the charges, as the respondent and other witnesses testified credibly that requested leave for obligations such as court dates were "always approved," and thus it was reasonable for respondent to assume that his leave requests had been and would remain authorized. In the present case, by contrast, there is no evidence that respondent's specific requests for leave and the reasons for those requests are routinely approved. Thus, it cannot be said that respondent reasonably relied on the initial approval of his leave requests. Moreover, I do not credit respondent's testimony that he reasonably relied on the status of his leave request communicated to him when he telephoned the garage at 11:00 a.m. As previously noted, all the Department's employees must know that the schedule is not finalized until after 1:30 p.m. (Tr. 393), and thus, respondent actually knew and should have known that approval of his requests was subject to change until that time.

Accordingly, I find that the Department proved by a preponderance of the evidence that respondent was AWOL on May 12, 2005. This charge is sustained.

Charge 113683: Failing to Complete an Assigned Sanitation Route

Respondent has been charged with violating Department rule 8.1 by failing to complete an assigned recycling route for section 132 in Brooklyn District 13 on September 7, 2004; he allegedly left a quarter load of metal out in the field and failed to document any material out on the DS 350 form for that section. For the reasons set forth below, this charge should be dismissed.

The Department failed to meet its burden of proving by a preponderance of the evidence that respondent did not complete his assigned recycling duties, left a quarter load of metal on the curb in front of a building complex on Ocean Parkway and Neptune Avenue in Brooklyn, and improperly filled out the DS 350 form for section 132 in Brooklyn District 13. The Department's witness, District Superintendent Michael Gonzalez ("Gonzalez"), testified that he wrote a complaint against respondent after discovering that a load of metal had not been collected during the recycling pick-up on September 7, 2004. With the passage of nearly three years from the event, Gonzalez' memory was diminished; he was unable to recall the salient details surrounding the charge. He could not recall how he became aware that the load of metal remained out in the field. He testified that he may have contacted the building complex's superintendent, or the superintendent may have telephoned him to complain there was no pick-up on September 7th (Tr. 125). More importantly, the DS 350 for September 7, 2004, the day the load of metal was allegedly left out, was illegible, and the Department did not offer it into evidence because Gonzalez was unable to read the key handwriting on it (Tr. 130). Gonzalez could not read which supervisor had been assigned to the particular recycling route at issue; thus, he could not even say which supervisor was responsible for the material that had not been collected (Tr. 130-31). The charge was stale.

Gonzalez testified that recycling pick-up was done weekly on Tuesdays. Off-duty on Tuesday, September 7th, he observed the metal the next day, Wednesday, September 8th (Tr. 122-24). He could not recall or identify a draft form for the complaint, and the Department did not offer that document into evidence either (Tr. 131-32). He could not recall speaking with respondent, or whether he asked respondent why he did not pick up the metal, or why respondent called the section clean (assuming it was respondent's responsibility) when Gonzalez received a complaint that there was still metal out: "You know, I don't remember. I can't remember that. I've written quite a few, so you know I don't remember it" (Tr. 132). Significantly, Gonzalez

was not sure at the hearing that Nieves was the relevant supervisor responsible for the quarter load of metal (Tr. 134).

Upon realizing he could not make out the supervisor's signature on the DS 350, Gonzalez testified that, he "probably" did an investigation in 2004 to determine which supervisor was responsible for the incident: "I can't make it -- I don't know why I wrote the complaint to him, it had to be -- I had to investigate it, I wouldn't just write him for -- I probably investigated to see who was in that section" (Tr. 130). He stated "I probably went to the [carting] book, which has the assignments in the [carting] book. They put the supervisor's name there. And then I probably went to the blotter to see who signed in. And the blotter is the daily sign in sheets for the supervisors" (Tr. 130). Gonzalez was unable to say how he established that respondent was responsible for this particular recycling route. He was left to speculate that he must have investigated at the time (Tr. 130).

Moreover, the Department was unable, after diligent search in response to a written document request served by respondent's counsel (Tr. 137-38; Resp. Ex. C), to produce the carting book Gonzalez had mentioned. That book might have corroborated his vague testimony that he had probably investigated three years ago and established whether respondent was in fact the supervisor assigned to this recycling route, an allegation respondent denies. I hereby grant respondent's application to have an adverse inference drawn from the absence of the carting book, which would have told who was supervising recycling on September 7th (Tr. 133).

Although the draft complaint was not in evidence, respondent was able to identify his response to the draft and that response was in evidence. In it, respondent wrote that he was assisting the recycling officer on September 7th and that the information showing the status of the route on the DS 350 was given to him by the crew, but implicitly denied being the supervisor in charge of recycling that day (Pet. Ex. 9). Respondent testified that he was a section officer, and not responsible for recycling that day, except to assist the recycling officer if he asked for help. He was in charge of collection, a different function. According to respondent, the recycling officer for the relevant truck, number 25-CN-276, was Supervisor Rasheed (Tr. 419-21). Respondent admitted that he took the recycling report from sanitation workers, but could not or did not check the information because he was not in the field; he was supervising a different collection truck (Tr. 424-25, 429). Respondent's defense was that even if he had called the route clean on the DS 350, it was the responsibility of the recycling officer to verify that information

(Tr. 425), the same theory on which I have sustained Charge 120988 against respondent here (that total reliance on information from others will not relieve the designated supervisor on duty of verifying the goodness of the information for which he is held accountable).

Respondent thus made an admission that in trying to help the responsible officer with recycling, he supplied the clean route information based on what the crew told him, but the Department did not establish the foundation for this charge -- that respondent was the recycling supervisor on duty on September 7, 2007 -- and respondent's partial admission does not fill the gaps in the Department's case in chief on this charge. According to Operations Order 03-03 (Dec. 23, 2005), which explains the use of the DS 350 card, it is the responsibility of the District Superintendent to insure that the DS 350 data is accurate and complete, and of garage officers and section officers to provide the required information relative to their area of responsibility (Pet. Ex. F). A blue DS 350C card must be prepared for equipment assigned to the collection of recycling metal material, for residential metal. The Department has not established that respondent was responsible for the DS 350C card, which was so illegible in pertinent part, that Gonzalez was unable to say respondent was the recycling supervisor. Thus, the very form that was at the core of this charge was not even offered in evidence.

During trial, respondent's counsel made a motion to dismiss this charge based on a lack of evidence. I reserved decision to review the testimony, and now grant respondent's motion. The Department's proof on this charge is weak at best, and does not establish by a preponderance of the evidence that respondent was responsible for this particular recycling route. Because this charge is nearly three years old, it is understandable that Gonzalez had difficulty remembering the facts. The admittedly faded memory of one witness is insufficient to form the basis of liability and this charge should be dismissed.

Charge 107127: Failing to Record Required Facility Checks in the DS Blotter

Respondent is charged with failing to record the required garage facility checks in the "DS Blotter," in violation of Department rules 8.1 and 8.6. The Department alleges that on 22 days during the month of April 2005, respondent, as Garage Supervisor, recorded only one

facility check, despite Department orders mandating that he perform a facility check during each of his shifts and record it in the DS Blotter.[4]

Respondent was assigned as the 12:00 a.m. to 8:00 a.m. Garage Supervisor for Manhattan District 3 (Tr. 507). Superintendent Thomas Hughes was likewise assigned to Manhattan District 3 (Tr. 190). Hughes testified that the duties of the garage foreman include performing two facility checks of the garage, one when his shift commences and one before it ends (Tr. 191-92). After the facility check is completed, the supervisor is required to enter his findings in the DS Blotter (Tr. 191). The facility checks are particularly important because they document any equipment or facility problems in the garage, such as leaking pipes, necessary repairs, vandalism, or safety issues that need to be addressed (Tr. 191-92).

The DS Blotter for April 2005 was received in evidence (Pet. Ex. 12). Hughes testified that the DS Blotter is used to record many things, including the attendance of supervisors and superintendents, as well as documentation of equipment and facility checks. Garage supervisors are supposed to enter language such as "Facility and equipment check all ok" in the blotter after performing each facility check if there are no problems to report, or note any issues within the garage (Tr. 193, 203; Pet. Ex. 12). Upon reviewing the DS Blotter for the garage, Hughes noticed that during the twenty-two days respondent worked as Garage Supervisor for District 3, respondent only recorded one facility check (Tr. 197-98). The witness did not identify that entry in Petitioner's Exhibit 12, nor was I able to locate it, if indeed it was among the pages copied from the April 2005 blotter. Perhaps it was not included because respondent is not charged with failing to make the one entry Hughes said he did make, though it would be illustrative of a typical entry that was unobjectionable.

Respondent's defense to this charge is that he performed the required facility checks for each of his shifts, but recorded his findings in the "Garage Order Book" (Tr. 507-08). Respondent testified that he entered the facility check findings in the Garage Order Book because he noticed that no other facility checks had been noted in the DS Blotter, so he assumed that he should write them elsewhere (Tr. 508). Counsel for respondent requested the Garage Order Book during discovery in order to substantiate respondent's claim that the facility checks

[4] At the hearing, the Department made a motion to conform the pleading to the proof to allege that respondent was required to perform and record two security checks per shift (Tr. 195). Respondent's counsel objected that respondent did not have notice of such additional requirements or charges (Tr. 195). I hereby deny the motion because I find that there was a lack of proof of notice to employees that this was the requirement and I do not find it appropriate to conform the pleading to a requirement that was not proved.

were performed, but the Department did not produce it (Tr. 508; Resp. Ex. C). Petitioner stipulated that respondent may indeed have performed the required facility checks, but asserts that the charge hinges on respondent's failure to record the facility checks in the DS Blotter according to the Department procedure as shown only by Hughes' testimony (Tr. 509).

I credit respondent's testimony, which was undisputed, that he performed the required facility checks and recorded them in the Garage Order Book. Moreover, Alfredo Sigcha ("Sigcha"), a sanitation worker who had also been assigned to the Manhattan 3 garage during April of 2005 on the same shift as respondent, credibly testified that he witnessed respondent perform and record a facility check during each of his shifts (Tr. 330-31). Sigcha also testified that he saw respondent record the facility checks in the Garage Order Book, corroborating respondent's statements (Tr. 331). He knew that respondent performed the checks because respondent asked Sigcha to watch the phones and the radio while respondent checked the grounds (Tr. 331, 323).

A summary explaining the handwritten entries in the Daily Blotter would have been helpful. As neither side provided such a summary of which entries qualified as facility checks by a supervisor, and the testimony did not fully explain it either, I made my own review, with some guidance from Hughes' testimony, of the Daily Blotter (Pet. Ex. 12) to try to understand how the book is used. That review tends to confirm respondent's contention that for the month of April 2005, the only month of the blotter submitted (without the pages for April 4th), there are many days showing no indication that anyone recorded language that could be interpreted as a facility check. Such language appearing on certain dates in the book, I find, did reflect facility checks by others: "equipment and facility check, all ok," or "all ok," or "facility check, all ok," or "secure," or "ok." These entries appeared, in handwriting apparently other than respondent's, on some days without a discernible pattern, and neither side provided an explanation of the rank of the writers when the blotter notations omitted that identifier. Some of the pages showed hourly checks. Respondent's counsel argued that some of these entries were by sanitation workers, not supervisors, but the proof was left unexplained on that score. Respondent did not work 24-hour shifts, so it seems that all the omissions are not attributable to him. Hughes did not explain why there were hourly notations on some dates, when he testified that two checks were required per garage foreman's shift (Tr. 190-91), or how entries by sanitation workers who are not supervisors fit with the procedure he described for supervisors.

Based on the foregoing, I find that even if Hughes has testified correctly as to the procedure the Department requires for performing and recording facility checks in the Daily Blotter, supervisors were not following it religiously in April 2005, and there was no proof that respondent was notified of this procedure or received any writing or verbal command or training about it. The blotter itself tended to negate the testimony that two facility checks per shift were required to be recorded in the blotter, and the testimony did little to illuminate the meaning of the line-by-line handwritten entries in that book covering a 30-day period.

The record suggests that respondent was not aware that he was required by departmental procedure to record two facility checks per shift in the DS Blotter as opposed to the Garage Order Book. "It is fundamental that employees may only be disciplined for violations of rules of which they have notice." *Dep't of Sanitation v. Shinnick*, OATH Index No. 1466/07, at 3 (June 29, 2007); *Dep't of Sanitation v. Uryevick*, OATH Index No. 777/06, at 4 (Aug. 11, 2006). The fact that only some facility checks at the Manhattan 3 Garage were recorded in the DS Blotter during the month of April suggests that it was unclear where facility checks were to be recorded. Had the Department produced the Garage Order Book, as requested by respondent, more light may have been shed on the various supervisors' understanding of the facility check procedure. The Department's failure to produce this requested evidence or any written order embodying the standard procedure suggests that recording facility checks in the DS Blotter may not be the prevailing practice among supervisors. Moreover, while respondent did not record the facility checks in the DS Blotter, he did perform them and record them elsewhere. There is no evidence that respondent was shirking his supervisory responsibilities as to this charge. Accordingly, this charge should be dismissed.

Charges 131724, 131723, and 123349: Omitting Numerous Required Entries on DS 350 and DS 332 Forms

Charge 131724

Respondent has been charged with omitting numerous required entries on the DS 350's for the fourteen sanitation workers handling brooms under his supervision on December 12, 2006, in violation of Department rules 8.1, 8.6, and 8.19. For the following reasons, the charge is sustained.

Petitioner presented the testimony of District Superintendent Thomas Hughes, who testified credibly to the following. Hughes was assigned as Superintendent in Manhattan District 10 on December 12, 2006. Respondent was also assigned to Manhattan 10 as a field supervisor for section 101 (Tr. 164). Respondent's supervisory duties that day included monitoring fourteen hand broom operators. According to Department procedure as articulated by Hughes, a separate DS 350 form must be completed for each hand broom worker; thus, respondent should have filled out and turned in fourteen DS 350's for the sanitation workers operating the hand brooms in his section (Tr. 165).

When Hughes reviewed the DS 350's for respondent's section on December 13th, he found that many required entries were missing. Petitioner presented eleven DS 350's into evidence (Pet. Ex. 11A – 11K). Hughes testified that he found, and the documentary evidence showed, the following omissions by respondent as Section Supervisor:

1. Weather entries: omitted on seven DS 350's (Pet. Exs. 11E-11K).

2. Loads entries: omitted on eight DS 350's (Pet. Exs. 11C, 11E-11K).

3. Street route entries: omitted on seven DS 350's (Pet. Exs. 11E-11K).

4. First section supervisor's name: omitted on seven DS 350's (Pet. Exs. 11E-11K).

5. Tools issued caption: omitted on ten DS 350's (Pet. Ex. 11A, 11B, 11D-11K).

6. Afternoon field check: omitted for Sanitation Workers Johnson, Newell and Demasters (Pet. Exs. 11A-11C).

(Tr. 166-177).

Hughes testified that the DS 350's serve an important function in that they record a section's activity, help verify that crews are productive, keep track of the tools (*i.e.*, brooms, barrels and shovels), and thus help the Superintendent and the Department to monitor the work and locate particular workers (Tr. 167).

In defense of this charge, respondent testified that he was under the impression that he had an additional cleaning officer to assist him with his supervisory duties that day, specifically in keeping up with the DS 350's and the hand brooms (Tr. 443-44). Respondent further testified that on this particular day, he was also responsible for supervising four collection trucks, a basket

truck, and a mechanical sweeper (Tr. 447). With the fourteen hand broom operators, respondent had a total of 25 sanitation workers to supervise (Tr. 447).

Respondent's defense that his heavy workload and his belief that he had an additional cleaning officer to assist him in filling out the DS 350's do not excuse him. Hughes testified credibly that 25 sanitation workers was not an unusually high number of employees to supervise because the section respondent was supervising is a "low score card section," meaning it is "generally a dirty area that requires additional cleaning" (Tr. 264). As field supervisor, respondent had a duty to ensure that the DS 350's were properly completed before presenting them to the Superintendent. While I understand that respondent may have felt overwhelmed with the number of workers he had been assigned to supervise that day, the fact remains that he did not fill out eleven of the fourteen DS 350's properly. Respondent gave no satisfactory excuse for failing to perform this supervisory duty. Ultimately, respondent admitted on cross-examination that he was in fact the officer responsible for the cleaning crews, and as such, was responsible for the DS 350 performance records for all the functions under his supervision (Tr. 448).

Accordingly, I find the Department proved, through Hughes' testimony and documentary evidence, and respondent's own admissions, that respondent failed to complete the DS 350 forms properly for the hand broom workers assigned to his section on December 12, 2006. The charge is sustained.

Charge 131723

Respondent has been charged with improperly completing a DS 332 form for his section on December 12, 2006, in violation of Department Code of Conduct rules 8.1, 8.6, and 8.19.

Superintendent Hughes again testified for the Department. Hughes stated that he was working as Superintendent in Manhattan District 10 on the 7:00 a.m. to 3:00 p.m. shift. Respondent was assigned to District 10 as a field supervisor for section 1, and was responsible for overseeing the cleaning and collection functions (Tr. 258). Part of respondent's supervisory duties was to fill out a DS 332 form for his section, which form, the Daily Activities log, documents the activity in that section and functions as a record of personnel assigned to that section for payroll purposes (Tr. 259). Hughes reviewed the DS 332 for respondent's section, which petitioner submitted into evidence (Pet. Ex. 17). The information to be recorded on the DS 332 includes:

- The names of sanitation workers assigned to that section.
- The assignments for each sanitation worker.
- Any problems or incidents that occur in the field.
- Each worker's name, route number, function, equipment used, and the boundaries of the assigned routes.
- Eligibility of each worker for extra pay for efficient work.

(Tr. 259; Pet. Ex. 17).

Hughes found many omissions on the form. First, Hughes found that for the hand broom caption, respondent had not recorded the sanitation workers' names, route numbers, or any other details of their routes, the street names, assignments, or workers' locations. Hughes testified that this section of the form for the names of the workers is particularly important because it lets payroll workers know which sanitation employees were working in specific areas, and because different assignments result in different pay levels (Tr. 262-63). It is important that this particular section of the form be filled out accurately because there is additional pay for employees who clean their routes and dump their trucks on the same shift; this additional compensation is called "truck money" (Tr. 262-63).

Respondent testified that another supervisor, Supervisor Himristos, filled out a separate DS 332, as he was assisting respondent in supervising the hand brooms (Tr. 461; Resp. Ex. E). Respondent learned, however, that Himristos had not been assigned to assist him in monitoring the hand brooms, but was actually assigned to another section and was helping respondent only as a courtesy (Tr. 463). Therefore, as respondent admitted, Himristos was not responsible for the DS 332's for any of the hand broom operators at issue here (Tr. 463). For this reason, the fact that Himristos may have had a separate and only partially completed DS 332 form showing the 14 names respondent himself had omitted has no bearing on respondent's liability for this charge. *Voir dire* of respondent in regard to this second DS 332 he had in his possession and produced at the hearing established that respondent had never handed this additional DS 332 to Hughes, and it was not credibly shown that Hughes had received the correct information for the activities in respondent's section (Tr. 460-66). This supplemental form that respondent offered at the hearing (Pet. Ex. E) is unsigned and also incomplete, and I assigned it little weight. Respondent admitted further that only one DS 332 form is required for each section, and that the DS 332 bearing his name and showing the key omissions was the official one (Tr. 466).

The charge should be sustained, as petitioner proved by a preponderance of the evidence that respondent improperly filled out the DS 332 for his assigned section, and omitted important information needed to ensure that workers receive their correct pay.

Charge 123349

Respondent has been charged with omitting several entries on the DS 350 form for two sanitation workers assigned to replacing baskets in his section on December 15, 2005, in violation of Department Code of Conduct rules 3.6, 8.1, and 8.6.

Superintendent Hughes was working as District Superintendent in Manhattan District 3 on December 15, 2005 (Tr. 250-51). Respondent was assigned as a field supervisor in Manhattan District 3, and supervised truck 25-CU-110 and its crew of sanitation workers, who were replacing corner baskets in the district (Tr. 251-52). Upon reviewing the DS 350 for the truck and its workers, as submitted by respondent, Hughes found several discrepancies (Tr. 251; Pet. Ex. 16). The following entries were omitted on the DS 350A respondent submitted:

1. Frequency: documents how many times a particular operation is done, in this case, how many times the street wastebaskets were replaced on this particular route (Tr. 254).

2. Loads finished time: this entry should indicate what time the crew emptied and replaced its last basket. The start and finish time, as well as the supervisor's initials were omitted. These entries ensure that the supervisor keeps the crew working until its cut-off time (Tr. 254).

3. Street routes not complete: this entry documents the streets on the route that were not completed by the current shift, so that the Department can know where to start the route on the following shift and find the baskets that need replacement (Tr. 255).

4. Truck: this entry should indicate whether the truck is returning to the garage at the end of the shift or proceeding to disposal. It should also indicate the amount of material the truck is carrying, whether it is empty, full or partially used. This information is important so that the agency can keep track of whether the truck can be used again on the next shift (Tr. 254-56).

5. Tools used: this entry should document all the tools the sanitation crew used during an assignment (Tr. 256).

Many of these entries are simple check-offs of pre-printed boxes that respondent left blank.

Petitioner's documentary evidence and Hughes' credible testimony clearly showed that the above-noted entries were indeed omitted from the DS 350A (Pet. Ex. 16), and that respondent was responsible for these omissions. In defense of this charge, respondent argues that while the DS 350A was not complete, he provided Superintendent Hughes with enough information in accompanying documents so that Hughes still had the pertinent details. Specifically, respondent stated that he attached a route sheet along with the DS 350A on which he marked how far the crew had gone on its assigned route (Tr. 452). Moreover, respondent argues that the streets where the work was done were crossed out (though he was not sure who crossed them out and did not recall doing it himself), and that he indicated with a small hash mark the exact spot at which the next basket replacement crew should begin during the subsequent shift (Tr. 452-55). Respondent further contends that given the nature of the assignment, basket replacement, the "loads" and "frequency" entries were unnecessary because the crew was not collecting garbage, servicing baskets or cleaning up a condition (Tr. 453-54). Hughes testified credibly to the contrary that the loads section could be completed to show time of work done and that frequency meant the number of baskets replaced (Tr. 256-57). I credit Hughes' testimony on this point and, therefore, do not accept respondent's contention that he was free to leave the form blank in these areas. Finally, respondent testified that he gave Hughes a verbal indication as to what his notations meant on the route sheet that accompanied the DS 350A. Respondent admitted, however, that the hash mark he made had no meaning unless he explained it, so that the route sheet he attached to the DS 350A failed to provide the information required on the face of the form itself, and that it was his responsibility to complete that form properly (Tr. 456).

Although respondent attempted to provide Hughes with the relevant information on documents accompanying the DS 350A, his failure to make proper documentation of his activities as required on the DS 350A is not excused. The testimony establishes that the DS 350 is a crucial piece of documentation for the Department's administrative functions, and is essential to a proper allocation of resources necessary to keep the City clean. If supervisors were routinely allowed to omit information, the form would no longer serve its purpose. The Department of Sanitation must have some uniformity in the documentation it requires to allocate resources or an organization of its vast size would be unable to function effectively. Although respondent's paperwork was creative, the kind of improvised attachment of papers to the DS 350

form suggested by respondent as a substitute for completing the form itself, it seems to me, introduces inefficiencies in agency operations and does not conform to agency requirements. Respondent was careless in that he did not make the effort to document properly the activities in his section. Therefore, this charge is sustained.

Charges 107139 and 118058: Routinely Failing to Enter Required Information into the Department Computer System Correctly

The following two charges against respondent stem from complaints regarding his failure to enter information into the Department computer on numerous occasions.

Charge 107139

The Department alleges that respondent failed to correct a computer entry for which he was responsible on June 4, 2005, with respect to recycling and curbside collection, in violation of Department rules 8.1, 8.6, and 8.19. On June 4, 2005, Superintendent Hughes was working the 6:00 a.m. to 2:00 p.m. shift in Manhattan District 3. Hughes testified that one of respondent's duties as garage supervisor on the midnight to 8:00 a.m. shift is to enter information into and close out the productivity screens in the Department computer (Tr. 230-33, 240). This screen, called the 202 or "work complete" screen, lists the shifts from the previous workday, how many tons of material the crews picked up on their routes, and any tonnage remaining in the field (Pet. Ex. 15).

At the beginning of his shift, Superintendent Hughes reviewed a "material out" book, which tells how much, if any, tonnage has been left out in the field from the previous shift, as does the DS 350A (Tr. 239). The material out book indicated that no material had been left out in the field from the prior shift. Hughes then checked the computer to ensure that the computer entry matched the material out book. Hughes found that the "work complete" screen indicated that three tons of garbage remained in the field from a shift on June 3, 2005 (Tr. 231, 239). Respondent made this entry (Tr. 240). During an early shift on June 3, three tons of garbage had been left out. The crew on the third shift on June 3, the 4:00 p.m. – 12:00 a.m. shift, returned to the field and collected the three tons left out by the previous shift, so the material out book given to Hughes correctly indicated that no tonnage remained out at the end of June 3 (Tr. 236-37, 242-43). However, this information had not been updated in the computer to reflect the actual work of the third shift (Tr. 243-44). Hughes then received a communication from the Borough office

asking why the computer was showing tonnage left out in his district (Tr. 241). At approximately 6:10 a.m., Hughes told respondent about the inaccuracies and directed him to correct them (Tr. 240). Respondent told Hughes "he'd take care of it" (Tr. 240).

Hughes checked the computer entry again approximately one hour later, and found that the information was still erroneously showing that three tons of garbage remained in the field (Tr. 241). Hughes subsequently spoke to respondent again and told him the entry needed to be corrected. Once more, respondent told Hughes "he'd take care of it" (Tr. 244). Respondent admitted that he told Hughes, "I will get to it" and did not tell him he could not do it that morning (Tr. 472-73). At 8:00 a.m., after respondent's shift had ended and he had left for the day, Hughes checked the "work complete" screen again to see if the error had been rectified. It had not been. At 8:19 a.m., before correcting the mistake himself, Hughes printed out a copy of the screen to document the fact that the entry had not been corrected (Tr. 245; Pet. Ex. 15).

Superintendent Hughes reports to the Borough the cleaning operations of his district (Tr. 236). The computer information is very important to the Department so that the agency can collect the garbage and serve the community properly. If there is an incorrect report of three tons of garbage left out, that would be a significant amount that would fill a quarter truck, and the Borough would assign a crew and equipment to clean the garbage (Tr. 236-39). Although no extra resources were mobilized here because Hughes caught the mistake after the Borough inquiry (Tr. 248), respondent was nonetheless in the wrong. It was not clear whether respondent had the DS 350 form in hand before the end of his shift, but whether he did or not, under standard operating procedure, respondent should have checked the material out book, which had the correct data, even if, *arguendo,* the third shift made the dump late and he did not yet have the DS 350. According to Hughes, respondent did not request assistance with the computer entries in June 2005 (Tr. 247). Respondent testified that he had asked for assistance "numerous times," but he gave no time frame for these requests and did not relate them temporally to this charge (Tr. 472). He never gave a specific reason for failing to complete the computer entries (Tr. 248), though he clearly understood the importance of the computer information for allocating trucks to the work outstanding (Tr. 472).

Hughes had previously instructed respondent that he must close out the computer entries for collection for each section and for district recycling "every day." He documented this directive to respondent in the Telephone Order Book on March 3, 2005 (Tr. 234-35; Pet. Ex. 15),

so respondent was clearly on notice of his required tasks well in advance of the incident charged, but left the records incorrect and incomplete when he left work on June 4, 2005, having promised his supervisor that he would rectify the problem.

The testimony of Hughes, whom I found to be a credible witness, a conscientious professional with 18 years of service to the Department (Tr. 142), and the computer print-out of the "work complete" screen, establish that respondent did in fact fail to correct the tonnage information as instructed. Respondent's defenses to this charge must be rejected. As first a defense, respondent asserts that he likely got sidetracked with a more pressing task or his other supervisory duties on the day in question, so that he was unable to correct the computer entry (Tr. 472). However, respondent could not say with any certainty that he dealt with any specific, high priority assignments or situations that would have prevented him from correcting the computer entry. Indeed, respondent's exact words were "I could've been called to another pressing situation that involved my presence, and I guess my garage supervisory duties" (Tr. 472). I find this vague defense unconvincing. Significantly, respondent admitted that he had neglected to complete this work, which would have taken only a few minutes (Hughes: Tr. 248), because he simply forgot, not because he lacked help (Tr. 473). Respondent's other defense is also without merit. Respondent asserts that it is common practice to pass on any work one could not get done during his shift to the succeeding shift (Tr. 471). While this may be true in certain circumstances, it neither explains nor excuses respondent's failure to make the proper computer entries when he had told Superintendent Hughes he would do so. Upholding such an excuse with any regularity would discourage employees from completing their work on time, as each shift left work for the next one, and would impede the Department's mission of keeping the City clean.

I find that the Department proved by a preponderance of the evidence that respondent failed to make the proper computer entries required of him as part of his supervisory duties, and thus the charge is sustained.

Charge 118058

The agency alleges that respondent failed to close out the computer entries properly and sign off on various collection and recycling functions for his shifts from June 4 to 14, 2005, and "continuously fail[ed] to complete computer work," in violation of Department rules 3.1, 3.6, 8.1, and 8.6.

During trial, there was some dispute as to whether respondent was working on each of these ten days between June 4 and 14. I left the record open to allow counsel to verify the dates that respondent had worked. In a series of emails, counsel for both sides represented that respondent did not work on June 5 or June 8, 2005. Therefore, the charges, only insofar as they pertain to June 5 and 8 are dismissed in relevant part because the Department's evidence showed that respondent could not close out the collection functions on the computer when he was not on duty (Hughes: Tr. 222).[5] Respondent nevertheless remains liable for failing to make the necessary computer entries during the ten-day period covered by the charges insofar as he had opportunities when he was on duty, before and after June 8th, to correct his work and did not do so.

Superintendent Hughes testified that one of the duties of a garage supervisor is to make sure that the allocation of trucks is recorded properly in the Department computer. The supervisor is supposed to enter into the computer information showing which trucks worked the various routes in a district and the tonnage they collected (Tr. 210-11). This information should be reflected on the DS 350A form. The proper procedure is as follows. Sanitation workers are given a DS 350A form when they leave the garage to begin their route. After they complete the route, the workers take the truck to the dump. At the dump, the workers receive a dump receipt or ticket documenting how much weight the truck collected, the truck number, and the time. The sanitation workers then enter that information on the DS 350A and return to the garage with this form and the dump receipt (Tr. 211). Upon the workers' return from the dump with these documents, the supervisor is then supposed to enter the truck number, route, date, material collected, and weight into the computer system (Tr. 211-12). After completing the entries, the supervisor is required to sign off and attest that accurate information has been entered (Pet. Ex. 14). After entering the information, a "sign off" screen appears; it asks the supervisor to verify that the information is correct. He must enter his name and badge number then type "yes" or "no." After this information is entered, the computer work for the day is "closed out." If the supervisor does not enter his name and badge number and attest to the accuracy of the information, the work does not get closed out for that particular day and the records are not

[5] During trial, the Department's counsel stated that he would verify the days respondent worked during the period in question through the Department's attendance records and would withdraw any allegations covering particular days when respondent was off-duty (Tr. 225-29). After verifying the dates, both counsel e-mailed me. The dates respondent did not work were agreed upon in a series of e-mails dated June 22-25, 2007. Those emails are included in the record as ALJ Ex. 2.

correctly kept (Tr. 212-13). Respondent worked the midnight to 8:00 a.m. shift during this period as supervisor and was responsible for these computer sign-offs (Tr. 222).[6]

On June 15, 2005, Hughes checked the computer, and the print-out indicated that the last time respondent's assigned sections, MEO 33 and 34, had been closed out with respect to collections was June 7, 2005 (Tr. 220). As of June 15th, when Hughes checked, the last time respondent had closed out the computer for section MEO 31 collections was June 10, 2005 (Tr. 218). In addition, the last time the recycling had been closed out for MEO 3, the entire district, was June 4, 2005. Respondent was responsible for signing off on all of the recycling for District 3 (Tr. 221). By Department standards, close-outs are counted as of the day following the work done, such that Hughes subtracted two days from each period of neglected work, and the longest period during which respondent failed to close out the computer was eight days, by Hughes' calculation, not the calendar ten days apparent from the charges, which span the period June 4 to 14, 2005 (Tr. 220).

Hughes spoke to respondent on June 15th, 2005, about his failure to close out the computer entries properly on various occasions (Tr. 213). Prior to this conversation, Hughes left respondent two sets of instructions in the Telephone Order Book, on March 3 and again on April 18, 2005 -- two months before Hughes wrote this complaint -- reminding respondent to close out the computer function screen every day and instructing him on how to do that (Tr. 214, 216-17; Pet. Ex. 13). On April 18th, in the second of these directives, Hughes provided respondent with a confirmation of the March message, and gave a detailed, written reminder of the specific codes respondent must use:

> Once Again -- You must close out collection and recycling screens in computer after work complete is entered every day. Sunday thru Saturday must be closed out even if no collection or recycling went out. 50 screen for collection (51). 80 screen for recycling (81).

(Pet. Ex. 13). Thus, respondent was on notice of his duties and received instructions, but still had trouble fulfilling his responsibilities.

Petitioner presented Hughes' credible testimony as well as computer print-outs, which document the last times the sections had been closed out (Pet. Exs. 13, 14). Hughes' also

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[6] There was, initially, some doubt as to whether respondent worked on June 12, 2005. Counsel reported after the hearing that he did work the "day shift" on a Borough assignment on that date. (ALJ Ex. 2). Respondent offered no reason for which he could not have worked on the agency computer system that day.

testified that if the collection functions are not properly closed out, errors interfere with the Department's ability to document its collections and generally disrupt departmental procedures. Indeed, Hughes received many complaints from the Borough office about the collection functions that remained open. The Borough office has access to all 12 Manhattan districts' information on its computer (Tr. 225). Hughes himself completed respondent's work again (Tr. 223).

In response to these charges, respondent explained that he asked Hughes for assistance with respect to his computer duties before Hughes left him instructions in the Telephone Order Book (Tr. 468). Respondent explained that M3 is a very busy garage, and that he believed they needed more manpower and an additional employee to help with computer entries (Tr. 469). The Department was able to show through cross-examination of respondent that each district has only one garage foreman for the midnight to 8:00 a.m. shift and that, therefore, respondent was requesting more help than was afforded in any other district (Tr. 469-70). Respondent testified that when he explained to Hughes that he needed assistance with the computer, Hughes did not show any real concern about assisting him. Respondent testified that "basically, he gave me a comment as to if I couldn't handle it, you know, to get out" (Tr. 468). When respondent's counsel asked Hughes how he had replied to respondent's request for assistance, Hughes testified that he told respondent to manage his time better, and also attempted to show respondent how to complete the collection function screen. Hughes then explained that he believed respondent had difficulty completing the computer entries both because M3 is a particularly busy garage and because he had difficulty comprehending the task (Tr. 224).

Neither respondent's testimony nor cross-examination of Hughes yielded evidence that would excuse respondent from liability regarding these charges. While I understand respondent's testimony that the M3 garage is a busy one and that he believed he needed more manpower in order to handle the workload of computer entries, his defense was not convincing. Respondent's supervisors found fault with his work and denied his request for more staff, but respondent had prior, written notice of his requirements, he had received written and personal instruction from Hughes, and there was no reason to speculate that the agency's conclusion that no additional officer was needed was anything other than an appropriate exercise of managerial judgment. It remained respondent's duty to enter the information into the computer so that the Borough Command could have an accurate picture of work completed for purposes of allocating

resources correctly. The charge is sustained, and respondent's pleas for help will be considered as mitigating factors in the penalty recommendation.

Charge 121624: Failure to Sign Off on Fuel and Lubrication Records

Respondent has been charged with failing to sign in and out on fuel and lubrication logs on November 7, 2005, in violation of Department rules 8.1, 8.6, and 8.19.

The relevant facts are not disputed. Deputy Chief Myron Priester ("Priester") visited the Manhattan 10 garage on November 7, 2005, when he was a District Superintendent. Priester's duties then included overseeing operations of the garage, log books and records, as well as performing occasional audits and checks of a log called the DS 740, a fuel and lubrication record. The DS 740 contains information about the amount of fuel a garage has on hand. The log assists the Department in determining how much fuel to order, how much fuel was used during the day, and which trucks used it. Preister described the log as an inventory record (Tr. 49-50). In addition to any checks and audits of the DS 740 performed by the Superintendent, the Department employs the Field Investigation Audit Team (FIAT) to perform sporadic audits of these logs in various districts (Tr. 50-51).

On November 7, 2005, FIAT performed an audit of the logbooks of Manhattan District 10, the district Deputy Chief Priester was assigned to supervise. The FIAT issued a report to Preister stating that certain sections of the log book were not signed at the beginning and end of various shifts. According to Priester's testimony, if a FIAT officer finds an irregularity in the DS 740, he writes up an AR 1 or AR 2 complaint, which is then sent to the Deputy Chief's Borough Command, which then transmits it to the Deputy Chief (Tr. 51-52).

Priester received an AR 2 from Superintendent Avarack, a FIAT officer, concerning the audit he performed at District 10 on November 7, 2005. This AR 2 reported missing signatures by five supervisors on five different dates. Priester testified that he could not recall whether he wrote complaints for the other four supervisors, but he did write the complaint against respondent (Tr. 52-54). After receiving the AR 2, Priester examined the dates and notations indicating which shift was responsible for omitting signatures on the DS 740, then checked the Daily Blotter (Pet. Ex. 3) to determine which supervisor had worked that shift and was responsible for signing the log. Priester found that respondent had been the supervisor during the 8:00 a.m. to 4:00 p.m. shift in question, and wrote a complaint against him on November 26,

2005 (ALJ Ex. 1). Respondent concedes that he did not sign the log at the beginning and end of his shift on November 7, 2005 (Tr. 373; Pet. Ex. 4).

Priester testified as to the purpose and importance of the DS 740 logs. According to his testimony, a supervisor is supposed to verify the fuel and lubrication numbers on all the pumps before signing the log to record accurately how much fuel has been used, how much is available for the current shift, whether fuel was delivered, and whether more fuel (motor oil, transmission oil, anti-freeze, grease and other fuels) will need to be ordered (Tr. 55-62). Signing out is important as well, as the supervisor is indicating how much fuel was used on his shift, and whether any additional fuel is needed for the next shift. The harm to the operations of the Department if the logs are not signed is that if the inventory is incorrect, or if additional diesel fuel is needed but not correctly noted, the sanitation vehicles may be sent into the field to perform their operations with an inadequate fuel supply (Tr. 61, 2). This is especially important in the winter, with trucks going out in snow, for example. Both insufficient supply and excessive consumption could pose problems (Tr. 59-61). There was no indication that the inventory here was wrong or that there was an actual problem from respondent's failure to sign the DS 740 (Tr. 62).

Respondent argues that there is nothing in the record indicating that the fuel and lubrication numbers for the shift in question were inaccurate, and that no problems or shortfalls actually resulted from his oversight (Tr. 373-74). While this may be true, it does not negate the fact that he did not sign the log at the beginning and end of the shift, as is required of him. Respondent also argues that to his knowledge, the other supervisors cited in the FIAT audit report for the irregularities and omissions were not disciplined and complaints were not written against them (Tr. 372). Even if this were true -- and respondent conceded that he had no access to complaint logs and did not really know whether others were disciplined (Tr. 375) -- it is immaterial to a determination of respondent's liability as to this charge.

In a case previously heard by this tribunal, *Department of Sanitation v. Banton*, OATH Index No. 336/07 (Dec. 1, 2006), the respondent was charged with failing to complete the fuel and lubrication records for his shift, in that he did not record the amounts of fuel and lubricant consumed by the sanitation vehicles under his supervision. While that is a slightly different charge from failing to sign the logbooks, the charges are comparable because the signatures on these records signify the supervisor's verification that the fuel and lubrication amounts listed are

accurate. In *Banton*, the judge found that respondent's failure to record the fuel and lubricant amounts properly in the log book was not misconduct because the respondent had been assigned a lengthy and high priority assignment at the close of his shift, and was not able to fill out the log books. In the present case, by contrast, respondent does not offer any explanation as to why he did not sign in and out on the DS 740. Respondent violated Department rules 8.1, 8.6, and 8.19 by failing to keep these records accurately and by failing to follow Department procedure when he omitted his signature on the DS 740.

Therefore, I find that petitioner has proved by a preponderance of the evidence that respondent failed to sign the DS 740 during his shift on November 7, 2005, and the charge is sustained.

Charge 127403: Failure to Place Violation Stickers on Illegally Parked Vehicles

Respondent is charged with violating Department rules 8.1 and 8.6 by failing to place violation stickers onto the windows of two illegally parked cars to which he had issued summons notices.

On May 12, 2006, Deputy Chief Durrell was assigned to oversee operations in the lower districts of Manhattan, Districts 1, 2, and 3. His duties as Deputy Chief included overseeing snow removal, garbage collection, recycling, street cleaning, and block cleaning (Tr. 14). On this particular day, Durrell was supervising the mechanical broom truck, which sweeps the streets, on Second Avenue. Both Durrell and respondent testified that part of the duties of the street cleaning team is to place summons notices and stickers on vehicles that are blocking the path of the mechanical broom. While Durrell was following the mechanical broom southbound on Second Avenue, he noticed that two parked vehicles had been issued the summons, but did not have the required notification stickers affixed to the rear passenger window (Tr. 33). This meant the sweeper had passed by, but no stickers were affixed to these cars. Durrell contacted District Superintendent Capella, his subordinate, and notified him that cars were being issued the summons, but were not being given stickers. He also demanded that Capella take corrective action against the supervisor who had neglected to affix the stickers. The supervisor in question was respondent, Ramon Nieves. Capella wrote a complaint against respondent that day. Respondent admits that he did not affix stickers to the two vehicles. Durrell further testified that after calling in this information to Capella, he believed he overheard a radio transmission in

which respondent told Capella he had not affixed the stickers because he did not have any with him (Tr. 14-23). Respondent's testimony, however, established that he did have stickers with him, but chose not to affix them to the vehicle windows because he thought they would not adhere to the car windows due to the rainwater he said was on the window glass (Tr. 360-61). The weight of the testimony was to the contrary. The other witnesses testified that the stickers would adhere to a wet window (Moffatt: Tr. 114; Marone: Tr. 341-43; Hughes: Tr. 267), as respondent ultimately had to concede on cross-examination.

Petitioner presented direct evidence in the form of testimony from Deputy Chief Durrell, who testified credibly that he followed respondent's path and observed that respondent failed to affix the notification stickers. He also explained the proper procedure regarding the issuance of a summons and the accompanying stickers. According to Durrell, the supervisory training provided by the Department teaches that when a supervisor on the mechanical broom encounters a car that is illegally parked and blocking the path of the sweeper, he must first place a sticker on the rear passenger window, then write and issue a summons (Tr. 24). Superintendent Hughes confirmed this procedure (Tr. 267-68). Indeed, Department Directive "Dayglo Green Notification Stickers D.S. 1931's (9/91)" mandates that "The Notification Stickers will be placed prior to the writing of a summons to that vehicle" (Resp. Ex. A). Durrell did concede that sometimes a supervisor may write the summons first then affix the sticker, but this was uncommon. He clearly stated that the proper procedure was to put the sticker in place first (Tr. 19). Durrell further testified that the notification stickers are an important part of Department policy, as they serve as a warning and a deterrent to citizens that they should be aware of and follow the parking rules, so that sanitation workers can perform their duties and keep the streets clean. The sticker is Day-Glo Green and is meant to draw the attention of the driver to his parking violation that has interfered with street cleaning (Pet. Ex. 18). The sticker is hard to remove and has a deterrent effect on those who block the street cleaning (Tr. 17-18).

Respondent's defense to this charge is that there is language in Department Order 88-03 (Apr. 1, 1988) granting discretion to the supervisors as to whether a notification sticker should be placed on the window. Specifically, the order says that "Summonses will be issued along with the stickers whenever possible." This defense lacks merit. While this language might be open to interpretation, the order also states unambiguously that "Notification stickers will be placed prior to the writing of a summons." Thus, the order makes clear that the Department wants

notification stickers to be placed on the vehicle first. That the order reflects the actual practice was reinforced by Durrell's testimony that during supervisors' training, all supervisors are taught to put the notification sticker on first. All supervisors are trained --"everyone knows" -- to put the stickers on, not to put them on "whenever possible" (Tr. 37). "That's taught like, it's like brushing your teeth in the morning pretty much. There's no such thing as I'll think about putting a sticker, or not. There's no such thing as that on the job" (Tr. 26). Durrell testified that in fact, supervisors have no discretion as to the order in which they must work: they affix the sticker first, then issue a summons, except in the circumstance where the cars are parked and the owner runs out promising compliance before the sticker goes on (Tr. 17-21). Durrell testified that "it's known throughout the agency that every supervisor should be issuing a sticker along with a summons" and that the district at issue here, Manhattan 3, is a "dirty district too, I mean [it] is one of the dirtiest districts scorecard rating wise, and we stay on top of our cleaning in that particular district," so that in his view, the complaint was required (Tr. 28-29).

The defense stems from respondent's contention that the order gives him discretion as to whether to place a sticker. Respondent argues that it had been raining heavily on the day in question, and he was unable to affix the stickers to the window due to "excessive water on the glass" (Tr. 359). I find this explanation unconvincing because respondent admitted that he had affixed notification stickers onto vehicle windows during the rain in the past (Tr. 365). Thus, I find that the task here was not discretionary, but even if it were, respondent has conceded that it was indeed possible to place stickers on the cars at issue here, even in the rain, and, therefore, the "whenever possible" clause on which he relies so heavily, is unavailing. He offered no explanation other than the rain on the window as to why, on this particular day, a sticker would not have been possible.

For these reasons, I find that petitioner has proved by a preponderance of the credible evidence that respondent did not affix notification stickers, and thereby violated Department Rules. Therefore, the charge is sustained.

FINDINGS AND CONCLUSIONS

1. Charge 120988 should be dismissed in part because petitioner failed to meet its burden of proving that respondent knowingly entered false information on a DS 350 card with intent to deceive the Department, and sustained in part because respondent's recordkeeping was

negligent, in violation of Department Code of Conduct, rules 3.6 and 8.1, but not 4.4.

2. Charge 115160 should be sustained in that respondent negligently ordered a salt spreader vehicle to be driven on a front flat tire, resulting in damage to the truck, in violation of Department Code of Conduct rules 5.11, 5.12, and 8.1.

3. Charge 122135 should be dismissed as the Department failed to prove that respondent willfully disobeyed an order to remedy a litter condition.

4. Charge 118913 should be sustained in that respondent disobeyed an order to appear timely at the Personnel Management Division, in violation of Department Code of Conduct rule 3.1.

5. Charge 107131 should be dismissed as the Department failed to prove that respondent disobeyed an order to submit proof of purchase timely for the newly required Department raincoat.

6. Charge 117320 should be sustained in that respondent was AWOL on May 12, 2005, in violation of Department Code of Conduct rules 1.1, 1.4, and 1.6.

7. Charge 113683 should be dismissed, in that the Department did not prove by a preponderance of the evidence that respondent was the supervisor assigned to and responsible for the neglected recycling functions in Brooklyn District 13 on September 7, 2004.

8. Charge 107127 should be dismissed in that the Department did not prove by a preponderance of the evidence that respondent knew or should have known that he should document the facility checks in the DS Blotter as opposed to the Garage Order Book.

9. Charge 131724 should be sustained in that respondent omitted several entries on the DS 350 cards for eleven sanitation workers on December 12, 2006, in violation of Department Code of Conduct rules 8.1, 8.6, and 8.19.

10. Charge 131723 should be sustained in that respondent improperly completed the DS 332 form for his assigned section on December 12, 2006, in violation of Department Code of Conduct rules 8.1, 8.6, and 8.19.

11. Charge 123349 should be sustained in that respondent omitted several entries on the DS 350 for two sanitation workers assigned to basket

replacement on December 15, 2005, in violation of Department Code of Conduct rules 3.6, 8.1, and 8.6.

12. Charge 107139 should be sustained in that, on June 4, 2005, respondent failed to correct the tonnage entry and incorrectly showed in the Department computer a three-ton load of garbage left out even though the route was clean, in violation of Department Code of Conduct rules 8.1, 8.6, and 8.19.

13. Charge 118058 should be sustained in that respondent failed to sign off on the data needed to allocate trucks properly for eight days in June 2005, in violation of Department Code of Conduct rules 3.1, 3.6, 8.1, and 8.6.

14. Charge 121624 should be sustained in that respondent failed to sign off on the DS 740 fuel and lubrication records on November 7, 2005, in violation of Department Code of Conduct rules 8.1, 8.6, and 8.19.

15. Charge 127403 should be sustained in that respondent failed to place parking violation stickers on illegally parked cars on May 12, 2006, in violation of Department Code of Conduct rules 8.1 and 8.6.

RECOMMENDATION

It is important to note at the outset that the majority of the charges sustained in this case do not stem from an intentional or purposeful violation of Department procedures. Rather, the charges represent a pattern of failure by respondent to perform properly many of his supervisory duties, and reflect his ongoing inability to fulfill his recordkeeping responsibilities correctly, with the caveat that charges cover a three-year period; they were not brought for trial contemporaneously and respondent's "pattern" of difficulties must, therefore, be discounted somewhat. Respondent has served the Department for 20 years. His long tenure weighs in his favor.

Having made the above findings, I requested a summary of respondent's personnel history. The record shows an insignificant disciplinary history during his fourteen years as a sanitation worker, before he was promoted to supervisor in 2001. Respondent began his employment with the Department in 1987. In his 14 years as a sanitation worker, respondent received two reprimands, one in 1996 for not reporting to work on time, and one in 1997 for violating rule 3.6 of the Department Code of Conduct (employees must promptly and properly perform assigned duties and complete all assigned tasks). In 1999, respondent was found guilty

of violating Department rule 3.19 (employees must not loiter, lounge, or sleep while on duty), for which the Department fined him $50. That same year, respondent was found guilty of violating rule 1.4 of the Code of Conduct (prohibiting AWOL, absence without official leave), for which the Department exacted a one-day suspension. Suffice it to say that respondent's conduct during his time as a sanitation worker was, overall, without significant blemish. The record strongly suggests that while respondent was a satisfactory sanitation worker, he has manifested continuing difficulties in carrying out the duties of an agency supervisor since his promotion in 2001.

Petitioner seeks termination of respondent's employment, or, in the alternative, five days' suspension for each charge, with the sole exception of Charge 120988, as to which petitioner seeks 15-20 days' suspension, on the expressed theory that falsely entering a crew's departure time was the most serious conduct in the case (Tr. 544, 547-49). The Department is thus seeking up to 90 days of suspension without pay in the aggregate if termination is not imposed. Given the nature and age of the charges, respondent's minor disciplinary history, his 20-year tenure with the Department, his struggles to complete his assigned, supervisory work, the dismissal of four of the charges, and the lack of proof that he was dishonest, termination strikes me as an unduly harsh penalty, and a 90-day suspension seems excessive, assuming termination of employment is not the appropriate remedy. The Department's counsel acknowledged that demotion would be the appropriate penalty, but that demotion is not among the array of penalties permitted by the Administrative Code (Tr. 543-44). *See Dep't of Sanitation v. Rizzo,* OATH Index No. 1423/06, at 24 (Sept. 26, 2006); *Dep't of Sanitation v. Singer,* OATH Index No. 2033/00, at 43 (Mar. 15, 2001). In these circumstances, I am constrained to recommend suspension without pay, allocated as follows.

Charge 120988 was not sustained in significant part, as I found the proof insufficient to show that respondent deliberately made or allowed a false entry to be made in Department records about the time his crew completed its field work. Respondent did fail, however, to verify the information from the crew, and he is responsible for that failure to complete his tasks properly. He was lax in supervising an errant crew, and I recommend a penalty of five days' suspension without pay on the aspects of this charge that were sustained.

I recommend a penalty of five days' suspension for charge 115160. I found respondent liable for negligently ordering a sanitation worker to drive a salt spreader with a front flat,

causing the tire to be destroyed. Respondent ignored Department procedure by not awaiting a field investigator to inspect the tire before ordering the vehicle to be driven. Respondent also ignored the high probability of damage to the truck and the possibility of injury to others that could result from driving such a heavy piece of machinery on a flat front tire. Safety procedures are in place for a reason, and should be followed at all times.

For charge 118913, I recommend a three-day suspension. I found that respondent was insubordinate in that he disobeyed an order to appear at PMD. Although petitioner seeks a five-day penalty for this charge, I believe this to be excessive in light of the fact that respondent promptly reported to PMD when he received a transmission from Chief Murphy reminding him of his meeting. He arrived late.

I recommend a three-day suspension for charge 117320, as to which I found that respondent was AWOL on May 12, 2005. While being AWOL is serious misconduct, mitigating circumstances warrant a lesser penalty than five days. Respondent called to inquire as to the status of his leave request and was told that it was approved. While it was his responsibility to call again after the final schedule had been set to ascertain whether his leave was still authorized, there was also evidence in the record, specifically from Superintendent Carlson, that the Department may attempt to phone an employee to inform him that his leave status has been revoked. That was not done here. However, once respondent was ordered to work, after his shift began, he refused to come in, a fact that should exacerbate the penalty. A penalty of three days' suspension seems appropriate to this charge, in keeping with principles of progressive discipline, given respondent's prior forfeiture of one day's pay for violating time and leave requirements, and the fact that he has not been disciplined recently for any AWOL, and his refusal to face his responsibility once called back to work.

For charge 131724, I recommend a penalty of three days' suspension. Respondent omitted several entries on the DS 350's for eleven sanitation workers. I further recommend a penalty of five days' suspension for charge 131723; respondent omitted information on the DS 332 for his assigned section. Respondent's sloppy accounting created headaches for payroll and interfered with paying 14 sanitation workers timely and correctly. I recommend a penalty of two days' suspension for charge 123349, where respondent omitted several entries on the DS 350 for two sanitation workers assigned to basket replacement, but made efforts to supply the necessary

information, albeit in the wrong form, an attached, marked route sheet with a verbal report to Superintendent Hughes.

I further recommend five days' suspension as to charge 107139. Respondent failed to correct the tonnage entry in the Department computer after being asked to do so by Superintendent Hughes. Not only did respondent disobey an order from his superior, the only explanation he provided as to why he neglected to correct the computer entry before the end of his shift was that he "could have been" called away to attend to a more pressing situation, an explanation which I found wanting.

As to charge 118058, I recommend a four-day suspension. I found respondent liable for failing to sign off on the truck allocation functions for an eight-day period. The lengthy period of time during which respondent neglected his supervisory duty warrants the four-day suspension, but I have not recommended the full five days the Department sought because respondent testified, and Hughes agreed, that the garage was a very busy one and that respondent requested help and had trouble with this task, even after being told what he must do. I gave respondent the benefit of the doubt left by the witnesses, on the record before me, at least for purposes of formulating an appropriate penalty, as to whether respondent should have been given more training to complete this task. There is no dispute that respondent received instructions, but he needed more help. The parties do dispute the question of whether and when respondent requested more instruction. Whether Superintendent Hughes gave up on respondent out of frustration because respondent was not grasping the instructions and lacked a facility with computers, or whether respondent received all appropriate training is left unclear. Hughes repeatedly asked respondent to complete the appropriate computer entries. When a supervisor fails to enter information properly and sign off on computer entries, he disrupts important Department functions, and creates additional work for other supervisors, who must attempt to allocate their equipment using incomplete and, therefore, confusing computer records. *See generally Dep't of Sanitation v. Rizzo,* OATH 1423/06, at 13-14.

For charge 121624, as to which I found respondent did not properly sign off on the DS 740 fuel and lubrication records for November 7, 2005, I recommend a penalty of three days' suspension. According to Hughes' testimony, which I found credible, the fuel and lubrication logs are important to ensuring that the Department supplies adequate fuel for its trucks and

machinery. If the DS 740 log is incorrect or incomplete, the following shift does not know how much fuel or lubricant has been used or is needed for the equipment.

I believe that five days' suspension is excessive with respect to charge 127403, where I found respondent failed to place parking violation stickers on two illegally parked cars. While respondent ignored Department procedure, he did not shirk his responsibilities entirely; he did issue summons notices to both cars, and there is no evidence that respondent has, either before or after this particular incident, failed to place notification stickers on other vehicles. Therefore, I recommend a one-day suspension for this charge.

While I have recommended the aforementioned penalties within the constraints of the Administrative Code, I feel it important to note that in this situation, suspension seems an ineffective penalty. Suspension is meant to deter workers from engaging in similar, inappropriate conduct in the future. However, the efficacy of suspension often hinges on a respondent's previous willful or intentional violation of agency rules and his ability to conform his conduct to departmental requirements. As noted, I do not believe that respondent routinely violates Department procedure intentionally. Rather, the proof showed that he is ill equipped to handle the many supervisory duties required of him. While arguing that no adverse consequences befell the Department as a consequence of respondent's errors, his attorney almost conceded as much in closing: "So, judge, maybe Nieves is not good on paper and entries. . . . " (Tr. 521). But "paper and entries" are the supervisor's job and respondent has not been doing it well.

While demotion is not listed as an available penalty under Administrative Code section 16-106, I note that it seems a more appropriate solution in this case, assuming both parties are amenable to such a penalty in lieu of suspension. Respondent's long tenure shows that he was able to serve the Department for 14 years as a sanitation worker with a nearly unblemished record. The Commissioner has imposed a penalty of demotion. In *Department of Sanitation v. Ponzio*, OATH Index No. 265/05 (Mar. 22, 2005), *modified on penalty,* Comm'r Dec. (April 11, 2005), the administrative law judge recommended suspension for multiple violations of agency rules by the respondent in that case. Noting that a supervisor must set an example for other Department employees and perform his duties competently, the Commissioner concurred with the findings of guilt, but demoted the respondent, a supervisor whose record he found

"abominable" and who had amassed about 100 penalty days in the last 14 of his 24 years with the Department.

If demotion is not available by agreement or regulation, or as a matter of agency discretion, I note that both respondent and the Department may benefit mutually from additional supervisory, last-chance training for respondent in addition to any suspension imposed. The Department has provided such retraining to a supervisor who had difficulty fulfilling his various recordkeeping responsibilities in *Department of Sanitation v. Rizzo*, OATH 1423/06 (supervisor's willingness to improve recordkeeping skills was a mitigating factor). Here, respondent's counsel complained that the charges collected in this matter spanned a long period of time and were consolidated for trial, and that this was unfair (Tr. 523). It is true that had the earliest charges been brought on for trial sooner, respondent might have been able to improve himself had he been given an opportunity to respond to criticism through prompt, periodic, formal discipline within the context of progressive discipline.[7] It is also true that some of the charges involve conduct that is now three years old, and that respondent has not been found guilty of similar conduct as a supervisor in the past. Therefore, I have attempted to follow principles of progressive discipline and to address respondent's counsel's forceful plea that I consider the 15 charges not as a pattern of recalcitrance, but as, in part, a function of the consolidation of charges up to three years old in what is really respondent's first trial in which the Department alleges that he has performed shoddy supervisory work. *See Dep't of Sanitation v. Singer*, OATH 2033/00, at 45 (agency's failure to act on older complaints more contemporaneously and respondent's long tenure should mitigate the penalty).

For all of these reasons, but also mindful that the record showed that respondent did receive some instruction along the way, for example, in using computers, and that his continued errors became a source of exasperation to his superiors, who were justified in their frustration with him, I am recommending that the Department consider whether, in its discretion, additional training for respondent would make sense if suspension is imposed. If respondent has actually made all other computer entries since 2001 correctly, the training he needs would relate to attention to detail on particular records, juggling supervisory tasks, and time management. Respondent should be keenly aware that if his record of now proven inability to meet his supervisory duties continues, he will face termination of his employment with the Department.

[7] Respondent's counsel did not claim that this accumulation was the product of any deliberate, nefarious design by the Department to discredit respondent (Tr. 521).

The agency is entitled to have supervisors who can exercise good judgment and keep up with the recordkeeping that is essential to running this vast municipal sanitation operation. This record shows that respondent tends to avoid difficulties by ignoring them until they develop into a disciplinary problem. He must step up to his responsibilities. If he is unable to or otherwise fails to deliver careful records and fails to demonstrate sound, reliable judgment, he will find that there is no place for him in the Department.

Accordingly, I recommend consideration of demotion by mutual agreement, and that the parties engage in a conference prior to final action by the Department to see whether they can stipulate to a penalty or other resolution of this matter. Failing an agreement between the parties, I recommend that respondent be suspended a total of 41 days without pay, allocated, in summary form below, and training in supervisory tasks as deemed appropriate by the Department to facilitate its work:

Complaint No.	**Charge**	**Penalty**
120988	Incorrect form DS 350	5 days
115160	Negligently ordering a salt spreader to be driven on a front flat tire	5 days
118913	Insubordination for failing to appear at Personnel Management Division	3 days
117320	AWOL	3 days
131724	Improperly completing DDS 350's for eleven sanitation workers	3 days
131723	Improperly completing DS 332	5 days
123349	Improperly completing DS 350 for two sanitation workers	2 days
107139	Failure to correct material out entry in Department computer	5 days
118058	Failure to close out collection computer functions for an eight-day period	4 days
121624	Failure to sign off on fuel and lubrication records, DS 740	3 days
127403	Failure to affix notification stickers on illegally parked cars	3 days

	Total	**41 Days**

Joan R. Salzman
Administrative Law Judge

September 19, 2007

SUBMITTED TO:

JOHN J. DOHERTY
Commissioner

APPEARANCES:

CARLTON LAING, ESQ.
Attorney for Petitioner

BIAGGI & BIAGGI, ESQ.
Attorneys for Petitioner
BY: RICHARD BIAGGI, ESQ.