

Dep't of Sanitation v. Anonymous

OATH Index No. 0056/16 (Jan. 4, 2016)

Sanitation worker became irate when criticized by a Deputy Chief and slammed the Deputy Chief's car door shut while the Deputy Chief was standing between the car door and the body of the car. The door hit the Deputy Chief's hand, fracturing his finger. The Deputy Chief ordered the sanitation worker to remain in his vehicle and told him that he would be drug tested, but the sanitation worker instead drove away and went home rather than return to the garage office. Termination of employment is recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
-against-
ANONYMOUS
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

This is a disciplinary proceeding brought by the Department of Sanitation pursuant to section 16-106 of the New York City Administrative Code. Petitioner alleges that on January 27, 2015, respondent, a sanitation worker,¹ became irate with a superior, Deputy Chief Anthony Pennolino, and, as Deputy Chief Pennolino was standing outside his passenger door making a call on the radio, slammed the passenger side door shut, causing it to strike Deputy Chief Pennolino's left hand, in violation of rule 3.22 of the Department's Code of Conduct. Also alleged is that respondent was then ordered to submit to a drug test and refused to do so, in

¹ Sanitation workers hold commercial driver's licenses and are subject to federal regulations that require drug testing. Under title 49, section 40.323(b) of the Code of Federal Regulations, respondent's name has been withheld from publication. See *Dep't of Sanitation v. Anonymous*, OATH Index No. 1888/13 at 1, n.1 (Nov. 12, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2013-246 (Apr. 24, 2014); *Dep't of Sanitation v. Anonymous*, OATH Index No. 765/11 (Dec. 1, 2010); *Dep't of Sanitation v. C.L.*, OATH Index No. 760/11 (Nov. 8, 2010).

violation of rule 2.5 of the Code of Conduct and section 4.13 of the Department's Policy and Administrative Procedure ("PAP") 2012-02 ("substance abuse"). Finally, petitioner contends that respondent's subsequent arrest for assault was prejudicial to good order and discipline and brought discredit to the city, in violation of rule 3.2 of the Code of Conduct (ALJ Ex. 1)².

At trial, petitioner called Deputy Chief Pennolino and respondent testified on his own behalf. The parties also presented documentary evidence. For the reasons below, I find that the charges are sustained.

ANALYSIS

The Department's case rested on the testimony of Deputy Chief Pennolino, along with supporting medical and photographic documentation of an injury to a finger on his left hand. Respondent relied upon his own testimony. Both men admitted cursing and yelling at each other in the early morning hours of January 27, 2015 during two encounters on the streets of Queens, the first on Maurice Avenue, and the second at a nearby fueling station on 54th Avenue. However, respondent denied that he knew the identity of Deputy Chief Pennolino until the encounter at the fueling station. He also denied ever slamming Deputy Chief Pennolino's car door shut, or having been ordered to submit to a drug test.

It was undisputed that both men had started their shift at 7:00 p.m. the night of January 26, 2015, during a major snowstorm that had hit New York City. Due to the anticipated conditions, an emergency had been declared, with highways and local roads closed and vehicles, except for sanitation vehicles and emergency vehicles, ordered to keep off the roads (Tr. 14, 226-227). A full fleet of sanitation workers and supervisors had been called in to work during the storm (Tr. 15).

At some point early in the shift, which neither respondent nor Deputy Chief Pennolino could pinpoint, they were both present during a tandem plow operation on the Grand Central Parkway. A team of plow operators, including respondent, had been assigned to clean the snow off the highway, staggered in formation across the highway lanes (Tr. 18-20, 78, 210). By that time at least two inches of snow had fallen; it was accumulating fast (Tr. 63, 64). A civilian driver was disrupting the operation by weaving in and out of the lanes, in violation of the

² Additional charges in the petition were withdrawn by petitioner at trial (Tr. 5).

emergency order to stay off the roads (Tr. 80, 226-228). Deputy Chief Pennolino testified that he had been checking field operations and decided to monitor the tandem plow (Tr. 79). The parties agree that Deputy Chief Pennolino got out of his car to confront the civilian driver, but the individual drove away on the shoulder (Tr. 89, 211, 228).

The parties disagree on whether respondent and Deputy Chief Pennolino spoke to each other during the tandem plow operation. According to Deputy Chief Pennolino, respondent got out of his truck and told him that he would chase the driver if the Deputy Chief wanted. Deputy Chief Pennolino told respondent to keep working and respondent returned to his truck (Tr. 92). Respondent, on the other hand, testified that at one point all the plow drivers, including him, stopped and got out of their trucks to watch the civilian vehicle, that he saw Deputy Chief Pennolino trying unsuccessfully to chase the driver on foot, and that he then returned to his truck (Tr. 211). He denied talking to Deputy Chief Pennolino at this time (Tr. 211, 229).

By all accounts Deputy Chief Pennolino and respondent next met somewhere between 5:00 a.m. and 6:00 a.m. on January 27, 2015. According to Deputy Chief Pennolino, he was pulled over to the side of the road on 58th Street in Queens, speaking with a colleague on the telephone, when he noticed a sanitation truck, later identified as respondent's, "driving rapidly, fast, with his plow down on blacktop, causing sparks" (Tr. 16). The truck passed him on his left, "at a high accelerated rate" (Tr. 16). He was able to see the sparks because there was no snow on the ground in that area. The snow had stopped falling and the street had been plowed all night (Tr. 16, 102). There was no reason to have the plow down (Tr. 107). He followed respondent's truck, catching up to it when it was stopped about two blocks away, under the overpass at the next traffic light on Maurice Avenue (Tr. 17, 110, 116). Respondent still had his plow down, even though there was no snow on the ground (Tr. 118).

Deputy Chief Pennolino testified that he pulled over to the left of the truck and told respondent, who he did not recognize from the tandem plow operation, to pull over (Tr. 20). Respondent opened his window and began "screaming" and cursing, asking Deputy Chief Pennolino what he was doing and why he was bothering respondent, telling the Deputy Chief to leave him alone, and insisting that he had been working all night and was just trying to get fuel (Tr. 17, 126, 136). Rather than pulling over, respondent "took off" once the light turned green and continued in the direction of the fuel truck stationed on 54th Avenue in Queens, a block away (Tr. 18, 129). Deputy Chief Pennolino admitted that he did not identify himself during the

encounter, testifying that he “didn’t have a chance” (Tr. 126), and he was in a civilian unmarked car, albeit a white Jeep SUV that Department superiors usually drive, and not in uniform (Tr. 119, 120).

Respondent acknowledged that, after he had finished plowing and was heading to the fuel truck, a driver in a white car caught up to him at the light on Maurice Avenue and yelled at him about going too fast (Tr. 213, 214, 229). He said the driver told him he was going 50 miles per hour. The car was not marked, it was dark under the overpass, and he did not recognize that the driver was Deputy Chief Pennolino (Tr. 214). Indeed, he told the driver that he had “no idea” who the driver was (Tr. 214) and that if the driver was not a police officer, he did not have to pull over for him (Tr. 214, 241). He denied asking the driver why he had to pull over or telling the driver that he had been working all night and was just trying to get gas (Tr. 241). For his “safety” and the “safety” of the truck, he left when the light turned green and drove to the fueling truck (Tr. 215, 236).

Respondent and Deputy Chief Pennolino next met at the fuel truck station, where respondent was in line to get fuel. They each gave a very different version of the encounter, although both acknowledged becoming angry and confrontational with each other. According to Deputy Chief Pennolino, he and respondent both got out of their vehicles and began talking “face to face” in between the two vehicles (Tr. 21, 22, 134). Both were upset, yelling, and cursing (Tr. 22, 135, 141). They argued over whether respondent was driving fast (Tr. 22). Deputy Chief Pennolino did not recall who spoke first (Tr. 135), but he acknowledged that “possibly” the first thing he said to respondent was, “What the fuck are you doing?” (Tr. 135, 138). He accused respondent of driving recklessly and fast with his plow down on the road (Tr. 123). Respondent asked “what the fuck” Deputy Chief Pennolino was doing, if Deputy Chief Pennolino had a radar gun and how Deputy Chief Pennolino knew he was driving fast (Tr. 136, 22). Respondent also told Deputy Chief Pennolino that he had been working all night and was “trying to fuckin’ do [his] job” and that Deputy Chief Pennolino should leave him alone (Tr. 136, 22). Further, respondent said that Deputy Chief Pennolino did not recognize him, and that respondent had been “the one on the highway” who had asked if the Deputy Chief wanted him “to chase that guy” (Tr. 28).

Deputy Chief Pennolino testified that he was afraid the situation would escalate, so he returned to his car, which was about five feet away, intending to use the car phone to report

respondent's behavior to the borough office (Tr. 23, 138, 150). He opened his front passenger door to pull out the microphone for the phone, which was tethered to the car (Tr. 24). As he was standing between the door and the body of the car, making the telephone call, respondent approached him, "screaming and yelling" and telling the Deputy Chief "to get a real job" (Tr. 25, 152). While yelling, respondent pushed the car door into Deputy Chief Pennolino. Deputy Chief Pennolino moved away, but the fingers of his left hand, with which he had held the microphone, "got caught" between the car door and the car (Tr. 25, 152). Deputy Chief Pennolino "pulled" his hand out and realized he was bleeding and in pain (Tr. 26).

When respondent began approaching him, Deputy Chief Pennolino told him, "Go back to your truck, stay the fuck in your truck . . . you're going to be papped" (Tr. 26, 182, 199). The word "papped" referred to the Department's PAP 2012-02 on substance abuse testing.

According to Deputy Chief Pennolino, respondent returned to his truck but continued to fuel it, while Deputy Chief Pennolino reported the incident to the borough office (Tr. 28). Deputy Chief Pennolino also took a photograph of his left hand, which was bleeding (Pet. Ex. 4a). Rather than remain on the scene, respondent drove away in the truck, with Deputy Chief Pennolino trying unsuccessfully to run after him (Tr. 28). Deputy Chief Pennolino telephoned the borough office, indicating that respondent had left the scene and should not be permitted to sign out and leave, because a "PAP" had been ordered (Tr. 29, 192, 193). When Deputy Chief Pennolino returned to the borough office, he was advised that respondent's truck was parked at the depot, but respondent could not be found, despite a search for him (Tr. 30, 193). Respondent had not signed out (Tr. 31). Deputy Chief Pennolino was interviewed in connection with an unusual occurrence report, which was prepared at the Borough office shortly after he returned and contained a detailed description of his encounters with respondent, including his observation of respondent on 58th Avenue, their conversation on Maurice Avenue, and the incident and the fueling station (Tr. 44, 195; Pet. Ex. 1). He was then taken to a local hospital, and treated for a finger fracture, as confirmed by hospital records (Tr. 35; Pet. Ex. 4b). Deputy Chief Pennolino filed a police report the following night, alleging that respondent had intentionally hit him with the vehicle door (Tr. 38; Pet. Ex. 5).

In contrast, respondent testified that he did not get out of his truck until he saw Deputy Chief Pennolino "charging" towards him (Tr. 216). He testified that he did not recognize the Chief, but got out of his truck to talk to the person, who he thought was "a concerned civilian"

(Tr. 217). Respondent testified that they spoke in between the two vehicles. The other person spoke first, asking who respondent thought he was and how fast he was driving. Respondent asked how the person knew he was driving fast and said that he was just doing his job (Tr. 218). They fast became “confrontational” and cursed at each other (Tr. 219). “I’m the type of person that I . . . I give what I get” (Tr. 220). The other person said “degrading, demeaning things” about how respondent was a sanitation worker and had to listen to him (Tr. 219). Respondent testified that he didn’t “respect” the person, because he “had no idea who he was” (Tr. 219). Later, in his testimony, however, respondent acknowledged that the person who confronted him “was obviously of higher ranking, because anybody that rolls around in an unmarked car and no uniform pretty much is somebody that’s high-ranked” (Tr. 240-241). He then acknowledged telling the Chief, who he had recognized as a superior-ranking Department official, to “get a real job” (Tr. 241, 243).

According to respondent, Deputy Chief Pennolino then told him to get back into his truck and stay there, so he returned to his truck (Tr. 220, 244). Respondent denied ever approaching the Chief’s car or touching the car door (Tr. 243). He also denied that the Deputy Chief ever told him that he was “going to have [him] papped” (Tr. 220, 254). He acknowledged, however, that he did not follow Deputy Chief Pennolino’s orders to stay in the truck but instead drove away and returned to the garage (Tr. 245, 254). Respondent testified that he left the fueling area because Deputy Chief Pennolino was “becoming very aggressive” and “coming towards” him (Tr. 254). Similarly, respondent testified that he parked the truck in the lot but went home, even though it was about 5:45 a.m. and it was not yet time to sign out (Tr. 221, 245). Respondent felt “threatened” by Deputy Chief Pennolino and was afraid that if he went into the garage building, Deputy Chief Pennolino would find him and “hurt” him (Tr. 221, 246). Respondent also explained that he did not report the incident to another sanitation official, because he did not trust the Department, which considers him “just a number” (Tr. 246). Nor did he report the incident to the police department, because he was already suspended from work (Tr. 247).

Respondent denied having anything to drink that night (Tr. 221). He said the incident never should have happened and that if Deputy Chief Pennolino had a problem with his work, he should have told respondent’s supervisor, instead of coming “after” him and becoming “very aggressive” (Tr. 254). Respondent further acknowledged being suspended and later arrested for

felony assault as a result of the incident. He later pled guilty to disorderly conduct, a violation, and received a conditional discharge, including the issuance of a two year order of protection banning contact with Deputy Chief Pennolino (Tr. 222, 223; Pet. Exs. 6, 7).

Resolution of these charges requires an assessment of the relative credibility of respondent and Deputy Chief Pennolino. In assessing credibility, relevant factors include: witness demeanor, consistency of a witness's testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

Here, I found Deputy Chief Pennolino more credible than respondent. Deputy Chief Pennolino was candid about his own conduct. He did not hesitate to admit that he was yelling and cursing during the encounter. He acknowledged, in response to a question on cross-examination, that he was "a little bit out of control" (Tr. 200). Deputy Chief Pennolino also acknowledged that he did not know how fast respondent was driving (Tr. 104) and that he did not recall all the details of the tandem plowing operation: for example, when it started, when it was disrupted by the civilian driver, or the particulars of the route assigned to the tandem plow trucks (Tr. 59, 77, 94-96).

Further, Deputy Chief Pennolino's testimony made sense. He did not recall ever supervising respondent or even meeting him prior to the snow emergency (Tr. 54). He had no motive to single respondent out. He stopped respondent because respondent was driving with his plow down on a street with no snow. Respondent became belligerent and verbally abusive, leading to the confrontation by Deputy Chief Pennolino's car.

Deputy Chief Pennolino's inability to recall every detail of the night's operations, almost a year ago, was understandable and did not detract from his credibility. Importantly, the Deputy Chief consistently testified about his interactions with respondent that night: that he saw respondent driving fast, with the plow down; that at two confrontations under an overpass and at a fueling station, respondent and he argued, each becoming irate, cursing, and yelling; that, at the fueling station, respondent slammed the passenger side door of his vehicle, catching his finger; and, that he ordered respondent to remain in his truck and be "papped," and respondent did not comply.

Respondent's counsel argued that "as a matter of physics," the car door would not have hit Deputy Chief Pennolino's hand, because if the door was open at a 45 degree angle, as Deputy Chief Pennolino testified, and respondent pushed it, it would have hit Deputy Chief Pennolino's hips, not his finger (Tr. 154, 155). Deputy Chief Pennolino testified, during cross-examination, that when respondent pushed the car door, the door "kind of hit" his body, then he dropped the radio and moved out of the way, then respondent pushed the door again, and "that's when" the door caught his hand (Tr. 157, 159). Respondent's counsel staged a lengthy re-enactment, using chairs to demonstrate the relative positions of Deputy Chief Pennolino and the car door (Tr. 161-78), during which Deputy Chief Pennolino repeated this explanation and physically demonstrated what he believed his body movements may have been (Tr. 170, 172, 181).

Moreover, Deputy Chief Pennolino credibly acknowledged that he did not precisely recall his every movement when approached by respondent at the car door. However, he was adamant that respondent slammed the door against his hand. "However, however it happened, my hand ended up in the door, causing the injury. I couldn't tell you exactly how it happened, but the final outcome was that" (Tr. 197). Deputy Chief Pennolino credibly denied counsel's suggestion that he somehow was "so aggravated" that he closed the car door on himself (Tr. 197). He noted that having a sanitation worker slam a car door on his hand "doesn't happen every day," so it is something that he remembers (Tr. 200).

Documentary evidence supported Deputy Chief Pennolino's testimony. It was undisputed that Deputy Chief Pennolino sustained an injury to his hand. He took a photograph of his bloody finger and petitioner introduced medical records showing the finger fracture. It is not plausible that Deputy Chief Pennolino somehow closed the car door on himself.

Deputy Chief Pennolino's testimony that he ordered respondent to be "papped" was also credible. Deputy Chief Pennolino testified that he orders substance abuse tests "all the time" (Tr. 188). He had been angry with respondent from the time he saw respondent's truck driving on 58th Street. And he became angrier as a result of his verbal confrontations with respondent both under the overpass on Maurice Avenue and at the fuel depot. Certainly, by the time respondent pushed the front passenger door shut on Deputy Chief Pennolino's finger, the Deputy Chief was furious. If he orders substance abuse tests "all the time," it is extremely likely that in this case he ordered a substance abuse test by telling respondent to remain in his car and that he was going to be "papped." Deputy Chief Pennolino's testimony about the drug test was

supported by the unusual occurrence report, which included the allegation that Deputy Chief Pennolino ordered respondent to remain in his vehicle and informed respondent that he would be “papped” (Pet. Ex. 1).

Respondent’s testimony was only partly credible. He was candid in admitting that he cursed and became confrontational with Deputy Chief Pennolino when they met under the overpass and again at the fueling station. However, his testimony that he did not talk to Deputy Chief Pennolino earlier in his shift on the tandem plow operation was contradicted by Deputy Chief Pennolino’s credible account of that earlier operation and seemed calculated to support his testimony that he did not recognize Deputy Chief Pennolino either under the overpass on Maurice Avenue or at the fueling station. Respondent’s assertion that he had no idea about the identity of the driver of the white vehicle on Maurice Avenue because it was dark outside and the driver did not identify himself was undercut by Deputy Chief Pennolino’s credible testimony that respondent told him that he had been working all night and was going to get fuel. It would be unusual for respondent to volunteer this information if he did not believe the person he was talking to was a Department superior. Moreover, although Deputy Chief Pennolino was driving an unmarked car, it is notable that the roads and highways were closed except for Sanitation and emergency vehicles.

Most notably, respondent gave conflicting testimony about whether he recognized Deputy Chief Pennolino when they spoke at the fueling station. Initially he testified that he had “no idea” who the person was who was yelling at him. Later he acknowledged that it “obviously” had to be a higher-ranking Department official. The certainty with which respondent first asserted that he did not recognize Deputy Chief Pennolino, which was untrue, casts doubt upon his veracity as a witness. In particular, this calls into question respondent’s testimony that he never approached Deputy Chief Pennolino at his car and that he never heard Deputy Chief Pennolino order him to be “papped.”

Respondent has urged that I take an adverse inference against petitioner for failing to call additional persons who were present at the fueling station at the time of the incident, namely, the sanitation worker who was fueling the trucks and two sanitation workers whose trucks were either being fueled or about to be fueled (Tr. 261). An adverse inference is predicated upon the “uncalled witness” or “missing witness” jury charge, which instructs a jury that it may draw an adverse inference upon the failure of a party “to call a witness who would normally be expected

to support that party's version of events." *DeVito v. Feliciano*, 22 N.Y.3d 159, 165 (2013). In both civil and criminal cases, drawing such an inference has been held appropriate if four "preconditions" are met: (1) the witness' knowledge is material to the trial; (2) the witness is expected to give noncumulative testimony; (3) the witness is under the "control" of the party against whom the charge is sought, so that the witness would be expected to testify in that party's favor; and (4) the witness is available to that party. *DeVito*, 22 N.Y.3d at 165-166. Here, taking an adverse inference would not be appropriate as there is no evidence that these other, unnamed individuals would have knowledge that is "material" to the trial. Deputy Chief Pennolino testified that the sanitation workers were all inside their trucks and they did not come over to see what was happening (Tr. 191). Thus, it is not clear that any of these persons would be in a position to testify about what happened to cause the injury to Deputy Chief Pennolino's hand.

Accordingly, based upon Deputy Chief Pennolino's credible testimony and the supporting documentary evidence, including the photograph of his injured hand, the medical records, and the near-contemporaneous filing of an unusual occurrence report detailing the events, I find, as alleged, that respondent became irate toward Deputy Chief Pennolino on January 27, 2015, both at the underpass under Maurice Avenue, when Deputy Chief Pennolino questioned him about why he was going fast and driving with his plow down, and at the fueling station on 54th Avenue, when Deputy Chief Pennolino again questioned him about driving fast with the plow down. I further find that when Deputy Chief Pennolino returned to his car to telephone the Borough office to report respondent's conduct, respondent followed him to the car, infuriated, and slammed the front passenger door shut, closing it on Deputy Chief Pennolino's finger. After this, Deputy Chief Pennolino ordered respondent to return to his truck and wait there, and that he would be "papped." Respondent instead left, returned the truck to the garage, and went home. He did not submit to a drug test.

Petitioner established the misconduct alleged in the petition. Respondent violated rule 3.22 of the Code of Conduct, which prohibits an employee from striking, attempting to strike, threatening to strike, or engaging in "any altercation" with another employee or member of the public, by slamming the car door against Deputy Chief Pennolino while the Deputy Chief was standing in between the car door and the body of the car, resulting in a fracture to the Deputy Chief's finger when the door closed against his hand.

Respondent also violated rule 2.5 of the Code of Conduct and section 4.13 of PAP 2012-02, both of which prohibit drug test refusals. Respondent's counsel argued that this charge could not be sustained, because, he asserted, Deputy Chief Pennolino did not have authority to order respondent to take a drug test, but could only recommend that respondent be evaluated by a doctor for substance abuse (Tr. 258). I disagree. Counsel seemed to be referencing section 9.2(A) of PAP 2012-02, which governs "reasonable suspicion" testing and indicates that an employee "will be required to test" if a supervisor submits a referral and evaluation form noting observations of an employee's "odor, speech, appearance or behavior" consistent with drug or alcohol use, drugs or alcohol" and a clinic doctor "concurs with" the supervisor's observations. However, section 9.8 of the PAP separately provides for "testing following a physical altercation," stating, "Any person employed by the Department either on duty or on city property who is involved in a physical altercation with another employee or member of the public *will* be tested" (emphasis added). Although the Rule contemplates a medical evaluation at the clinic, it also provides that the medical evaluation "*will* include substance abuse testing and referral to the EAU" (emphasis added). Thus, Deputy Chief Pennolino had authority under section 9.8 to order that respondent be drug tested. By driving away in his truck and going home rather than submitting to a drug test, respondent violated rule 2.5 of the Code of Conduct and section section 4.13 of the PAP, which requires employees to "submit to any substance use tests ordered to be performed in connection with this policy."

Petitioner further alleged that respondent violated rule 3.2 of the Code of Conduct. Rule 3.2 prohibits employees from bringing discredit to the City by being arrested for a crime. Specifically, petitioner contends that respondent's "activities" and his arrest for assault brought discredit to the City. Generally, we have held that an arrest "amounts to an accusation only," *Dep't of Sanitation v. Lowe*, OATH Index No. 1499/06 at 5 (Sept. 22, 2006) (internal citation omitted), and is insufficient to sustain a finding of misconduct. *Dep't of Transportation v. Pierre*, OATH Index No. 2112/11 at 2-3 (Oct. 3, 2011); *Dep't of Correction v. Holston*, OATH Index No. 592/04 at 11 (Sept. 29, 2004); *Fire Dep't v. Best*, OATH Index No. 1506/04 at 3 (Sept. 2, 2004); *Admin. for Children's Services v. Bass*, OATH Index No. 902/03 at 2 (Apr. 10, 2003). Here, however, because respondent has been found to have engaged in conduct -- slamming the car door against his superior -- which led to his arrest, there is a basis to find respondent liable for bringing discredit upon the Department because of his arrest. The charge,

accordingly, is sustained. However, as the arrest charge does not rest on any additional facts, it is duplicative and will not be considered separately for purposes of penalty. *See Savello v. Frank*, 48 A.D.2d 699 (2d Dep't 1975); *Human Resources Admin. v. Lovell*, OATH Index No. 2477/14 at 9 (Feb. 13, 2015); *Dep't of Environmental Protection v. Trotman*, OATH Index No. 337/14 at 10 (Jan. 16, 2014), *modified*, Comm'r Dec. (Feb. 7, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2014-0187 (June 25, 2014).

FINDINGS AND CONCLUSIONS

- 1) Petitioner established by a preponderance of the credible evidence that on January 27, 2015, respondent engaged in an altercation with Deputy Chief Pennolino, in violation of rule 3.22 of the Code of Conduct, as alleged.
- 2) Petitioner established by a preponderance of the credible evidence that on January 27, 2015, respondent refused an order to take a substance abuse test, in violation of rule 2.5 of the Code of Conduct, as alleged.
- 3) Petitioner established by a preponderance of the credible evidence that respondent's participation in an altercation with Deputy Chief Pennolino led to his arrest, bringing discredit to the city, in violation of rule 3.2 of the Code of Conduct, as alleged.

RECOMMENDATION

Upon making this finding, I requested and received an abstract of respondent's personnel record. The information submitted indicated that respondent became a sanitation worker in 2004. Since that time he has amassed multiple disciplinary charges, which were resolved by five dispositions, stemming from 2006 through 2013. In 2006 and twice in 2007, he accepted pay fines ranging from two days to four days for charges involving sick leave and time and leave violations. On May 2, 2011, respondent agreed to an 11-workday suspension for charges involving emergency leave, safeguarding equipment, and a positive drug test for marijuana. The charges were adjourned in contemplation of dismissal if respondent did not violate the drug testing directive within a year. The charges were revived in January 2012 when respondent was charged with violating the drug testing directive by testing positive for marijuana. On January

18, 2012, respondent accepted a 19-day suspension and signed a last chance agreement relating to the 2011 charges, the 2012 positive drug test, and two additional charges involving medical documentation and absence from a work site. On November 20, 2013, respondent accepted a ten-day pay fine for numerous charges relating to sick leave, lateness, and absence. Respondent's last two evaluations rated him overall as "unsatisfactory" because of issues relating to sick leave and time and leave.

For the proven misconduct, the available penalties under the Administrative Code are a pay fine, suspension up to 30 days, or termination of employment. Petitioner has requested that respondent be terminated for the proven misconduct, which involves both the drug test refusal and the altercation with Deputy Chief Pennolino. I agree.

The door slamming incident is particularly troubling. Respondent and Deputy Chief Pennolino had argued at the fuel station, yelling and cursing at each other. Deputy Chief Pennolino felt the situation was getting out of hand so he walked away from respondent and went to his car to report respondent's behavior to the borough office. Respondent chose to follow Deputy Chief Pennolino and continue the confrontation. He slammed the car door while Deputy Chief Pennolino was standing between the car door and the car, talking on the telephone. Whether or not respondent meant to hit Deputy Chief Pennolino or simply acted recklessly, it was foreseeable that the car door would strike the deputy chief. Respondent had displayed contempt for the Deputy Chief's authority throughout their earlier encounters, yelling, cursing, and refusing an order to pull over in his truck. But by slamming the car door shut, he went further and engaged in an act of workplace violence, fracturing the Deputy Chief's finger. This bellicose and impetuous behavior suggests that respondent is a danger to other workers and the public.

Although respondent had been working all night under emergency snow conditions, the vast majority of Department of Sanitation employees handle themselves with a high degree of professionalism under stressful circumstances. To excuse respondent's assaultive behavior on the basis of the difficulty of the snow operation would be a discredit to his colleagues.

Respondent's misconduct was exacerbated by his decision to go home early rather than submit to drug testing, in further disregard of the deputy chief's authority. Moreover, respondent displayed a remarkable lack of remorse throughout the trial, failing to take responsibility even for his verbal bellicosity toward Deputy Chief Pennolino and instead insisting that the entire

incident was the deputy chief's fault, because he had been the "aggressive" one. Finally, respondent's tenure at the Department has been marred by a significant disciplinary history, including two prior violations of the Department's substance abuse policy, further suggesting that termination of employment is the appropriate remedy. *See Dep't of Sanitation v. Anonymous*, OATH Index No. 1888/13 at 15 (Nov. 12, 2013), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2013-246 (Apr. 24, 2014) (termination of employment recommended for "unprovoked physical attack on a supervisor," coupled with failure to cooperate with a drug testing order and related misconduct).

Accordingly, I recommend that respondent's employment as a sanitation worker be terminated.

Faye Lewis
Administrative Law Judge

January 4, 2016

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

APPEARANCES:

CARLTON LAING, ESQ.
Attorney for Petitioner

KIRSCHNER & COHEN, P.C.
Representative for Respondent
BY: ALLEN COHEN, ESQ.