

Transit Auth. v. Shahbaz

OATH Index No. 801/16 (Mar. 23, 2016), *adopted*, Auth. Dec. (Apr. 8, 2016), **appended**, *modified*, NYC Civ. Serv. Comm'n Case No. 2016-0308 (Dec. 8, 2016), **appended**

Respondent found guilty of using expletives and a racial slur against co-worker who repeatedly used demeaning language towards respondent and admitted to so doing. ALJ recommends that respondent be suspended for 20 days without pay, with credit for time served.

On appeal, CSC reduces the penalty to a ten day suspension without pay, with credit for time served.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TRANSIT AUTHORITY
Petitioner
- against -
ZAFAR SHAHBAZ
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This is a disciplinary proceeding referred by the Transit Authority (“petitioner” or “Authority”), pursuant to section 75 of the Civil Service Law. Petitioner alleges that respondent, Zafar Shahbaz, a Level II Transit Railcar Technical Specialist, engaged in an altercation with a co-worker on October 16, 2014, during which he used expletives and a racial slur towards the co-worker, in violation of rules 2(a), (b) and (d), 4(a) and (b), and 10(a), (c) and (d) of petitioner’s rules and regulations, and in violation of petitioner’s policy/instructions on maintaining respect in, and having a workplace free of sexual and other discriminatory harassment (ALJ Ex. 1).

At a trial before me on February 12, 2016, petitioner presented the testimony of Chad Allum, who lodged the complaint against respondent, and Marissa Kang, an investigator with petitioner’s Office of Equal Employment Opportunity (“EEO”). Petitioner also presented documentary evidence. Respondent presented the testimony of Liem Huynh, a co-worker who was present on the day that respondent’s altercation with Mr. Allum occurred. Respondent also

testified on his own behalf. At respondent's request, I held the record open until March 21, 2016, for closing arguments to be made by way of written submissions.

For the following reasons, I found it more likely than not that respondent used a racial epithet against Mr. Allum on October 16, 2014. I also found that prior to that date, there existed animus between respondent and Mr. Allum, partially caused by Mr. Allum's demeaning and derogatory responses to respondent's heavy accent and his stutter, as well as his persistent refusal to share in driving petitioner's vehicle to or from a job location, causing respondent's internalized feelings of resentment to percolate and erupt.

Given respondent's lengthy and clean record with the Authority, and the circumstances that led up to respondent's use of a racial slur, I find termination to be disproportionate to the proven misconduct. Accordingly, I recommend that respondent be suspended from employment without pay for 20 days with credit for time served, and that he be restored to his job and be reimbursed with 10 days' pay.

BACKGROUND

This case involves two co-workers who developed tension and animosity towards each other which were minimized and went unaddressed for too long, and which formed the basis for the charges against respondent.

The Incident

Chad Allum is a mechanical engineer who holds the title of level I Associate Transit Management Analyst ("ATMA"), and has worked for the Authority for over 13 years (Tr. 13). Respondent is a Transit Railcar Technical Specialist II, who has worked for the Authority for over 23 years (Tr. 123-24). Respondent is originally from Pakistan where Urdu is his native language. He speaks English with a thick accent, and also stutters (Tr. 136, 141). Mr. Allum and respondent are assigned to the Accidents Investigations Unit and have worked together consistently since 2013. Prior to that, they had worked in the same unit from 2002 to 2006, but had had no direct interaction with each other (Tr. 44-45). Among other things, their jobs involve investigating train problems, track testing, and on-the-road accidents. On October 16, 2014, Mr. Allum, respondent, and Liem Huynh,¹ a level II ATMA who has worked for the Authority for

¹ Like respondent, Mr. Huynh is Asian, and speaks rapidly, with an accent.

about 10 years, were directed to the Jamaica Maintenance Shop in Queens, to inspect a train, after someone's bag got caught between its doors the previous night (Allum: Tr. 14-17; Resp: Tr. 131). Mr. Allum testified that he had an appointment and needed to leave early, so his supervisor instructed him to assist respondent and Huynh, and leave when he needed to (Tr. 18).

At the Jamaica Maintenance Shop, Mr. Allum wanted to inspect the train indoors, in what he referred to as "the barn," because voltage issues on the tracks made it unsafe to conduct the inspection outdoors. But respondent wanted the inspection done outside the barn. The job itself required a manual inspection of the train's doors and their functioning. One person had to be outside the train, and the other two, inside, with one opening and closing the doors, and the other, using a cloth rag between the doors as part of the testing. The person on the exterior of the train had to climb a ladder to check one set of doors, descend to the ground, move the ladder to the next set of doors and repeat the process (Allum: Tr. 19-23; Resp: Tr. 131).

On October 16, 2014, Mr. Allum was the one conducting the testing from the exterior of the train (Tr. 21). He was admittedly anxious to complete the job because of his pre-arranged appointment. Even though he opined that respondent and Huynh were sluggish on the job because they wanted to earn overtime pay (Tr. 23-24), he later denied complaining that respondent was slow (Tr. 53).

Upon completion of the train inspection/testing, Mr. Allum updated the superintendent at the Jamaica Maintenance Shop on the status of the train. The superintendent requested a written report which Allum said that he would complete when he returned to his office. But that was unacceptable to respondent and Huynh, who wanted to remain at the Shop and complete it. Allum felt that this was a deliberate ruse by them to rack up overtime (Tr. 24-26). He maintained that he never drafts a report at the barn because it would have to be handwritten, and he always types his reports. He conceded however, that when there are no problems with the train, the report may indeed be completed at the barn (Tr. 53-55, 64). Mr. Allum testified that he reminded respondent and Huynh that he would not have accompanied them if they could not return to the office by 2:00 p.m. (Tr. 27).

When they reached the parking lot of the Jamaica Maintenance Shop, another dispute arose, which triggered a barrage of insults between Mr. Allum and respondent. Respondent wanted Allum to drive back to the office, but Allum resisted, maintaining that respondent and Huynh had agreed to drive to and from the Shop (Tr. 27). Allum acknowledged that assignments

required driving to different locations and admitted that at times, when working with respondent and Huynh, he drove less than they did, which caused resentment and friction. When he worked with others, he rotated the driving duties (Tr. 45-48). Allum claimed that respondent was smirking at him in the parking lot, and because he was tired of respondent's attitude, he called respondent "a selfish bastard," to which respondent replied, "If I'm a selfish bastard, you're a nigger." Astounded, Allum asked respondent, "What did you say?" and looked at Huynh, whom he maintained was standing between him and respondent. Respondent repeated "You're a fucking nigger. You're a nigger." Allum emoted that at that moment, he felt like "dirt" and like "gum underneath [respondent's] shoe." He added that during his exchange with respondent, Huynh shook his head from side to side and clicked his tongue (Tr. 28-30). On his way back to the office, Allum texted co-worker Harold Mathieu and asked Mathieu to let the supervisor and director know that he, Allum, wanted to meet with them before they left the office. He said that he reached out to Mathieu because he did not have his supervisor's telephone number. He also told Mathieu what respondent had said to him (Tr. 31-32).

When Allum, respondent and Huynh got back to the office at around 4:15 p.m., Mathieu informed Allum that the supervisor and the director had left. The following day, Allum went to work early, in anticipation of a call from his supervisor, Job Thomas, about the incident. When, by 10:00 a.m., he had received no call, he e-mailed a memorandum to Mr. Thomas, which he copied to director Eric Barthell. In his memo, Allum reported that he was having a discussion with respondent and Huynh about driving the truck back to the office and that respondent called him the "N" word four times in front of Huynh. He requested a group meeting. Mr. Allum testified that he wrote the identical memo to Mr. Barthell, copying Mr. Thomas (Tr. 32-38; Pet. Ex. 1). After that, nothing happened until he was contacted by someone from the EEO office. He met with an EEO investigator on three separate occasions (Tr. 39-40).

Mr. Allum expressed that he, respondent and Huynh were not a happy union because the latter two usually left the hard work to him (Tr. 20) He was sick and tired of respondent's work ethic and accused respondent and Huynh of doing dangerous things on the tracks. He was also displeased that respondent had to be given repeated instructions on various tasks (Tr. 34). On the day of the altercation, Allum was peeved because respondent, who always selected the easiest tasks, was the one doing the testing with the rag cloth, yet wanted to work overtime. Moreover, respondent appeared to equate driving with work (Tr. 63) It further irked Allum that he was the

one who was always accountable to the supervisors as to the steps taken because, as he put it, respondent and Huynh got nervous speaking with the bosses. Allum denied saying that he was put in charge because respondent and Huynh cannot speak English properly (Tr. 49-50). He also denied that respondent's stutter bothers him (Tr. 53). Yet he admitted to calling respondent "stupid" and an "idiot" (Tr. 48-49). He further acknowledged that the use of profanity in the workplace violates the Authority's Rules and Regulations, and stated that he was forthcoming with the EEO officer that he had directed profanity towards respondent. His admission garnered him a penalty of five days' suspension without pay (Tr. 40-42).

Respondent provided little detail regarding what preceded his exchange with Mr. Allum on October 16, 2014. Both he and Mr. Huynh noted that a sore point of discontent between Allum and other workers was the issue of driving the Authority's vehicle, which respondent considered to be an integral part of the job (Resp: Tr. 129-30, 147-48; Huynh: Tr. 103-04). Respondent testified that he had complained to his supervisor about Mr. Allum's reluctance to drive but the supervisor had taken no action. On the day in question, upon completing the inspection and contrary to instruction that they should write a report at the shop, Allum gave a verbal report to the superintendent and deputy superintendent of the shop, and then headed to the parking lot (Tr. 130). He asked Allum to drive back to the office and Allum got angry (Tr. 132-33). This sparked an exchange of curse words, in particular, "motherfucker" and "asshole," which, respondent concurred, was prohibited in the workplace (Tr. 153). But respondent vehemently denied calling Allum the "N" word, which he acknowledged to be a "terrible word." Respondent claimed that this was the first time that he had cursed Allum, who had previously picked on him and cursed him on several occasions. He corroborated that Allum had called him "idiot" and "stupid," but added that as regards his accent and stutter, Allum had also called him "bastard" and "asshole," and would make remarks such as, "I don't know what the fuck you're talking about" (Tr. 126-28, 133, 141, 145). Respondent denied that he and Huynh deliberately delayed the job in order to earn overtime, and opined that Allum discriminates against him. He had informed his supervisor about the terms he had been called, and that co-workers, particularly Allum, yelled at him out of frustration and in the presence of other workers, because they had to repeat instructions to him. But he had never filed an EEO complaint (Tr. 136-37, 143-44).

Respondent believes that Mr. Allum filed the complaint against him because he speaks out against Allum's work. He also believes that Allum colludes with Mr. Mathieu with the

ultimate goal of getting rid of him from the Accident Investigations Unit, hence the reason why Allum communicated with Mathieu and not his supervisor on the day of the incident. He described the complaint as a fabrication designed to get rid of him (Tr. 133, 140).

Respondent was interviewed twice by an EEO investigator (Tr. 138). On November 19, 2014, the day preceding his first interview, respondent sent a text message to Mr. Allum, alluding to “improper language” which hurt them both. He apologized for his use of improper language if it hurt Mr. Allum’s feelings, and offered to meet with Allum to resolve the matter. When Allum realized who had sent the text, he instructed respondent to stop texting him (Tr. 150-51; Pet. Ex. 2 at 3). During the course of his interviews, respondent told the investigator that Allum had cursed him in the past (Tr. 135). He also admitted to using profanities on October 16, 2014, which he knew to be prohibited by the Authority’s rules, as were racial epithets. Respondent doubted that the EEO investigation was done in an impartial manner because individuals who were not present during the incident were questioned, and the investigator appeared to accept as true, the statements made by those individuals while ignoring statements made by his witness, Mr. Huynh (Tr. 134, 137). After the incident, respondent worked with Mr. Allum for about one year until he was suspended without pay for 30 days, in October 2015, following the completion of the EEO investigation and the release of its report. Respondent testified that during that time, Allum assumed driving responsibilities and did not curse him. To date, respondent remains suspended from his job (Tr. 138-39).

Respondent’s witness, Liem Huynh, had little to add. Mr. Huynh is a level II ATMA who has worked for the Authority for approximately 10 years (Tr. 99). He has worked with respondent intermittently, for a one and a half years before the incident between respondent and Mr. Allum (Tr. 100). He underscored that Mr. Allum rarely drove the Authority’s vehicle and that, in the past, he had taken Allum aside and spoken to him about sharing the driving duties (Tr. 103-04). He knew that the contention between respondent and Allum on the day of the incident stemmed from Allum’s reluctance to drive (Tr. 108-09). Mr. Huynh stated that he was at the front of the vehicle when his colleagues began their argument at the rear. Only then did he approach the rear of the truck, but he did not hear respondent use a racial epithet (Tr. 101, 109-12, 116). Mr. Huynh was twice interviewed by the EEO investigator. He testified that after the incident between respondent and Allum, the three of them continued to work together and were very respectful towards each other (Tr. 104-05).

The EEO Investigation and Report

Marissa Kang was hired by the Authority as an EEO investigator in January 2015. Before that, she worked for petitioner as a law fellow, from September 2013. In October 2014, Ms. Kang, a new attorney, was assigned to investigate Mr. Allum's complaint against respondent. Accordingly, she interviewed Mr. Allum, respondent, and Mr. Huynh, as well as Mr. Mathieu, respondent's supervisor, Mr. Thomas, and his director, Mr. Barthell. Upon completion of her investigation, she was involved in drafting a report which, in its final form, consisted of edits and revisions from her managers (Tr. 68-73; Pet. Ex. 2). Ms. Kang's ultimate conclusion was that there was reasonable cause to believe that both Allum and respondent violated the Authority's Respectful Workplace and Sexual and Other Discriminatory Harassment policies.

The EEO report contained a synopsis of the interviews conducted. Mr. Allum's first interview with the EEO office was held almost two months after the incident. What emerged from both the trial testimony and the reported interviews was that there was a long-standing feud between Mr. Allum and respondent, which was minimized at trial. It was also evident from the EEO report that respondent's and Mr. Allum's supervisor, Mr. Thomas, was aware of the underlying behavior that caused the tension, and did little to abate it. In fact, if Mr. Allum's statements to the EEO investigator are to be credited, it appears that Mr. Thomas might have unwittingly fueled some of the tension.

First, Ms. Kang noted in her report that during the course of three interviews, Mr. Allum described his relationship with respondent as very strained, and that he repeatedly commented on respondent's and Huynh's accents, and how they were difficult to understand. Moreover, while at trial he denied saying that he was put in charge because respondent and Huynh could not speak English properly, Allum actually told the EEO investigator that in Mr. Thomas's absence, he is appointed as field manager because, "I'm the only one who can talk" to the barn chiefs and train crews, and tell them what to do, and "those guys can't speak proper English" (Pet. Ex. 2 at 3, ¶ 4), and further, that "Thomas wants me to go with them [Shahbaz and Huynh] because he doesn't want the group to sound like a bunch of idiots. These other guys [Shahbaz and Huynh] can't talk" (Tr. 79-81; Pet. Ex. 2 at 4, ¶ 3). When asked whether she considered Allum's remarks about respondent's and Huynh's accents and their lack of proficiency in English to be discriminatory, Ms. Kang side-stepped an affirmative response and instead characterized them as

“inappropriate” (Tr. 81). In a footnote to her report, Ms. Kang indicated that during the March 13, 2015 interview of respondent, the EEO staff addressed “the inappropriate language that [Allum] acknowledged using towards Shahbaz as well as the disrespectful way that he spoke about the way that Shahbaz and Huynh communicate” (Pet. Ex. 2 at 4, n. 4).

Mr. Allum admitted to the investigator that he and respondent argued all the time and had inappropriate verbal exchanges on approximately eight occasions. He did not articulate the exact content of those verbal exchanges, but claimed to have called respondent “idiot” on approximately two occasions, and may have used the word “motherfucker.” He also noted that he had addressed respondent as follows: “Zafar, you can’t be this stupid, you’re doing this on purpose.” According to Allum, respondent would reciprocate with “motherfucker” or “shut up,” the latter being his favorite response (Tr. 77-80; Pet. Ex. 2 at 4, ¶ 2).

Ms. Kang testified that Allum did not appear to be vindictive because he did not want respondent to lose his job, and would have accepted an apology (Tr. 73-74). Her report noted that Allum did not consider respondent’s text to be an apology (Pet. Ex. 2 at 4, ¶ 4).

During his interviews, respondent mentioned that Allum had cursed at him in the past, but that he had never complained to the EEO office (Tr. 81, 89). He indicated that on the day in question, Allum prefaced their inappropriate exchange with “Motherfucker, you always make this problem about driving,” which generated an exchange of profanities. But he denied calling Allum the “N” word, stating, “I didn’t use the ‘N’ word, I know this is a bad word for these people” (Pet. Ex. 2 at 9, ¶ 4). He described instances when Allum cursed at him, and stated that they were always alone when it occurred. For example, on one occasion when respondent forgot to cut a snowblock, Allum said, “Motherfucker, how can you forget this?” On another occasion, when respondent returned from getting coffee, Allum said, “Why didn’t you tell me you were getting coffee? Get your ass on the train.” Then on the day of the incident, Allum also said to him, “Motherfucker, you are the biggest problem” (Pet. Ex. 2 at 9, ¶ 5).

Respondent admitted that he texted Mr. Allum in an attempt to reduce the tension between them, but made no further attempts to communicate with him (Pet. Ex. 2 at 10, ¶ 1). He also told the investigator that his only problem with Allum was the driving issue, which was the source of the friction between them (Tr. 90; Pet. Ex. 2 at 10, ¶ 2).

Mr. Huynh appeared to be a little more forthright during his EEO interview than he was at trial. The report noted that he described Allum as not “an easy guy” who had probably

brought the complaint because he does not want to drive (Pet. Ex. 2 at 10, ¶ 3). He also denied hearing respondent use the “N” word, or that he had said so to anyone, above all Mathieu, whom he claimed to have a very close relationship with Allum. In addition, Huynh told the investigator that Allum and Mathieu “don’t like [respondent]” (Tr. 83; Pet. Ex. 2 at 10, ¶¶ 2, 5).

Even though Ms. Kang’s report was admitted into evidence, some of the interviewees were not present to testify at trial. Thus, their statements to the EEO investigator as presented in the report constituted hearsay. Sworn testimony is usually considered more reliable than hearsay statements. *See Dep’t of Correction v. Velez*, OATH Index No. 1655/02 at 5 (Dec. 3, 2002), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD-05-34-SA (Aug. 11, 2005). But hearsay is admissible in disciplinary proceedings and may provide the sole basis for a finding of fact. *See* Charter § 1046(c)(1) (Lexis 2015); 48 RCNY § 1-46 (Lexis 2015); *People ex rel. Vega v. Smith*, 66 N.Y.2d 130, 139 (1985); *Dep’t of Correction v. Connell*, OATH Index No. 1598/11 at 10 (May 24, 2011); *Transit Auth. v. Wong*, OATH Index No. 1866/08 at 18-19 (Aug. 28, 2008); *Dep’t of Correction v. Jackson*, OATH Index No. 134/04 at 4-5 (May 5, 2004), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD-05-67-SA (Sept. 14, 2005). Respondent did not challenge the reliability² or admissibility of any of the statements in the report, made by persons who were not present at trial. As such, I found no reason to accord less consideration to any portion of the report.

Harold Mathieu was one of the interviewees who was not present at trial. The EEO report indicates that Mr. Mathieu is a Level III System Safety Specialist, who socializes with Mr. Allum outside of the workplace. Mathieu corroborated Allum’s statements to the investigator that he had sent a text message to Mathieu immediately following the incident, but the investigator noted that neither had produced a copy of the text. Mathieu also informed the investigator that when he told Thomas that Allum wanted to meet with Thomas upon his return to the office because respondent had called him the “N” word, Thomas appeared disappointed and remarked, “The reason why is [sic] it’s because of the way you guys are treating him badly”

² Hearsay must have probative value and bear some objective indicia of reliability in order to be given significant weight. *See Dep’t of Housing Preservation & Development v. Davron*, OATH Index No. 1533/11 at 16 (Dec. 21, 2011); *Police Dep’t v. Mazzoli*, OATH Index No. 1610/07, mem. dec. at 4 (Apr. 6, 2007). In assessing the reliability and probative value of hearsay, significant factors include the declarant’s personal knowledge of the facts, the independence or bias of the declarant, the detail and range of the hearsay, the degree to which it is corroborated, and the centrality of the hearsay evidence to the agency’s case. *Police Department v. Ayala*, OATH Index No. 401/88 at 6 (Aug. 11, 1989), *aff’d. sub nom. Ayala v. Ward*, 170 A.D.2d 235 (1st Dep’t 1991); *Richardson v. Perales*, 402 U.S. 389, 402-06 (1971); *Calhoun v. Bailar*, 626 F.2d 145, 149-50 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1981); *Police Department v. Digristina*, OATH Index Nos. 389-90/91 at 11 (May 30, 1991).

(Pet. Ex. 2 at 5, ¶ 4). Mathieu then informed Senior Director Eric Barthell, that Allum wanted to meet with Thomas when he returned to the office. After that, he (Mathieu) left for the day and did not know whether Thomas or Barthell waited for Allum to return (Pet. Ex. 2 at 5, ¶ 4). At trial, this was contradicted by Allum who affirmed that when he got back to the office around 4:15 p.m., Mathieu was the one who informed him that Thomas and Barthell had left (Tr. 32-33).

What followed in the report suggested that Mathieu himself harbored doubts about Allum's allegation. He told the investigator that the day following the incident Huynh had confirmed to him (Mathieu) that respondent had used the "N" word. Yet, in spite of what appeared to be Huynh's corroboration of Allum's complaint, Mathieu approached Allum and asked him "if he was sure of it [the use of the "N" word], because it will only escalate." Mathieu reported that Allum appeared to be "really upset" but he did not want respondent to lose his job (Pet. Ex. 2 at 5-6).

Supervisor Thomas also did not appear at the trial. During his EEO interview, his admission that he had commented on respondent's and Huynh's accents garnered an admonition from the EEO office, that he needed "to be careful about the way that he discusses people's accents and the way that people communicate" (Tr. 80). Thomas assessed both Allum and respondent to be "good workers" and "good people," but stated that he could not assign respondent certain jobs because of respondent's stuttering problem. In addition, respondent demonstrated "a little absent-mindedness" which infuriated his co-workers, particularly Allum, because they had to repeat themselves to him (Pet. Ex. 2 at 7, ¶¶ 4, 5). In a footnote, the EEO report noted that Mr. Thomas was rebuked by the EEO office for his characterization of respondent's stuttering as a disability. And at trial, Ms. Kang opined that she did not consider stuttering to be a disability (Tr. 83-85).

Thomas characterized Allum and Mathieu as "young" and noted that Allum needed "a little time to get matured." Both Allum and Mathieu had complained to him about difficulties they encountered while working with respondent, and Thomas had addressed their complaints with respondent. Thomas informed the investigator that Allum had little patience with respondent whom Allum felt should be smarter because of his experience. This often caused Allum to yell at respondent. Thomas expressed that on the flip side, respondent believed that Allum and Mathieu picked on him because of his communication difficulties. In Thomas'

estimate, underlying the issues between Allum and respondent were cultural differences (Tr. 85-87; Pet. Ex. 2 at 7, ¶¶ 4, 5; Pet. Ex. 2 at 8, ¶ 1-2).

At around 4:00 p.m. on the day of the incident, Thomas learned of Mr. Allum's allegation against respondent from Mathieu. During his first interview, he feigned ignorance as to what "N" word respondent had reportedly used, claiming that "[he] thought it was cursing or something, [he] thought maybe 'nasty'" (Pet. Ex. 2 at 7, ¶ 3). Thomas also stated that he did not trust what Mathieu says, because Mathieu usually picks on respondent (Pet. Ex. 2 at 7, ¶ 3). At his second interview, Thomas denied telling Mathieu that the incident between Allum and respondent was caused by their treatment of respondent (Pet. Ex. 2 at 8, ¶ 4). He further appeared to deny hearing Mathieu mention the "N" word, and claimed to be unfamiliar with the word and its offensive weight. Hence, he "may not have noticed it" (Pet. Ex. 2 at 8, ¶ 3). In his third interview, Thomas told the investigator that the abuse between respondent and Mr. Allum was verbal only, not physical, and could therefore be addressed the following day. Thomas also questioned why Mathieu was the one who reported it to him, and why Allum had not called him if the altercation was serious (Pet. Ex. 2 at 8, ¶ 4).

The EEO report suggested that Mr. Thomas became indignant at the veiled implication by the EEO office that he may have shirked his responsibility when he failed to wait for Allum, respondent and Huynh to return to the office on the day of the incident. Thomas also got furious at what he perceived to be an EEO investigation that was getting out of hand. In an e-mail to the EEO office, he expressed outrage that the EEO investigators were giving more weight to hearsay statements and the statements of bystanders as opposed to his (Pet. Ex. 2 at 9, ¶¶ 1, 2, 3).

Based on its investigation, the EEO office found reasonable cause to believe that Allum's complaint against respondent was substantiated. It also found that Allum engaged in inappropriate behavior, and Thomas did not comply with his managerial responsibilities, and recommended corrective action against all three.

At trial, what was immediately apparent was that Mr. Allum, who is much younger than respondent, appeared to be more assertive as well. Also, they hail from vastly different ethnic and cultural backgrounds. By themselves, those differences should have absolutely no impact on how each should treat the other in the workplace or otherwise. City workers are required to undergo annual EEO training which, among other behaviors, teaches respect and tolerance. I turn now to the charges against respondent and my analysis of the testimony and evidence.

ANALYSIS

To prevail in this disciplinary proceeding, petitioner must prove its case 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 non-existence." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993); *See also Dep't of Correction v. Tavaréz*, OATH Index No. 1273/02 at 5 (Nov. 21, 2002).

Resolution of the charges is primarily based on a credibility determination. In assessing credibility, this tribunal has considered factors such 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). After an assessment of the testimony of the witnesses and the evidence, I find it more likely than not that respondent used a racial epithet against Mr. Allum, as charged.

Like respondent, Mr. Huynh has a very heavy accent. At trial, not only did I find him to be extremely nervous and skittish, but he did not appear to fully comprehend the questions because his answers were often non-responsive. Huynh also seemed unwilling to speak ill of either Allum, by whom he was possibly intimidated, or respondent, with whom he was often paired, and with whom he suffered denigration because of his accent. However, there was no reason for me to discredit his denial that he heard respondent use the "N" word to Allum, in spite of Allum's contrary claim that Huynh was present. Given Huynh's unwavering denial, I am disinclined to put much trust in Mathieu's statement to the EEO officer, that Huynh had confirmed hearing respondent use the "N" word. Huynh's similar situation with respondent, his recognition that Allum was not "an easy guy," and his awareness of Mathieu's friendship with Allum, militated against Mathieu's claim. But what emerged from Huynh's statements to the EEO investigator and his trial testimony was that Allum's reluctance to drive, and his apparent

preference to be chauffeured by respondent and Huynh sparked the unpleasant verbal exchange between respondent and Allum on October 16, 2014.

Mr. Allum's testimony was credible in part and not so convincing in others. For instance, I was not persuaded that Huynh was standing between them when Allum and respondent engaged in their most offensive exchange. I was more inclined to believe Huynh's version that upon hearing the heated argument between the two, he left what he was doing at the front of the vehicle and approached Allum and respondent at its rear, giving credence to his claim that he did not hear respondent use the "N" word. I also found that Allum's testimony was not truly reflective of the level of animosity that existed between him and respondent. First, it was unrealistic that Allum would actually tally the number of times that he used expletives to respondent prior to the incident on October 16, 2014. It is not something of which one normally takes stock. Therefore, I find it more likely than not that Allum grossly underestimated the frequency with which he cursed respondent during altercations. In addition, the EEO report contradicted Allum's denial at trial that he used derogatory remarks about respondent and Huynh because they spoke English with a heavy accent. The report contained his statements that when he is on assignment with respondent and Huynh, he is elevated to field manager because respondent and Huynh cannot speak proper English, and the supervisor did not want the group to sound like "a bunch of idiots." It was unclear whether his opinion of supervisor Thomas' wishes was based on his interpretation of non-verbal signals from Thomas or on direct utterances by Thomas, such as Thomas' admission to the investigator that respondent's stuttering problem precluded consideration for certain jobs. Notably, the EEO investigator did not inquire of Thomas whether Allum's statements could be directly attributed to remarks that Thomas had made about respondent. Regardless, it was clear that Allum engaged in a persistent pattern of addressing respondent in a demeaning manner, rooted in some preconception that a stutterer must be an "idiot" or "stupid." It was equally apparent that supervisor Thomas saw this as a contributing factor to Allum's derision of respondent.

Before moving on to my assessment of respondent's credibility, I must note that while I found Ms. Kang to be credible, it was disturbing to read that the EEO office chided supervisor Thomas for characterizing respondent's stutter as a disability, and to hear Ms. Kang opine that a stutter is not a disability. As defined in the New York City Human Rights Law, a disability is "any physical, medical, mental or psychological impairment," which affects any system of the

body, “including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs” Admin Code § 8-102(16) (Lexis 2015). The Americans with Disabilities Act (“ADA”) leaves no doubt as to what should be considered a disability. It defines a disability as a physical or mental impairment that substantially limits one or more major life activities of an individual. 42 USCS § 12102(1)(A) (Lexis 2015). Major life activities include speaking and communicating. 42 USCS § 12102(2)(A). Such impairment need not limit other major life activities in order to be considered a disability. 42 USCS § 12102(4)(C). Moreover, even if it is episodic or in remission, such impairment is still considered a disability so long as it would substantially limit a major life activity when active. 42 USCS § 12102(4)(D). According to the National Institute on Deafness and Other Communication Disorders, “stuttering is a speech disorder in which sounds, syllables, or words are repeated or prolonged, disrupting the normal flow of speech” which “can make it difficult to communicate with other people which often affects a person’s quality of life.”³ This does not mean that all stutterers are considered disabled. The severity of the stutter and how much it impedes the stutterer’s ability to communicate would factor into whether one’s stutter qualifies as a disability.

In *Preacely v. Schulte Roth & Zabel*, 2001 U.S. App. LEXIS 19686 (2d Cir. 2001), the appellant challenged the District Court’s grant of summary judgment in favor of the respondent, on grounds that the appellee’s stated reasons for his termination were pretextual, and that his termination was actually motivated by unlawful discrimination on the basis of, among other contentions, his physical disability (stuttering), in violation of the ADA. With respect to this particular assertion, the Second Circuit found that Preacely failed to establish a prima facie case of disability discrimination because the facts did not support his claim that he is disabled or an inference that Schulte terminated him because of a disability. *Id* at 4; *see also*, *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 52 (2d Cir. 1998) (applying *McDonnell Douglas*⁴ framework to ADA claim, and holding that a plaintiff must present sufficient facts to establish a prima facie case that his discharge “was effected under circumstances giving rise to an inference of discrimination.”). The *Preacely* court held that “far from demonstrating that he suffered from any impairment that limited a major life activity as required under the ADA, Preacely admitted

³ See National Institute on Deafness and Other Communication Disorders, Stuttering (2014), at <http://www.nidcd.nih.gov/health/pages/stutter.aspx>.

⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792.

that his stutter was neither a physical nor a mental disability; and that it did not interfere with his ability to work or talk.” 2001 U.S. App. LEXIS 19686 at 4.

While Preacely’s admission that his stutter was not a disability and did not impact his ability to work or talk factored into the court’s ruling, his case suggests that a case-by-case analysis may be necessary. In the present case, respondent’s supervisor made a management decision that he could not assign certain jobs to respondent because of his stutter. From this, an inference may be drawn that respondent’s stutter limits his work assignments, and may well be considered somewhat of a disability. The fact that the EEO office seemed unwilling or unable to grasp that a stutter may be a disability means that a stutterer may be teased relentlessly and have no recourse at the agency, or at least from the EEO office. Here, respondent did not explain why he had not complained about being called “stupid” and “idiot” prior to the investigation of the incident that occurred on October 16, 2014. I turn now to an assessment of respondent’s credibility.

Respondent’s testimony that he and Allum were frequently at loggerheads over driving the Authority’s vehicle was conceded by all, even Allum, who acknowledged that he was less inclined to drive when on assignment with respondent and Huynh. They also both conceded that the driving issue formed the basis for their inappropriate behavior towards each other on October 16, 2014. But I did not find credible, respondent’s testimony that this was the first time that he had cursed Allum. Allum’s admission to the EEO investigator that he and respondent frequently engaged in inappropriate verbal exchanges was more credible.

Even though Allum texted his friend Mathieu, and not his supervisor, to report on respondent, I find that that has little bearing on whether or not respondent used the “N” word. Supervisor Thomas acknowledged that Mathieu relayed Allum’s message to him on the day of the incident, that respondent had called Allum by the “N” word. Allum subsequently wrote memos to Thomas and director Barthell the following day. This tribunal has found that contemporaneous statements evince reliability. *See Human Resources Admin. v. Ali*, OATH Index No 2380/09 at 16 (July 20, 2009); *Dep’t of Sanitation v. Sanders*, OATH Index No. 558/09 at 4 (Jan 5, 2009); *Dep’t of Correction v. Boyce*, OATH Index No. 789/97 at 14 (July 9, 1997), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 99-75-SA (July 19, 1999). Moreover, respondent’s text to Mr. Allum prior to his first interview with the EEO office, in which he apologized for using “inappropriate language” which may have “hurt” Allum, suggested that the inappropriate

language for which he was apologizing went beyond the expletives that they regularly exchanged. Thus, the evidence preponderates in favor of a finding that respondent repeatedly blurted out the “N” word in frustration and reciprocation for the humiliation that he no doubt felt after a protracted period of derision by someone who is much younger. Respondent was well aware that the “N” word was a “terrible word” and that it would inflict pain, which is what he did.

Authority rules require employees to treat each other with courtesy and prohibit profane and uncivil language, including offensive remarks about race, national origin, or ancestry. *See* Transit Authority Rules and Regulations 2(a), 2(b), 2(d), 4(a), 10(a), 10(c) and 10(d). Respondent’s behavior violated those rules as well as the Authority’s Respectful Workplace Policy No. 1.12.0 (issued Nov. 28, 2007), and its Sexual and Other Discriminatory Harassment Policy No. 1.16.3 (issued Feb. 16, 2010). The charges against respondent as they pertain to a violation of said rules are therefore sustained. The Authority also charged respondent with a violation of rule 4(b), which requires employees to obey the orders of supervision. Petitioner put on no evidence at trial in support of this charge, which appeared to be erroneously included in the list of rules that respondent was alleged to have violated.

FINDINGS AND CONCLUSIONS

1. On October 16, 2014, respondent violated multiple Authority rules, its Respectful Workplace Policy, and its Sexual and Other Discriminatory harassment policy when he engaged in an exchange of profanities with a co-worker, and used a racial epithet towards that co-worker.

RECOMMENDATION

Upon making the above findings and conclusions, I requested a copy of respondent's personnel file in order to make an appropriate penalty recommendation, and received a one-page document which revealed that respondent has been employed by petitioner since December 1993, and has no history of prior discipline. No performance evaluations were provided.

Respondent has been found guilty of using expletives against a co-worker, and calling that co-worker the “N” word, in violation of the Authority’s rules and policies. The Authority

seeks a recommendation of termination of respondent's employment, which I find to be excessive.

This tribunal has denounced the use of the "N" word as an "ugly racial epithet, which '... ranks as perhaps the most offensive and inflammatory racial slur in English.... [It is] a word expressive of racial hatred and bigotry.'" *Dep't of Sanitation v. Lugo*, OATH Index No. 1634/05 at 4 (Nov. 17, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-65-SA (July 10, 2006) (quoting MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, at 784 (10th ed. 1995)). We have recommended penalties ranging from 10 days' suspension without pay to termination, or demotion, where respondents have used the word wantonly against co-workers. *See Transit Auth. v. Borowski*, OATH Index No. 1873/06 (Aug. 10, 2006), *modified on penalty*, Auth. Determination (Aug. 22, 2006), *appeal dismissed as moot*, NYC Civ. Serv. Comm'n Item No. CD 07-57-D (May 25, 2007) (15-day penalty recommendation for respondent's use of offensive language in a work-related voicemail message modified to demotion, but dismissed as moot after respondent resigned prior to imposition of the penalty); *Transit Auth. v. Brodowski*, OATH Index No. 766/04 (Apr. 30, 2004), *modified on penalty*, Auth. Determination (May 20, 2004) (15-day penalty recommendation modified to 44 days for supervisor who regularly used profanity and prohibited language towards a subordinate over a two-year period); *Transit Auth. v. Pasieka*, OATH Index No. 2112/01 (Feb. 19, 2002), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 04-12-SA (May 17, 2004), *rev'd*, *Pasieka v. Transit Auth.*, Index No. 26592/04 (Sup. Ct. Kings Co. March 3, 2005), *rev'd and reinstated*, 2006 N.Y. App. Div. Lexis 9726 (2d Dep't 2006) (supervisor demoted, where he was found to have used derogatory ethnic names to his subordinates on a daily basis for two years, and was unremorseful); *Transit Auth. v. Kerr*, OATH Index No. 1234/00 (May 10, 2000), *modified on penalty*, Authority Decision (July 18, 2000), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 03-22-M (Feb. 5, 2003) (15-day suspension recommended for a supervisor, a 22-year employee with one prior incidence of discipline, who called his subordinate by the "N" word, modified to 44 days by the Authority, but reduced by the Civil Service Commission which found 44 days to be excessive). The penalty recommendations in these cases are consistent with penalties imposed by other agencies.⁵

⁵ *See Dep't of Sanitation v. Lugo*, OATH Index No. 1634/05 (Nov. 17, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 06-65-SA (July 10, 2006) (10-day suspension for respondent who used the "N" word in a Department facility, in the presence of three other Department workers); *Police Dep't v. Kilroy*, OATH Index No. 1096/91 (July 10, 1991), *aff'd sub. nom.*, *Kilroy v. Brown*, 190 A.D.2d 530 (1st Dep't 1993) (penalty of 15 vacation days for

The peculiar circumstances of this case provide some mitigation. That does not mean that I endorse respondent's behavior. However, the testimony and EEO report lead me to conclude that Allum discriminated against respondent when he consistently called respondent "stupid" and "idiot," and that this was based on respondent's perceived disability and his heavily accented language, and thus, his national origin. Such discrimination was underscored by the generational and ethnic differences between them which were unmistakable. Thus, respondent's use of the "N" word to Mr. Allum appeared to be the eruption of repressed anger at Allum's protracted derision and demeaning behavior towards him. The fact that respondent never reported Allum to the EEO office should not be interpreted to mean that discrimination by Allum did not occur. Nor should Allum's admissions to cursing respondent and treating him with contempt be easily discounted. Not only was it a contributing factor to respondent's behavior, but it was clear that the supervisor was aware of the ill treatment being meted out to respondent, yet he never bothered to identify it as a problem or address and remedy the situation, or report it to the EEO office as he was obligated to do.

What I find inexplicable is the five-day penalty that Mr. Allum received versus the penalty of termination that the Authority is seeking here against respondent. No justification was advanced for the disparity, given Allum's admitted intolerance of respondent.

In order to arrive at an appropriate penalty, respondent's misconduct must be balanced by his long tenure and lack of disciplinary history. *See Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990) ("employees should have the benefit of progressive discipline wherever appropriate, to ensure that they have the opportunity to be apprised of the seriousness with which their employer views their misconduct and to give them a chance to correct it"). The penalty may not be "so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *See Pell v. Board of Education*, 34 N.Y.2d 222, 233 (1974) (citing *McDermott v. Murphy*, 15 A.D.2d 479 (1st Dep't 1961), *aff'd*, 12 N.Y.2d 780 (1962)). Here, I find the Authority's request for termination to be disproportionate to the offense, given the circumstances that gave rise to respondent's isolated use of the "N" word, even though it was repeated multiple times on that one occasion.

officer who uttered the words, "dirty [N]" in presence of an administrative aide); *see also Dep't of Correction v. Andino*, OATH Index No. 430/89 at 8 (Aug. 10, 1989), *modified on penalty*, NYC Civil Serv. Comm'n Item No. CD 90-57 (June 20, 1990) (penalty for captain who referred to a subordinate using the "N" word, reduced from 60 to 30 days, in spite of his lack of remorse).

Accordingly, for responding to Mr. Allum with expletives similar to those used by Allum, I recommend a penalty similar to Allum's, a five-day suspension without pay with credit for time served. For his use of a racial slur after much provocation, I recommend that respondent be suspended for 15 days without pay, with credit for time served.

In sum, I recommend that respondent be suspended without pay for 20 days, with credit for time served. In light of his 30-days pre-trial suspension, I recommend that the Commissioner restore respondent to his job and reimburse him with 10 days' pay.

Ingrid M. Addison
Administrative Law Judge

March 23, 2016

SUBMITTED TO:

VERONIQUE HAKIM
President

APPEARANCES:

ELLEN JITTRARACHIT, ESQ.
Attorney for Petitioner

LAW OFFICES OF FAUSTO E. ZAPATA, JR., PC
Attorneys for Respondent
BY: FAUSTO E. ZAPATA, JR., ESQ.

Shahbaz, Zafar

OATH Index #801/16

Transit Authority v. Shahbaz, OATH Index No. 0801/16

A disciplinary hearing on the charges was held on February 12, 2016 before Administrative Law Judge ("ALJ") Ingrid Addison at the Office of Administrative Trials and Hearings ("OATH"). In her Report and Recommendation, ALJ Addison found Respondent guilty of violating, "multiple Authority rules, its Respectful Workplace policy, and its Sexual and Other Discriminatory Harassment policy when he engaged in an exchange of profanities with a co-worker, and used a racial epithet [use of the word "nigger"] towards that co-worker." I have reviewed the Report and Recommendation as well as the letter dated April 1, 2016 submitted by Respondent's counsel. I concur with ALJ Addison's finding of guilt and denouncement of the use of the "N" word.

The Authority is committed to its long-standing policy of maintaining a work environment free from discrimination, harassment, acts of intolerance, and other offensive and disrespectful behaviors. All of our employees are put on notice that misconduct which violates our Respectful Workplace policy and Sexual and Other Discriminatory Harassment policies may result in dismissal from employment. The Authority has a zero tolerance policy for this type of misconduct.

The ALJ recommended as a penalty that Respondent be suspended without pay for 20 days, with credit for time served. I recognize that Respondent is a 23-year employee who has a clean disciplinary record and that the recommended penalty may be consistent with similar OATH recommendations and decisions issued by the Civil Service Commission. Based on my entire review I agree with the ALJ's recommended penalty of 20 work days' suspension with credit for time served. The record reflects that Respondent was suspended from duty without pay on October 22, 2015 and continues on such suspension. He was restored to the payroll pursuant to applicable law on November 23, 2015 and has been paid since that time. In accordance with Civil Service Law Section 75 (3) I find that the initial 30 day suspension without pay should be considered as part of the penalty. The Respondent will not be reimbursed for additional unpaid suspension time.

Therefore, Respondent will serve a 20 work day suspension for his misconduct with credit for time served and he will be reinstated without back pay.

CHRISTOPHER JOHNSON, *Vice President Labor Relations*, MTA/New York City Transit Authority

NEW YORK CITY TRANSIT
Office of Labor Relations

THE CITY OF NEW YORK
CITY CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

ZAFAR SHAHBAZ

Appellant

-against

NYC TRANSIT AUTHORITY

Respondent

Pursuant to Section 76 of the New York
State Civil Service Law

CSC Index No: 2016-0308

DECISION

ZAFAR SHAHBAZ ("Appellant") appeals from a determination of the NYC Transit Authority ("NYCTA" or "the Authority") finding him guilty of incompetency and misconduct and imposing a penalty of 30 days' unpaid suspension following disciplinary proceedings conducted pursuant to Civil Service Law ("CSL") Section 75.

Following a hearing at the Office of Administrative Trials and Hearings ("OATH"), the Administrative Law Judge ("ALJ") found Appellant, who has been employed at NYCTA since 1993 and currently holds the civil service title of Level II Railcar Technical Specialist, guilty of using a racial epithet and inappropriate language during a verbal altercation with a co-worker.

The ALJ recommended a penalty of 20 days' suspension in her Report and Recommendation ("R&R"), with credit for time Appellant served on a 30-day pre-hearing suspension. Although the Authority accepted the ALJ's findings, it rejected the penalty and imposed a 30-day suspension but credited Appellant with time served.

The Civil Service Commission ("CSC" or "Commission") conducted a hearing on July 21, 2016. For the reasons indicated below, the Commission modifies the penalty to 10 days' unpaid suspension.

Background

On October 16, 2014, Appellant, Mr. Allum, and another co-worker, Liem Huynh, were dispatched to a work location in Queens. When their task had been completed, a dispute arose between Appellant and Mr. Allum over who would drive back to the office. Mr. Allum testified below that after he called Appellant a "spiteful asshole," Appellant called Mr. Allum "the 'N' word" repeatedly. R&R at 4.

Mr. Huynh was at the front of the vehicle and testified at the OATH hearing that he did not hear Appellant use a racial epithet during the argument. Mr. Huynh did testify that Mr. Allum is always reluctant to drive and that has been a source of conflict between Mr. Allum and Appellant whenever they work together.

Mr. Allum testified that he texted another co-worker, Harold Mathieu, asking that a supervisor be informed and he drove back to the office. However, Mr. Allum's supervisor had already left by the time the three men returned. The next day, Mr. Allum informed his direct supervisor in writing about what had taken place, including Appellant's use of a racial epithet. Because Mr. Allum's direct supervisor was not in the office on the day he submitted his memorandum about the incident, another supervisor, who was copied on the memorandum, referred the matter to the NYCTA's Office of Equal Employment ("EEO"). An EEO investigator interviewed all the parties involved over the year-long investigation. Mr. Allum reported to the EEO investigator that on November 19, 2014, Appellant sent Mr. Allum a text message apologizing for the use of "improper language" and asking Mr. Allum to have a conversation before the matter went any further. Mr. Allum asked that Appellant not text him anymore. Appellant told the investigator that Mr. Allum repeatedly cursed at him on several occasions, including on October 16, 2014, and provided several instances where Mr. Allum called Appellant a "motherfucker." Appellant admitted that he also cursed at Mr. Allum during the October 16, 2014 verbal altercation, but denied using a racial slur. Appellant also admitted to the EEO investigator that he sent Mr. Allum the text on November 19, 2014, but that the "improper language" that he apologized for referred to the curse words he directed to Mr. Allum and not to the racial epithet that Mr. Allum claimed.

In its October 14, 2015 report, the EEO found it more credible than not that Appellant used a racial slur in the argument with Mr. Allum. The EEO also found that there was a strained working relationship between the two and that Mr. Allum had made inappropriate comments,

using belittling and profane language, towards Appellant.

NYCTA charged Appellant with violating several Authority rules regarding employee behavior in the workplace, including its Respectful Workplace Policy and Sexual and other Discriminatory Harassment Policy, while on duty on October 16, 2014, when he engaged in a verbal altercation with a co-worker, Chad Allum, using profanity and a racial epithet. NYCTA suspended Appellant for 30 days from October 22, 2015, to November 23, 2015, prior to the OATH hearing on February 12, 2016.

Both Appellant and Mr. Allum testified below that the driving issue "formed the basis for their inappropriate behavior towards each other on October 16, 2014," and both conceded that they argued about it frequently. R&R at 15.

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The ALJ held that "it was clear that [Mr.] Allum engaged in a persistent pattern of addressing [Appellant] in a demeaning manner" because of Appellant's age, heavy Pakistani accent, and stutter, and that he and Appellant argued and cursed at each other frequently. R&R at 13. However, she also held the following:

[Appellant's] text to Mr. Allum. . . in which he apologized for using "inappropriate language" which may have "hurt" Allum, suggested that the inappropriate language for which he was apologizing went beyond the expletives that they regularly exchanged. Thus, the evidence preponderates in favor of a finding that [Appellant] repeatedly blurted out the "N" word in frustration and reciprocation for the humiliation he no doubt felt after a protracted period of derision by someone who is much younger.

R&R at 16.

The ALJ recommended a penalty of five days for using profane language towards a coworker and 15 days' unpaid suspension for using a racial slur towards that co-worker, with credit for time served during Appellant's 30-day pre-hearing suspension. NYCTA accepted the ALJ's findings of guilt but imposed a penalty of 30 days' suspension, with credit for time served.

Appellant's Position

At the commission hearing, Appellant's attorney argued that there was insufficient evidence in the record for the ALJ to find that he used a racial slur in the argument with Mr. Allum. Appellant noted that there was no corroborating evidence other than Mr. Allum's

statement. Neither Mr. Allum nor Mr. Mathieu produced the contemporaneous text message Mr. Allum sent immediately following the argument. In addition, Appellant also argued that Mr. Huynh testified that he did not hear Appellant used a racial slur towards Mr. Allum. Finally, Appellant stated that the text message he sent to Mr. Allum did not mention a slur and only referred to the "improper language" used. Appellant contended that the October 16, 2014 incident was the first time he cursed back at Mr. Allum, even though Mr. Allum had cursed at him on several occasions. Therefore, he was apologizing for cursing.

Appellant also argued that even if he engaged in the charged misconduct the penalty imposed by the Authority was excessive. Appellant admitted to using profane language, but stated that he did not use a racial slur. Appellant pointed out that the EEO report stated that his manager was aware of the ongoing verbal harassment from Mr. Allum and that the first time he had argued back was when Mr. Allum cursed at him during the October 16, 2014 argument.

NYCTA's Position

Counsel for NYCTA argued that the ALJ credited Mr. Allum's testimony that Appellant used a racial slur, and that she found Mr. Allum more credible than Appellant. NYCTA noted that the ALJ's finding was supported by the EEO report, which also found that Appellant used a slur. Counsel argued that the EEO had conducted a thorough investigation and interviewed Mr. Allum, Appellant, and Mr. Huynh, the supervisors responsible for both men, and Mr. Mathieu, the co-worker to whom Mr. Allum sent a contemporaneous text message following the argument on October 16, 2014. Mr. Mathieu testified to receiving the text message, although neither he nor Mr. Allum was able to produce it at the OATH hearing. The Authority conceded that Mr. Allum bore some responsibility for the incident, but that it was Appellant who used the racial slur.

Analysis

The Commission has carefully reviewed the record and considered the arguments on appeal. The Commission finds that the record does not support a penalty of 30 days' unpaid suspension and modifies it to a penalty of 10 days' unpaid suspension: five days for cursing and five days for using the racial slur. This is to be credited against the 30 days Appellant served from October 22 to November 23, 2015, prior to the OATH hearing.

There is a basis for questioning the 30-day pre-hearing suspension Appellant served in

this case. CSL Sec. 75(3) states that "pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days." Although the statute does not provide specific guidance regarding the implementation of the pre-hearing suspension, presumably it is to be imposed in cases where the employee is a threat or disruption to the ongoing conduct of the agency. However, in this case when a full year elapsed before this Appellant was suspended pursuant to CSL Sec. 75(3), it assumed a punitive rather than an administrative function. Following the October 16, 2014 incident, NYCTA continued to send Appellant out on jobs, sometimes with Mr. Allum, and no further incident occurred between them. Furthermore, there is no evidence in the record of prior or continued belligerent behavior by Appellant towards Mr. Allum, and no reason to believe Appellant's continued presence caused a threat to the ongoing business of the agency.

The EEO report found that Mr. Allum admitted to using profane language during the argument with Appellant and the Authority imposed a five-day suspension which Mr. Allum accepted and served. The ALJ imposed the same penalty for Appellant's use of profane language during the argument, language he admitted to using both to the EEO investigator and at the OATH hearing. The commission finds no basis to disturb this finding or the penalty imposed. However, we do find that there is a basis for mitigating the penalty imposed for Appellant's use of the racial slur.

Although the record supports the ALJ's finding that Appellant used a racially-charged epithet, and should be disciplined accordingly, the Commission finds that Appellant's lack of prior disciplinary record and the clear evidence that he himself was subjected to repeated harassment due to his stutter and Pakistani ethnicity, mitigates the penalty imposed on him for his isolated use of the racial slur. Appellant has been employed by the Authority since 1993 and has no prior disciplinary incidents. Further, there is evidence in the record of substantial and ongoing harassment of the Appellant and no remedial action taken by management, although the EEO report found that managers were well aware of Mr. Allum's behavior. Finally, there is further reason to mitigate the penalty when Appellant showed remorse by texting Mr. Allum to apologize, offering to talk through the incident. Finally, as noted above, the Appellant and Mr. Allum continued to work together on occasion without incident for approximately one year before Appellant was suspended.

Therefore, under the particular circumstances in this case, we find the penalty of 30 days' unpaid suspension to be excessive, and modify it to five days for using profane language and five days for using a racial epithet, for a total of 10 days' unpaid suspension with credit for time served.

Decision

Accordingly, the Commission hereby modifies the determination of NYCTA to a penalty of 10 days' unpaid suspension and Appellant's employment record should reflect as such.

**NANCY G. CHAFFETZ, COMMISSIONER
CHAIR**

**RUDY WASHINGTON, COMMISSIONER
VICE CHAIR**

**CHARLES D. MCFAUL
COMMISSIONER**

**LARRY DAIS
COMMISSIONER**

Dated: 12/08/2016