

Dep't of Sanitation v. Serrano

OATH Index No. 813/16 (Jan. 20, 2016), *modified*, NYC Civ. Serv. Comm'n Index No. 2016-0243 (July 27, 2016).

Sanitation police officer engaged in unprofessional conduct while on duty when he acted on behalf of a friend and questioned private security personnel about littering summonses issued at a local housing development. Thirty-day suspension recommended.

CSC reduced the penalty to a 10-day suspension, finding mitigation in that respondent received no benefit from his actions, he took responsibility for his misconduct, and he has demonstrated an exemplary performance record.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
MELVIN SERRANO
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Sanitation, brought this proceeding, under section 16-106 of the Administrative Code, alleging that respondent, sanitation worker Melvin Serrano, engaged in unprofessional conduct prejudicial to good order and discipline, failed to accurately maintain Department records, and committed related misconduct on August 6, 2014 (ALJ Ex. 1). Respondent denied the charges and insisted that he was addressing a civilian complaint (Tr. 12).

At trial on December 8, 2015, petitioner relied on documentary evidence and the testimony of two employees, Sanitation Police Lieutenant Michael DiFalco and Superintendent Steven Tinkler. Respondent testified and also presented documentary evidence.

For the reasons below, I find that petitioner proved that respondent engaged in conduct prejudicial to good order or discipline, acted unprofessionally, and did not accurately maintain

Department records, and I recommend a 30-day suspension without pay. The remaining charges were unproved and should be dismissed.

ANALYSIS

The following is undisputed. On August 6, 2014, respondent was assigned to Bronx District 9 as a sanitation police officer. During his tour of duty that morning, respondent spoke to members of the Parkchester Department of Public Safety (DPS), a private security force for a housing complex located in District 9. That afternoon, respondent went to Parkchester DPS offices and spoke with a supervisor. Both the morning and afternoon conversations concerned littering summonses that DPS had issued to a friend of respondent's.

At trial, the parties disagreed about what was said and why it was said. Petitioner alleged that respondent made inappropriate remarks while engaged in an unauthorized investigation. Respondent denied that he said anything inappropriate. He insisted that he spoke to Parkchester DPS personnel staff about procedures for issuing summonses and a harassment complaint.

Petitioner did not call any Parkchester DPS personnel as witnesses. Instead, it relied mainly on Superintendent Tinkler's interview with one witness from Parkchester DPS, reports prepared by Parkchester DPS, and voluntary statements that respondent made during a recorded interview (Pet. Exs. 2, 3, 4).

According to DPS Officer Murphy's unusual incident report, he was on patrol near Tremont Avenue shortly after 9:00 a.m. on August 6, 2014, when respondent approached and asked to see his memo book. Officer Murphy contacted his supervisor, Sergeant Medina, and refused to show respondent his memo book. Respondent told Sergeant Medina that DPS personnel had been harassing respondent's girlfriend who lived in the Parkchester housing complex. Respondent, who was in uniform, would not provide details and said that he would contact the Department of Investigation (DOI) or DPS internal affairs bureau to investigate the alleged harassment (Pet. Ex. 2c).

At about 1:00 p.m. that day, respondent went to the DPS office on Unionport Road in the Bronx and complained to Captain Maresca, DPS's integrity control officer, about improper Environmental Control Board (ECB) summonses issued by DPS officers (Pet. Ex. 2a). According to Captain Maresca's report, respondent informed him that several unidentified DPS officers were locating garbage with the names of Parkchester residents and slipping summonses

under the residents' doors. Respondent told Captain Maresca that littering violations had to be personally observed by the officers who had to hand the summonses to the offenders. Noting that the summonses were being dismissed at ECB, respondent told Captain Maresca that DOI would investigate if the issue was not corrected (Pet. Ex. 2a).

Captain Maresca spoke to DPS Officer Murphy and Sergeant Medina about the incident. Officer Murphy repeated the substance of his unusual incident report (Pet. Exs. 2a, 2c). Sergeant Medina did not write a report. He told Captain Maresca that respondent said that DPS Officers had harassed his girlfriend and that her complaint to building management had not been addressed. Respondent asked whether one particular DPS Officer was a "dyke," "implied" that the officer was "romantically pursuing his girlfriend," and said that he would notify DOI and DPS Internal Affairs Division "and someone was going to lose their job." Sergeant Medina told respondent that Parkchester was private property, Officer Murphy did not have to show him his memo book, and if he wished to file a complaint he should speak to Sergeant Medina's supervisor (Pet. Ex. 2b).

Respondent's supervisor, Lieutenant DiFalco, testified that he had little or no recollection of respondent's assignment on August 6, 2014 (Tr. 29). According to respondent's daily activity report, he worked from 6:00 a.m. to 3:30 p.m. that day (Tr. 27; Pet. Ex. 1b). From 9:00 to 10:00 that morning, respondent was assigned to "CFC patrol," monitoring refrigerators and other large appliances with Chlorofluorocarbons (CFC) that must be removed prior to disposal (Tr. 19-21, 24). The report made no mention of any investigation at Parkchester that day (Pet. Ex. 1b).

According to Lieutenant DiFalco, respondent did not have to make an entry in his daily activity report every time he helped a civilian with a complaint (Tr. 32-34). However, if respondent had conducted an investigation at Parkchester he should have noted it in his daily activity report (Tr. 28-29). On August 6, 2014, Lieutenant DiFalco had no knowledge of any issue regarding respondent and Parkchester DPS (Tr. 30-31). Lieutenant DiFalco learned about this matter a few weeks later (Tr. 30-31).

On August 20, 2014 Superintendent Tinkler, of the Department's Field Inspection Audit Team, was assigned to investigate a complaint from DPS Captain Maresca (Tr. 35, 37, 39). Superintendent Tinkler did not speak to Officer Murphy or Sergeant Medina; instead, he spoke to Captain Maresca, who essentially repeated what he had written in his report (Tr. 45-47, 66). Surveillance video confirmed that respondent was at the DPS office for approximately 20

minutes and he left at 1:15 p.m. (Tr. 47). Respondent had difficulty starting his car and he left the scene at 2:00 p.m. (Tr. 48).

On September 5, 2014, Superintendent Tinkler recorded an interview with respondent (Tr. 51). In the interview, respondent recalled that he spoke to a woman, whom he referred to as his girlfriend, on the morning of August 6, 2014 (Pet. Ex. 3a at 14). She had complained about receiving summonses for littering (Pet. Ex. 3a at 4-5). Respondent believed that Parkchester DPS was harassing her and the summonses were illegal (Pet. Ex. 3a at 5). He recalled asking to see an officer's memo and summons books before speaking with the officer's supervisor for about 10 to 15 minutes that morning (Pet. Ex. 3a at 11). That afternoon, he met with a captain for 15 to 20 minutes (Pet. Ex. at 8, 11). According to respondent, his conversations with Parkchester DPS concerned the proper procedure for issuing littering summonses (Pet. Ex. 3a at 6, 9). Denying that he threatened anyone, respondent said that, if Parkchester DPS continued to harass his girlfriend, she would call 311 and DOI (Pet. Ex. 3a at 9, 12).

Superintendent Tinkler asked respondent whether he had been instructed to go to Parkchester and respondent replied, "I did it on my own because I received a phone call and I'm a sanitation police officer" (Pet. Ex. 3a at 9). When Superintendent Tinkler suggested that respondent had abused his authority by conducting an unauthorized investigation while on duty, respondent noted that he acted in plain view and said, "If I see corruption, I'm gonna report it" (Pet. Ex. 3a at 13-14).

According to Superintendent Tinkler, the disputed summonses were dismissed at ECB before respondent questioned DPS personnel (Tr. 74). In Superintendent Tinkler's view, respondent's actions were for a personal matter (Tr. 69). However, if it had been referred through the proper chain of command, respondent's conduct would have been appropriate (Tr. 72).

Respondent testified that he has worked for the Department for more than a decade and he had previously worked as a patrol officer for Departments of Public Safety in Co-op City and Hunts Point, which were similar to Parkchester DPS (Tr. 81-82, 101). On the morning of August 6, 2014, he was assigned to CFC patrol for an hour (Tr. 83). He was expected to check two locations for two CFC appliances and resume routine patrol (Tr. 82-83).

While on CFC patrol, respondent received a phone call from Ms. Lopez, whom respondent described as merely a friend (Tr. 85, 115, 122, 126). She told him that a Parkchester

DPS officer, who had previously harassed her, was in front of her building (Tr. 85, 115, 122, 126). Respondent replied that he would get there later because he was outside the district on CFC patrol (Tr. 85, 115).

Within the hour, respondent went to Parkchester and spoke to Officer Murphy (Tr. 85, 115). Respondent asked Officer Murphy if there were any sanitation issues in the area (Tr. 87, 117). When Officer Murphy said that there were no issues, respondent asked the officer whether he could confirm that with documentation (Tr. 119). Respondent did not ask to see Officer Murphy's memo book, but he believed that the officer may have misconstrued his remarks (Tr. 119). Officer Murphy called his supervisor (Tr. 87). Respondent spoke to Sergeant Medina and told him that he wanted to "confirm if there were any sanitation issues in the area" (Tr. 87, 120).

According to respondent, Captain Maresca called that afternoon and invited him to his office to discuss the matter (Tr. 89). Respondent drove his unmarked patrol car to the DPS office and told Captain Maresca that DPS officers were issuing improper summonses for littering and he offered to provide assistance or training (Tr. 90, 92, 125). Recalling that they had a good conversation, respondent testified that he considered part of his job to educate other peace officers how to enforce sanitation rules (Tr. 135-36). He did not make any notation about these conversations in his daily activity report because he did not consider it to be an investigation (Tr. 94). Rather, it was a form of conflict resolution (Tr. 88, 153).

At trial, respondent said that he was embarrassed by the charges (Tr. 153). He conceded that he should have done a better job documenting his activities (Tr. 153). However, respondent denied that he had threatened anyone or acted unprofessionally (Tr. 91, 144).

The evidence established that respondent used his position to act on behalf of a friend or girlfriend, failed to document his activities, and cast the Department in a bad light (Tr. 158). By doing so, respondent violated Department Rule 3.2 (conduct prejudicial to good order and discipline); Rule 3.11 (failure to accurately maintain Department forms, reports, and records); and Rule 3.22 (failure to act in a courteous and professional manner at all times), as alleged in the petition (ALJ Ex. 1).

I did not credit respondent's claim that he was merely following up on a citizen complaint and engaging in conflict resolution. Even if respondent sincerely believed that Parkchester DPS had engaged in harassment and issued improper summonses, he should not have conducted his own ham-fisted investigation. By overstepping his authority, respondent

acted unprofessionally and needlessly caused ill-will between the Department and Parkchester DPS. Respondent also created the appearance that his friend or girlfriend had an unfair advantage over ordinary citizens who are expected to call 311 or seek other lawful remedies.

If he was conducting a proper investigation, respondent should have documented it in his daily activity report. Every interaction with the public need not be recorded. But Lieutenant DiFalco and Superintendent Tinkler credibly maintained that respondent had an obligation to document an investigation of alleged harassment (Tr. 28-29, 64). This is especially so where respondent confronted members of a private security force and made accusations of wrongdoing. Respondent's failure to document his activities further supports the conclusion that he was acting unprofessionally and using his position to advance a private interest.

Petitioner failed to prove additional rule violations arising from the same conduct. The evidence did not show that respondent violated: Rule 3.1 (failure to obey a direct order from a superior); Rule 3.6 (failure to promptly and properly perform assigned duties); Rule 3.23 (unauthorized absence from assigned work site, route, garage or section during work hours); or Rule 4.4 (making false reports, statements or entries in connection with Department activities). There was no evidence that respondent failed to complete an assigned task or disobeyed any direct order. On the contrary, respondent credibly testified that he completed his CFC patrol and other assigned tasks for the day. The evidence also showed that the Parkchester housing complex was located within respondent's district. Though respondent's daily activity report was incomplete, because he neglected to mention his interactions with Parkchester DPS, he did not falsify entries.

The evidence also failed to prove that respondent made an offensive reference to sexual orientation when he spoke to Parkchester DPS personnel. Respondent denied that he used such language. Petitioner's witnesses were credible, but they were not present for the incident and they did not hear respondent use any offensive language. The allegation was based solely on a hearsay statement made by Sergeant Medina to Captain Maresca. Where an allegation is based on multiple layers of hearsay, it is less reliable. *See Business Integrity Comm'n v. Liberty Water & Sewer, LLC*, OATH Index No. 983/13 at 5 (Jan. 25, 2013) (though hearsay is admissible, "hearsay upon hearsay has been held to have diminished reliability"); *Taxi & Limousine Comm'n v. Singh*, OATH Index No. 984/07 at 6 n.1 (Jan. 26, 2007) (double hearsay statement on critical issues found to be "conclusory and unreliable"). Notably, Sergeant Medina did not write any

report about the incident. Officer Murphy, who was at the scene and filed an unusual occurrence report, made no mention of any derogatory remarks about sexual orientation. Moreover, as petitioner acknowledged, Parkchester DPS “took issue with the way [respondent] approached them and with his allegations that they were doing something wrong” (Tr. 7). Under these circumstances, uncorroborated hearsay statements from a potentially biased witness, who was never subjected to cross-examination, are particularly unreliable. *See Dep’t of Sanitation v. Meth*, OATH Index No. 1371/96 at 11-12 (Aug. 26, 1996), *rev’d on other grounds*, NYC Civ. Serv. Comm’n Item No. CD 97-67-R (Aug. 6, 1997) (declining to credit hearsay complaint from a non-testifying witness who had motive to falsely accuse Department employee of discourtesy).

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondent engaged in conduct prejudicial to good order and discipline, in violation of Rule 3.2 of the Department’s Code of Conduct.
2. Petitioner proved that respondent failed to accurately maintain Department records, in violation of Rule 3.11 of the Department’s Code of Conduct.
3. Petitioner proved that respondent failed to act in a courteous and professional manner, in violation of Rule 3.22 of the Department’s Code of Conduct.
4. Petitioner failed to prove that respondent disobeyed a direct order, failed to promptly perform assigned tasks, was absent without authorization from his assigned route, or made a false statement, in violation of Rules 3.1, 3.6, 3.23, and 4.4 of the Department’s Code of Conduct.
5. Petitioner failed to prove that respondent was unfamiliar with or did not comply with the City’s EEO Policy on discrimination, in violation of Rule 3.14 of the Department’s Code of Conduct.

RECOMMENDATION

After making the above findings, I requested and received a summary of respondent’s personnel history. The Department hired respondent in 2004. He has no prior disciplinary record. His recent performance evaluations rate his work as satisfactory or superior. He is a

certified emergency medical technician and he previously served as an auxiliary police officer with the New York City Police Department and a police officer with Co-Op City's Department of Public Safety (Resp. Ex. A). In 2011, the Commissioner awarded respondent a distinguished service certificate for a "Samaritan act that goes beyond the call of duty to both the Department and residents of New York City" (Resp. Ex. A). Respondent testified that he received that award in 2011 after providing assistance to a child who had been struck by a car (Tr. 96-97).

Petitioner now seeks termination of respondent's employment (Tr. 161). That would be excessive. Petitioner's penalty request was premised on the assumption that all of the charges were proved. Because petitioner failed to prove some of the most serious charges – including the claims that respondent disobeyed an order, falsified records, and made offensive remarks – a lesser penalty would be appropriate.

The proven charge is that respondent engaged in unprofessional and prejudicial conduct when he spoke to Parkchester DPS personnel at the behest of a friend and failed to note it in his daily activity report. It appears that this was an isolated lapse of judgment in an otherwise exemplary career. Respondent received no personal benefit for his actions and at trial he expressed sincere remorse. It is also unlikely that this misconduct will recur. As a result of this incident, respondent was transferred (Tr. 11). He is assigned to garbage collection and no longer serves as a sanitation police officer (Tr. 91). Based on these circumstances, termination of employment is unwarranted. *See Dep't of Correction v. Rodriguez*, OATH Index No. 792/09 (July 27, 2009), *modified on penalty*, Comm'r Dec. (Sept. 1, 2009), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 10-23-M (Apr. 26, 2010) (60-day suspension imposed on correction officer who used her official position to gain a favorable court outcome on behalf of a friend); *Dep't of Correction v. Sweeney*, OATH Index No. 1929/99 at 17 (Sept. 16, 1999), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 00-77-SA (July 24, 2000) (20-day suspension for correction officer who falsely represented himself to be a police officer in an off-duty incident with fellow law enforcement officers, in an attempt to obtain favorable treatment for a friend whose car had been seized, and who failed to report the incident).

Accordingly, I recommend a penalty of 30 days' suspension without pay, the maximum penalty, short of termination, permitted by section 16-106 of the Administrative Code.

Kevin F. Casey
Administrative Law Judge

January 20, 2016

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

APPEARANCES:

CARLTON LAING, ESQ.
Attorney for Petitioner

RICHARD BIAGGI, ESQ.
Attorney for Respondent

Commission Decision (July 26, 2016)

MELVIN SERRANO (“Appellant”) appeals from a determination of the New York City Department of Sanitation (“DSNY”) finding him guilty of incompetency and/or misconduct and imposing a penalty of a 30-day suspension following disciplinary proceedings conducted pursuant to Civil Service Law (“CSL”) Section 75. The Civil Service Commission (“CSC” or “Commission”) conducted a hearing on May 5, 2016.

DSNY charged Appellant, a Sanitation Worker, with five charges, including engaging in unprofessional conduct, failing to accurately maintain DSNY records, and other related charges, for an incident that occurred on August 6, 2014, when Appellant, without notifying his chain of command, improperly reached out to the Parkchester Department of Public Safety about littering summonses that had been improperly issued against his friend. The disciplinary hearing was conducted by the Office of Administrative Trials and Hearing (“OATH”). The OATH Administrative Law Judge (“ALJ”), Kevin F. Casey, found Appellant guilty of three charges, and recommended 30 days’ suspension without pay. The DSNY Commissioner adopted the ALJ’s findings and penalty recommendation.

Appellant’s Position

Appellant argued that a 30-day suspension was not consistent with the principle of progressive discipline in this case. Appellant was a ten-year employee at the time of the incident, with an exemplary record. After two and one-half years of commendable performance as a Sanitation Worker, Appellant had received a discretionary promotion to Sanitation Enforcement Officer. During that time, he earned several awards and commendations from DSNY. Appellant expressed sincere remorse for the incident, and pointed to mitigating factors, including the fact that DSNY acknowledged that his actions would have been appropriate if he had properly reported them to his chain of command. He also argued that he received no personal benefit from the incident, and noted ALJ Casey’s finding in his Report and Recommendation that this sort of misconduct was unlikely to occur again.

DSNY’s Position

DSNY argued that, given the totality of the circumstances, its decision to impose a 30-day suspension was consistent with the principle of progressive discipline. DSNY had originally

sought termination based on the charges of falsification of records and official documents, but those charges were dismissed by ALJ Casey. However, Appellant's actions in reaching out to another enforcement agency without permission from his supervisors, and giving them a false impression of his authority, brought discredit on DSNY and warranted serious punishment.

Analysis

The Commission has carefully reviewed the record adduced below and considered the arguments on appeal. We find that, under the particular circumstances of this case, a 30-day suspension is unwarranted.

The penalty should reflect the "nature of the misconduct, tenure, and the absence or presence of other mitigation." *Taxi & Limousine Comm'n v. Neubauer*, OATH Index No. 584112, at 7 (Dec. 12, 2011), adopted, Comm.'r Dec. (Dec. 23, 2011), citing *Dep't of Transportation v. Jackson*, OATH Index No. 299/90 (Feb. 6, 1990). In this case, we find that there are mitigating factors, specifically that Appellant received no benefit from his actions and took responsibility for his misconduct. ALJ Casey noted that Appellant's conduct was "an isolated lapse of judgment in an otherwise exemplary career" and was unlikely to happen again. See Report and Recommendation at 8. Indeed, DSNY acknowledged that Appellant's actions would have been appropriate if he had first sought permission from his chain of command. Appellant is a ten-year employee who has demonstrated an exemplary performance record, including receiving a discretionary promotion to Sanitation Enforcement Officer based on his work performance as a Sanitation Worker, and several commendations and awards from DSNY. Thus, we find that the overall record does not support a suspension for 30 days.

Decision

Accordingly, the Commission hereby modifies the determination of DSNY to a penalty of 10 days' suspension. Appellant is to be reimbursed for the difference between this penalty and that imposed by DSNY within 30 days of this decision.

Charles D. McPaul, *Commissioner*

Nancy C. Chaffetz, *Commissioner Chair*

Rudy Washington, *Commissioner Vice-Chair*

Dated: 7/26/2016