

***Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Sullivan***

OATH Index No. 1236/14 (Aug. 28, 2015)

Petitioner established that respondent, an oiler, verbally threatened and menaced a stationary engineer in a profane manner on two occasions, improperly lowered the medical air pressure, failed to follow a directive to put oil in the air compressor, left his post without authorization, and failed to tighten the feed valve on the regulator for one of the boilers, creating a potentially hazardous situation. The remaining misconduct charges of viewing pornography in the workplace, taking photographs of hospital equipment, causing a delay in preventative maintenance and the free flow of patient care, threatening the senior stationary engineer, and failing to wear a surgical flu mask while at human resources department were not sustained. Termination of employment is recommended.

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

*In the Matter of*  
**HEALTH AND HOSPITALS CORPORATION  
(WOODHULL MEDICAL AND MENTAL HEALTH CENTER)**  
*Petitioner*  
*-against-*  
**BARRY SULLIVAN**  
*Respondent*

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**REPORT AND RECOMMENDATION**

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

The Health and Hospitals Corporation brought this disciplinary proceeding pursuant to section 7.5 of its Personnel Rules and Regulations. Respondent Barry Sullivan, an oiler/plant maintainer at Woodhull Medical and Mental Health Center (“Woodhull” or “facility”), is charged with viewing pornographic material on his personal DVD player; taking photographs of hospital property; engaging in disruptive behavior including insubordination, profanity, and picking up a computer monitor in a threatening manner; failing to notify a supervisor that he lowered the regulator’s air pressure; failing to perform duties that caused a low level of medical air to be generated throughout the facility; failing to follow a directive to pour a quart of oil into

an air compressor, leaving the boiler room without authorization; failing to tighten the feed water valve on the regulator for one of the boilers; verbally threatening and using profanity towards a supervisor in the facility's parking lot; clinching his fist and verbally threatening a supervisor near the pump room; and failing to wear a required surgical flu mask while in the human resources department.

Following a three-day trial held before me, I find that petitioner established that respondent verbally threatened and menaced a stationary engineer in a profane manner on two occasions, improperly lowered the medical air pressure, failed to follow a directive to put oil in the air compressor, left his post without authorization, and failed to tighten the feed valve on the regulator for one of the boilers creating a potentially hazardous situation. The remaining misconduct charges of viewing pornography in the workplace, taking photographs of hospital equipment, causing a delay in preventative maintenance and the free flow of patient care, threatening the senior stationary engineer, and failing to wear a surgical flu mask while at human resources department were not sustained. Termination of employment is recommended.

### **ANALYSIS**

Respondent and his engineering colleagues maintain and repair the heating, ventilation, and air conditioning system ("HVAC") for Woodhull Medical Center. Respondent, an oiler/plant maintainer ("oiler"), is responsible for maintaining the proper level of water in the boilers, conducting preventative maintenance, checking oil levels, checking temperatures, and making repairs in the boiler room and the mechanical equipment room. In addition to maintaining the boilers, an oiler works with the de-aeration tank, diesel pumps, fuel pumps, medical air compressors, generators, and domestic water pumps (Tr. 142-43, 200). There are seven oilers on staff at Woodhull (Tr. 205). There is an oiler "on the watch" for each of the three tours – 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., and 10:00 p.m. to 6:00 a.m. (Tr. 89). The oiler on the watch remains in the boiler room while the other oilers are responsible for repair work throughout the hospital (Tr. 475).

The engineering department is located in the basement of the facility. The boiler room is accessible from the mechanical equipment room via a short flight of stairs or from the delta room, which is up a full flight of stairs and across the corridor (Pet. Ex. 1; Tr. 33-34, 38-39, 42, 231).

The stationary engineer is responsible for anything to do with climate control in the facility. He is stationed in the delta room, where he monitors the telephones and alarms (Tr. 38, 43, 294-95). Stationary engineers report to the senior stationary engineer. The oiler on the watch is stationed in the boiler room, where there are three high-pressure boilers, the de-aerator tank, and pumps, such as sump pumps and transfer pumps. The oiler on the watch reports directly to the stationary engineer on duty (Tr. 39-40).

Respondent has a contentious relationship with Joe Riccio, the senior stationary engineer, Ferenc Marocik, one of the stationary engineers, and John Kilfoil, another oiler. It was readily apparent throughout the course of the trial, that there is a tremendous amount of animosity and workplace conflict within this department. In addition to testifying about the charges, each of the witnesses spent a considerable amount of time discussing their relationships and grievances with one another. In order to better evaluate the charges and the witness' credibility, it is useful to consider the personalities involved and the nature of their interactions with one another.

#### *Joe Riccio*

Riccio has worked at Woodhull for 27 years and has been in his current title of senior stationary engineer for seven years. Prior positions at the facility included stationary engineer, thermostat repairer, and oiler (Tr. 21-22). As the senior stationary engineer, he oversees facility operations and maintenance. Riccio supervises a number of different tradesmen, including oilers, sheet metal workers, thermostat repairers, carpenters, plumbers, electricians, painters, and maintenance workers (Tr. 46). In addition to his other responsibilities, Riccio informs the engineering staff whether they will be performing regularly scheduled work or responding to an emergency. He frequently visits the delta room to check in with the stationary engineer (Tr. 44-45). The amount of time that Riccio spends in the boiler room depends upon whether there are any problems or issues that need to be addressed. Otherwise, he would only visit the boiler room during his rounds of all of the equipment rooms (Tr. 46).

Riccio testified that he has known respondent for eight years. At respondent's request, Riccio switched him from repair work to the watch position and assigned him to the midnight shift, from 10:00 p.m. to 6:00 a.m. Although Riccio is respondent's supervisor, because respondent worked the midnight shift he reported to the stationary engineer on duty, Ferenc Marocik. According to Riccio, Marocik and respondent do not get along and after a few

incidents, respondent requested to come off the watch and return to repair work. Riccio accommodated respondent's request and assigned him to do repairs during the 6:00 a.m. to 2:00 p.m. shift (Tr. 50-51, 85, 87).

During the trial, respondent expressed dissatisfaction with Riccio's promotion to senior stationary engineer. Respondent testified that Riccio is unqualified for the position because he does not have steam plant experience (Tr. 532, 557). Respondent contended that Riccio is not a good supervisor and has said negative things about him. Respondent testified that in 2012, he told his colleagues that he was having trouble sleeping and was suffering from anxiety. He asserted that he "pretty much told everybody because they knew what was going on with [Riccio]" (Tr. 513). Respondent maintained that once Riccio heard about his anxiety, he started telling "everyone" that respondent was crazy (Tr. 512-14).

Riccio denied saying that respondent was crazy, but admitted saying "he's got some issues" (Tr. 114). Riccio, however, acknowledged that he was aware that several of respondent's co-workers have referred to him as crazy and he has done nothing about it (Tr. 114-15). Frank Politi, a stationary engineer at Woodhull, contradicted Riccio's testimony by maintaining that he had overheard Riccio refer to respondent as "crazy" after an argument he had with respondent in the hallway (Tr. 419, 433). Lawrence Tellerman, a thermostat repairman at the facility, also testified that he had heard Ricco refer to respondent as delusional (Tr. 444).

Kilfoil testified that he has never heard Riccio refer to respondent as crazy (Tr. 244). Indeed, Kilfoil maintained that it is respondent, who has a problem with Riccio. According to Kilfoil, respondent is "obsessed" with Riccio (Tr. 264). Respondent continually says that "Joe Riccio is out to get him" and blames Riccio for everything (Tr. 262). For example, respondent had commented that he believed Riccio had installed cameras in the boiler room just to watch him (Tr. 261). Kilfoil further testified that if the level on a gauge was off, then respondent would inexplicably blame Riccio and say "this fucking Joe Riccio" (Tr. 261). At first Kilfoil would agree with respondent to pacify him, but respondent would not stop and Kilfoil did not want to listen to him anymore. Respondent, however, would not let it go. He kept saying that "Joe Riccio is out to get [me]." Kilfoil described respondent as being obsessed with Riccio and theorized that respondent's "anger consumed his intellect" (Tr. 262).

*Ferenec Marocik*

Marocik and respondent were hired as oilers on the same day in 2006 (Tr. 298). Marocik was promoted three years ago from oiler to stationary engineer. Marocik works the 10:00 p.m. to 6:00 a.m. tour in the delta room (Tr. 296-97). Marocik reports to Riccio and was respondent's supervisor when he was on the watch during the midnight tour (Tr. 51).

It was unclear exactly how Marocik's and respondent's relationship deteriorated or if there was disharmony from the outset. It was apparent, however, that respondent has no respect for Marocik and Marocik is exasperated and somewhat frightened by respondent's conduct. Respondent maintained that Marocik has been lying about the misconduct charges against him because he has pictures and video of Marocik sleeping on duty (Resp. Ex. K; Tr. 474, 485). In 2012, respondent started secretly leaving the boiler room in the middle of his shift to surreptitiously videotape Marocik dozing on duty in the delta room (Tr. 535). Although respondent admitted that it is impossible for him to see the boiler from the delta room, he asserted that it is permissible to leave the boiler room at certain times. He denied that he needed the engineer's permission to leave the boiler room (Tr. 537). Politi, respondent's witness, however, maintained that an oiler should not leave the boiler room unless the engineer is aware of it because someone has to watch the boiler (Tr. 430).

Respondent was inconsistent in explaining why he was filming Marocik. Initially, respondent testified that he took videos of Marocik sleeping on duty because he was concerned about his own safety. Respondent complained that Marocik did not make rounds or check the boiler room to make sure that everything was okay after 11:00 p.m. Respondent contended that he took the videos of Marocik to give to his wife since Marocik was assigning dangerous jobs to him to do on his own (Resp. Exs. K, L; Tr. 474, 476, 480). Respondent testified that, "I was afraid they were going to pick me up off the floor dead one day and I just wanted to make sure my wife had something to bring to a lawyer to show that I wasn't being supported at work" (Tr. 481). Respondent later testified that he took the videos to "cover his butt" (Tr. 489, 539). Then he subsequently testified that he was obligated to videotape Marocik sleeping because it was his "job duty" (Tr. 554). Yet, when asked if he ever reported it to anyone, respondent replied "it's common knowledge" and then reluctantly admitted that he never reported it (Tr. 554).

Marocik denied that he was sleeping in the videos (Resp. Ex. K; Tr. 368). Despite his feet being up on a chair and his leaning back in the videos with his chin resting on his chest, he

insisted that he was aware of his surroundings (Resp. Exs. K, L; Tr. 369). He did not realize that respondent was videotaping him, but this was because respondent had “snuck up” on him (Tr. 370). Marocik testified that sometimes his eyes would get tired, so he closed them and he has a circulation problem which was helped by putting his feet up (Tr. 401).

Marocik further denied that he was telling colleagues that he was “going after” respondent because respondent had photos of him sleeping at work (Tr. 374). Politi, who works the shift after Marocik, testified that Marocik informed him that he was having a hard time with respondent and had “to write him up” (Tr. 420). Politi asked Marocik why he could not just talk to respondent and work it out rather than resorting to discipline (Tr. 420-437). According to Politi, Marocik replied that respondent had taken pictures of him sleeping (Tr. 421). Politi further testified that he has come into the delta room on more than one occasion and has observed Marocik with his feet up on a chair and his head down with his eyes closed. Politi testified that he did not know whether Marocik was sleeping or just had his eyes closed, acknowledging that “you can close your eyes and not be sleeping” (Tr. 422). He conceded, however, that if a stationary engineer was asleep, he could not effectively or safely do his job (Tr. 422). Tellerman also testified that he had occasionally seen Marocik sleeping in his chair during workhours (Tr. 446).

### *John Kilfoil*

Kilfoil has worked at Woodhull hospital for 31 years as an oiler (Tr. 142). In 2012, Kilfoil was working the 6:00 a.m. to 2:00 p.m. shift, and would relieve respondent on the watch when respondent was working the midnight tour. Kilfoil testified that he and respondent got along well and described their working relationship as “pretty good” (Tr. 151-53).

According to Riccio, respondent has had a conflict with Kilfoil over overtime assignments. Riccio testified that he does not want to micromanage overtime so he permitted the oilers to create their own overtime schedule with the expectation that it would be distributed equally (Tr. 102-04). Kilfoil, as the senior oiler, made up the overtime schedule for the oilers because none of the other oilers wanted to do it (Resp. Ex. I; Tr. 206, 259-60). Kilfoil contended that he was unable to recall respondent ever complaining about an uneven distribution of overtime (Tr. 209). He asserted that if an oiler had a problem with the way overtime was scheduled, all that he had to do was come to speak to him. Although Kilfoil maintained that he

was unaware that respondent had filed a grievance regarding overtime, he admitted that he had heard about some “turmoil” but does not “pay attention to nonsense” (Tr. 240-43, 255). Kilfoil asserted that he had offered to let respondent create the overtime schedule, but he declined (Tr. 255).

Kilfoil maintained that overtime is normally assigned through a rotating schedule going first to oilers on the watch. If none of them are interested, then overtime is offered to oilers doing repairs. Kilfoil testified about one occasion when his name was on the overtime schedule, but when he arrived at work the following day, someone had erased his name and written in respondent’s name instead. Kilfoil erased respondent’s name and reinserted his own. He then called respondent to tell him that he had changed the overtime schedule back (Tr. 205-07). According to Kilfoil, the following Monday, respondent was “bent all out of shape” (Tr. 257). Respondent confronted Kilfoil, asking him “Are you losing your fucking mind?” (Tr. 255). He then accused Kilfoil of changing the overtime schedule, to which Kilfoil responded, that he did not change the schedule, he wrote it. Respondent retorted, “that’s what the problem is, you wrote the schedule” (Tr. 258). Respondent further accused Kilfoil of “glomming” all of the overtime shifts because he was working more overtime than anyone else (Tr. 472).

Kilfoil testified that he never referred to respondent as “crazy”, but admitted that he has used other words to describe respondent, such as “obsessed,” “angry,” and “delusional” (Tr. 243). When asked if he liked respondent, Kilfoil replied, that he does not dislike or like respondent, he feels sorry for him (Tr. 247). Politi contradicted Kilfoil’s testimony by maintaining that he has heard Kilfoil refer to respondent as delusional and crazy (Tr. 419, 433).

With respect to the confrontation regarding overtime, respondent testified that he accused Kilfoil of stealing time from him in front of some witnesses. Respondent maintained that after that argument he was afraid because Kilfoil “was at his wit’s end” (Tr. 504). In addition to “screaming and cursing,” respondent contended that Kilfoil’s “eyes were popping out of his head” (Tr. 504). He thought that Kilfoil was going to take a “swing at [him]” because he knew that respondent had filed a grievance about the overtime (Tr. 500, 502). Referring in general to Kilfoil and Marocik, respondent testified, “Now I think these guys are reduced to try to start an actual fist fight because they weren’t able to goad me into like these verbal argument, but they would do it - - lying to my face. They were just doing horrible things to me.” (Tr. 502).

This discordant work environment negatively impacted the employees' relationships and conduct in the workplace as shown by the discussion below. The charges allege misconduct that occurred between 2012 and 2014 and will be addressed chronologically.

*March 2012*

Respondent was charged with viewing pornographic material on his personal DVD player in the boiler room during the month of March 2012 (ALJ Ex. 2).

During March 2012, Kilfoil worked the watch on the morning shift immediately following respondent's overnight shift. He testified that on two occasions he saw respondent reading pornographic magazines when he went to relieve him. According to Kilfoil, respondent would usually take his magazines with him when he finished his shift. One day, however, Kilfoil was looking for something in the drawer of the shared desk and found two pornographic DVDs and a magazine. Kilfoil assumed that the porn belonged to respondent and complained to Marocik about respondent leaving "this kind of filth" in the desk (Tr. 154). Kilfoil testified that he was concerned that someone might think that it belonged to him. The following day, Kilfoil confronted respondent and told him "I'm not going to take a hit for this" if someone discovered that there was porn in the desk drawer (Tr. 155). Respondent replied, "relax, calm down," then removed the materials from the drawer. Kilfoil assumed that respondent put the pornography in his locker because he walked in that direction (Tr. 153-56, 210, 212-13, 280-81).

Kilfoil submitted a written statement regarding the incident on July 8, 2013, 16 months later, at the behest of labor relations. He explained that he did not write a contemporaneous statement or report it to labor relations when it occurred because he was embarrassed (Pet. Ex. 7; Tr. 156-58). Kilfoil's written statement indicated that this occurred sometime in "early spring of 2012" (Pet. Ex. 7).

Marocik similarly testified that he had observed respondent reading pornographic magazines and watching pornographic videos on a portable DVD player. Marocik told respondent that he should not be watching porn while at work and respondent replied, "calm down, calm down, it's nothing" and then he put it away (Tr. 301). Marocik did not report it at first, but after observing respondent viewing porn a few times and Kilfoil complaining about it, he reported it to Riccio in March 2012. Marocik assumed that Riccio would take care of it, but respondent continued to watch porn at work (Tr. 300-302). Marocik, like Kilfoil, did not



document the pornography situation until July 2013, almost a year and a half later, when labor relations asked him to submit a written statement (Pet. Ex. 10; Tr. 303-04, 359-60).

Marocik acknowledged that as respondent's direct supervisor on the midnight watch, he had input on respondent's evaluation. The evaluation for July 10, 2011 through July 9, 2012, does not mention that respondent was looking at pornography in the workplace (Resp. Ex. B; Tr. 371-73). Marocik testified that Riccio had written the evaluation but he discussed the pornography situation with Riccio several times before the evaluation was written. Marocik testified that he had asked Riccio to discuss it with respondent because he was embarrassed to talk about "this kind of stuff" (Tr. 360-61). Riccio, however, testified that there was no mention of respondent looking at pornography in his performance evaluation because he was unaware of it at the time he drafted the evaluation. He learned about the pornography afterwards from Marocik (Tr. 116).

Frank Politi, a stationary engineer at Woodhull hospital testified that he had heard about the allegation that respondent had been looking at pornography in the workplace. He contended that before respondent had started working at the facility, there was a locker filled with pornographic material. Ironically, Politi further testified that he had seen Kilfoil occasionally looking at porn, but had never observed respondent looking at pornography. He then acknowledged that he did not work with respondent very often (Tr. 417-18).

Respondent denied that he looked at pornography in the workplace and maintained that Kilfoil was lying. He posited that the only reason Kilfoil had made this allegation was because respondent had filed a grievance about overtime distribution. Respondent testified that after he filed the grievance, he could sense that Kilfoil had "turned on him" (Tr. 472). Respondent also asserted that Marocik was lying about respondent looking at porn because respondent has videos of Marocik sleeping on duty (Tr. 474).

Respondent testified that the four oilers who work the watch share the same desk in the boiler room. Yet, no one else had ever been accused of looking at porn in the workplace. Moreover, pornography had been generally accepted because it was displayed openly in other shop areas in the basement and there were pornographic DVDs lying around (Tr. 474).

In a disciplinary proceeding, petitioner bears the burden of proof by a preponderance of the credible evidence. *Foran v. Murphy*, 73 Misc. 2d 486, 489 (Sup. Ct. N.Y. Co. 1973); *Antinore v. State*, 79 Misc. 2d 8, 12 (Sup. Ct. Monroe Co. 1974), *rev'd on other grounds*, 49

A.D.2d 6 (4th Dep't 1975), *aff'd*, 40 N.Y.2d 921 (1976); *Osoba v. Bd. of Education*, NYC. Civ. Serv. Comm'n Item No. CD 92-127 at 3 (Nov. 19, 1992), *aff'g*, OATH Index No. 237/92 (Feb. 28, 1992). A preponderance has been defined as the burden of persuading "the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence . . . .'" *In re Winship*, 397 U.S. 358, 371 (1970) (citation omitted). *See also Dep't of Correction v. Tavarez*, OATH Index No. 1273/02 at 5 (Nov. 21, 2002). Respondent was charged with viewing pornography in the workplace in violation of section B(3) of the Employee Handbook, which prohibits employees from loitering, socializing or attending to personal business while on duty. Petitioner failed to meet its burden in establishing that respondent violated this rule by looking at pornography in March 2012.

In addition to this charge being ambiguous, the testimony in support of the charge is contradictory and vague. In analyzing credibility, this tribunal may consider such factors as: witness demeanor; consistency of a witness' testimony; supporting or corroborating evidence; witness motivation; bias or prejudice; and the degree to which a witness' testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd* NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998); *Dep't of Correction v. Hansley*, OATH Index No. 575/88 at 19-20 (Aug. 29, 1989), *aff'd*, 169 A.D.2d 545 (1st Dep't 1991).

Petitioner charged respondent with viewing pornography in March 2012, without providing any specific dates. Furthermore, although Marocik and Kilfoil testified that they observed respondent viewing porn in the Spring of 2012, they did not submit a written statement regarding the matter until the Summer of 2013. Both Marocik and Kilfoil testified that they were too embarrassed to mention it earlier. Nonetheless, I found that their professed sensitivities to discussing pornography to be exaggerated, especially since they both had confronted respondent directly at the time.

Moreover, respondent's evaluation for this period of time failed to mention that respondent was viewing pornography. When asked about this omission, Marocik contended that he told Riccio about it and expected that he would handle the situation. Since Riccio wrote respondent's evaluation, Marocik could not account for why the information was missing. Riccio, on the other hand, maintained that he was not told about respondent viewing pornography until after the evaluation was written. Regardless, this charge should be dismissed

due to the lack of specificity coupled with the inconsistent and ambiguous testimony in support of the charge. *See Dep't of Transportation v. Abad*, OATH Index No. 242/12 at 4 (Mar. 12, 2012) (witness' subjective assessment that respondent used "inappropriate and foul language" and "curses and threats" was insufficient, without further specificity); *Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Franco*, OATH Index No. 942/04 at 3 (Mar. 24, 2004) (ambiguity of the charge coupled with the lack of supporting testimony warrants that the charge of excessive absence be dismissed).

*March 25, 2012*

Respondent was charged with taking photographs with his digital camera of hospital property (ALJ Ex. 2). Marocik testified that on March 25, 2012, he observed respondent walking around the facility with a camera taking photographs of hospital property. Marocik directed respondent to stop taking the photos and respondent replied that he was only taking pictures of the equipment. Marocik repeated his directive for respondent to stop. Respondent replied that they "were all going to pay" because "everything is out of compliance" so he wanted proof of what was going on (Tr. 306).

Marocik observed respondent taking photos of equipment on multiple occasions. He testified that he had been informed that there was a facility prohibition against taking photographs of hospital equipment, so he reported the incident to Riccio. After reporting it two or three times, Riccio instructed Marocik to speak to the Administrator on Duty directly because each time Riccio spoke to respondent about it, he denied that he was taking photographs. On June 2, 2012, the Administrator on Duty met with Marocik and respondent to discuss the situation, but respondent once again denied taking pictures of the equipment (Tr. 307, 397-98, 483). Marocik documented that the meeting occurred in the engineer's logbook (Resp. Ex. Q).

Respondent testified that he never took photos of hospital equipment after he was directed not to do so at the June 2 meeting with the Administrator on Duty. He contended that before this meeting no one had told him that it was impermissible to take photographs of the equipment (Tr. 484-85). He then qualified this statement later, by saying he did not believe Marocik had talked to him about taking pictures (Tr. 541). Respondent testified that he took the pictures of the equipment to "cover [his] backside" (Tr. 541). He maintained that it is not unusual to take pictures to document the condition of a piece of machinery or to show, for

example, that a gauge is reading empty, when it is supposed to be full (Tr. 541-42). After further probing, however, respondent denied that he took photos of the equipment for safety reasons and discussed a photo that someone had taken of him assembling a fan. Respondent again maintained that it is commonplace to take pictures in such a setting (Tr. 543).

I credited Marocik's testimony that respondent took digital photographs of facility equipment. His testimony was internally consistent and corroborated by his contemporary notation in the engineer's logbook. Furthermore, it seems highly unlikely that Marocik would have arranged for respondent to meet with him and the Administrator on Duty if he had not really observed respondent repeatedly taking the photographs.

In contrast, respondent's testimony regarding his photography was inconsistent and unclear. During the trial, he never denied taking photographs. He only maintained that he did not take photographs after the meeting with the Administrator on Duty, when he was told that it is impermissible to take pictures of the equipment. I found this testimony to be incredible. At first, he had testified that he took the photos for safety reasons and then as a social photo, while defensively asserting that it is not unusual to take photographs of equipment in a physical plant.

Although I find that respondent took the photographs, it is unclear how it constituted misconduct. Respondent was charged with violating section E(7) of the Employee Handbook, which requires employees to respect and safeguard the property of the facilities. In its opening statement, petitioner contended that respondent had been insubordinate for taking photographs of equipment after Marocik directed him not to. Petitioner, however, failed to charge respondent with insubordination with respect to the photos, to the contrary, the only rule cited in the charge concerned safeguarding facility property. There is nothing in the record to establish that taking photographs of hospital equipment violated this rule. Consequently, this charge should be dismissed.

*May 10, 2012*

Respondent was charged with vociferously stating to Marocik, the stationary engineer, "What the fuck is going on?"; picking up the computer monitor from Marocik's desk, lifting it 18 inches in the air and threatening Marocik; and vociferously stating to Marocik, "Take this fucking screen and shove it up Joe's ass! It's his fault why the system is operating like that!" (ALJ Ex. 2).

Marocik testified that on May 10, 2012, there was a sudden increase in steam load, meaning that the temperature outside had dropped in conjunction with an increase in the number of people in the facility asking for more heat. Marocik had heard an alarm coming from the boiler room and assumed that respondent was “blowing down” the boiler (Tr. 308). A few minutes later, however, respondent stormed into the delta room and said, “What the fuck is going on?” “I don’t have boiler water in the boiler” (Tr. 309).

Marocik informed respondent that the building management system was probably calling for more steam because the building is too cold. Respondent replied, “what the fuck, you know that this all Joe’s fault” (Tr. 308) Marocik testified that respondent reached across his desk, grabbed his computer monitor, and lifted it at least 18 inches off the desk (Tr. 308-310). While holding it in the air, respondent said, “take this monitor and shove it up Joe’s ass, it’s all his fault that the system is operating like that” (Tr. 311).

Marocik maintained that he was very “taken aback” and initially thought that respondent was going to throw the monitor at him. The monitor landed face down on Marocik’s desk, without breaking. Marocik testified that he felt very threatened by respondent’s conduct and was confused because respondent had been working at the facility long enough to know that sometimes there is a sudden increase in steam load (Tr. 311-12). When asked why this incident was not documented in respondent’s 2012 performance evaluation, Marocik was unable to explain its absence, but noted again that Riccio did the evaluation (Tr. 373-74, 399). Marocik did, however, submit a written statement dated May 10, 2012, documenting what had occurred. In the statement Marocik stated that he tried to reason with respondent and explain that a fan coil system must have been activated, opening the boiler to one hundred percent. Since the system was on automatic, Marocik would have had no control over it. Respondent continued to curse and blame Marocik, so he told respondent that he should just do his job and keep a safe level of water in the boilers (Pet. Ex. 13).

During direct examination, respondent denied that the incident occurred and asserted that Marocik was lying because respondent has pictures of him sleeping on duty (Tr. 485-86). During cross-examination, however, respondent testified that he was making his rounds outside the boiler room when Marocik turned on the heating system without notifying him. Respondent testified that all of the water was sucked out of the boiler creating a dangerous situation. When he returned to the boiler room the alarm was ringing. Respondent went to the delta room to ask

Marocik what he was doing because there was no water in the boiler. Respondent denied that he was “really upset” but acknowledged that he was “rattled” because the alarms were blaring (Tr. 543-44).

Respondent postulated that Marocik was lying about the confrontation and trying to make him sound belligerent because Marocik was responsible for creating a dangerous situation, putting his engineering license at risk, and did not want to be blamed. Respondent maintained that the engineer is supposed to call the oiler and tell him that the heating system is being turned on so that the oiler can stay by the boiler (Tr. 544-46).

I found Marocik to be credible. His testimony was consistent and sincere. He appeared genuinely puzzled and troubled by respondent’s reaction. Moreover, he contemporaneously documented the incident in a written statement. In contrast, respondent’s testimony was erratic and inconsistent. I was unpersuaded by respondent’s attempt to minimize his reaction to the alarm going off and there being no water in the boiler. Respondent’s demeanor during the trial and especially while on the stand could best be described as unsettled. He appeared restless and easily agitated, making it difficult to believe that he was calm and composed during this incident.

Respondent was charged with violating the following rules in the Employee handbook on May 10, 2012: section E(1), which requires employees to maintain high standards of courtesy; section E(4), which requires employees to exercise self-control towards supervisor at all times, even under extreme stress; section E(15), which prohibits employees from threatening or intimidating other employees or using intemperate or abusive language; and section E(16), which prohibits employees from engaging in fights, horseplay, or any form of boisterous or disorderly conduct on facility premises.

It is permissible for an employee to disagree with a supervisor, so long as the disagreement remains within the bounds of decorum and discretion. *See Health & Hospitals Corp. (Lincoln Medical & Mental Health Ctr.) v. Thomas*, OATH Index No. 531/04 at 5 (May 4, 2004). Whether conduct or remarks are insubordinate or disrespectful is a factual question to be decided in the totality of the circumstances. *See Dep’t of Correction v. Martin*, OATH Index No. 431/95 at 14 (Jan. 17, 1995). While it may not always be insubordinate to disagree with a supervisor, it is insubordinate to direct profane comments towards a supervisor while maligning his authority. *See Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital and Nursing Facility) v. Ramsey*, OATH Index No. 724/04 at 5 (Apr. 16, 2004) (while mild profanity may be

permissible and expected in a work shop environment, maintenance worker went too far when he told his supervisor that he did not “know what [he is] fucking doing”); *Dep’t of Sanitation v. Mitchell*, OATH Index No. 1823/00 at 3, 7 (Nov. 3, 2000), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 01-60-SA (July 27, 2001) (sanitation worker found guilty of misconduct for telling his supervisor, “Fuck you. Who do you think you are? You’re a piece of S-H-I-T”). *See also*, *Dep’t of Environmental Protection v. Sutton*, OATH Index No. 565/91 at 3 (Feb. 7, 1991); *Human Resources Admin. v. Bichai*, OATH Index No. 211/90 (Nov. 21, 1989), *aff’d*, NYC Civ. Serv. Comm’n Item CD No. 90-54 (June 15, 1990). Respondent’s comments while confronting Marocik were abusive and exceeded the bounds of decorum and discretion. His use of profanity and his disrespectful attitude constituted misconduct. *See Law Dep’t v. Coachman*, OATH Index No. 1370/00 (June 13, 2000), *aff’d* NYC Civ. Serv. Comm’n Item No. CD01-13-SA (Apr. 11, 2001) (employee committed misconduct by telling his supervisor that she was “stupid” and a “dirty ass bitch” and did “not know who [she] was messing with”).

More importantly, respondent threatened his supervisor with physical harm when he menacingly picked up Marocik’s computer monitor as if to throw it at him. Marocik understandably testified that he felt very threatened by respondent who was holding Marocik’s computer monitor in the air while engaged in a profanity laden rant about him and Riccio.

Respondent acted in a menacing and threatening manner in an attempt to intimidate Marocik. Moreover, his profane and contemptuous comments regarding his supervisors were insubordinate. Consequently, I find that on May 10, 2012, respondent failed to maintain high standards of courtesy, failed to exercise self-control towards his supervisor, threatened and intimidated his supervisor by using intemperate and abusive language, and engaged in boisterous and disorderly conduct on facility premises in violation of sections E(1), E(4), E(15), and E(16) of the facility’s rules of conduct.

*June 24, 2012*

Respondent was charged with failing to notify the stationary engineer that he lowered the medical air regulator’s pressure below the acceptable range and failing to perform his duties by causing a low level of medical air to be generated throughout the facility (ALJ Ex. 2). Every evening the oiler on watch is responsible for checking the medical air generator and including

the information in his daily checklist. The stationary engineer is responsible for reviewing the oiler's paperwork and signing off on it (Tr. 319-20, 322).

Marocik testified that at the beginning of the tour on June 24, 2012, the medical air alarm went off. After the alarm went off, Marocik followed the usual practice of acknowledging and silencing the alarm. The delta room was subsequently "flooded with phone calls" because the alarm went off in each of the individual departments throughout the facility indicating that the medical air level was low (Tr. 313-15).

Marocik called respondent in the boiler room but there was no answer, so he ran downstairs to the medical air panel which is located in the mechanical equipment room adjacent to the boiler room (Tr. 318). Marocik found that the medical air gauge was reading 40 pounds per square inch ("PSI"), but it should have been in the range between 50 and 55 PSI. Consequently, Marocik raised the level of the medical air to the acceptable range (Tr. 318, 326).

Marocik testified that after he corrected the air level, he looked for respondent and found him on the telephone in the "shed," the air-conditioned room where the oilers cool off after making their rounds. Marocik waited for respondent to finish his telephone conversation before telling him that the medical air was low, causing the alarm to ring, which resulted in a lot of telephone calls from all over the facility. When Marocik asked respondent why the medical air was low, he replied that he did not know because he was on the telephone (Tr. 329-331).

The following day, while Marocik was doing his rounds, he observed respondent make an adjustment to the medical air level, which was already reading 52 PSI. Marocik asked respondent why he made an adjustment if the medical air was within an acceptable range. Respondent replied that he liked to keep the medical air at 50 PSI. Marocik reminded respondent that he must notify the engineer on duty before he adjusts the medical air and that he may not adjust the regulators if they are within the range. Marocik submitted a written statement documenting that when the alarm went off the day before he initially thought that the regulator was faulty. However, the next day he saw respondent adjusting the regulator and respondent admitted to frequently correcting the medical air level (Pet. Ex. 12; Tr. 332-33, 378-79).

Politi corroborated Marocik's testimony that medical air needs to remain within a range between 50 and 55 PSI. He further testified that an oiler can adjust the medical air regulator if it is not within that range and tell the engineer that he is making an adjustment or can get the engineer and do it together (Tr. 429-30). Politi emphasized that as a stationary engineer, he



would want to know if in oiler touches the medical air regulator and the oiler should notify the engineer either before or after adjusting the medical air (Tr. 437).

Respondent admitted to trying to lower the medical air regulator to the correct range, but indicated that the level went much lower than he thought it would. Yet, he denied that he is required to obtain authorization before adjusting the medical air pressure because he routinely adjusted it (Tr. 486-87). Respondent noted that his performance evaluation indicates that one of his job duties is, “[a]djusts manual controls or overrides automatic controls to bring equipment into recommended/prescribed operating ranges” (Resp. Ex. B). I did not find respondent credible on this point.

Marocik testified that there are several regulators in the hospital that an oiler can adjust to bring them into recommended operating range. The medical air regulator, however, is not one of them. An oiler must notify the engineer if he adjusts this particular regulator (Tr. 402-04). It is also significant that respondent’s witness, Politi, agreed with Marocik that the engineer on duty should be apprised if the oiler adjusts the medical air regulator.

Respondent further argued that the regulator must have been defective because he had been forced to adjust it more frequently than he had in the past. To support this contention, respondent submitted a report of the findings and recommendations from Praxair Healthcare Services, which conducted an inspection of the medical air regulator on January 17, 2013 (Resp. Ex. R). Also attached to the report was a service call work order from October 2012, for a routine service call regarding the manifold for the medical air regulator (Resp. Ex. R). Respondent testified that “I’m pretty sure that there were problems with the regulator” because the work order shows that the plumbers “were swapping out parts” (Tr. 488). This charge, however, relates to conduct which occurred in June 2012, so it is unclear how a work order from October 2012, or an inspection report from January 17, 2013, is relevant to the charged misconduct. There is nothing in the record to support respondent’s contention that the medical air regulator was faulty in June 2012. Moreover, even if the medical air regulator was malfunctioning, it does not eliminate respondent’s obligation to notify the engineer when an adjustment is made. Indeed, if respondent suspected that the regulator was faulty it would have been even more essential for him to report the situation to the stationary engineer.

Accordingly, I find that respondent, as charged, failed to notify Marocik that he lowered the medical air regulator’s pressure below the acceptable range and failed to perform his duties

by causing a low level of medical air to be generated throughout the facility in violation of section B(1) of the Employee Handbook, which requires employees to perform their duties and responsibilities in a satisfactory manner and section E(5), which requires employees to respond promptly to all emergencies and/or directives due to the essential services being provided by the facility.

*September 23, 2012*

Respondent was charged with failing to follow the stationary engineer's directive to pour one quart of compressor oil into Air Compressor #1 (ALJ Ex. 2).

It is undisputed that after taking over the watch at approximately 10:00 p.m. on September 23, 2012, respondent notified Marocik that the oil level was dangerously low on one of the air compressors. Marocik testified that he directed respondent to pour a quart of oil into an air compressor but when he made his rounds at around midnight, he noticed that respondent had not added the oil to the compressor. He observed that respondent had still not added the quart of oil, when he made his next rounds at 3:00 or 4:00 a.m. (Tr. 334). Marocik testified that he decided to add the oil himself. Later on respondent asked Marocik why he added the oil instead of asking him to do it. Marocik replied that he already had asked respondent to add the oil twice and he did not do it, and as the engineer on duty, he was responsible for ensuring that the oil in the compressor was at a safe level. Marocik submitted a written statement documenting what had occurred (Pet. Ex. 11; Tr. 335, 387).

Respondent denied being given an order to put oil in the compressor. He testified that he notified Marocik that the compressor was low on oil and asked if he could add a quart of oil. Marocik, however, said no (Tr. 494). Respondent submitted a copy of the boiler room log for September 24, 2012, with his written notation that he had apprised the engineer that the oil level on the compressor was low. The note further states that Marocik put a quart of oil in the compressor at 2:45 a.m. (Resp. Ex. S; Tr. 492). When asked why he had written this on the log, respondent replied, "I was just tracking what [Marocik] was doing" and "to let you know what he was up to because he eventually came down and put oil in the machine" (Tr. 493).

Marocik's testimony regarding respondent's failure to follow his directive on September 23, 2012, was very credible. His testimony was consistent and corroborated by a contemporaneous written statement that was submitted to Riccio. Respondent's testimony, that

he noticed the low oil and was directed not to add oil, was nonsensical. It is difficult to believe that the stationary engineer would prohibit an oiler from putting oil in the compressor after being notified that the oil level was dangerously low.

Respondent contended that his version of events was accurate and Marocik's was a lie because Marocik did not document in the engineer's log that respondent had disobeyed an order (Resp. Ex. T; Tr. 495). This was not persuasive, however, given Marocik's credible testimony that he did not enter respondent's failure to put oil in the compressor in the logbook because he wrote it up separately and submitted the written statement to Riccio (Pet. Ex. 11; Tr. 386-87).

Respondent's attempt to impeach Marocik's testimony by submitting a page from the engineer's logbook for June 25, 2012, was similarly not compelling. Marocik had noted in the log for June 25, 2012, that although the oil was low in air compressor #1, he had told respondent not to add oil. Instead, he directed respondent to switch to air compressor #2. However, comparing what occurred on June 25, 2012, with what happened on September 23, 2012, was illogical. Marocik credibly explained that on June 25, 2012, it was a completely different set of circumstances. Since it was close to the end of the shift on June 25, he decided that the morning shift should add the oil (Resp. Ex. M; Tr. 385).

The written entry in the logbook on June 25, was to notify the next stationary engineer on duty that oil needed to be added. By contrast, there was no need to note respondent's failure to follow an order on September 23, into the logbook. Marocik had already added the oil and did not need to make sure that the next tour took care of it. Moreover, Marocik documented respondent's failure to comply with his directive elsewhere.

As such, I find that respondent failed to comply with Marocik's directive to put oil in the compressor on September 23, 2012, in violation of section B(1) of the Employee Handbook, which requires employees to perform their duties and responsibilities in a satisfactory manner.

### *June 14, 2013*

Respondent is further charged with leaving the boiler room without authorization; failing to tighten the feed water valve on the regulator for boiler #2; and failing to perform his duties causing a delay in preventive maintenance and the free flow of patient care (ALJ Ex. 2).

Danny Balsamo, the stationary engineer on duty, called Riccio on June 14, 2013, at approximately 9:30 a.m., asking him to come to the delta room. Respondent had notified

Balsamo that he wanted to go home because he was not feeling well. When Riccio arrived in the delta room around 9:45 a.m. he observed respondent acting “erratically” (Tr. 52). He described respondent as “irritated,” “agitated,” and “irrational” as he paced around the delta room. Respondent repeatedly told Riccio that he wanted to go home. He asked to use annual leave, but wanted it documented in the logbook that he was taking sick leave (Tr. 53, 106, 111). Riccio had asked respondent what was wrong, but respondent only said that he wanted to go home for personal reasons (Tr. 106-07). Riccio told respondent that if he wanted it documented in the logbook as sick leave, he would have to go to Occupational Health Services, get a document signed, and conduct a face-to-face relief with the oiler replacing him on the watch (Tr. 53, 107).

Since Kilfoil was already scheduled to start work at 1:30 p.m. that day, Balsamo called him a little before 10:00 a.m. to ask him to come into work early to relieve respondent (Tr. 52, 159, 454). Riccio informed respondent that no one was available to immediately replace him, so he would have to wait until Kilfoil arrived so that he could do the face-to-face relief (Tr. 57). Riccio had to go to a meeting, but was concerned about respondent’s behavior and did not want respondent and Kilfoil to be alone together. Riccio told Balsamo that if Kilfoil arrived before his meeting ended, Balsamo should go to the boiler room with Kilfoil to do the relief (Tr. 57).

When Kilfoil arrived at work, he telephoned respondent from the delta room to notify him that he was at the facility and would report to the boiler room in a few minutes to relieve him. Riccio, who was on a break from his meeting, saw Kilfoil in the delta room finishing up his telephone call with respondent. Riccio and Kilfoil then proceeded to the boiler room but when they arrived, respondent was nowhere to be seen. Balsamo told Riccio that he had not given respondent permission to leave. Riccio, Balsamo, and Kilfoil then searched for respondent because they were concerned that he might have gotten injured (Tr. 58-59, 107, 160, 224-25, 253, 457).

Unable to find respondent, Kilfoil returned to the boiler room to start his rounds. He immediately noticed that the regulator on the number two boiler was locked in the full open position. The lever on the regulator looks like a horizontal wheel that is about 18 inches in diameter and sits on top of a very big spring. To be opened, the lever must be turned with a considerable amount of force. The lever must be manually locked into place to stay in the open position. Kilfoil testified that on June 14, 2013, the lever was locked in the full open position, allowing pressure to feed the water valve, which meant that there could be an explosion. In

addition, the water valve was slightly cracked open or “off its seat,” which meant that it was not closed tightly enough to prevent water from leaking past it into the boiler room. Since the boiler was offline, an alarm did not sound as the water level rose too high, potentially creating a very dangerous situation (Pet. Ex. 8; Tr. 160-62, 166-67, 171-74, 268).

Kilfoil maintained, “in the best case scenario it would have definitely killed me downstairs and if it really had an intense rupture it could have killed the individuals on the next floor above it, which would be the emergency room” (174). He testified that, “When I seen it, chills went up through my spine. My life went before my eyes” (Tr. 174-75). Kilfoil immediately went through the steps to remedy the situation and lower the water level to a safe level (Tr. 175).

Kilfoil testified that he was very upset, so he asked Balsamo to come downstairs to see what had happened. Balsamo, however, told Kilfoil that he did not want to get involved. Kilfoil later made a formal complaint both verbally and in writing that respondent had created a dangerous condition in the boiler room. Kilfoil postulated that Balsamo did not want to get involved because he is a shop steward for the union and wanted to remain neutral (Pet. Ex. 9; Tr. 175, 178, 268).

Kilfoil confronted Riccio when he finished with his meeting because he was still upset about respondent leaving the number two boiler offline. Kilfoil was so distressed that he told Riccio that he refused to work with respondent on the watch because he believed that respondent was a danger (Tr. 62). Riccio noted the incident in the engineer’s log because Balsamo failed to do it (Pet. Ex. 3; Resp. Ex. N; Tr. 63).

Riccio corroborated Kilfoil’s testimony about the potential danger of the feed water regulator being locked in the open position while the boiler was offline (Tr. 59). He maintained that keeping this valve in an open position means that eventually the water would have come into contact with the high pressure steam, which could have created a “major water hammer” (Tr. 61). If a water hammer occurred it would have sounded like a bomb exploding when it ruptured the lines, causing people in engineering and the emergency room on the floor directly above the boiler room to be injured or killed (Tr. 62).

Respondent denied that he opened the regulator on the number two boiler. Instead, respondent asserted that since the machines are shaking all day long, things vibrate loose (Tr. 515). Respondent testified that when he had arrived at work that day, Balsamo told him that he

was assigned to the watch. He became very anxious because he was not expecting to be placed on the watch and was worried about Kilfoil relieving him at the end of his shift. Respondent maintained that the last time he had seen Kilfoil they had an argument about overtime and that, in front of other people, he accused Kilfoil of stealing time from him (Tr. 499-500). Respondent testified that his doctor advised him to avoid stressful situations, but he was already feeling “nervous,” “upset,” and worried that he would get into a fist fight with Kilfoil. Respondent’s doctor told him that whenever he felt stressed at work, he should go home and he would give him a medical note afterwards (Resp. Ex. V; Tr. 503-04).

Riccio told respondent that if he wanted to go home sick that he would have to go to Occupational Health Services. Respondent testified that when Balsamo gave him permission to go to Health Services he told Balsamo, in Riccio’s presence, that “everything’s quiet in the boiler room” (Tr. 506). Respondent contended that this statement was his “official handoff to [Balsamo]” (Tr. 506). When he arrived at Health Services, he was informed that he could not be seen without a supervisor’s referral form. He was given a blank form to fill out, but was unable to find Riccio because he was in a meeting (Tr. 460, 464, 507-08). Instead, he went to the Assistant Director of Engineering, Dailiaa Patricia Blackman, who signed the referral for him (Resp. Ex. O; Tr. 459-60, 509). He returned to Health Services, where he was examined by medical personnel and directed to follow up with his own doctor (Tr. 464). According to Josephine Nalivasn-Taganas, a nurse practitioner at Health Services, respondent was supposed to return to his unit and bring the signed form to his supervisor (Tr. 463, 467).

Respondent testified that he returned to the delta room to drop off the paperwork for Riccio and informed Balsamo that he was going downstairs to close his locker. When he arrived downstairs, the phone was ringing. It was Kilfoil, calling him from the delta room. Respondent maintained that he told Kilfoil “it’s all quiet down here,” hung up the phone, and then went home (Tr. 512, 547).

Riccio explained that doing a face-to-face relief is a standard industry practice to discuss what happened during the prior shift (Tr. 53-54). Kilfoil testified that he used to work the watch on the shift following respondent’s tour and had never relieved respondent over the telephone. They always did a face-to-face transfer every morning, which took anywhere from five to thirty minutes (Tr. 153). However, respondent insisted that he did a face-to-face transfer on June 14, 2013, when he was in the delta room because he told both Riccio and Balsamo that the boiler

room was quiet (Tr. 512, 547). He testified that as far as he was concerned his boiler room duties ended at 9:30 a.m. (Tr. 556). Riccio maintained that respondent was never released for the day and Blackman did not have the authority to release respondent until he conducted a face-to-face transfer (Resp. Ex. E; Tr. 100).

Respondent was charged with leaving the boiler room without authorization, failing to tighten the feed water valve on one of the boilers and causing a delay in preventative maintenance and in the free flow of patient care in violation of the following sections of the Employee Handbook: section B(1), which requires employees to perform their duties and responsibilities in a satisfactory manner; section B(2), which requires employees to promote safe and sanitary conditions throughout the facility; section B(4), which prohibits employees from leaving their posts without permission; and section E(5), which requires employees to respond promptly to all emergencies and/or directives due to the essential services being provided by the facility.

It is undisputed that respondent was not present in the boiler room when Kilfoil went to relieve him. Consequently, respondent and Kilfoil did not have a face-to-face transfer. Respondent contended, however, that a face-to-face transfer occurred when he told Balsamo that everything was quiet in the boiler room. He also asserted that he conducted a transfer to Kilfoil over the telephone when he called the boiler room before respondent left. Moreover, respondent maintained that he was no longer in charge of the boiler room once he told Balsamo and Riccio that he wanted to go home.

I found Riccio and Kilfoil's testimony credible that a face-to-face transfer is a standard industry practice, considering the equipment that an oiler is responsible for and the necessity of ensuring a smooth transition between the different shifts. Even if the face-to-face transfer was not required, respondent nonetheless violated Riccio's directive to remain in the boiler room until Kilfoil relieved him. At the time of this incident, respondent had been working as an oiler long enough to know that speaking on the telephone with the next oiler, who said he would be coming to the boiler room shortly, is insufficient to constitute a safe transfer of duties. Respondent was never relieved from duty and was still responsible for the boiler. Regardless of his desire to avoid a confrontation with Kilfoil, he should not have left his post until he updated Kilfoil on conditions in the boiler room. *See Human Resources Admin. v. Walker*, OATH Index No. 837/00 (Apr. 13, 2000) (ALJ found custodial assistant guilty of misconduct for leaving his

post without authorization, noting that he failed to sign out in the log book when he left the worksite, did not fill out the required forms, and failed to present documentation for his absence).

With respect to the feed water valve on the regulator for boiler #2, I found that Riccio's and Kilfoil's testimony regarding the exertion required to manually turn this valve to be credible and supported by photographs of the valve. Respondent's testimony that the valve must have shaken loose into the open position defies logic. The photograph of the valve shows a lever on top of a very thick spring that must be manually turned in order to lock into an open position. The valve does not appear as though it could be shaken into an open position. Moreover, it is likely that the manufacturer of the valve would have taken into account the vibrations from the boiler in designing the locking mechanism. Indeed, it appears that this was considered because of the considerable effort required to turn the lever to prevent the valve from opening accidentally. I find that on June 14, 2013, respondent left the boiler room without authorization and failed to tighten the feed water valve on the regulator for boiler #2.

Finally, respondent was charged with violating sections B(1) and E(5) of the Employee handbook for causing a delay in preventative maintenance and in the free flow of patient care. Petitioner, however, failed to substantiate this charge. There was no evidence presented that there was a delay in preventative maintenance or a lapse in patient care because respondent left the boiler room without authorization and failed to tighten the feed water valve on one of the boilers. Therefore, this charge should be dismissed.

*April 21, 2014*

Respondent is charged with approaching Marocik in the parking lot and verbally threatening him as he walked to his car; stating to Marocik in a loud, angry voice, "You motherfucker, you freaking liar, you piece of shit, I'm gonna get you. I know how to take care of you"; approaching Marocik's car in a threatening manner, while stating "I'm going to take care of you by kicking your fucking ass, you piece of shit"; approaching Riccio with a clinched fist and verbally threatening him; and stating to Riccio "I am not afraid of you" after Riccio directed him to clean the pump room. Petitioner alleges that by doing so, respondent violated the following sections of the Employee Handbook: section B(1), requiring employees to perform their duties and responsibilities in a satisfactory manner; section E(1), requiring employees to maintain high standards of courtesy; section E(4), requiring employees to exercise self-control



towards supervisor at all times, even under extreme stress; section E(5), requiring employees to respond promptly to all emergencies and/or directives due to the essential services being provided by the facility; section E(15), prohibiting employees from threatening or intimidating other employees or using intemperate or abusive language; and section E(16) prohibiting employees from engaging in fights, horseplay, or any form of boisterous or disorderly conduct on facility premises (ALJ Ex. 2).

Marocik testified that he was relieved by Politi around 5:00 a.m. on April 21, 20014. As he was walking through the parking lot to his car, he heard respondent cursing and saying, “you motherfucker, you lying piece of shit” (Tr. 341). At first, Marocik did not see respondent but he heard him. He rushed to his car and once he got inside he saw respondent walking towards him carrying a big, black duffle bag. As he approached he kept saying, “you lying piece of shit, I’ll take care of you, you motherfucker” (Tr. 341). Respondent stopped about 20 to 25 feet from Marocik’s car and was staring at him, while he kept repeating the same thing. Marocik drove away because he was frightened. He was still shaken when he arrived home so he woke up his wife to tell her what had happened. She became very upset and asked why he was still working there because “she needs him more than the job” (Tr. 343-45).

Marocik tried to call Riccio to let him know what had happened, but was unable to reach him. He then called Kilfoil to ask if he had seen Riccio (Tr. 346). Kilfoil testified that Marocik was very upset on the telephone. His voice was cracking and he sounded “terrified” (Tr. 181-82). After they hung up, Kilfoil was able to reach Riccio on his cell phone and told him what had happened.

Riccio called Marocik and directed him to come back to the facility to report the incident to hospital police (Pet. Ex. 14; Tr. 347). After speaking to Marocik, Riccio found respondent in the corridor outside the delta room. He told respondent that he cannot threaten people and that the matter was being referred to hospital police (Pet. Ex. 15). Politi and Tellerman testified that they heard yelling in the hallway immediately before respondent threw open the door to the delta room and said, “I want you to be a witness, [Riccio] is threatening me” (Tr. 68, 425, 445). Politi asked what was happening and respondent replied, “all I want to do is go clean and he’s preventing me from doing that” (Tr. 425).

Riccio testified that he told respondent to stop it and that he was not threatening him. Riccio instructed respondent to go clean up the pump room. Riccio testified that as they started

walking towards the pump room, respondent all of a sudden turned around with a clenched fist and said, "I'm not afraid of you" (Pet. Ex. 4; Tr. 68). Instead of continuing to the pump room, respondent returned to the delta room and told Politi that Riccio had made a fist and pulled back his arm as though he were going to punch him (Tr. 425). Riccio replied, "that's it," and ushered respondent to the hospital police's office, where he was escorted off the property (Pet. Exs. 4, 14; Tr. 68-69).

Politi testified Riccio returned to the delta room after escorting respondent to the hospital police and said, "you know, he's crazy" (Tr. 434). Politi testified that he could not hear what was being said in the hallway during the argument and he never saw Riccio become aggressive or cock his fist back as respondent had alleged (Tr. 424, 435).

Respondent admitted that there was "a bit of a confrontation" with Marocik in the parking lot but his version of events differed markedly from Marocik's (Tr. 515). He testified that he was sitting in his car drinking coffee. In order to avoid an altercation, he deliberately waited for Marocik to leave the facility before going inside. After respondent observed Marocik get into his car, he grabbed his gear and started walking towards the hospital. According to respondent, Marocik started the incident by rolling down the window of his car and asking respondent if he had a problem (Tr. 515-16). Respondent replied, "I don't like that you're lying about me" (Tr. 516, 551). Respondent denied being upset. He contended that despite being 75 to 100 feet away from each other, that they were not screaming, but only speaking loud enough to be heard (Tr. 517, 550-51, 553).

According to respondent, Riccio approached him later in the day and accused him of threatening Marocik. Respondent denied it but Riccio told him that he had to go to hospital police to be escorted out of the facility (Tr. 517-18). Respondent testified that he "broke into" the delta room and said, "he's throwing me out of the building" and Politi and Tellerman "were a little stunned" (Tr. 518). Although respondent admitted saying that he was not afraid of Riccio, he denied that he threatened him or clenched his fists (Tr. 519, 521). Instead, respondent asserted that Riccio threatened him. Respondent testified that he told Riccio that the truth would come out at the trial and Riccio would be caught in his lies. According to respondent, Riccio became very red in the face and drew back his fist. It was at that point that respondent went into the delta room to announce that Riccio was threatening him (Tr. 519-20).

With respect to the incident in the parking lot, I found respondent's attempt to minimize what had occurred to be unpersuasive. Marocik's credible testimony about being frightened by respondent's threatening behavior was corroborated by Kilfoil's and Riccio's testimony describing Marocik's distress afterwards. Moreover, it is difficult to believe that Marocik would have returned to the hospital to file a police report if he did not feel threatened. Respondent's counsel unsuccessfully attempted to impeach Marocik by noting that there was no mention of a black duffle bag in the written hospital police report. Marocik credibly testified that he had mentioned the bag to hospital police but does not know why it was not included in the report (Tr. 389). Also, respondent testified that he had taken his "gear" from the car before walking towards the hospital (Tr. 515-16).

I find that petitioner established that respondent made threatening, menacing, and profane comments toward Marocik in the facility parking lot on April 21, 2014. Respondent's menacing and threatening comments constituted misconduct. *See Dep't of Sanitation v. Mitchell*, OATH Index No. 1823/00 (Nov. 3, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD01-60-SA (July 27, 2001) (respondent found guilty of misconduct for making profane and threatening statements to a supervisor by stating that he would sic his Rottweiler dog on his supervisor and telling him that he knew where he lived and would "get" him); *Dep't of Transportation v. Mendez*, OATH Index No. 384/05 (Jan. 19, 2005) (use of the phrase, "I'll kick your ass" or "I'll kick your butt" was misconduct).

With respect to the incident inside the facility between respondent and Riccio on April 21, 2014, I find that petitioner failed to establish that respondent committed misconduct. I credit Riccio's testimony regarding this incident. I agree with Riccio's assessment that respondent's reaction was somewhat peculiar, but odd behavior does not automatically qualify as misconduct. Although petitioner charged respondent with clenching his fist and verbally threatening Riccio, the record reflects that respondent's only comment was "I am not afraid of you." Riccio did not testify if respondent's fist was raised or down at his side. Even if respondent's fist was clenched, he did not step very close to Riccio, and simply stating that he was not afraid of Riccio does not rise to the level of misconduct. Respondent did not use profanity nor was he abusive. Indeed, Riccio did not testify that he felt threatened by respondent's behavior. To the contrary, Riccio sounded more annoyed and exasperated, then frightened. *Dep't of Correction v. Oudkerk*, OATH Index No. 1600/14 at 6 (May 19, 2014) (correction officer's statement to a captain that he

is not afraid of him did not constitute misconduct). *Cf. Dep't of Sanitation v. Tripplin*, OATH Index No. 2308/07 at 7 (Oct. 5, 2007) (employee committed misconduct by approaching his supervisor in an aggressive manner during an argument, bumping into the supervisor, and raising his hands in a threatening and intimidating manner as if to choke him); *Dep't of Health and Mental Hygiene v. Henderson*, OATH Index No. 1797/02 (Oct. 17, 2002), *modified on penalty*, Comm'r Dec. (Oct. 31, 2002) (respondent used abusive language and engaged in conduct that was threatening and intimidating by clenching his fists and thrusting forward very close to his supervisor while repeatedly cursing).

Accordingly, I find that respondent verbally threatened and menaced Marocik in the facility parking lot but did not later verbally threaten Riccio inside the facility on April 21, 2014. As such, the charges related to the incident with Marocik in the parking lot should be sustained and the charges related to the incident with Riccio outside the delta room should be dismissed.

*April 22, 2014*

Respondent is charged with failing to wear the required surgical flu mask while in the Human Resources Department (ALJ Ex. 2). This charge was never addressed during the course of the hearing. Consequently, petitioner failed to meet its burden and the charge should be dismissed.

### **FINDINGS AND CONCLUSIONS**

1. Petitioner failed to establish that respondent was viewing pornography in the workplace in March 2012.
2. Petitioner failed to establish that taking photographs of hospital property constituted misconduct or violated section E(7) of the Employee Handbook.
3. Petitioner established that respondent violated sections E(1), E(15), and E(16) of the Employee Handbook on May 10, 2012, by vociferously stating to the stationary engineer, "What the fuck is going on?"
4. Petitioner established that respondent violated sections E(1), E(4), and E(15) of the Employee Handbook on May 10, 2012, by picking up the stationary engineer's computer monitor and lifting it in the air, while threatening him.

5. Petitioner established that respondent violated section E(1), E(15), E (16) of the Employee Handbook on May 10, 2012, by vociferously stating to the stationary engineer, "Take this fucking screen and shove it up Joe's ass! It's his fault why the system is operating like that!"
6. Petitioner established that respondent violated section B(1) of the Employee Handbook on June 24, 2012, by failing to notify the stationary engineer that he lowered the regulator's air pressure to 40 PSI, instead of maintaining it at 50-55 PSI.
7. Petitioner established that respondent violated sections B(1) and E(5) of the Employee Handbook on June 24, 2012, by failing to perform his duties, causing a low level of medical air generated throughout the facility.
8. Petitioner established that respondent violated section B(1) of the Employee Handbook on September 23, 2012, by failing to comply with the stationary engineer's directive to add a quart of oil to the air compressor.
9. Petitioner established that respondent violated sections B(1), (2), and (4) of the Employee Handbook on June 14, 2013, when he left the boiler room without authorization.
10. Petitioner established that respondent violated sections B(1) and (2) of the Employee Handbook on June 14, 2013, by failing to tighten the feed water valve on the regulator for boiler #2.
11. Petitioner failed to establish that on June 14, 2013, that respondent's failure to perform his duties caused a delay in preventative maintenance and in the free flow of patient care.
12. Petitioner established that respondent violated sections E(1), (4), (15), and (16) of the Employee Handbook on April 21, 2014, by approaching Marocik in the parking lot and verbally threatening him as he walked to his vehicle
13. Petitioner established that respondent violated sections E(1), (4), (15), and (16) of the Employee Handbook on April 21, 2014, by stating to Marocik, "you motherfucker, you freaking liar, you piece of shit, I'm gonna get you! I know how to take care of you!"

14. Petitioner established that respondent violated sections E(1), (4), (15), and (16) of the Employee Handbook on April 21, 2014, by approaching Marocik's car in a threatening manner and continuing to state, "I'm going to take care of you by kicking your fucking ass, you piece of shit!"
15. Petitioner failed to establish that respondent verbally threatened Riccio or committed misconduct by clinching his fist on April 21, 2014.
16. Petitioner failed to establish that, respondent's statement to Riccio that "I am not afraid of you" on April 21, 2014, constituted misconduct.
17. Petitioner failed to establish that respondent failed to wear the required surgical flu mask while in the Human Resources Department on April 22, 2014.

### **RECOMMENDATION**

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record provided to me by the Hospital. Respondent was appointed to his position as an oiler/plant maintainer on July 10, 2006. During his nine-year tenure with the Hospital, he has never been formally disciplined.

Petitioner asserts that respondent's employment should be terminated if the charges are sustained. Petitioner established that respondent verbally threatened and menaced Marocik in a profane manner on two occasions, improperly lowered the medical air pressure, failed to follow a directive to put oil in the air compressor, left his post without authorization, and failed to tighten the feed valve on the regulator for one of the boilers creating a potentially hazardous situation. The remaining misconduct charges were not sustained.

Petitioner credibly established that on multiple occasions, respondent failed to adequately perform his duties, causing a potential serious risk to the welfare of others in the facility. As an oiler, respondent has a significant responsibility regarding heating, ventilation, and air conditioning, which impacts not only hospital staff, but patients as well. "While an employer may show a degree of tolerance for an employee's substandard performance, such is not the case where the employee's duties directly affect the health or safety of others. Where health and safety concerns are involved, the employer can afford little tolerance for an employee whose

conduct presents a serious risk of harm to others.” *Health & Hospitals Corp. (North Bronx Central Hospital) v. Doxen*, OATH Index No. 1577/01 at 18 (May 4, 2001) (respiratory technician terminated for engaging in misconduct that posed serious risk of harm to patients).

Fortunately, no one was injured by respondent’s actions, but the potential was there, especially when respondent left his post and failed to tighten the feed water valve on the regulator of one of the boilers. Respondent has allowed his animosity towards his colleagues to interfere with properly doing his job.

Respondent’s demeanor in the courtroom during the trial supported the testimony of petitioner’s witnesses that he is easily agitated. He has been found guilty of menacing and threatening Marocik on two separate occasions, once in the facility by grabbing the computer monitor off Marocik’s desk during a profanity laden rant and once in the parking lot by making threatening and profane comments. “The workplace must be an area where all employees can perform their daily functions without fear of intimidation or threats.” *Health & Hospitals Corp. (Kings Co. Hospital) v. Miller*, OATH Index No. 503/02 at 12 (Jan. 31, 2002). Respondent’s agitated state and threatening conduct toward Marocik violated that basic tenet.

Petitioner has an obligation to provide a safe workplace. To do so, it must rid itself of workers whose conduct is not only unprofessional, but intimidates and/or threatens co-workers. *Human Resources Admin. v. Powers*, OATH Index No. 879/12 at 16 (Mar. 5, 2012). *See Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Smith*, OATH Index No. 1398/98 (May 19, 1998), *modified on penalty*, Director’s Determination (June 17, 1998), *aff’d* HHC Pec. Rev. Bd. Dec. No. 951, Dkt. No. 1485/98 (July 20, 1999) (respondent terminated for threatening supervisor); *City Clerk v. Hecht*, OATH Index No. 781/94 (Mar. 30, 1994), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 93-16 (Mar. 19, 1993) (finding termination appropriate where respondent’s misconduct demonstrated that he may be dangerous if left on the job); *Dep’t of Parks & Recreation v. Chapman*, OATH Index No. 371/88 at 13 (Nov. 7, 1988) (finding termination appropriate where “[t]he Department can no longer trust that respondent will submit to authority and maintain his self-control.”). Repeated findings of insubordination, threats and disruptive conduct may warrant termination. *Bd. of Education v. Fuccio*, OATH Index No. 924/01 (June 21, 2001), *aff’d*, NYC Civ. Serv. Comm'n Item No. CD 03-37-SA (Apr. 11, 2003).

Respondent has demonstrated that he has a problem with authority and has repeatedly failed to maintain his self-control. Accordingly, termination of employment is recommended.

Kara J. Miller  
Administrative Law Judge

August 28, 2015

SUBMITTED TO:

**GEORGE PROCTOR**  
*Executive Director*

APPEARANCES:

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