

Dep't of Sanitation v. Chau

OATH Index No. 1420/17 (Feb. 16, 2018)

Sanitation supervisor charged with failing to notice that a screen cover on a handheld device was cracked, failing to notify an officer to appear for a hearing, failing to prepare a report regarding an officer's off-duty incident, compromising the scene of an accident and failing to prepare a report, failing to document a sanitation worker's sick leave, failing to have a truck repaired, abandoning his post, and making false statements during an official investigation. ALJ finds petitioner did not establish that respondent failed to report a cracked handheld device, failed to have a truck repaired or made false statements during an official investigation. The remaining charges were sustained. ALJ recommends a 19-day suspension without pay.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SANITATION
Petitioner
- against -
PETER CHAU
Respondent

REPORT AND RECOMMENDATION

KARA J. MILLER, *Administrative Law Judge*

This is a disciplinary proceeding referred by petitioner, the Department of Sanitation, pursuant to section 16-106 of the New York City Administrative Code. Peter Chau, a sanitation supervisor, was charged with failing to be responsible and accountable for carrying out his assigned supervisory tasks on six occasions (Rule 8.1); failing to accurately prepare and record information in Department files, records, reports, and forms on three occasions (Rule 8.19); failing to follow the proper procedures and complying with Department rules on the preparation and maintenance of Department files, records, reports, and forms on three occasions (Rule 8.6); and failing to cooperate with an official inquiry on one occasion (Rule 4.1).

Following a three-day trial before me, I find that five of the eight charges have been proven and recommend that respondent be suspended without pay for 19 days.

ANALYSIS

The Department originally filed ten complaints against respondent but withdrew two during the trial.¹ The remaining charges allege that respondent failed to notice damage to the screen cover of a handheld device (complaint 99985); failed to notify an officer to appear for an ECB hearing (complaint 99442); failed to prepare reports for an officer who had an off-duty incident (complaint 103492); allowed the scene of an accident to become compromised by permitting the sanitation truck and driver to leave and failed to prepare the report (complaint 109246); failed to document a sanitation worker's illness in the computer system, preventing him from returning to work (complaint 126911); failed to take a truck out of service after being notified that there was a mechanical problem (complaint 133510); abandoned his post and failed to document that a garage utility worker was driving a sanitation truck into the field (complaint 136130); and made false statements during an official interview (complaint 136133) (ALJ Ex. 1; Tr. 7-10, 76, 194, 414).

Failed to Notice Damage to Screen Cover of Hand Held Device (complaint 99985)

Respondent is charged with failing to notice and report discernable damage to the screen cover of a handheld device during his 3:00 p.m. to 11:00 p.m. shift on September 9, 2011 (ALJ Ex. 1).

Respondent, while working as a lieutenant assigned to the Sanitation Enforcement Division, was responsible for assigning vehicles, handheld radios, and NOVAS devices to the Sanitation police officers in his squad. A NOVAS device is used to electronically issue summonses or notices of violation (Tr. 63-64). Lieutenants are responsible for ensuring that all of the NOVAS devices are signed out at the beginning of the shift and are returned in good condition at the end of the shift (Tr. 64). These devices are tracked in a logbook (Pet. Ex. 4; Tr. 65).

Superintendent Kenneth Dombrowski was assigned to the Sanitation Enforcement Division as an Inspector, supervising three enforcement squads during the 2:00 p.m. to 10:00

¹ The Department withdrew complaint numbers 103493 and 136129.

p.m. shift during 2011 (Tr. 62-63). Superintendent Dombrowski testified that he was notified on September 9, 2011, that a NOVAS device was damaged. He conducted an investigation to ascertain who was in charge of distributing and collecting the equipment that day (Tr. 65, 68).

When he examined the NOVAS device, Superintendent Dombrowski found “discernable damage” on the display screen, which he defined as something that would make the screen totally incapacitated (Tr. 83). The Department identifies each piece of equipment by number in a logbook and tracks who has taken it out and the times it was taken out and returned at the end of the shift. The equipment logbook also indicates who received the piece of equipment when it was returned (Pet. Ex. 4). After reviewing the logbook, Superintendent Dombrowski determined that respondent initialed the logbook, indicating that he received the device from an officer at the end of the shift and that the equipment was in good condition (Tr. 74-78, 85). If the returned equipment is damaged or broken, then the lieutenant should report the damage and submit an unusual incident report (Tr. 78). The superintendent concluded that respondent failed to file an unusual incident report (Tr. 80).

Rafael Vanderpool, a supervisor for the unit that provides technical support for these devices, testified that the handheld devices often malfunction because they are beyond their life expectancy (Tr. 487-88). A handheld device will be taken out of commission if it can no longer be repaired (Tr. 487). If a device is in need of repair, the supervisor assigned to distribute and/or collect them will notify Mr. Vanderpool (Tr. 489). Mr. Vanderpool corroborated Superintendent Dombrowski’s testimony that if the screen of a handheld device is broken, the supervisor needs to fill out paperwork to report it (Tr. 493, 495).

Respondent testified that the handheld devices are prone to damage because the officers who use them “poke” the screen with a stylus and “they have very strong hands” (Resp. Ex. I; Tr. 424). Respondent provided a copy of a page from the Queens Squad’s telephone order book from June 2011, to demonstrate that the NOVAS devices are often sent out to repair the screens (Resp. Ex. H; Tr. 426-27). Additionally, respondent submitted a letter from an employee in petitioner’s Information Technology (“IT”) department, who similarly stated that the handheld devices were “past their life expectancy and are sent for repair constantly making them very sensitive and prompted [sic] to malfunction” (Resp. Ex. J; Tr. 429). This letter, however, did not address this particular handheld device or respondent’s reporting responsibilities.

Superintendent Dombrowski acknowledged that there were some issues with the screens on the NOVAS devices because they are glass. Sometimes they would get scratched or cracked during normal use (Tr. 84). Regardless, he testified that respondent was aware that he was responsible for reporting damaged equipment because he had been previously warned for not reporting damaged equipment (Tr. 80).

Respondent conceded that he was responsible for ensuring that returned equipment is not damaged (Tr. 424). He testified, however, that he did not recall the incident because no one had showed him a damaged handheld device that day (Tr. 423).

In a disciplinary proceeding, petitioner “has the burden of proving its case by a fair preponderance of the credible evidence.” *Human Resources Admin. v. Hilliard-Smith*, OATH Index No. 280/12 at 2 (Dec. 15, 2011) (citing *Dep’t of Correction v. Hall*, OATH Index No. 400/08 at 2 (May 30, 2008)). See *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). This has been defined as “the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.” Prince, Richardson on Evidence § 3-206 (Lexis 2018).

Instead of submitting the page in the equipment logbook for Friday, September 9, 2011, the date charged, petitioner submitted the page for Thursday, September 8, 2011 (Pet. Ex. 4). Consequently, the Department failed to establish that respondent actually signed in the broken handheld device on September 9, 2011. Accordingly, this charge should be dismissed.

Failed to Inform an Officer to Appear at ECB for a Hearing (complaint 99442)

Respondent is charged with failing to inform Officer Caceres at roll call to appear the next day at ECB at 2:30 p.m. for a hearing. Respondent is further charged with failing to make a notation of these orders on the September 29, 2011 sign-in sheet, and failing to ensure that the orders were followed on September 30, 2011. The Department alleged that Officer Caceres did not appear at ECB, and the hearing proceeded without him (ALJ Ex. 1).

Superintendent Dombrowski testified that an email was sent to respondent on September 29, notifying him that Officer Caceres was to report to ECB the next day to testify at a hearing at 2:30 p.m. (Pet. Ex. 8; Resp. Ex. D; Tr. 97). Officers working on the 3:00 p.m. shift, who are scheduled to testify at ECB the next day, should be directed during roll call to arrive one hour

earlier for their shift so that they can be on time for their ECB hearing (Tr. 91, 98). On September 29, 2011, respondent was in charge of the roll call (Pet. Ex. 6; Tr. 96). Superintendent Dombrowski testified that respondent failed to follow the protocol and did not notify Officer Caceres that he was scheduled to appear at ECB on September 30, 2011 (Tr. 92, 97).

On September 30, 2011, Officer Caceras reported to work and signed in at 3:00 p.m., which was on time for his regular shift but late for his changed tour. Since the officer was scheduled to appear at a 2:30 p.m. hearing at ECB and did not arrive at work until 3:00 p.m., he missed the hearing. When Superintendent Dombrowski questioned Officer Caceras about what happened, he informed the superintendent that he was never notified about the hearing (Tr. 99, 209). In addition, after reviewing the DS57 for September 29, 2011, the superintendent discovered that respondent had never noted Officer Caceras' shift change for September 30 (Pet. Ex. 7; Tr. 99).

Superintendent Dombrowski acknowledged that he could not recall what respondent had said when he questioned him about the incident (Tr. 100, 103). The superintendent was unaware of the outcome of the ECB case, but admitted that he would not be surprised if the Department had won even without the officer appearing for the hearing (Tr. 102).

Officer Caceras testified that he worked on September 29 and 30, 2011. He stated that normally when he has to appear at ECB for a hearing, he is notified by his immediate supervisor during roll call and the information is also noted on the DS57, which is a reminder when he signs out at the end of the day (Tr. 205). Officer Caceras testified that respondent never informed him during roll call the morning of September 29 that his shift had been changed for the following day. Moreover, there was no notation about the hearing on the DS57 when he signed out on September 29 (Pet. Ex. 7; Tr. 205-07). When he reported to work at 3:00 p.m. on September 30, respondent asked him why he was there. Respondent told Officer Caceras that he was scheduled to start at 2:00 p.m. that day because he had a 2:30 p.m. hearing at ECB. He told the officer to go to ECB immediately (Pet. Ex. 9; Tr. 207-08). Officer Caceras was unable to recall the time he had arrived at ECB or the disposition of the case.

During cross-examination, Officer Caceras was asked whether it was a comprehension issue because respondent speaks very quickly. The officer adamantly denied the assertion that respondent had told him about the hearing but he was unable to understand what respondent had

said. Indeed, Officer Caceras testified that he has never had a problem understanding respondent in the past (Tr. 214). He further testified that nothing was posted in the roll call room notifying him to report to ECB the next day and there was nothing noted on the DS57 (Tr. 215).

Respondent testified that as a lieutenant for Sanitation Police assigned to the 3:00 p.m. to 11:00 p.m. shift, he held roll call at 3:00 p.m. in the muster room. He maintained that he conducted roll call on September 29, 2011, by calling out everyone's name and reading the orders for the day, including that Officer Caceras had a court date the next day at 2:30 p.m. (Pet. Ex. 8; Resp. Ex. D). Despite Officer Caceras' testimony to the contrary, respondent maintained that he then posted the orders on a column in the muster room. Respondent asserted that when the officers return from the field it is their responsibility to check their orders for the next day. He concluded that it was Officer Caceras' fault that he failed to appear at ECB on September 30, because he must not have checked the posted orders (Resp. Ex. C; Tr. 383, 386-89, 404, 418).

According to respondent, he was surprised to see Officer Caceras at the 3:00 p.m. roll call on September 30 (Pet. Ex. 9). Respondent told the officer that he was supposed to be in court and the officer left immediately. Respondent testified that Officer Caceras arrived at ECB "a little bit late" and the judge reprimanded him but ultimately ruled in the City's favor (Resp. Ex. A; Tr. 390, 397).

Respondent acknowledged that the change of shift orders arrive at the facility prior to the 3:00 p.m. roll call (Pet. Ex. 8; Resp. Ex. D; Tr. 399). He further acknowledged that it would be the supervisor's responsibility to indicate on the DS57 that an officer had a change of shift for the following day (Tr. 409). In reviewing the DS57 for September 29, 2011, respondent conceded that there was no notation for Officer Caceras to change his shift (Pet. Ex. 7). Respondent testified, however, that he normally enters the information on the DS57 towards the end of the shift but on September 29, 2011, he was unable to enter the information because he was in the field and did not return to the garage in time for the end of shift sign out (Resp. Ex. E; Tr. 410).

Indeed, respondent boldly contended that it was actually Superintendent Dombrowski's fault that there was no notation on the DS57. Respondent maintained that because he returned to the garage late, Superintendent Dombrowski should have made the notation of the officer's change of tour on the DS57 in his absence (Pet. Ex. 7; Resp. Exs. E, G; Tr. 391-93). Respondent relied on a Department Message issued on September 1, 2011, which states that the location

supervisor or designee will clearly indicate a sanitation worker's shift change on the DS57 in red ink (Resp. Ex. F; Tr. 394). Respondent highlighted that the Department Message further states that the "District Superintendent will monitor to ensure compliance" (Resp. Ex. F; Tr. 395). As a lieutenant in the enforcement unit, respondent was the location supervisor. Superintendent Dombrowski was the district superintendent (Tr. 408).

Respondent reasoned that since there is nothing in the Department Message saying that the supervisor needs to enter the information at the beginning of the shift, he did not do anything wrong (Tr. 411). Respondent asserted that Superintendent Dombrowski signed everyone out and he was supposed to "monitor and ensure compliance" with the Department Message, therefore the superintendent should have realized the information was not on the DS57 and should have entered it himself (Tr. 412, 414). Respondent maintained that the superintendent should have taken responsibility for his error, instead of blaming him (Tr. 412).

Respondent refused to take any responsibility for failing to notify Officer Caceres of his September 30, 2011 court date. To the contrary, he claimed that it was Officer Caceres' fault for not looking at the assignments posted in the muster room and Superintendent Dombrowski's fault for not ensuring that respondent had entered the information on the DS57. Even if respondent's testimony regarding his practice to enter the information on the DS57 towards the end of the tour is true, it is a questionable practice. Moreover, as a supervisor, if he had to go into the field during the tour, the responsible thing would have been to enter the information prior to leaving just in case he was delayed and missed the officers' signing out. Regardless, I question respondent's sincerity and credibility. It does not comport with common sense that respondent would wait until the end of the shift to enter the officer's assignment on the DS57, but would post the following day's assignments in the muster room at the beginning of the tour. Most likely these two activities would have been completed contemporaneously.

Respondent's testimony sounds like a fabricated excuse for the purposes of trial. Furthermore, he misconstrued the Department Message regarding the superintendent's responsibility. Even if Superintendent Dombrowski was to monitor what respondent was doing, it does not obviate respondent's responsibility to do his job in the first place. Respondent relied on faulty logic by asserting that he could not do his job because he was out in the field, therefore he did nothing wrong. And, by extension, that the superintendent failed to notice that respondent did not do his job, so it is ultimately the superintendent's fault that the officer missed his court

date. It was respondent's responsibility as the supervisor to notify the officer of his court date the next day. I credit Superintendent Dombrowski's and Officer Caceres' testimony that respondent did not do so. Accordingly, this charge should be sustained.

Failed to Prepare Reports for an Officer's Off-Duty Incident (complaint 103492)

Petitioner alleged that respondent was notified by Officer Rivera, before and during the March 12, 2012 shift, about an off-duty incident that occurred the previous day. Respondent is charged with failing to timely prepare an unusual incident report and to notify his supervisors on March 12, 2012 (ALJ Ex. 1).

Officer Rivera testified that as soon as he arrived at work on March 12, 2012, he reported to respondent that he had an off-duty incident the previous day involving a civilian and the police (Tr. 219, 222-24). After the incident he drafted a typed statement on his home computer regarding what had occurred. The next day, when he reported to work he provided the printed statement and a USB drive containing the statement to respondent so that respondent would not have to re-type the entire statement for the unusual incident report (Tr. 219, 223). Officer Rivera testified that when he tried to give it to respondent, he would not take it. Respondent told him, "Cuz, if you do that you're going to jam yourself up. Cuz, don't do it. Cuz, I'm trying to look out for you, don't do it" (Tr. 220, 225).

Officer Rivera further testified that towards the end of the shift or the following day, Superintendent Dombrowski questioned him about not providing respondent with all of the information regarding the incident (Tr. 221). Officer Rivera was surprised and told the supervisor that he tried to give the information to respondent but he refused to take it (Tr. 227).

Superintendent Dombrowski corroborated Officer Rivera's testimony. The superintendent testified that he was informed towards the end of the shift on March 12, that Officer Rivera had been involved in an off-duty incident with the police (Tr. 105, 113). Since an off-duty incident involving the police requires prompt notification to the Director of Enforcement, the superintendent directed respondent to prepare an unusual incident report (Tr. 106).

Superintendent Dombrowski recalled respondent telling him that he was waiting for Officer Rivera to provide him with additional information in order to fill out the report. The superintendent stressed that verbal notification is also required and noted that respondent failed

to provide verbal notification as soon as Officer Rivera informed him about the incident. When Superintendent Dombrowski asked respondent about the lack of verbal notification, respondent claimed that he did not have enough of the necessary details to provide verbal notification either (Tr. 113-14).

Superintendent Dombrowski testified that he questioned Officer Rivera about his notification and the officer told him that he had informed respondent at the start of the shift about the incident. Department Message #DM2012-0454 reminds Department personnel that “all Unusual Incidents must be reported to the Borough Office or Division Headquarters immediately.” Incidents that are not reported immediately require a letter to the Assistant Chief of Operation explaining the delay (Pet. Ex. 10; Tr. 110-11). Superintendent Dombrowski maintained that respondent should have apprised him of the situation once he learned about it, but he was not made aware of the incident until approximately six hours later (Tr. 107-08).

Respondent denied that Officer Rivera notified him about the incident at the start of the shift. He testified that the officer did not report an off-duty incident until about an hour before the end of the shift (Tr. 463, 468). Respondent asked him what had happened and Officer Rivera replied, “I don’t know what the situation is, everything is on my home computer” (Tr. 464). Respondent testified that he told the officer to go home and get the information because there was still time to report it and Officer Rivera told him that he did not want to (Tr. 464).

Respondent further testified that the following day he received a call from the superintendent, asking about the incident. Respondent told him that Officer Rivera mentioned something about a gun, but he did not know what the officer was talking about. According to respondent, when Officer Rivera reported to work the following day, he gave him the paperwork and a flash drive. Respondent testified that he looked at the information carefully and said to himself, “Whoa, what? This is what happened?” “He never had a gun” (Tr. 464). Respondent used the information on the flash drive to fill out the unusual incident report and then submitted it (Tr. 464-65). Respondent testified that the superintendent later asked him “about a situation with Rivera having to do with a gun and IAB” (Tr. 469). Respondent replied that he had no idea what the chief was talking about (Tr. 469).

Respondent contended that he did nothing wrong because an unusual incident is something that occurs while on the job and this incident occurred while Officer Rivera was off-duty (Tr. 465-66). Respondent repeatedly denied that Officer Rivera told him about the incident

at the start of the tour. He further denied that he told the officer not to report it (Tr. 466, 468). In addition, he insisted that Officer Rivera did not immediately provide him with all of the pertinent information (Tr. 465, 470).

I found Officer Rivera to be sincere and credible. Moreover, his testimony was corroborated by Superintendent Dombrowski. Respondent, on the other hand, is less than credible. He is quick to blame everyone else for his failings. His testimony at times was confusing and contradictory. His contentions that the officer did not want to give him the information that he had on his personal computer and that respondent told him to go home to get it is difficult to believe. It makes more sense that if the officer had taken the time to record the information regarding the incident on his home computer that he intended on sharing it with the Department. Also, respondent's testimony about a gun being involved in the incident was baffling and seemed to be improvised to make the officer look unreliable.

I find that petitioner established that respondent was notified about an officer's off-duty incident at the start of his shift and failed to timely report it. Accordingly, the charge should be sustained.

Allowed an Accident Scene to Become Compromised and Failed to Prepare a Report (complaint 109246)

Petitioner alleged that on December 4, 2012, at 6:00 a.m., respondent was ordered to report to the scene of an accident at First Avenue and East 106th Street by the Manhattan borough radio room. Upon arriving at the scene, respondent observed that the sanitation truck had made contact with a civilian vehicle and that the civilian was claiming injury. After radioing for emergency medical services ("EMS"), the police department ("NYPD"), and the Department's Safety Unit ("Safety") to report to the scene, respondent allowed the truck and the sanitation worker driving the truck to leave the scene prior to Safety's arrival. Respondent is charged with compromising the scene of an accident and failing to prepare an unusual incident report regarding the accident to notify the borough that a civilian was injured and taken to the hospital (ALJ Ex. 1).

Respondent was the assigned Night District Supervisor when the accident occurred on December 4, 2012 (Tr. 320, 437). He testified that at approximately 6:00 a.m. he responded to an accident scene at First Avenue and East 106th Street in Manhattan. When he arrived, EMS

was present and the civilian's car was already hooked up to a tow truck. According to respondent, he did not observe any damage when he examined the sanitation truck (Tr. 438-39).

Superintendent Christina Stennett testified that she was initially notified about the accident when she received a telephone call earlier that morning from a deputy chief, who wanted an explanation regarding the accident scene being compromised (Tr. 316, 318). Superintendent Stennett called respondent, who was at the scene. He informed her that the civilian's vehicle was towed away by NYPD and that the sanitation truck was redeployed to a collection route in another district. Superintendent Stennett acknowledged that the Department does not have any control over civilian vehicles being removed from the accident scene by NYPD, but maintained that the sanitation truck should not have been removed prior to Safety responding to the accident (Tr. 331-33, 335).

Respondent testified that over his objection, the Manhattan borough superintendent ordered that the truck be removed from the scene and placed on a collection route (Tr. 439). Respondent maintained that he could not override the superintendent's order regarding the truck and, with respect to the civilian vehicle, he had to defer to the NYPD's authority (Tr. 440). Respondent asserted that even though Safety was called to the accident scene, as the responding officer, he was still in charge of the accident investigation. Even though respondent had called Safety to the scene, he had trouble articulating what Safety's role was in the accident investigation (Tr. 455-57). Indeed, respondent testified "I'll be honest, I really don't know what their function is" (Tr. 456).

Superintendent Stennett disagreed with respondent and maintained that as the investigating supervisor, respondent could have overruled an order to move the truck if it was a serious accident. Indeed, all he needed to do was advise the borough superintendent that the truck had to remain at the scene until Safety arrived to take photographs. Respondent failed to do this and the truck was removed and placed back into service (Tr. 334). Superintendent Stennett testified that because of the severity of the accident and the fact that a civilian was taken to the hospital, respondent should not have permitted the sanitation truck to be removed from the scene even if the civilian's car had already been towed away by NYPD (Tr. 337-38). Moreover, when a sanitation worker is involved in a serious accident, he must remain on the scene so that Safety can take his statement. Respondent, however, permitted the driver of the sanitation truck to be taken to the clinic for a drug test before Safety arrived (Tr. 338-40).

Superintendent Stennett testified that the standard operating procedure for a supervisor responding to an accident involving a Department vehicle is to: secure identification from Department personnel; attempt to obtain identification from civilians; ascertain how the accident occurred; request EMS to respond to the scene if there are any injuries; notify NYPD, if necessary, depending on the severity of the accident; and notify the district superintendent and borough office (Tr. 317).

At approximately 7:00 a.m., after hanging up with the deputy chief inquiring about the accident, Superintendent Stennett called respondent. He informed her that he was on the scene and “completing all necessary protocols” (Tr. 321). About an hour later when she saw respondent in the office, he informed her that Safety had ordered him to complete the accident report and authorized overtime for him to do so (Pet. Ex. 19). The superintendent had thought that it was odd for respondent to need overtime so she asked him if everything was okay (Tr. 323). He replied yes, so she directed him to document that Safety had authorized the overtime in the telephone order book. Superintendent Stennett subsequently learned that Safety had not ordered respondent to work overtime, instead, respondent volunteered to work overtime to complete the report (Tr. 323-24, 345). Displeased, the superintendent told respondent that he could not work overtime and that he should stop working on the accident report and just leave the information for Supervisor Rodriguez, who was working the next shift, to complete (Tr. 324, 345).

Respondent’s testimony differed. He testified that he returned to the garage near the end of his shift and he explained to Superintendent Stennett that he would need overtime to complete the accident report. He denied telling her that Safety authorized his overtime and was confused by the superintendent’s order to speak to a supervisor in Safety. Nevertheless, he called Safety and they said they would not authorize overtime for him. According to respondent, at about 8:20 a.m., when he notified Superintendent Stennett that Safety had denied his overtime, she told him to stop what he was doing, sign out, and leave the building. Respondent contended that he told her that the documents were very important and that he would stay on his own time without pay to complete the paperwork (Tr. 459). According to respondent, Superintendent Stennett said she did not care and told him to leave the building. When he asked her what she wanted him to do with the paperwork, she responded “I do not care what you do with it,” “I don’t want it, do not give it to me” (Tr. 460).

Superintendent Stennett received another telephone call from the same deputy chief at about 11:00 a.m., asking about the unusual incident report. According to the deputy chief, respondent had not submitted the information regarding the accident to the borough office (Tr. 322, 326). Superintendent Stennett testified that a supervisor investigating an accident should call the borough office upon arriving at the scene to provide preliminary information and then call back later to follow up with the details for the unusual incident report (Tr. 318). The report should be completed about 30 minutes after the accident. Since this accident occurred at between 6:00 a.m. and 7:00 a.m., Superintendent Stennett maintained that the preliminary information regarding the accident should have at least been submitted to the borough office before the end of respondent's shift at 8:00 a.m. (Tr. 326).

Superintendent Stennett called Supervisor Rodriguez and directed him to forward the information that respondent had left for him to complete the accident report to the borough office so that they could draft the unusual incident report. According to Superintendent Stennett, Supervisor Rodriguez informed her that respondent had locked the accident information in his personal locker. The superintendent instructed Supervisor Rodriguez to call respondent and obtain the information over the telephone. It was at this point that Superintendent Stennett had learned for the first time that the civilian driver had been taken to the hospital. Superintendent Stennett sent Supervisor Rodriguez to the hospital to check on the status of the civilian driver while she provided the information for the unusual incident report to the borough office at 11:45 a.m. (Pet. Exs. 18, 19; Tr. 327-28). Superintendent Stennett testified that respondent did not tell her that the unusual incident report had not been done nor did he inform her that the civilian was injured and taken to the hospital (Pet. Ex. 19).

Respondent asserted that his usual practice is to provide verbal unusual incident report to the borough office (Tr. 439). He does not submit a written report because the clerk in the borough office is supposed to prepare the unusual incident report (Tr. 441). Respondent testified that he called the Manhattan borough office from the accident scene to verbally submit his unusual incident report regarding the accident. Respondent maintained that he spoke with Mr. Green, a civilian clerk, and provided a description of the accident, including the location, the names of the police officers and EMS workers, the sanitation worker's information, and the civilian driver's information (Tr. 438-39). He further maintained that he later informed Mr. Green that the civilian had gone to the hospital (Tr. 439).

Respondent further testified that he never called Mr. Green to follow up on the unusual incident report when he returned to the garage because he had already provided him with all of the necessary information when he called from the accident scene (Tr. 443). Respondent asserted that “someone” called him later in the day and said that they could not find the unusual incident report. He told them that he had given all of the information to Mr. Green. Respondent testified that he then provided the information again “off of the top of [his] head” (Tr. 446). When asked if Mr. Green could corroborate his testimony, respondent testified that he asked Mr. Green to appear as a witness on his behalf or submit written statement and he refused because “he knows he’ll be in trouble” (Tr. 441).

I found respondent’s testimony regarding this charge to be at times confusing because he was more focused on the accident report than the unusual incident report. Respondent was evasive during cross-examination and most of his answers were not responsive to the question asked. Respondent insisted that he provided the information to the borough office for the unusual incident report. As in the other charges, respondent blamed someone else. He asserted that he was only responsible for verbally notifying the borough office and providing a civilian clerk with the necessary details. According to respondent, it was the civilian clerk’s responsibility to write the unusual incident report and for some reason the civilian clerk did not prepare the report.

Respondent was very defensive and spent a significant amount of time indignantly testifying about Superintendent Stennett’s treatment of him and the accident report. Respondent, however, is not charged with failing to complete the accident report. Instead, respondent is charged with failing to submit the unusual incident report and compromising the scene of an accident. I was unpersuaded by respondent’s assertions that he had done his job, provided the accident information to the borough office, and that the clerk was at fault.

With respect to the accident scene, I credit respondent’s testimony regarding the police department’s authority to remove the civilian’s vehicle from the scene. In contrast, respondent’s testimony regarding the sanitation truck was incredible. It is difficult to believe that respondent could not convince the borough superintendent that the truck needed to stay at the accident scene until Safety completed its investigation. The accident investigation would have superceded the need to redeploy the truck to collect refuse, especially since a civilian had been injured. Finally, respondent’s feigned ignorance of what Safety’s role is in an accident investigation is belied by

him actually calling them to the scene of the accident. Accordingly, this charge should be sustained.

Failed to Document a Sanitation Worker's Sick Leave in Computer System (complaint 126911)

On March 6, 2015, at 5:55 a.m., respondent received a call from Sanitation Worker ("SW") Rosa, who was calling in sick for the 7:00 a.m. to 3:00 p.m. shift in Manhattan East 10 garage. Although respondent documented the telephone call in the telephone order book, he is charged with failing to document the type of illness in the telephone order book and failing to enter that SW Rosa called in sick in SCAN, the centralized computer tracking system. SW Rosa was unable to obtain a resumption of duty from the clinic due to the missing information in the SCAN system (ALJ Ex. 1).

Superintendent Stennett testified that the standard operating procedure when a sanitation worker calls in sick is for the person taking the telephone call to document the information in the telephone order book, including the sanitation worker's name, the time that he or she called, the nature of the illness, and where the sanitation worker is calling in sick from in case the Department needs to perform a sick check (Tr. 348-50). In addition, the information has to be entered into the sick log and into SCAN (Tr. 351). Entering the information in SCAN permits the healthcare facility to determine if a sick leave home visit is necessary and provides operational information to the borough office (Tr. 353).

Respondent was working as the garage foreman in Manhattan 11 garage from 8:00 p.m. on March 5, 2015, to 8:00 a.m. on March 6, 2015, because the Department was in snow operations status (Pet. Ex. 20B; Tr. 355, 360, 608-09). Superintendent Stennett reviewed the telephone order book and saw that respondent had entered that SW Rosa had called in sick at 5:55 a.m. (Pet. Ex. 20A; Tr. 355-56, 361). The entry read that SW Rosa had called in sick from home and was scheduled to work at Manhattan East 10 garage between 7:00 a.m. and 3:00 p.m. (Pet. Ex. 20A; Tr. 361). Superintendent Stennett testified that respondent failed to note the nature of the sanitation worker's illness in the telephone logbook and did not make an entry in the sick log. She later learned that respondent also failed to enter the information into SCAN (Resp. Exs. W, X, Y; Tr. 362).

Superintendent Stennett testified that several days later, a deputy chief contacted her because SW Rosa had gone to the healthcare facility to obtain permission to resume work, but

they were unable to give him a resumption of duty authorization because the information was never entered into SCAN (Tr. 362).

Respondent testified that SW Rosa called around 5:55 a.m. on March 6, 2015, to say that he would not be coming to work because he was sick. The sanitation worker informed respondent that he was assigned to Manhattan 11A garage, but was “working out of” Manhattan 10 garage for the day. Respondent asked SW Rosa what was wrong with him but SW Rosa refused to respond and hung up (Tr. 587-88, 609). Respondent asserted that SW Rosa should not have called him and should have instead called Manhattan 11A to report that he was going to be out (Tr. 588).

Respondent testified that after SW Rosa hung up, he called Manhattan 10 garage and spoke to a sanitation worker, who informed him that SW Rosa had called there five minutes earlier to say he was out sick (Resp. Ex. S; Tr. 587). Respondent contended that he asked the sanitation worker in Manhattan 10 if he had contacted Manhattan 11A garage to tell them that SW Rosa was sick and if he entered the information in SCAN. The sanitation worker replied that he would take care of it. Respondent testified, “just to cover myself, I documented when [SW Rosa] called me into the telephone order book” (Pet. Ex. 20A; Tr. 587).

Respondent further testified that he also called Manhattan 11A garage and spoke to a civilian clerk, who he asked to enter the information in the sick log and SCAN (Tr. 587). Although respondent entered SW Rosa’s telephone call in the telephone log, he did not enter that he called Manhattan 11A to inform them that SW Rosa would not be reporting to work (Pet. Ex. 20A; Tr. 610). Respondent testified that he is not always required to document an outgoing call to another garage (Tr. 611). In this instance, he did not document his call to Manhattan 11A because SW Rosa was not assigned to his garage (Tr. 611).

Respondent submitted a copy of the Manhattan 11 garage’s sick log for the date in question. There is an entry with respondent’s name signed next to it, but respondent denied that it was his signature (Resp. Ex. T; Tr. 600-01). Respondent believed that the civilian clerk signed his name in the sick log. He maintained that she should have signed her own name (Tr. 601).

Respondent testified that he was out sick on March 6, 2015, and remained out until March 16, 2015 (Resp. Exs. Y, Z; Tr. 602-03). Respondent asserted that since he was out sick, the supervisors on the later shifts should have checked the computer system to see who was out sick and if someone was missing. Relying on Department Message, DM2015-1257, respondent

argued that it was the other supervisors' responsibility to correct the error by inputting the information because the location supervisor is supposed to check the system (Resp. Ex. V; Tr. 602).

Respondent submitted a copy of the Department's Medical Leave Control Policy and Administrative Procedure General Order 86-09 and argued that it is the district superintendent's or location supervisor's responsibility to ensure compliance with the sick leave policy (Resp. Exs. Q, R; Tr. 602). Respondent maintained that he was not responsible for entering the information into SCAN (Tr. 614, 616). He argued that since he was the supervisor in M11 garage and SW Rosa worked at M11A garage, the M11A supervisor was responsible for making sure that the sanitation worker's absence was entered into the computer system (Tr. 603).

Respondent acknowledged that he did have some responsibility in failing to input the information, but maintained that in the end it was the district superintendent's overall responsibility (Resp. Ex. U; Tr. 605). Respondent took exception to being charged because the sanitation worker called Manhattan 10 garage before calling respondent in Manhattan 11A, and the sanitation worker in Manhattan 10 garage failed to notify Manhattan 11A. Respondent stressed that at least he contacted Manhattan 11A to let them know that the sanitation worker would be out sick (Tr. 607).

Again respondent demonstrated a pattern of blaming everyone around him for his failure to do his job properly. With respect to this charge respondent blamed: SW Rosa for not calling the correct garage; SW Rosa for not telling him what his illness was; the unidentified sanitation worker who answered the telephone in Manhattan 10 garage for not entering SW Rosa's absence in SCAN; the civilian clerk in Manhattan 11A garage for not entering the sanitation worker's sick status in SCAN and signing respondent's name in the sick log; every supervisor who worked the shifts while he was out sick for not checking SCAN and failing to notice that SW Rosa's information was not entered into the system; and finally the district superintendent because of General Order 86-09.

Despite respondent's assertions to the contrary, I find that it was his responsibility to enter the information in the sick log and SCAN, or at a minimum ensure that someone else had taken care of it by checking the system. Also, there is a lapse in respondent's logic, if he entered the information in the telephone order book to cover himself, it would make sense to also enter

the information in the sick log and SCAN, not just to cover himself, but to do his job because he received the call. Accordingly, I find that the charge should be sustained.

Failed to Down a Sanitation Truck in the System (complaint 133510)

Respondent is charged with failing to input information regarding a sanitation truck that was having mechanical problems in the SMART or SCAN computer systems on Saturday, December 12, 2015, resulting in the truck going out into the field again on Monday, December 14, 2015, which led to an unsafe situation (ALJ Ex. 1).

Ryan Dempsey, the Manhattan Borough Operation Superintendent, is responsible for the Department's facilities and equipment throughout Manhattan (Tr. 123). Superintendent Dempsey testified that he was notified that a sanitation truck had broken down on the George Washington Bridge on December 12, 2015 (Tr. 130). He later learned that the same truck had broken down at the same spot on the bridge a few days later (Tr. 131, 144).

Superintendent Dempsey explained that when a truck breaks down in the field and cannot be driven it will be towed back to the garage to determine what is wrong with it. If the truck can still be driven, it is driven back to the garage for an assessment. The driver is required to notify the garage supervisor when a truck breaks down (Tr. 123-24). If the sanitation worker has not entered the information in the "down log," then the garage supervisor must enter it because it is ultimately the supervisor's responsibility to ensure that the information is logged (Tr. 124-25, 154). The supervisor must also enter the information into the SMART computer system and move the truck to the "down column" on the operations board in the garage (Tr. 125). In addition, the garage supervisor is responsible for notifying the mechanic that a truck needs to be repaired (Tr. 129).

Superintendent Dempsey conducted an investigation regarding the broken down truck (Tr. 144). SW Starke had reported that while he was driving to the dump in New Jersey on Saturday, December 12, 2015, the truck lost power on the George Washington Bridge (Tr. 146). Superintendent Dempsey determined, however, that the truck was not identified as "down" or in need of mechanical repair in the computer system on December 12, when the incident was reported to the garage during respondent's shift (Pet. Ex. 11; Tr. 145, 147-48, 152).

After reviewing the SMART and SCAN systems, Superintendent Dempsey determined that truck 25DD769, was entered as down at 2:48 a.m. on December 12, 2015, but was put back

into service 8 minutes later at 2:56 a.m. (Pet. Ex. 14; Tr. 148-49). According to SCAN, the next time that truck 25DD769 was entered as down, was at 10:52 p.m. on December 14, 2015 (Pet. Ex. 14; Tr. 150).

The superintendent also reviewed the down log and the daily blotter. The down log showed that SW Starke entered the truck in the down log at 11:05 p.m. on December 12 (Pet. Ex. 15A; Tr. 153). The truck was put back into service the morning of Monday, December 14, for garbage collection (Tr. 157). The truck was not dumped during the morning shift, but was instead scheduled to be dumped during the 4:00 p.m. to 12:00 a.m. shift. SW Starke drove the truck again on December 14, to run a relay to the dump in New Jersey (Tr. 158). The sanitation worker had the same issue while crossing the George Washington Bridge. The truck lost power in the middle of the bridge and had to be towed back to the garage. In Superintendent Dempsey's opinion, respondent improperly allowed the truck back into service before it was repaired (Tr. 159).

SW Starke testified that he was working relays, taking sanitation trucks to New Jersey to be dumped on Saturday, December 12, 2105, during the 4:00 p.m. to 12:00 a.m. shift (Tr. 165). He explained that trucks are assigned based on seniority. Since he was the most junior sanitation worker on that shift he was assigned the last available truck, which was 25DD769 (Tr. 167-68). SW Starke testified that while he was crossing the George Washington Bridge at about 5:00 p.m., the truck shut down and lost power (Tr. 168-70). The sanitation worker stated that sometimes trucks lose power, so he did what he normally does when it happens. He turned everything off, sat for about a minute, and started it back up. But after 10 feet, the truck lost power again. He had to turn everything off again. While he was waiting to start the truck up again, SW Starke called the garage to let respondent know what was happening (Tr. 170). Respondent told him to do what he was doing, turn everything off and wait a minute before starting it back up. The truck ended up losing power another two or three times before the sanitation worker was able to get across the bridge. SW Starke called respondent back to tell him that it kept happening and that the truck had to be downed when he returned to the garage (Tr. 171). He managed to drive the truck to the dump and back to the garage (Tr. 171).

According to respondent, on Saturday, December 12, SW Starke called him and started yelling, cursing, and threatening him over the phone because the truck broke down on the George Washington Bridge (Pet. Ex. 16; Tr. 560). SW Starke was eventually able to drive the

truck to the dump and return to the garage. Respondent testified that upon the sanitation worker's return, he downed the truck in the computer and in the logbook and noted it on the operations board (Pet. Ex. 16; Tr. 561). Respondent referred to his entry in the logbook on December 12, 2015, in which he noted that the truck needed to be evaluated by a mechanic (Pet. Ex. 15A; Tr. 567-68).

SW Starke was off on Sunday but when he returned to work on Monday, December 14, one of the trucks that he was assigned to drive to New Jersey was 25DB769 (Tr. 174). Another sanitation worker, who is senior to SW Starke, initially selected truck 25DB769, but was not convinced that it had been repaired so he switched trucks (Tr. 175). SW Starke asked respondent if he had downed the truck on Saturday and whether the truck had been repaired. Respondent replied that it had been repaired. SW Starke testified that he was still concerned so he asked respondent again if he was sure. Respondent said, "yeah, cuz, the truck is good" (Tr. 176, 189). SW Starke was not reassured, so he asked respondent several more times if the truck was repaired and respondent said that the truck must have been fixed because it was used to collect trash during the day (Tr. 177, 185, 189).

SW Starke started the drive to New Jersey in the truck, but it broke down on the George Washington Bridge in the same spot as it had two days earlier (Tr. 179). SW Starke immediately called the garage and told respondent that the truck lost power again. SW Starke admitted that he was irate and started yelling and cursing at respondent. He was upset because the truck broke down in the middle lane of the bridge and traffic was driving by on both sides at about 45 to 55 miles per hour, making for a very dangerous situation (Tr. 180).

Respondent testified that on Saturday when he was initially notified that there was a problem with the truck he followed his normal practice, which is to adjust the operations board by putting the truck in the down column, note the information in the logbook, and finally enter the information in the SMART system (Tr. 576). After a mechanic repairs the truck and puts it back in service, the mechanic puts a line through the entry in the logbook (Tr. 577). If the entry is not crossed out in the logbook, the truck has not yet been repaired. Another way to determine if the truck is back up is to look at the operations board (Tr. 578). The third way to determine if the truck has been repaired is to look at the SMART system (Tr. 578). Respondent contended that on Monday, December 14, he checked the logbook to see if the entry had been crossed out and it was not, so he told SW Starke that the truck may not have been fixed (Pet. Ex. 16; Tr.

580). He asserted that sometimes the mechanics do not follow through and cross out the logbook entry after repairing a truck (Tr. 581). Since the truck was used on the daytime shift and was full, he thought the truck could have been fixed (Tr. 581-82).

Respondent testified that he permits the sanitation workers to pick their truck based on seniority. Respondent maintained that the most senior sanitation worker assigned to relays that day initially selected truck 25DD769. Respondent told him that there may still be a problem with the truck so he decided to take another truck. Respondent testified that when SW Starke returned from his first relay, he specifically asked for truck 25DD769 and respondent told him not to take the truck because he was not sure that it was repaired. According to respondent, SW Starke said he wanted to use the truck and if it breaks down, he promised not to complain. Fifteen minutes later, SW Starke called respondent and was yelling, cursing, and threatening him. He accused respondent of giving him a broken down truck and purposefully trying to harm him (Pet. Ex. 16; Tr. 562). Respondent reiterated that he did not assign the truck to SW Starke and the sanitation worker selected it in spite of respondent's warning that it may still be malfunctioning (Tr. 563).

When asked why he believed it was necessary to warn someone that the truck may have a problem if he thought the truck was fixed, respondent replied that he did not want them to blame him if something was still wrong with the truck. Respondent testified that he was not "one hundred percent sure" that the truck was repaired and only permitted SW Starke to take the truck because the sanitation worker insisted (Tr. 582-83).

SW Starke was eventually able to drive the truck to the dump after losing power several more times. The truck, however, could not be driven back to the garage so SW Starke asked respondent to send a tow truck (Tr. 181, 191). SW Starke testified that it is not unusual for a truck to break down because of "wear and tear," but it is unusual for a truck to breakdown twice in the exact same location (Tr. 190-91). When he arrived back at the garage, SW Starke was angry and confronted respondent, accusing him of not downing the truck on Saturday. SW Starke was subsequently asked to write a statement about the incident (Pet. Ex. 12; Tr. 182). Although he alleged in his statement that respondent intentionally put him in harm's way, SW Starke testified that he did not actually believe that respondent intended to harm him. Instead, he believed that respondent neglected to do his job and down the truck on Saturday (Pet. Ex. 12; Tr. 564).

SW Starke admitted that he cursed at respondent on Monday, but denied that he yelled and cursed at respondent on Saturday after the truck initially broke down (Tr. 186-88, 190). The sanitation worker explained that he had no reason to curse at respondent on Saturday because it was the first time the truck broke down and he was eventually able to get to the dump and back to the garage. Since respondent had said that he would down the truck, he had no reason to complain (Tr. 189). SW Starke further denied asking respondent to “do him a favor” or begging respondent to let him drive truck 25DD769 (Tr. 186-87, 189). SW Starke maintained that respondent never warned him to not take that truck (Tr. 186).

Supervisor Antoine Murray testified that the SMART system is a computer program that tracks the daily activities of each district, including a sanitation worker’s status for the day, if they are working, which piece of equipment he was assigned to, and the location that they worked (Tr. 196). In addition, the SMART system tracks each piece of equipment’s service history, such as whether the truck was up or down, who placed the truck up or down, and the dates (Tr. 197). The SCAN system contains similar information and is linked to the SMART system (Tr. 197). Supervisor Murray reviewed both the SMART and SCAN systems and found that the truck was downed at 2:48 a.m. and upped at 2:56 a.m. the same day during the midnight shift (Pet. Ex. 14; Tr. 198-99). There was no indication that the truck was downed during respondent’s shift (Tr. 199).

Respondent contended that there were problems with the SMART system, which is reflected in a Departmental Messages, issued on October 16, 2015 and April 29, 2016 (Resp. Exs. O, P; Tr. 568-69, 572). Respondent postulated that system bugs were responsible for truck 25DD769 being brought back up within minutes of him entering it into the system as downed (Tr. 571, 573-74). Respondent did not have any proof that these system bugs were related to the downed truck on December 12, 2015, because the supervisor in the SMART lab refused to provide him with something in writing (Tr. 575). Supervisor Murray, however, acknowledged that there was a time period when the SMART system was resetting itself and would indicate that a downed truck was back in service. He searched the records to pinpoint the time period but was unable to determine when it was happening (Tr. 198).

Respondent successfully established that there were significant issues with the computer tracking systems. In addition to the two Departmental Memorandum, one issued before the incident and one issued after, Supervisor Murray corroborated that there was a period of time

that the SMART system was resetting itself. The information generated by the computer systems indicate that this sanitation truck was downed at 2:48 a.m. and upped at 2:56 a.m. the same day during the midnight shift. The Department is attempting to use the time that the truck was downed to establish that respondent did not enter the information during his shift. However, the information is inherently unreliable. There is no explanation as to why only eight minutes elapsed between the time that the truck was downed and then brought back up. This appears to be a system malfunction. As such, the information is not reliable enough to hold respondent accountable. Accordingly, the charge should be dismissed.

Abandoned His Post, Failed to Document that a Garage Utility Worker and Sanitation Truck went into the Field, and Made False Statements During an Official Interview (complaints 136130 and 136133)

Respondent is charged with abandoning his post as garage supervisor on March 23, 2016, at 10:30 p.m. and taking a truck out into the field with the garage utility worker without documenting it. Respondent is further charged with making false statements regarding his conversations with Supervisors Sosa and Vega about leaving the garage on March 23, 2016 (ALJ Ex. 1).

Assistant Chief Paul Brown, of the Field Investigative Audit Team (“FIAT”), testified that he conducted an investigation about a supervisor collecting refuse on March 23, 2016. The complaint was precipitated by the sanitation workers’ union sending photographs of respondent with recycling materials in his hand behind a collection truck (Tr. 18, 20, 500-01). Chief Brown testified that this was unusual because collecting recycling is not within the scope of a supervisor’s duties (Tr. 20). Chief Brown began his investigation by going to the Manhattan 11 garage to interview respondent and Supervisor Thomas Sosa, who was the night district supervisor on the evening in question (Tr. 21). Supervisor Sosa, who was interviewed in Chief Brown’s car, acknowledged that he and respondent had loaded metal and glass on to a truck on March 23. He explained that he and respondent were collecting recycling that was left out on part of the route by day shift (Tr. 22).

The night district supervisor is responsible for managing the field activities of all of the garages in his district during the 4:00 p.m. to midnight shift (Tr. 22-23). Respondent was working as the garage supervisor and was responsible for the physical plant, the garage itself,

and the equipment. A garage supervisor works in the garage as the foreman for the entire shift (Tr. 23). When asked if it is unusual for a garage supervisor to leave the garage to collect garbage, Chief Brown, stated, "It's unheard of" (Tr. 24). Chief Brown testified that the borough office would not have given respondent permission to leave the garage because the garage was "open for business" (Tr. 24, 50). Chief Brown further testified that it is not within a supervisor's job description to "service material" (Tr. 46). Moreover, if there was an accident or if someone was injured while respondent and Supervisor Sosa were collecting the recycling, the City may not indemnify them because it was not their job to be out in the field servicing materials (Tr. 260, 522).

Supervisor Sosa explained to Chief Brown that a crew was sent out during the day tour to initially service metal and glass on one truck, return the truck to the garage, and go back into the field to service the paper in a second truck. Manhattan 11 is divided into three sections. A crew picks up metal and glass before lunch and after lunch takes the second truck out to collect paper. Unfortunately, on the day in question the second truck was disabled while the crew was collecting the paper. When the replacement truck was sent to the third section to pick up the paper, it discovered that the metal and glass were never collected in that section before lunch. According to Chief Brown, Supervisor Sosa called respondent, who told him that "he could pull some strings" and would take care of it. Respondent, with the garage utility sanitation worker as the driver, took out a truck and loaded the additional metal and glass from the third section with Supervisor Sosa (Tr. 26, 260-61, 267).

Chief Brown testified that when he interviewed respondent at the garage he indicated that Supervisor Sosa had called him several times that night because he was concerned about the recycling material having been left out in the third section (Tr. 27-28). Respondent told Chief Brown that the Borough Office directed Supervisor Sosa to have the material picked up and they did not care how. Chief Brown went back to Supervisor Sosa to confirm the accuracy of respondent's statement, but Supervisor Sosa denied telling respondent that. In addition, Supervisor Sosa said he did not speak to the Borough Office. Chief Brown later spoke with the Night Borough Superintendent, who confirmed that he had not spoken to Supervisor Sosa (Tr. 29, 53).

Chief Brown further testified that he asked respondent who was left in charge of the garage while he was out in the field. Respondent told him that Supervisor Vega, the garage

supervisor for the midnight to 8:00 a.m. shift, had arrived early and agreed to cover the garage (Pet. Ex. 1; Tr. 29, 31, 259). Chief Brown maintained that if respondent had actually asked Supervisor Vega to cover the garage for him, it would have been a mitigating factor, but he still would have needed permission from the borough office to leave the garage and go into the field (Tr. 32). Although the daily blotter shows that Supervisor Vega signed in at 9:40 p.m., Chief Brown testified that it did not mean that he was present in the garage while respondent was out in the field (Pet. Ex. 2; Tr. 263-64, 269, 508). Despite signing in early, Supervisor Vega was not officially “on the clock” at 9:40 p.m. (Tr. 272, 509). Chief Brown elaborated that if the borough office did not know who was in charge and assumed that it was respondent, then the garage was abandoned when respondent went into the field (Tr. 56, 508).

Chief Brown reviewed the recording book, which is the log of all sanitation trucks that are leaving the garage. There were no entries indicating that respondent took a truck out into the field that evening (Tr. 30, 522). Chief Brown testified that respondent acknowledged that the garage utility worker drove the truck and he and Supervisor Sosa loaded the materials. They were out of the garage for approximately 45 minutes (Tr. 33, 258). As a part of his investigation, Chief Brown asked District Superintendent Stennett to interview Supervisor Vega. She reported that Supervisor Vega said that he had not agreed to watch the garage for respondent (Pet. Exs. 1, 3; Tr. 34, 44, 53, 259, 520). Chief Brown concluded that respondent loaded materials on to a recycling truck, abandoned his post as garage supervisor, and failed to make a record of taking a sanitation truck into the field (Pet. Ex. 1; Tr. 43-44).

As the Night District Supervisor, Supervisor Sosa reported directly to the Night Borough Superintendent, Edgar Lopez (Tr. 283). Supervisor Sosa testified that at about 8:30 p.m. on March 23, 2016, Superintendent Lopez called to find out if any work would be left out on the route. He told the supervisor that everything was running smoothly (Tr. 287). Supervisor Sosa, who was a relatively new supervisor at the time, testified that it was too early in the shift for him to know whether the route would be left completely clean, but the superintendent was giving him a hard time and pressured him for an answer (Tr. 288-89). He later learned that materials had been left out on the route and was concerned because he told Superintendent Lopez the route would be clean (Tr. 290-91).

Supervisor Sosa testified that at about 10:30 p.m., he called respondent, who suggested that he speak with the superintendent and ask what he wanted him to do. Supervisor Sosa

acknowledged that he was “really stressed out” because he was a new supervisor and he had problems with Superintendent Lopez previously. He did not want to speak to Superintendent Lopez again and hoped to resolve the issue on his own (Tr. 293-94). Supervisor Sosa testified that he and respondent came up with a plan to make sure the garbage was off the street. They decided to have the garage utility worker drive the truck while the two supervisors loaded it with the leftover trash (Tr. 297).

The next day, Chief Brown went to the garage to speak to Supervisor Sosa and respondent (Tr. 299). Supervisor Sosa testified that he explained what had happened to the Chief. He denied telling Chief Brown that he had called Superintendent Lopez and apprised him of the situation (Tr. 302). Supervisor Sosa further denied telling respondent that he had called Superintendent Lopez (Tr. 303). Supervisor Sosa postulated that there may have been some miscommunication between him and respondent. He acknowledged that respondent had told him several times to call Superintendent Lopez (Tr. 304). Supervisor Sosa recalled later asking respondent who was covering the garage while they were in the field and respondent told him that Supervisor Vega arrived early for his shift (Tr. 305).

Superintendent Stennett testified that Deputy Chief Sica notified her that respondent left his assignment at the garage and took the garage utility sanitation worker out into the field (Tr. 364). Superintendent Stennett discovered that there was no entry in the recording book memorializing that respondent had taken the truck into the field (Tr. 366). Nor were there any entries regarding respondent leaving the garage or that Supervisor Vega was left in charge while respondent was in the field (Tr. 366). Superintendent Stennett testified that she subsequently interviewed Supervisor Vega. Supervisor Vega told her that he was present in the garage when respondent went into the field because it is his usual practice to arrive very early before his shift. Superintendent Stennett testified that Supervisor Vega told her that respondent had not asked him to watch the garage for him (Pet. Ex. 3; Tr. 368-69).

Respondent submitted into evidence a sworn statement from Supervisor Vega, who had retired from the Department, stating that he arrived early for work on March 23, 2016, and he agreed to cover the garage when respondent asked him to do so (Resp. Ex. B; Tr. 374). Superintendent Stennett could not explain the discrepancy between the sworn statement and Supervisor Vega’s interview, but noted that the statement was dated more than a year after the incident, while she had interviewed Supervisor Vega and memorialized his statement in a

contemporaneous email to Chief Brown (Pet. Ex. 3; Tr. 376). The superintendent emphasized that she wrote her email to Chief Brown while Supervisor Vega was in her office and read it to him. According to Superintendent Stennett, Supervisor Vega told her that the email was accurate before she sent it out (Tr. 376).

Respondent testified that he asked Supervisor Vega to testify on his behalf but Supervisor Vegas, who was recently retired and had just gotten married, stated that he was too busy to testify. However, he offered to provide respondent with a notarized statement (Resp. Ex. B; Tr. 531-32). Respondent contended that he and Supervisor Vega discussed Superintendent Stennett's email, specifically her statement that Supervisor Vega told her that respondent did not ask him to cover the garage. Supervisor Vega denied saying that to her (Tr. 543-44).

Respondent testified that Supervisor Sosa contacted him on March 23, 2016, because materials had been left out on the route. It was too late in the shift for sanitation workers to go back out to pick up the materials. Respondent told Supervisor Sosa that he would see what he could do to help because Supervisor Sosa sounded "like he wanted to throw the badge in" (Tr. 532). Since he had not taken lunch yet and there were only a few streets that needed to be picked up, respondent decided to personally help pick up the materials (Tr. 533). Respondent told the garage utility worker to drive the truck while respondent and Supervisor Sosa picked up the materials (Tr. 534).

Respondent testified that Supervisor Vega arrived very early that night, as was his practice, and started working immediately upon his arrival. He usually comes in about three hours prior to his shift and even though he is not compensated, Supervisor Vega starts working upon his arrival (Tr. 539). When asked why he did not call the borough office to let them know that Supervisor Vega would be covering the garage for him, respondent replied that Supervisor Vega had already signed in (Tr. 549).

With respect to the charge of making false statements, Chief Brown specifically concluded that respondent had made false statements regarding conversations he had with Supervisors Sosa and Vega (Pet. Ex. 1; Tr. 43-44). Respondent denied making any false statements or intentionally misleading anyone during his interview with Chief Brown (Tr. 528, 534).

Instead of advising Supervisor Sosa and respondent of their rights, Chief Brown told them about their obligation to cooperate. His standard practice before starting an interview is to

read rules 4.1 and 4.4 of the Department's Code of Conduct (Tr. 253, 264, 269, 501, 504). Rule 4.1 states that an employee must cooperate with an official inquiry relating to his duties and rule 4.4 states that an employee must not lie, make a false report, make a false entry on an official document or make false statements during an investigation. The recording of respondent's interview is incomplete because the recording device malfunctioned and did not record the beginning of the interview. After Chief Brown fixed the recorder, he summarized what had been discussed while it was not working (Pet. Ex.17; Tr. 274).

The Department established that respondent abandoned his post at Manhattan 11 garage when he went into the field to assist Supervisor Sosa. I believe respondent's intentions were noble in that he was trying to help a new supervisor, who was very anxious about getting into trouble. Unfortunately, in this situation the means did not justify the ends. Respondent was assigned as the garage supervisor, a post that requires him to be present in the garage. Regardless of whether it was beyond the scope of his job to collect recycling materials, he was obligated to perform the job he was assigned to do. Once he left the garage to go into the field, he abandoned his post. He did not request permission or even notify supervision, for that matter, that he was leaving the facility. Moreover, he took another employee assigned to work in the garage with him and did not document that a truck was in the field. The Department keeps records of when and where its equipment is deployed for a number of reasons, one of which has to do with legal liability. Even though the ultimate goal was to remove trash from one of the routes and to help out a colleague, respondent went about this in the wrong way. Accordingly, the charge of respondent abandoning his post should be sustained.

The remaining charge of making false statements, however, should be dismissed. Respondent was charged specifically with falsely stating that Supervisor Sosa had spoken with the borough office and Supervisor Vega had agreed to watch the garage. Respondent had several conversations with a panicked Supervisor Sosa. It is undisputed that respondent told Supervisor Sosa to call the borough office to inform them about the materials that were left out on the route. Supervisor Sosa testified, "I also didn't specifically tell [respondent] that I didn't call [the borough office]. I don't think that I didn't - - maybe I wasn't clear that I didn't call Lopez. I just pretty much stated that Lopez doesn't want to hear it" (Tr. 304). In his interview with Chief Brown, Supervisor Sosa stated, "maybe I should have contacted the Super Lopez again" indicating that he had spoken to the borough office at least once (Pet. Ex. L). It is quite plausible

that during the several telephone calls between them, in the back and forth of telling Supervisor Sosa to call the borough office, that respondent misunderstood what Supervisor Sosa said or panicked Supervisor Sosa misspoke. Therefore, I do not find that respondent intentionally misrepresented what Supervisor Sosa had said.

With respect to Supervisor Vega, the Department did not have Supervisor Vega testify because he had retired. Instead, the Department relied on Superintendent Stennett's hearsay statements regarding a conversation that she had with Supervisor Vega. Superintendent Stennett sent a contemporaneous email to Chief Brown and testified that Supervisor Vega told her that respondent had not asked him to watch the garage. To counter this testimony, respondent submitted a sworn statement from Supervisor Vega, stating that respondent had asked him to watch the garage. It is difficult to weigh the strength of a trial witness' hearsay statement against a notarized letter from the person the statements are attributed to in order to determine which version is more likely than not. Therefore, I find that the Department did not establish by a preponderance of the credible evidence that respondent made a false representation that he asked Supervisor Vega to cover the garage for him.

Accordingly, the charge that respondent made false statements regarding conversations that he had with Supervisors Sosa and Vega should be dismissed.

FINDINGS AND CONCLUSIONS

1. Petitioner did not establish that respondent failed to report damage to the screen cover of NOVAS handheld device #084 on September 9, 2011.
2. Petitioner established that respondent failed to inform an officer at roll call that his shift was changed for the next day so that he may appear at a hearing at ECB and further failed to note the change of tour on the DS57 on September 29, 2011.
3. Petitioner established that respondent failed to promptly prepare a report and notify Sanitation Police headquarters of an unusual incident involving an officer's off-duty incident involving the police on March 12, 2012.

4. Petitioner established that respondent compromised the scene of an accident by permitting the sanitation truck to be removed from the scene and allowing the driver to leave the scene before Safety officers arrived and failed to submit an unusual incident report for the accident on December 4, 2012.
5. Petitioner established that respondent failed to document a sick sanitation worker's illness and failed to enter into the SCAN computer system that the sanitation worker had called in sick on March 5, 2015.
6. Petitioner did not establish that respondent failed to enter the information in SCAN or SMART systems on December 12, 2015, or was responsible for a malfunctioning sanitation truck being sent out into the field on December 14, 2015.
7. Petitioner established that respondent had abandoned his post as a garage supervisor and had a garage utility man drive a sanitation truck into the field without documenting it in the logbook on March 23, 2016.
8. Petitioner did not establish that respondent made false statements during an official investigation March 24, 2016.

RECOMMENDATION

Upon making the above findings and conclusions, I obtained and reviewed an abstract of respondent's personnel record provided to me by petitioner. Respondent was appointed as a sanitation worker in April 2001 and was promoted to a supervisor in August 2007. During his nearly seventeen-year tenure with the Department, respondent had been disciplined on one occasion. In September 2011, respondent was suspended for five days for a failure to supervise. The Department submitted respondent's last five performance evaluations. Respondent received an overall rating of satisfactory on four of the five evaluations and an unsatisfactory on the July 1, 2015 through June 30, 2016 evaluation. The unsatisfactory rating was attributed to two of the complaints adjudicated in this trial regarding abandonment of post and false statements.

Under the Administrative Code, the penalties available for each substantiated complaint are "forfeiting or withholding pay for a specified time, not exceeding thirty days; . . . suspension,

without pay during such suspension, for a period not exceeding thirty days; or . . . dismissal from the force." Administrative Code § 16-106(a) (Lexis 2018).

The Department requested a penalty of a five-day suspension for each complaint. Only five of the eight complaints were sustained. Petitioner successfully established that respondent failed to notify an officer of a court date, failed to timely prepare an unusual incident report regarding an officer's off-duty incident, compromised the scene of an accident and failed to submit an unusual incident report regarding the accident, failed to properly document that a sanitation worker called in sick, and abandoned his post, taking the garage utility worker and a sanitation truck out into the field without documenting it. Other than abandoning his post, the charges that respondent has been found guilty of are fairly minor in nature. With respect to abandoning his post, I found respondent's misconduct was mitigated by his motivation to assist Supervisor Sosa and remove the materials from the route.

Respondent has a minimal disciplinary history. Moreover, it is concerning that at least half of these charges involve incidents that occurred five to six years ago. By holding on to old charges and not prosecuting when they occur the Department deprives the respondent of progressive discipline and an opportunity to correct his conduct. The Department's failure to act more contemporaneously should serve to mitigate the penalty at least as to the older charges. *See Dep't of Sanitation v. Singer*, OATH Index No. 2033/00 at 47 (Mar. 15, 2001).

With that said, I found respondent's less than credible testimony and overall attitude towards his job troubling. Throughout the trial respondent blamed everyone around him and failed to admit any wrongdoing. Respondent should be less concerned with "just covering himself" and more concerned about acting like a supervisor who makes sure that the job is done properly. Respondent's inability to take responsibility for anything that goes wrong is disconcerting. It goes beyond merely submitting a defense to the charges. Instead, it demonstrates a pattern of behavior that exemplifies the type of supervisor and employee that he is. His penchant to avoid responsibility, or in the alternative, his refusal to accept responsibility is indicative of his work ethic. Respondent should be mindful that as a supervisor he sets an example for his subordinates and should act accordingly.

In balancing all of the above factors, I find it appropriate to impose a three-day penalty for each of the sustained charges involving misconduct in 2011 and 2012, and a five-day

suspension without pay for each for the remaining two sustained charges. Accordingly, I recommend that respondent be suspended for a total of 19 days without pay.

Kara J. Miller
Administrative Law Judge

February 16, 2018

SUBMITTED TO:

KATHRYN GARCIA
Commissioner

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