

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

OATH Index No. 211/16 (Feb. 10, 2016)

Sewage treatment worker charged with engaging in verbal altercation, throwing chairs, and slamming doors. As to the alleged altercation, ALJ found that proof of staring, remaining silent, and then speaking loudly failed to establish misconduct. As to the other allegations, ALJ found that unreliable hearsay was insufficient to sustain the charge and recommended that all charges be dismissed.

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

*In the Matter of*  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
*Petitioner*  
*- against -*  
**NICHOLAS GIACIA**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**JOHN B. SPOONER**, *Administrative Law Judge*

This disciplinary proceeding was referred in accordance with section 75 of the Civil Service Law. Petitioner, the Department of Environmental Protection, charged respondent Nicholas Giacia, a senior sewage treatment worker (SSTW), with engaging in a verbal altercation, throwing chairs, and slamming doors.

A hearing on the charges was conducted on November 17 and 18, 2015, and January 13, 2016. Petitioner presented the testimony of three employees. Respondent testified on his own behalf, denying any misconduct, and presented the testimony of four other employees.

For the reasons provided below, I find that the evidence was insufficient to sustain the charges and recommend that they be dismissed.

### **ANALYSIS**

Respondent has been an employee of the Department for 18 years. He was hired as a sewage treatment worker (STW) and, since 2012, has been a SSTW. He is currently assigned to

the Hunts Point facility and, at the time of the charges in July 2015, was assigned to the Ward's Island facility. The two charges concern (1) an alleged "altercation" which occurred on July 22, 2015, near the loading dock at the Ward's Island facility between respondent and Mr. Ortiz, another STW, and caused Mr. Ortiz to feel "threatened" and (2) allegations that, on the same date, respondent threw chairs and slammed doors in anger over "an erroneous recording of overtime."

A few background facts were undisputed. In 2015, Mr. Ortiz was the shop steward and responsible for maintaining records regarding overtime assignments of the sewage treatment staff, records which were used in ensuring that these assignments were equitably distributed (Tr. 25). Respondent and some other workers had made complaints that Mr. Ortiz's recordkeeping was inaccurate and that this had resulted in some workers being offered fewer overtime assignments. As respondent put it, he became concerned about "irregularities" with the overtime logs kept by Mr. Ortiz, causing him to take photos of the log pages and share his concerns with a supervisor (Tr. 179-80).

The loading dock incident on July 22, as shown by a video surveillance recording offered by petitioner (Pet. Ex. 1), consisted of Mr. Ortiz walking by and speaking to respondent for approximately two minutes as respondent stood on a loading dock just outside the door to a locker room. According to both Mr. Ortiz and respondent, Mr. Ortiz first asked respondent why respondent was staring at him, to which respondent asked why he could not look. Mr. Ortiz then brought up the issue regarding the overtime logs and, after a brief exchange, challenged respondent to go "outside." The incident ended as another SSTW, Mr. Licari, came out of the door and separated the two workers, with Mr. Ortiz going inside the locker room. Both respondent and Mr. Ortiz complained to a supervisor about the other's behavior during the incident.

After July 22, respondent had several days off, returning to work on July 28. That morning, after changing his clothes, he was served with disciplinary charges (ALJ Ex. 1) and notified that he would be suspended from work without pay (Tr. 210-13). The original charges alleged that respondent "made threats of physical harm against one or more" co-workers and threatened to "put a bullet" in a co-worker's head. At an informal conference held on August 3,

2015, a conference leader found that the evidence established “all charges and specifications” and recommended that respondent be terminated (Resp. Ex. G).

On August 20, 2015, a workplace violence investigatory report (Resp. Ex. A) was completed regarding the incident. After interviewing nine workers, including Mr. Ortiz and respondent, the report found no one had ever heard respondent utter any threats toward anyone, and therefore concluded that there was “no reasonable basis to believe that [respondent] did make threats against Ortiz” (Resp. Ex. A, 10). The report further concluded that the “explosive meeting” on the loading dock was a result of Mr. Ortiz’s fear concerning rumors of being threatened and respondent’s resentments of being treated unfairly with regard to overtime (Resp. Ex. A, 10). The report did not recommend any charges be filed against either Mr. Ortiz or respondent regarding the loading dock encounter, but did conclude, based upon a double hearsay statement from Mr. Ortiz and a unattributed statement by another worker, that respondent engaged in “inappropriate behavior” by “slamming doors” (Resp. Ex. A, 10).

Following the issuance of the report, respondent was returned to work after losing 19 work days of pay (Tr. 276). In addition, on September 3, 2015, the charges against respondent were amended to remove the two original allegations regarding threats and replace them with the current charges regarding an altercation, throwing chairs, and slamming doors (Tr. 233).

At the trial, the eight witnesses gave largely similar accounts as to the encounter on the loading dock between Mr. Ortiz and respondent. Mr. Ortiz testified that, as he came up the stairs, respondent was standing near the top and Mr. Ortiz felt him “staring at me.” Mr. Ortiz turned around and asked respondent what he was looking at. Respondent replied, “What’s the matter, I’m not allowed to look at you?” Mr. Ortiz stated, “Nick, if this is about the overtime I fixed it.” Respondent replied, “You didn’t fix nothing. I’ll fix it” (Tr. 35). Respondent then walked forward and “got in my face” (Tr. 35).

Mr. Ortiz indicated that, at that point, he and respondent had “hard words” and Mr. Ortiz “felt threatened” because respondent had “invaded my personal space” (Tr. 36). Mr. Ortiz told respondent, “If, you know, you have something to say why don’t you tell me what you’ve been telling everybody?” Respondent replied, “Well, what did you hear?” Mr. Ortiz did not indicate whether he replied to this question, but indicated that respondent did not deny making a threat

against Mr. Ortiz. Mr. Ortiz regarded respondent's silence as an effort "to intimidate me" (Tr. 37).

According to Mr. Ortiz, he told respondent to "get out of my fucking face." Respondent told Mr. Ortiz he "could stand wherever he wants." Mr. Ortiz then loudly told respondent, "If you're going to do something, do it now because if we go outside this gate, it's not going to end well" (Tr. 38). By this remark, Mr. Ortiz intended to convey to respondent that if they went outside Mr. Ortiz was "no longer one person" but four people, including his wife and two children (Tr. 38). The confrontation ended when Mr. Licari came between Mr. Ortiz and respondent (Tr. 40).

Mr. Ortiz immediately reported the encounter with respondent to his supervisor, Mr. Pastore, saying that "something had to be done" (Tr. 43). He wanted to "sit down" with respondent and settle their grievances (Tr. 72). Mr. Ortiz then complained to the assistant chief, Mr. Preshaud, who "took it serious enough to call it workplace violence" (Tr. 43).

Respondent testified that, at around 6:45 a.m., he was smoking a cigarette and drinking coffee outside the locker room, waiting for his crew to load some equipment (Tr. 190). Mr. Ortiz came up the stairs with a "big exaggerated grin" and, as he passed by respondent, asked him, "What are you looking at?" Respondent replied, "What? I can't look?" Mr. Ortiz stated, "You have a problem with me, you got something to say to me?" in a "threatening" manner. Respondent realized Mr. Ortiz must be speaking about overtime and started to speak. Mr. Ortiz interrupted to say that if respondent was dissatisfied with his work on the overtime list respondent should keep the list himself and respondent said he did not want to. Mr. Ortiz then said, through "gritted teeth," "You have no idea how lucky you are you have this job. You have no idea what I would do to you if you didn't have this job" (Tr. 192). Respondent told Mr. Ortiz he was "trying to show me who's boss." Mr. Ortiz then said, "If you had hair on your balls we would go outside and handle this like men." Respondent admitted that, at some point, he "stepped to" Mr. Ortiz (Tr. 193).

After this Mr. Licari came in between them and told Mr. Ortiz to "calm down" and to "go inside" (Tr. 193). Respondent remarked to Mr. Licari, "You believe this guy? The nerve him threatening me?," to which Mr. Licari replied, "Yeah, that's some shit" (Tr. 193). Respondent reported the incident to Mr. Pastore, stating that "Bobby was out there threatening me," "making

faces,” “wants to beat me up,” and was “messing with me with the overtime” (Tr. 194). Mr. Pastore promised to “talk” to Mr. Ortiz. Respondent insisted that Mr. Pastore place a letter in Mr. Ortiz’s file, something Mr. Pastore would not do (Tr. 194-95). Respondent spoke at least twice more to Mr. Pastore that day, demanding that he record respondent’s complaint, but Mr. Pastore refused to do so, saying, “There’s no witnesses and nothing happened” (Tr. 201). At the end of his testimony, respondent expressed his resentment at his treatment following the July 22 incident and described panic attacks, headaches, weight loss, and sleeping problems (Tr. 220). Ultimately, respondent rejected a union-retained attorney who urged him to accept a settlement penalty and retained a private attorney to defend him against the charges (Tr. 215).

Several other witnesses saw the brief interaction between respondent and Mr. Ortiz and recalled that both were speaking loudly, although only two of the other witnesses overheard the substance of what Mr. Ortiz and respondent said to one another. Mr. Corona, another STW, testified that he was just behind Mr. Ortiz on the stairs and overheard Mr. Ortiz ask, “What are you looking at?” and respondent reply, “I can’t look?” (Tr. 134). Mr. Koller, another STW, testified that he was in the tool room and heard an argument between Mr. Ortiz and respondent. The only remark he overheard was Mr. Ortiz “basically calling [respondent] out” (Tr. 142). He also recalled Mr. Ortiz saying, “If you had any hair on your balls . . . we’d settle this like men and you’d meet me outside” (Tr. 142). Respondent replied, “Well, you find me another man and I will accommodate you” (Tr. 142). Mr. Koller remembered this because he found respondent’s remark humorous (Tr. 143).

Mr. Licari testified that he heard people “talking” and “yelling” (Tr. 81-84). The yelling got louder and louder and after a few minutes Mr. Licari went to the door and separated Mr. Ortiz and respondent (Tr. 86-87). Mr. Licari did not hear or did not pay attention to what the pair were saying (Tr. 86).

Mr. Giudice, another STW, recalled that he was at the bottom of the loading dock and saw Mr. Ortiz climb the steps and exchange words with respondent (Tr. 110). There was “some kind of argument” but he couldn’t understand the words due the noise from an engine idling behind him (Tr. 110). He did not pay much attention because such bickering was “normal” (Tr. 110) and “not rare” (Tr. 111). Mr. Giudice recalled some “finger pointing” and a volume “a little higher than average” (Tr. 111).

Mr. Pastore testified that he was on the loading dock at the time of the incident but did not witness or hear any confrontation (Tr. 288). He recalled that respondent later complained that Mr. Ortiz had threatened him (Tr. 289) and was “staring him down” (Tr. 290). According to Mr. Pastore, respondent insisted that Mr. Pastore write up Mr. Ortiz, but never gave Mr. Pastore any written report of the incident (Tr. 292).

Petitioner’s proof as to the second specification, alleging that respondent “engaged in the physically aggressive acts of throwing chairs and slamming doors,” was remarkably sparse. None of the witnesses who testified at the hearing observed respondent throw a chair or slam a door on July 22. Respondent denied ever slamming a door in anger or throwing a chair (Tr. 231-32).

The only evidence offered in support of this allegation was the hearsay remarks of two witnesses contained in the investigative report offered into evidence by respondent (Resp. Ex. A). The report indicates that Mr. Giudice told investigators that, when respondent noticed that Mr. Ortiz had mistakenly charged him with four hours of overtime worked by another employee, respondent “went berserk and threw chairs” (Resp. Ex. A, 5). Mr. Ortiz also told investigators that Mr. Pastore told him that Mr. Pastore saw respondent “slamming doors and throwing chairs” (Resp. Ex. A, 5). At the trial, however, both Mr. Giudice and Mr. Pastore expressly denied ever observing respondent slam any doors or throw any chairs.

Specification 1 alleges that respondent “engaged in a verbal altercation/confrontation” with a co-worker “who felt threatened” and that this conduct violated Department rule E(3) (“Employee shall obey and not violate any internal rule, code, regulation or order of any bureau of the DEP, or any subdivision thereof.”). The primary evidence in support of this specification was the testimony of Mr. Ortiz, much of which was denied by respondent.

Mr. Ortiz’s testimony, even if fully credited, was insufficient to establish misconduct by respondent. Mr. Ortiz stated that, as respondent walked across the loading dock, respondent stared at him, when Mr. Ortiz told respondent that other workers had overheard respondent make threats directed at him, respondent did not deny this, and respondent’s actions, including getting “in my face,” seemed to Mr. Ortiz to be an effort “to intimidate me” (Tr. 37).

This tribunal has repeatedly held that not every disagreement between co-workers or supervisors constitutes misconduct. *See Dep’t of Environmental Protection v. Berlyavsky*, OATH Index No. 1011/06 at 5-6 (Apr. 19, 2006) (“Every statement made to a supervisor in the heat of a

disagreement does not constitute misconduct.”). Mr. Ortiz’s opinions notwithstanding, respondent’s actions of staring and remaining silent in the face of accusations of wrongdoing do not constitute a threat of any kind. *Cf. Dep’t of Citywide Admin. Services v. Ferguson*, OATH Index No. 1640/06 (May 24, 2006) (employee’s statement to co-worker that he would “blow them all up” held to be misconduct warranting termination). Furthermore, where Mr. Ortiz admitted that he initiated a verbal altercation by demanding to know what respondent was looking at, respondent’s loud remarks, made in a loading facility, unaccompanied by profanity, insults, or other improper or disruptive behavior, did not constitute misconduct. *Admin. for Children’s Services v. Rucando*, OATH Index No. 633/05 at 8 (Apr. 29, 2005) (“A loud argument with a supervisor is not disciplinable in the absence of threats, insolence, profanity or disruption of the agency”); *Dep’t of Environmental Protection v. Sutton*, OATH Index No. 565/91 at 3 (Feb. 7, 1991) (language must be taken in its context, and language that might be inappropriate in one setting might be acceptable elsewhere). As observed by Mr. Giudice, such bickering among the facility staff was “normal” and “not rare” (Tr. 111). Mr. Ortiz’s additional statement that respondent’s stare and silence made him feel “threatened” due to vague rumors about remarks respondent supposedly made to unidentified co-workers added nothing to shore up petitioner’s absence of proof of wrongdoing by respondent.

In fact, most of Mr. Ortiz’s testimony concerning the incident was not credible. Mr. Ortiz’s testimony was obviously embellished to portray respondent’s actions as menacing as possible. In describing the encounter, Mr. Ortiz insisted that respondent “stalked” him from the top of the stairs (Tr. 50, 51). He characterized respondent’s walking toward him as moving “forward as the aggressor” (Tr. 49). Mr. Ortiz insisted that he did not walk away because respondent “kept moving forward and kept antagonizing me” (Tr. 52). The following morning, Mr. Ortiz told Mr. Koller that based upon the incident Mr. Ortiz was “afraid for his family” (Tr. 143). All of these exaggerations and recitations of unwarranted fear persuaded me that Mr. Ortiz’s account was slanted toward making respondent’s conduct seem as sinister as possible in order to justify Mr. Ortiz’s own aggression.

Several of Mr. Ortiz’s prior statements about the encounter with respondent were inconsistent with the video and inconsistent with testimony at trial. He told investigators that respondent “tried to block” his entrance to the facility (Tr. 54-55), although the video shows that

Mr. Ortiz walked past respondent toward the door and then turned back around, with his back to the door. Even though the video made clear that respondent was also walking toward the locker room door, Mr. Ortiz stated that respondent “kept coming toward me” (Tr. 49). Mr. Ortiz contended that Mr. Koller would not let him view the surveillance video, although Mr. Koller credibly stated that Mr. Ortiz did, in fact, view the video the following morning (Tr. 144). Although Mr. Ortiz said that it was “totally untrue” that he made the remark about having hair on his balls (Tr. 38-39), Mr. Koller credibly corroborated respondent’s testimony that Mr. Ortiz, in fact, made the statement. This remark was notably consistent with Mr. Ortiz’s admitted threat to respondent to “go outside this gate” and settle their disagreement.

Mr. Ortiz also had a likely motive to accuse respondent of misconduct in order to deflect attention from the complaint made by respondent about the verbal threat Mr. Ortiz himself admitted making to respondent, a complaint which he was later made aware of by Mr. Pastore. It seemed notable that the source of most of the rumors concerning respondent’s supposed threats against Mr. Ortiz was Mr. Ortiz himself. As noted above, it was Mr. Ortiz who told the investigators that Mr. Pastore reported to him that respondent slammed doors and threw chairs, something expressly denied at trial by Mr. Pastore himself.

Despite respondent’s motive to deny any misconduct, his testimony was more credible than that of Mr. Ortiz. Respondent admitted to looking at Mr. Ortiz as he walked past him and to “stepping to” Mr. Ortiz after he made the remark about going outside. Respondent’s characterization of Mr. Ortiz as the aggressor was corroborated by Mr. Koller, who heard Mr. Ortiz “call out” respondent and make an off-color challenge. Mr. Pastore confirmed that respondent complained immediately about Mr. Ortiz threatening him. Likewise, Mr. Costa, an electrical engineer, testified that respondent told him later on July 22 that Mr. Ortiz had “threatened” him (Tr. 164). In contrast to Mr. Ortiz, there was little indication that respondent tailored his narrative to portray Mr. Ortiz as dishonest or sinister.

In short, Mr. Ortiz’s largely incredible testimony, even if believed, established little more than that he construed respondent’s actions as threats. This testimony failed to establish that respondent violated any agency rules. *See Health & Hospitals Corp. (Sea View Hospital Rehabilitation Ctr.) v. Rayside*, OATH Index No. 972/99, mem. dec. at 3-4 (Apr. 15, 1999) (“To



rely in any fashion on the unsupported conclusory statements . . . would be tantamount to abdicating [the ALJ's] function”).

As to the second specification, there is also little question that the hearsay account of Mr. Giudice and the double hearsay account from Mr. Pastore, both of which were contradicted by the testimony of Mr. Giudice and Mr. Pastore at trial, are insufficiently reliable to sustain the allegations. In cases where a charge is based primarily on hearsay, hearsay has been deemed sufficiently reliable only if the statement is detailed and corroborated. *Human Resources Admin. v. Green*, OATH Index No. 3347/09 at 10 (Nov. 18, 2009) (quoting *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980); *Dep't of Environmental Protection v. Ginty*, OATH Index No. 1627/07 at 16, 20 (Aug. 10, 2007)).

The hearsay offered in the instant case was singularly unreliable because both of the hearsay declarants testified at the trial and expressly denied the accuracy of the statements recorded by the investigators. In addition, the investigation report preserved the hearsay remarks in one-sentence summaries with little or no detail provided. While quotation marks are used in the report as to Mr. Ortiz's statement, no quotation marks are used with regard to Mr. Giudice's statement, raising concerns as to whether the words used were those of the declarant or those of the investigator. No dates or times are provided as to when these alleged observations were made. It is also unclear whether Mr. Giudice might have been referring to statements made by others, rather than to personal observations, as his trial testimony indicated. No corroboration was offered for either hearsay remark, which were, in fact, denied by respondent as well as by the hearsay declarants. Based upon this feeble evidence, specification 2 must also be dismissed as unproven.

In sum, neither Mr. Ortiz's incredible testimony nor the unreliable hearsay offered to prove that respondent slammed a door or threw chairs was sufficient to support the two charges. Both specifications should be dismissed. In addition, respondent's pay should be restored for the 19 work days during which he was suspended.

John B. Spooner  
Administrative Law Judge

February 10, 2016

**SUBMITTED TO:**

**EMILY LLOYD**

*Commissioner*

**APPEARANCES:**

**CARLA LOWENHEIM, ESQ.**

*Attorney for Petitioner*

**MARIO VASQUEZ, ESQ.**

*Attorney for Respondent*