Triborough Bridge & Tunnel Authority v. Jones

OATH Index No. 1229/17 (Aug. 29, 2017), *adopted*, Pres. Dec. (Sept. 15, 2017), **appended**

Respondent, a peace officer, found guilty of attempting to engage in forcible sexual intercourse with his former girlfriend, and causing her physical injury while so doing. Convicted of third degree assault with a five-year Order of Protection issued against him, respondent failed to notify the TBTA of his conviction and failed to provide the documents associated therewith to his employer. ALJ recommends that respondent be terminated from his employment.

NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
TRIBOROUGH BRIDGE & TUNNEL AUTHORITY
Petitioner
- against -
LAWRENCE JONES
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Triborough Bridge and Tunnel Authority ("petitioner" or "TBTA"), pursuant to section 75 of the Civil Service Law. Petitioner charged that respondent, Lawrence Jones, a Bridge and Tunnel Officer, violated petitioner's rules and regulations when he: attempted to engage in forcible sexual intercourse with his former girlfriend; caused her physical injury; was convicted of assault in the third degree; was sentenced to conditional discharge with a full and final Order of Protection being issued against him; and failed to promptly notify the TBTA of his conviction and sentence. Petitioner also charged respondent with time and leave infractions that were withdrawn at trial (ALJ Ex. 1).

During a three-day trial before me on March 22, May 9 and July 31, 2017, petitioner presented the testimony of respondent's ex-girlfriend MS,[1] Bill D'Amora, petitioner's Director of Special Investigations and Renee Shepherd, director of the bridge at which respondent works, as well as criminal court records and other documentary evidence. Because of an existing Order of Protection in MS's favor against respondent, MS was permitted to testify via video conferencing from a separate room at this tribunal, so as to preserve the integrity of the Order.

Respondent testified on his own behalf and presented documentary evidence.

For the reasons below, I find that the charges have been proven and recommend that respondent be terminated from his employment.

PRELIMINARY MATTER

Respondent was initially charged with attempting to engage in forcible sexual intercourse with another person, subjecting that other person to forcible sexual contact without consent, and causing physical injury to that person, as well as violating the TBTA's rules regarding time and leave. Those charges (Ref. No. B-76-01-2015) were dated January 16, 2016, and respondent signed for receipt of them on January 20, 2016. On July 21, 2016, the charges were amended to include additional charges that respondent had pled guilty in the Supreme Court of the State of New York, Kings County Criminal Term, to Assault in the Third Degree, a Class A misdemeanor, and had failed to immediately notify the TBTA of his conviction and sentencing and the conditions of his sentence (ALJ Ex. 2). Both sets of charges were scheduled for a conference before Administrative Law Judge Susan J. Pogoda on September 12, 2016. On September 9, 2016, with no objection from opposing counsel, petitioner's counsel e-mailed Judge Pogoda, requesting an adjournment of the conference because petitioner had failed to serve opposing counsel with the appropriate notifications. Recognizing such failure as jurisdictional, Judge Pogoda removed the matter from OATH's calendar and advised petitioner that it may re-file its charges against respondent.

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[1] Petitioner requested that I keep confidential the full name of respondent's ex-girlfriend. Over respondent's objection, I agreed to do so due to the nature of the allegations and to protect her privacy, since this report will be published on the internet. *See* 48 RCNY § 1-49(a) (Lexis 2017); *Health & Hospitals Corp. (Elmhurst Hospital Ctr.) v. Polepalle,* OATH Index No. 142/13 at 1 n.2 (Nov. 20, 2012) (citing *Dep't of Education v. Brust*, OATH Index No. 2280/07 at 2 n.1 (Sept. 29, 2008), *adopted*, Chancellor's Decision (Oct. 22, 2008)).

On February 1, 2017, petitioner re-filed charges against respondent, but neglected to include the charges that were served upon him as part of Ref. No. B-76-01-2015. At trial on March 22, 2017, petitioner moved to consolidate the charges that had been omitted. Over respondent's objection, I granted petitioner's motion, finding no prejudice to respondent, who had been aware of the previous charges for more than one year. *See Dep't of Correction v. Jenkins,* OATH Index No. 3070/09 at 13 (Dec. 16, 2009) ("Amendment of charges in administrative proceedings, where pleadings serve only a notice-giving function is freely granted absent irremediable prejudice."); *Human Resources Admin. v. Ali,* OATH Index No. 2380/09 at 18 (July 20, 2009) (amending charges where to do so created no prejudice to respondent).

ANALYSIS

As a Bridge and Tunnel Officer with the TBTA, respondent is a peace officer (Tr. 213). His job involves toll collection, patrol, writing summonses and effectuating arrests pursuant to New York State's Penal Code and its Vehicle and Traffic Law. In that regard, he is equipped with a firearm, pepper spray, handcuffs and a baton. Respondent executed an oath of office with the TBTA on April 11, 2005, and signed for receipt of the TBTA's Procedure Manual and a copy of its Rules and Regulations (Tr. 153-54; Pet. Exs. 7, 8). The initial charges against respondent stem from an incident involving MS on July 26, 2015, which culminated in his arrest. The amended charges were based on respondent's guilty plea to assault in the third degree and his conviction pursuant to that plea on March 16, 2016, for which he was allocuted (Pet. Ex. 2).

MS has been a correction officer with the New York City Department of Correction ("DOC") for approximately 15 years (Tr. 46, 73). She and respondent had dated for about one and a half to two years and had lived together at her apartment on New York Avenue in Brooklyn, New York, for approximately one year until she asked him to leave about three weeks preceding the incident and he moved out. But up until July 26, 2015, respondent collected his mail from her apartment and they had occasionally been intimate (MS: Tr. 47-50, 75-76; Resp. 215, 262).

MS's regular shift at the DOC is eight hours long. On July 26, 2015, she arrived home at around 3:30 a.m., after working a double shift. She testified that she showered and "passed out" and was awakened by the ringing of her door bell at around 7:30 a.m. She initially ignored it but the person persisted by banging on her door. She got up and through her peephole, saw

respondent, who had told her that he was coming for his mail but had not indicated when he would do so (Tr. 50-52, 78-80). MS opened the door, pointed to the mail on the table, and returned to her bedroom. Respondent came to the bedroom door to inform her that he was leaving. When she heard her front door slam, she got up to double-lock it and noticed that respondent had not taken all his mail. She texted him and he returned. As she walked towards her living room with her back to him, respondent grabbed her by the neck in the form of a chokehold, pulled his pants down and tried to penetrate her from behind. She could not breathe and told him to get off of her and that he was hurting her, but to no avail. MS, who was dressed in negligee, felt respondent's penis on her back and realized that she was about to be raped, so she started to fight, striking him with her elbow and also turning and attempting to strike him in the face. He began to retaliate, punching her in the arm. As MS tried to push respondent out through her door, he grabbed and swung her outside of her apartment and she landed on her knees in the hallway. She could not re-enter the apartment because the door had slammed shut. MS banged on her neighbor's door for assistance. Meanwhile, respondent, who was still in the hallway, offered to get a locksmith. He also beseeched her not to tell anyone about the incident because of their respective jobs (Tr. 52-59, 71, 83-86, 99, 101).

When MS's neighbor let her in, she told the neighbor that her ex-boyfriend had attempted to rape her. At some point while in the hallway, respondent uttered words to the effect that MS "wanted it." MS called the police and two officers initially responded. They wanted her to come out into the hallway but she requested a supervising officer and remained in her neighbor's apartment. A supervising officer arrived, MS was asked if she wanted to press charges and she did, so respondent was arrested. A locksmith eventually arrived and MS regained access to her apartment. After dressing, she accompanied the officers to the 67th precinct. MS testified that her throat was swollen, she had bruises on her neck and arms and she was in pain. The officers advised her to call her Union delegate. An ambulance transported her to Kings County Hospital emergency room where members of the DOC CARE unit, a division that ensures support for DOC officers, visited her. MS testified that x-rays revealed bruising of her throat. Her knees, arms and thighs were also bruised and she was given Motrin for pain. Medical records show that MS was also prescribed cyclobenzaprine, a muscle relaxant to block pain sensations (Resp. Ex. A at 00103). Upon her release from the hospital, MS returned home (Tr. 59-65, 103-05). She

maintained that the pain in her neck lingered for about two weeks, and in her knees, for about one month (Tr. 70-71).

In a handwritten statement to the police made within one hour of the incident, MS wrote that respondent "try to rape me I fought him off. I push him I punch him and I fell hurt my knee and got lock out my Apt" (Resp. Ex. A). When asked why her statement omitted that respondent swung her onto the floor or that he choked her and cautioned her about placing their respective jobs in jeopardy if she reported the incident, MS replied that she was emotionally upset and had written her statement in the midst of tears and pain (Tr. 98, 101, 109-10). The criminal court complaint against respondent dated July 26, 2015, displayed the following charges proffered against him based upon contemporaneous statements that MS gave to the District Attorney's ("DA's") office: Attempted rape in the first degree; attempted sexual abuse in the first degree; attempted rape in the third degree; assault in the third degree; criminal obstruction of breathing or blood circulation; attempted sexual misconduct; menacing in the third degree; and harassment in the second degree. The narrative, which outlines the basis for the charges, reflects in relevant part:

> DEPONENT IS INFORMED BY [redacted] THAT, AT THE ABOVE TIME AND PLACE WHICH IS THE INFORMANT'S RESIDENCE, THE DEFENDANT DID REPEATEDLY GRAB THE INFORMANT ABOUT INFORMANT'S BODY AND ATTEMPT TO PULL OFF INFORMANT'S NIGHTGOWN, AND THAT WHEN INFORMANT REPEATEDLY PUSHED DEFENDANT AWAY, ASKED DEFENDANT TO STOP, AND ASKED DEFENDANT TO LEAVE, THE DEFENDANT DID PULL DEFENDANT'S PANTS DOWN, DISPLAYING DEFENDANT'S PENIS, AND WRAP DEFENDANT'S ARM AROUND INFORMANT'S NECK WHILE DEFENDANT WAS STANDING BEHIND INFORMANT, AND APPLY PRESSURE, CAUSING THE INFORMANT TO BE UNABLE TO BREATHE, AND ATTEMPT TO PLACE DEFENDANT'S PENIS INSIDE INFORMANT'S VAGINA, AND THAT WHEN INFORMANT PUSHED DEFENDANT AWAY AND OUT OF THE ABOVE-MENTIONED LOCATION, DEFENDANT DID PUSH INFORMANT TO THE GROUND.

(Tr. 206-09; Pet. Ex. 11). Thus, there can be no doubt that among other things, MS gave a contemporaneous statement which indicated that respondent attempted to choke her or obstruct her breathing in some way. In addition, medical records submitted by respondent showed that she was examined at Kings County Hospital Center and treated for her injuries (Resp. Ex. A at 00073-82). Respondent was indicted on charges that differed little from the arrest charges (Resp.

Ex. A at 00027-30, 00086). A transcript of MS's testimony before a grand jury was consistent with her testimony before this tribunal. It appears that at that time, photos of the injury to her neck were also presented (Resp. Ex. A at 00047-53).

After the incident, MS had ongoing communication with the DA's office. But she never testified before a Grand Jury because respondent entered into a plea agreement (Tr. 65-68). A transcript, dated March 16, 2016, of respondent's allocution to his plea agreement before the Supreme Court of the State of New York, Kings County Criminal Term, and a Certificate of Disposition, indicate that respondent was indicted on four felony and three misdemeanor charges and in full satisfaction of those charges against him, respondent pled guilty to Assault in the Third Degree, a Class A misdemeanor. Accordingly, he was sentenced to a one-year conditional discharge and a full and final order of protection for five years in MS's favor (Pet. Exs. 2, 3). MS received the order of protection in the mail (Tr. 67-68). She testified that she did not object to the DA dropping the charge of attempted sexual assault against respondent because she did not want to "go through any more trials" (Tr. 106-07).

At the time of respondent's arrest, Bill D'Amora was a TBTA investigator. Currently the Director of Special Investigations, Mr. D'Amora testified that before joining the TBTA about six and one half years ago, he worked for the NYPD for 23 years and held the titles of sergeant, lieutenant, captain, and deputy inspector. As lieutenant, he was the Integrity Control Officer and conducted multiple types of investigations. As captain, Mr. D'Amora worked in Internal Affairs and handled complaints of misconduct against service members. His job as a TBTA investigator involved investigating complaints of employee misconduct and multiple types of theft. In the case of employee arrests, he obtained paperwork, spoke with the district attorney handling the arrested employee's case, monitored the case, and upon resolution, commenced the administrative proceeding (Tr. 172-75).

In July 2015, the TBTA received notification from the NYPD of respondent's arrest, and Mr. D'Amora was assigned to investigate. He compiled a case file which included paperwork generated by the NYPD such as respondent's arrest and complaint reports, and records of when he communicated with the assigned assistant district attorney, and his tracking of respondent's court appearances to resolution of the criminal matter in March 2016.[2] Mr. D'Amora

[2] The New York City Police Department ("NYPD") online arrest form, printed on July 27, 2015, listed the arrest and arraignment charges. Both that report and the online complaint contained succinct narratives of MS's statement to the NYPD officers (Pet. Ex. 2).

acknowledged that he did not obtain a copy of MS's handwritten statement to the NYPD officers. On June 15 and 16, 2016, Mr. D'Amora interviewed respondent in person and MS by phone, respectively, and wrote contemporaneous reports of his interviews from memory which were also included in his case file (D'Amora: Tr. 175-85, 187-90; MS: Tr. 68-69; Pet. Ex. 12). The report of Mr. D'Amora's interview of MS departed from her testimony only to the extent that it reflected that it was when respondent first entered her apartment, he grabbed her from behind. MS also expressed to Mr. D'Amora that respondent was not a bad person and had just "lost it." As such, she did not want him to be incarcerated, and was fine with his plea to a lesser charge (Pet. Ex. 12).

Mr. D'Amora acknowledged that based on his experience as a police officer, when someone is arrested for rape or domestic violence, an order of protection is normally issued and it remains in effect during the pendency of the criminal matter and may be continued even following disposition of criminal matter. Petitioner's submissions establish that a temporary order of protection was issued against respondent on August 27, 2015, and a full, five-year order of protection was issued on March 16, 2016 (Pet. Ex. 11). Conceding that the purpose of his investigation was to track the criminal matter, not to make a credibility determination, Mr. D'Amora took no steps to investigate the veracity of respondent's or MS's statements to him. Nor did he check into whether or not respondent met the TBTA's reporting requirements (Tr. 196-200).

Renee Shepherd has been the director of the Throgs Neck Bridge, where respondent works, and the Whitestone Bridge, for two years, and is responsible for, among other things, ensuring that the TBTA's rules and regulations are observed (Tr. 139-42, 145; Pet. Ex. 5). Ms. Shepherd testified that she was informed of respondent's arrest, the criminal case against him and the resolution of the case with respondent's plea and conviction of a class A misdemeanor crime. She did not reveal how, when or from whom she received such information. But she posited that respondent never provided her with a copy of Order of Protection against him or the Certificate of Disposition as he should have pursuant to the TBTA's Reference Number Memorandum Number 03-013 ("RNM # 03-013"), issued on April 24, 2003 (Tr. 143-46, 150-51; Pet. Ex. 9). RNM # 03-013 provides that TBTA officers "who have been served with an Order of Protection, have been arrested, or issued a summons . . . , or have any other law enforcement action pending against them are required to immediately disclose such information

to their facility General Manager and Operations or Maintenance Superintendent" (Pet. Ex. 9). It also requires the officer to provide copies of all documents relating to law enforcement action to the general manager or superintendent.

Ms. Shepherd testified that at the time that the memo was issued, the general manager was the highest ranking officer (Tr. 144). She further stated that the position of "Captain" was created in or around 2012, and that the Captain reported to the General Manager or the Director of Bridges (Tr. 156-57). But a TBTA memo to its operations force on May 11, 2012, indicated that the Captain reports to the Director of Central Operations and the Vice President and Chief of Operations (Pet. Ex. 10).

When respondent's criminal case was disposed of, Frank Pascual was the operations superintendent at the Throgs Neck Bridge and Robert Eckart was the bridge captain. Both retired in or around April 2017 (Tr. 147-48). According to Ms. Shepherd, Captain Eckhart was directly accountable to her, and officers at the Throgs Neck Bridge reported directly to the Captain (Tr. 158-59). Ms. Shepherd never received respondent's Certificate of Disposition or the Order of Protection issued against him from either Superintendent Pascual or Captain Eckhart. She maintained that when she inquired, Captain Eckhart told her that respondent had not provided notice of his conviction. But she did not inquire about the Order of Protection, leading her to surmise that respondent also never submitted the documents to either Captain Eckhart or Superintendent Pascual (Tr. 148-150, 152, 160-61, 167). Nor did she inquire of respondent whether he had submitted said documents to Captain Eckhart or to the Special Investigations Division and was unaware that Special Investigations had a copy of the criminal disposition (Tr. 162-65).

Respondent began his career with the TBTA in April 2005. While he corroborated MS's testimony as to the nature of their relationship, he claimed that he was the one who initiated the break-up in the latter part of June 2015 because it became too stressful. Records of text messages from MS to him show one in which MS indicated that she had told her mother that respondent had left her (Tr. 215-16, 260; Resp. Ex. C).

Respondent denied choking MS, attempting to penetrate her vagina with his penis, rubbing his body in any manner against her, attempting to tear off her nightgown or attempting to rape MS (Tr. 232-33). He testified that on the evening of July 25, 2015, he worked at the Throgs Neck Bridge Toll Plaza. He received an invitation text message from MS, a copy of

which he produced, and after leaving work on the morning of July 26, 2015, drove to her home to get his mail. He knocked on her door and rang her bell and when she eventually let him in, she pointed out his mail which he retrieved. He told her that he was leaving and she went back to her room and back to bed. Respondent stated that after leaving, he proceeded to his car but he received a call from MS that he had dropped a parcel slip. Records of his text messages show that MS actually texted him to inform him that he had dropped mail. In any event, when he returned to her apartment, MS asked him, "Why are you doing this to us?" They proceeded to discuss their situation, but when he let MS know that he could not resume their relationship, she started crying. He hugged her and told her that things will be alright, that she is a strong woman and will get over it. He then left her apartment for a second time (Tr. 223-26, 249, 263-66; Resp. Ex. C).

Respondent claimed that as he got to the staircase in MS's building, MS called him back, but when he returned to her door, she started swearing at him, cursing him and calling him all kinds of names. Then MS started swinging at him and hitting him and he put his hands up to shield his face and moved to the side against a wall. At that point, MS lunged at him and attempted to punch him but she flew through the door and fell to the floor. When she got up, she realized that the door had slammed behind her, which made her more irate. She jumped up, grabbed and shook him, started hitting him again and yelled for help from other neighbors to get the number for building maintenance so she could get back into the apartment. Respondent maintained that while MS was attacking him, he did not respond in words or action, but he admitted that he did not sustain any injury. Respondent denied placing his arm around MS's neck and choking her. He denied punching her, striking her and assaulting her. And he denied grabbing her arm or throwing her to the floor. But he did not dispute MS's testimony that he asked her not to tell anyone about the incident because of their respective jobs. One of the neighbors allowed MS into her apartment and gave MS the number which she attempted to call but no one answered. Respondent acknowledged that the neighbor did not let him into her apartment because the neighbor did not like him. So respondent went to the security office and informed someone there that a tenant was locked out of her apartment and needed help. Respondent was told that help would not be available before 10:00 a.m. but the security supervisor still decided to walk back to the apartment with respondent who decided to call a

locksmith. He eventually contacted one who promised to be at MS's building in 20 to 25 minutes (Tr. 226-31, 267-71, 274; Resp. Ex. B).

Respondent testified that while waiting for a locksmith in the hallway of MS's building, NYPD officers showed up and asked him if he knew MS. He directed them to the apartment of the neighbor who had given MS refuge. Respondent estimated that about 45 minutes to an hour had elapsed between the lock-out and the arrival of the police officers. When MS saw the officers, she started yelling that her boyfriend had attempted to rape her and beat her up, which he denied (Tr. 228-29, 271-73). Respondent "blurted out" to the NYPD officers that he and MS were uniformed officers with DOC and MTA, at which point the NYPD officers stated that a supervisor had to be present. NYPD supervisors arrived and met first with MS while their officers remained with respondent. Afterwards, they listened to respondent's version of events and informed him that based on MS's accusation, they were placing him under arrest. They took him down to the 62nd precinct and told him that they were going to notify both his and MS's commands. While at the precinct, respondent did not file assault charges against MS. Respondent believes that he called his Central Communications Unit from the precinct, as well as his union, to apprise them of his arrest, and Captain Eckhart showed up after about 15 or 20 minutes. Respondent was arraigned the same morning and an order of protection was issued against him. He did not notify anyone at the TBTA about the order of protection because he was immediately suspended from his job and was not in contact with anyone. But he understood that he could not contact MS. He testified that MS called him on multiple occasions following his arrest in spite of the order of protection against him, but she never texted him after the incident. Telephone records showed calls from MS's phone to respondent's where there appeared to be no contact between the parties as suggested by the elapsed time displayed on the record (Tr. 231-38, 252-53, 259; Resp. Ex. B).

At a Hearing in criminal court on March 15, 2016, the day preceding the scheduled criminal trial and also the day before respondent pled guilty to a lower charge, one of the NYPD officers who responded to MS's call on July 26, 2015, testified. The officer recalled that MS was very emotional and had told the officer that respondent was trying to get on top of her and she fought him off (Pet. Ex. 1 at 27). The transcript of the Hearing also revealed that the DA intended to call a named emergency room doctor to explain the pain medication that MS was

prescribed following the incident, as well as the physician's assistant who treated MS at the hospital (Pet. Ex. 1 at 6-7).

Respondent stated that he pled guilty to assault in the third degree because after weighing the extreme circumstances, he felt that his livelihood would have been placed in jeopardy, and he did not want his family or anyone else to suffer because of an allegation made against him. Respondent conceded that his guilty plea had the same effect under the law as if he had been found guilty after a trial but he could not recall his admission during allocution that he intended to and caused physical injury to MS. Rather, during cross-examination, he denied that he intended to or caused MS physical injury. But when he was read that portion of the transcript of his allocution, he reversed his stance, and once again admitted that he intended to and caused physical injury to MS (Tr. 253, 275-77, 279-83; Pet. Ex. 2 at 9).

Respondent further admitted that he did not provide a copy of the certificate of disposition in the criminal case to anyone at the TBTA, but maintained that on the eve of his plea, he had informed Captain Eckhart that he intended to plead out. He also acknowledged that he did not submit to anyone at the TBTA, a copy of the final order of protection against him (Tr. 254, 283-84). Besides the reference memorandum of 2003 (Pet. Ex. 9), the TBTA's Domestic Violence Policy issued in March 2014, provides that, "An employee who obtains or is served with an order of protection is responsible for notifying the Director of HR, or the Manager of Budget and Administration, of any changes to the order of protection" (Pet. Ex. 6). It further instructs employees to become familiar with the policy since it is posted at all work locations and on-line.

Mr. D'Amora's report of his interview with respondent also departed little from the testimony adduced at trial except to the extent that it noted respondent saying that as MS was hitting him, they traveled out into the hallway where she fell to the ground, as opposed to respondent's testimony that when MS lunged at him, she flew into the hallway and got locked out of her apartment (Pet. Ex. 12).

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). Taking these factors into consideration, I found MS to be a credible witness while I found respondent to be incredible and his testimony self-serving.

With respect to the charge that respondent failed to notify the TBTA of his conviction and of the order of protection against him, the TBTA's rules place the responsibility squarely on the shoulders of the employee. In addition, the TBTA's policies require that the employee provide copies of the documents. While there appeared to be some dispute as to whom respondent should have advised and provided with copies given changes in title, respondent admitted that he did not provide a copy of the certificate of disposition to anyone. The call which he claimed to have made to Captain Eckhart about his intent to plead guilty was insufficient because that preceded the actual disposition of the case and was subject to change. There was also no evidence that respondent apprised the TBTA of the change in the status of the order of protection from temporary to permanent.

Therefore, the charge that respondent failed to promptly notify the TBTA of his conviction and sentence is sustained.

I turn now to the charge that respondent attempted to engage in forcible sexual intercourse with MS. Recalling the incident seemed to take an emotional toll on MS who often became teary-eyed during her testimony. That was not surprising given that she was in a lengthy relationship with respondent and it was clearly difficult for her to testify against him. But I found MS's recount of the incident to be clear and convincing, and it was consistent with her contemporaneous statement to the DA, as demonstrated by the criminal court complaint. Courts have held that contemporaneous statements are more reliable as they eliminate the "likelihood of deliberate misrepresentation or faulty recollection." *People v. Brown*, 80 N.Y.2d 729, 733 (1993); *See also 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).

MS's testimony was also consistent with her statement to Mr. D'Amora almost one year after the incident. Moreover, it was plausible. MS had had little sleep having worked a double shift, and she was not prepared to engage in pleasantries as she silently pointed out respondent's mail and returned to bed. It may well be that respondent recognized MS's vulnerability as a

result of little sleep, so when he returned to collect the mail which he had fallen, he decided to take advantage of that vulnerability. MS's testimony regarding her hard-fought struggle to prevent herself from being raped was the only plausible explanation as to how she got locked out of her apartment and how she sustained her injuries, about which there was no doubt, and which were unlikely to be self-inflicted.

In an effort to impeach MS's credibility, respondent relied on her statement to Mr. D'Amora and her testimony before this tribunal that she was the one who ended the relationship given that her text message to respondent suggested otherwise. I find that insufficient to impugn MS's testimony. If anything, her revelation to respondent that she had informed her mother of the break-up and had attributed responsibility to him, may well have been designed to elicit a response from him. But it stood for nothing more.

Respondent's claim that MS fabricated her allegations because she was upset at the break-up also did not make sense. Similarly, his testimony that he comforted MS who was crying about the break-up by pointing out her strength was incredible. Both MS and respondent testified that they had broken up three weeks prior to the incident and this was not the first time that respondent had visited her apartment since the incident. Moreover, they both acknowledged that they had had intimate relations since the break-up. Thus, respondent did not advance any logical explanation as to why, on this particular day, and with little sleep, MS would first engage in an unprovoked attack and then choose to be so upset at the break-up that she would concoct such vile accusations against him. Nor did he explain what would motivate MS to put herself through such a harrowing experience of having to testify before a grand jury and possibly a criminal trial, and again before this tribunal. The sordid details could not have been easy for her to relate on one, much less multiple occasions.

Respondent suggested that the telephone record which shows calls from MS's number to respondent on numerous occasions after the incident was an indicator that her allegations against him were untrue. While petitioner did not recall MS for her to explain her contact attempts, respondent's suggestion fails to convince me that he did not engage in heinous conduct against MS. Regardless of his conduct, MS was in the best position to assess his character. She clearly saw it as one of his foibles and in fact, expressed as such to Mr. D'Amora when she told him that respondent was not a bad person, but he had "lost it" and she did not want to see him incarcerated. Thus, I have no doubt that she was concerned about him after he was arrested.

Respondent argued that his decision to call and wait for a locksmith is not characteristic of one who has perpetrated the serious allegations made against him. This was hardly a convincing argument. He was the reason why MS was locked out of her apartment causing her to seek refuge in a neighbor's apartment, so it was not surprising that he would want to appear magnanimous. If anything, having realized the gravity of his conduct, it was the least he could do. More importantly, however, and as he told Mr. D'Amora, respondent was unaware that MS had called the police. Hence, there was no reason for him to flee the scene.

In sum, I find that the evidence overwhelmingly supports that respondent attempted to engage in forcible sexual intercourse with MS.

In so far as the charge that respondent caused MS physical injury is concerned, his initial denials before this tribunal are attenuated by his guilty plea during which allocution, the Criminal Court judge addressed the following specific question to respondent:

> By pleading guilty to count seven, Assault in the Third Degree, a Class A Misdemeanor, do you admit that here in Kings County, on or about July 26th of 2015, in Kings County, with intent to cause physical injury to [MS], you caused such injury to [MS]. Is that what happened, sir?

(Pet. Ex. 2). Respondent replied, "Yes, Your Honor." Even absent his plea, however, the evidence fully supported that respondent caused injury to MS.

Under Civil Service Law, off-duty misconduct is sanctionable where there is a sufficient nexus between the misconduct and the employing agency. *See Dep't of Correction v. Matthews,* OATH Index No. 228/14 (Nov. 18, 2013), *adopted,* Comm'r Dec. (Jan. 10, 2014), *aff'd,* NYC Civ. Serv. Comm'n Case No. 2014-0133 (May 7, 2014) (nexus found where respondent's wife's 911 call and domestic incident report that respondent, a Correction captain, had grabbed her around the neck, were supported by police officer's independent observation of injury to wife's neck, even though she declined to pursue charges in criminal court); *Dep't of Correction v. Bivens,* OATH Index No. 2088/10 at 4 (Aug. 20, 2010) (correction officer's conviction for petit larceny involving fraud had the requisite nexus with her position "because of the inherent conflict between the commission of such crimes and a correction officer's law enforcement responsibilities"); *Dep't of Correction v. Dash,* OATH Index No. 336/06 (Mar. 28, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-66-SA (June 13, 2007) (nexus found where respondent was convicted of third degree assault and resisting arrest while off-duty).

Respondent’s attempt to have forcible sexual intercourse with MS is a criminal act which is inherently contrary to the law enforcement responsibilities of peace officers. *Dep’t of Correction v. McDowell,* OATH Index No. 150/88 at 12 (Oct. 7, 1988), *aff’d,* 159 A.D.2d 424 (1st Dep’t 1990). Hence, by proving this act alone, petitioner established a nexus between respondent’s off-duty misconduct and his job. But in addition, the nexus between respondent’s arrest and convictions is clear. Respondent is a law enforcement officer whose criminal conviction runs contra to his law enforcement duties. Accordingly, the disciplinary charges brought by the TBTA against respondent are appropriate for his proven off-duty misconduct.

FINDINGS AND CONCLUSIONS

1. Petitioner sustained its charges against respondent that on July 26, 2015, he attempted to engage in forcible sexual intercourse with his former girlfriend causing her to sustain physical injuries.

2. The charge that respondent was convicted of assault in the third degree was undisputed, and therefore sustained.

3. Petitioner also established that respondent failed to notify the TBTA of his conviction and sentence, and provide to anyone at the TBTA, copies of documents associated therewith, in violation of its rules.

RECOMMENDATION

Upon making the above findings and conclusions, I requested a copy of respondent's personnel abstract in order to make a penalty recommendation. Respondent was appointed as a Bridge and Tunnel Officer on April 4, 2005. He has no history of formal discipline and has had no performance evaluations within the past five years. For the charges that were the subject of this trial, respondent served a pre-trial suspension of 30 days without pay. Petitioner now seeks respondent’s termination.

This tribunal has generally applied the principles of progressive discipline, which aims to achieve employee behavior modification through increasing penalties for repeated or similar misconduct. *See Health & Hospitals Corp. (Woodhull Medical & Mental Health Ctr.) v. Ford*, OATH Index No. 2383/09 at 11 (July 10, 2009) (“The theory of progressive discipline is to modify employee behavior through increasing penalties for the same or similar misconduct, and

to give employees full notice that if they do not modify their conduct, they risk termination."); *Dep't of Transportation v. Jackson*, OATH Index No. 299/90 at 12 (Feb. 6, 1990) ("It is a well-established principle in employment law that 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.").

Notwithstanding, for off-duty misconduct, we have imposed penalties which have been commensurate with the level of misconduct and have included termination. *See Dep't of Correction v. Serrao*, OATH Index No. 2050/07 (Oct. 16, 2007) (termination recommended for respondent who assaulted his girlfriend and discharged his weapon); *Dep't of Sanitation v. Maldarelli,* OATH Index No. 1495/05 (Dec. 13, 2005) (respondent terminated where he pled guilty to off-duty felonious act of insurance fraud in the third degree).

Thus, even absent a history of prior discipline, peace officers who engage in violent off-duty misconduct with or without a resulting criminal conviction may be terminated. *See Dep't of Correction v. McDermott,* OATH Index No. 280/96 (June 26, 1996), *aff'd*, 250 A.D.2d 538 (1st Dep't 1998) (termination for pattern of on and off-duty harassing behavior toward Captain and his wife); *Dep't of Correction v. Islar*, OATH Index No. 321/88 (Oct. 5, 1988) (termination for conviction of third degree assault for engaging in fight with off-duty police officer, fracturing his jaw); *Dep't of Correction v. Flores*, OATH Index No. 146/82 (July 9, 1982) (termination for assaulting restaurant personnel and unholstering firearm).

Respondent argues against termination and cited to my recommendation in *Department of Correction v. Matthews,* OATH Index No. 228/14 (Nov. 18, 2013), *adopted,* Comm'r Dec. (Jan. 10, 2014), *aff'd,* NYC Civ. Serv. Comm'n Case No. 2014-0133 (May 7, 2014). I find that case inapposite because the underlying conduct of the respondent in *Matthews,* and respondent in the present case, is incomparable. In *Matthews*, a Correction captain was charged with unbecoming conduct for assaulting his wife of 25 years. The captain was arrested and criminally charged with assault based on his wife's allegations that he punched her in the back and grabbed her by the neck. The criminal charges in *Matthews* were dismissed after the complainant wife did not cooperate with the DA's office. While both Captain Matthews and respondent are law enforcement officers, respondent pled guilty to a crime involving physical injury.[3] Moreover,

[3] *See* Penal Law § 120.00 (Lexis 2017).

respondent's attempt to engage in forcible sexual intercourse with MS, which was overwhelmingly supported by the evidence and MS's testimony, was far more violent and thus, egregious than Captain Matthews' conduct towards his wife.

Accordingly, I find termination to be an appropriate penalty in this case, and I so recommend.

Ingrid M. Addison
Administrative Law Judge

August 29, 2017

SUBMITTED TO:

DONALD SPERO
President

APPEARANCES:

EDUARDO MIYASHIRO, ESQ.
Attorney for Petitioner

PITTA LLP
Attorneys for Respondent
BY: JOSEPH F. FARELLI, ESQ.
JOSEPH BONOMO, ESQ.

THE CITY OF NEW YORK
OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
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In the Matter of
TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Petitioner,

-against-

PRESIDENT'S DECISION

LAWRENCE JONES,

Respondent.
---x

I received and reviewed the Report and Recommendation (OATH Index No. 1229/17) dated August 29, 2017, issued by the Honorable Ingrid M. Addison, Administrative Law Judge ("ALJ") of the City of New York, Office of Administrative Trials and Hearings ("OATH"), the transcript of the hearing held before the ALJ and the exhibits introduced at the hearing.

In the Report and Recommendation, ALJ Addison concluded the following:

1. Petitioner sustained its charges against Respondent that on July 26, 2015, he attempted to engage in forcible sexual intercourse with his former girlfriend causing her to sustain physical injuries.

2. Petitioner sustained its charge that Respondent was convicted of Assault in the Third Degree.

3. Petitioner also established that Respondent failed to notify the TBTA of his conviction and sentence, and provide to anyone at the TBTA, copies of documents associated therewith, in violation of its rules.

ALJ Addison recommended that Respondent be terminated from his employment for the misconduct proven at the hearing. ALJ Addison noted that the hearing at OATH on the charges against the Respondent was held on March 22, 2017, May 9, 2017 and July 31, 2017.

In determining the Respondent's guilt and the appropriate penalty to recommend, the ALJ carefully analyzed the evidence presented at the hearing and then reviewed prior precedential cases. The ALJ noted that even absent a history of prior discipline, peace officers who engage in violent off-duty misconduct with or without a resulting criminal conviction may be terminated.

The ALJ, in recommending termination, took into consideration, among other things, that Respondent has been employed by the TBTA since 2005 when he was appointed to the title of Bridge and Tunnel Officer, and had no history of formal discipline.

On August 29, 2017, the ALJ sent a letter to the Authority and to Respondent, instructing that Respondent is entitled to comment on the OATH Report and Recommendation prior to my final action, and that the Authority should notify Respondent of the time period permitted for such comment. The Authority complied in a letter to Respondent and Respondent's counsel dated August 29, 2017 in which they were advised to submit any comments by the close of business on September 11, 2017. Respondent and Respondent's counsel did not submit any comments by the close of business on September 11, 2017.

. As the President of the Triborough Bridge and Tunnel Authority, I have the authority, pursuant to Civil Service Law Section 75, to accept or reject the recommendation of the OATH ALJ. In rendering my decision, I reviewed the Report and Recommendation issued by ALJ Addison, the hearing transcript and the evidentiary exhibits in this case.

I accept the ALJ's conclusions as they were supported by the record developed before the ALJ, who was in the best position to elicit the facts and assess the credibility of the witnesses. With respect to civilian witness MS, the ALJ found that she was a credible witness. The ALJ noted that she found MS's recounting of the incident to be clear and convincing and was consistent with, among other things, her contemporaneous statement to the District Attorney's Office, as demonstrated by the criminal complaint. Moreover, medical records in evidence corroborated that MS was treated for her injuries. On the other hand, the ALJ did not find the Respondent to be credible. For example, the ALJ noted that during cross examination, the Respondent denied he intended to or caused MS physical injury. However, when he was read that portion of the transcript of his allocution in Criminal Court, he reversed his stance, and once again admitted that he intended to and caused physical injury to MS.

I find that based upon my review of the record, there exists substantial evidence for me to accept the findings and recommendation of the OATH ALJ that the Respondent be terminated from his employment with the TBTA. I accept the ALJ's conclusions as they were supported by the record developed during the hearing.

I concur with the ALJ that the hearing record amply proves the charges for which the ALJ found Respondent guilty. I also concur with the ALJ's sound reasoning in her determination that a penalty of termination is warranted under these facts.

I concur with the ALJ that Respondent's attempt to have forcible sexual intercourse with MS is a criminal act which is inherently contrary to the law enforcement responsibilities of peace officers. I concur that the Respondent's criminal conviction runs

counter to his law enforcement responsibilities. I concur that the Respondent failed to promptly notify the TBTA of his criminal conviction and of the order of protection against him.

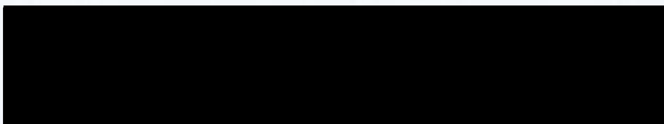
The Respondent's proven actions involved vile, violent and egregious behavior. The TBTA cannot depend on the Respondent to carry out its mission – to provide safe, efficient and courteous service to our customers.

Therefore, it is my determination, given the substantial evidence to support a finding that the Respondent is guilty of serious misconduct, that the penalty of termination from his employment is appropriate and not shocking to one's sense of fairness.

I direct that Respondent be terminated from his employment with the TBTA effective immediately.

Under the provisions of Section 75 of the Civil Service Law, the Respondent is entitled to appeal from this determination by application either to the Civil Service Commission or to a court in accordance with the provisions of Article 78 of the Civil Practice Law and Rules. If Respondent elects to appeal to the Commission, such appeal must be filed in writing within twenty (20) days of receipt of this determination. A decision of the Commission is final and conclusive.

Dated: September 15, 2017
New York, New York



Cedrick T. Fulton
President, TBTA

cc: OATH
Joseph Farelli, Esq., attorney for Respondent
Lawrence Jones, Respondent