

Dep't of Transportation v. Rabuse

OATH Index No. 1417/18 (June 1, 2018)

Petitioner proved that traffic device maintainer failed to secure his work tools in the proper compartments and failed to keep the back of his utility truck clean. ALJ recommended a three-day suspension without pay.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF TRANSPORTATION
Petitioner
- against -
JOHN RABUSE
Respondent

REPORT AND RECOMMENDATION

JOYCELYN McGEACHY-KULS, *Administrative Law Judge*

Petitioner, the Department of Transportation (“DOT”), referred this disciplinary proceeding under section 75 of the Civil Service Law, alleging that respondent, John Rabuse, a traffic device maintainer, performed his duties improperly, inefficiently or negligently when he failed to secure his work tools in the proper compartments and failed to keep the back of his utility truck clean on April 6, 2017, and failed to report to his field work assignment in a timely manner on June 15, 2017. Petitioner alleges that respondent, by these actions engaged in conduct prejudicial to the good order and discipline of DOT and engaged in conduct tending to bring DOT into disrepute (ALJ Ex. 1).

At a trial on April 26, 2018, petitioner relied on the testimony of three witnesses: supervisor B. Riggio; supervisor M. Fratianni; and co-worker M. James. Respondent testified on his own behalf. Petitioner and respondent also presented documentary evidence.

For the reasons below, I find that petitioner proved that respondent committed misconduct relating to the securing of tools and the condition of the truck assigned to respondent in April 2017. However, petitioner failed to prove that respondent did not report to his field assignment in a timely manner in June 2017.

ANALYSIS

In this disciplinary proceeding, petitioner “has the burden of proving its case by a fair preponderance of the credible evidence . . .” *Dep’t of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 08-33-SA (May 30, 2008) (citation omitted). Preponderance 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 2008); *see also Dep’t of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010), *aff’d*, NYC Civ. Serv. Comm’n Item No. CD 11-47-A (July 12, 2011).

Charge 1

Specification 1 - Failure to Secure Tools and Keep DOT Vehicle Clean

Respondent has been a traffic device maintainer (“TDM”) with DOT for 20 years and is currently assigned to the Sunset Industrial Park Brooklyn Sign Shop in Brooklyn, NY (“BSS” or “the sign shop”). He works weekdays from 6:00 a.m. to 2:30 p.m. As a TDM, respondent is responsible for installing, removing, repairing and maintaining traffic control devices commonly referred to as signs (Resp. Ex. D). His supervisors are Mr. Riggio and Mr. Frattiani. Mr. Riggio testified that, in addition to their responsibility for traffic control devices, all TDMs are responsible for maintaining their tools. He stated that they have time at the end of the day to put tools in the locked compartments on their trucks and to clean their assigned DOT trucks (Tr. 17-18). The job description for TDMs lists among other duties that they safeguard, maintain, and repair assigned vehicles, machinery, equipment, and tools and clean and maintain interior and exterior of assigned vehicles (Resp. Ex. D). Mr. Riggio stated that “the procedure is you do not leave your tools out on the truck. It’s a simple procedure” (Tr. 22).

On April 6, 2017, Mr. Riggio formally warned respondent about the condition of his assigned truck. Mr. Riggio stated that respondent had been assigned DOT truck 2760 on April 5, 2017, and that sometime in the late afternoon, after respondent left for the day, he saw a wrench, a sledge hammer, and an impact gun in the back of respondent’s assigned truck and noted that respondent did not secure those tools in the locked compartment (Tr. 20-22, 25). Mr. Riggio took photographs of the tools in the bed of the truck (Pet. Ex. 2). He documented the warning on the progressive discipline form citing respondent’s “failure to keep utility truck clean and failure

to safeguard tools” (Pet. Ex. 1). Mr. Riggio stated that he gave respondent a verbal warning because this was the third time that he had spoken to respondent about leaving tools unsecured and in the back of his truck. Since respondent had not responded to his previous instructions, Mr. Riggio concluded that respondent was not going to comply with informal requests (Tr. 26). He testified that he “wanted [respondent] . . . to learn that you have to put the tools away” (Tr. 22). Mr. Riggio had worked previously as a TDM and related that he was aware that trucks get dirty in the field and that TDMs have different habits regarding the condition of their trucks. His main concern was that tools are safeguarded so that TDMs have what they need to do their jobs (Tr. 36-37). Mr. Riggio emphasized that “it wasn’t about the truck only being dirty; it was about the power tools being left out” (Tr. 21).

Respondent testified that there is no standard way that TDMs keep their tools and that he does not leave tools unsecured when he is out on job assignments (Tr. 93). He acknowledged that he left his tools in the back of the truck on April 5 and explained that he was removing screws and other hardware from signs and had used his tools in the shop. Respondent testified that he told Mr. Riggio “that he was right and [respondent] apologized for leaving it on the back of the truck.” Respondent added that he usually puts everything away (Tr. 98).

This specification should be sustained.

Specification 2 - Failure to Timely Report to Field Work Assignment

Mr. Fratianni is a supervisor at the sign shop with Mr. Riggio, and oversees the work of 12 TDMs including respondent and Mr. James. Mr. Riggio and Mr. Fratianni both report to Superintendent J. McLaughlin (Tr. 41-42, 44). As a supervisor, Mr. Fratianni assigns fieldwork and loads the work assignments for the next day into the tablet for the TDMs. He also ensures that TDMs have signs and materials needed for work assignments (Tr. 42, 50-51).

Mr. Fratianni testified that in May or June of 2017, DOT began using tablets to monitor TDM projects. According to Mr. Fratianni, when TDMs arrive at work, they review the routes on the tablet and when they leave the shop for their assignments, they press the “shop departure button” to begin logging their time. When they arrive at their field work location, the TDM is supposed to press the “play” button to log their arrival (Tr. 49-50). There is only one tablet for each truck, even though there may be one or two TDMs assigned to a DOT truck for field projects (Tr. 55). The TDMs determine who will drive and who is responsible for the tablet. In

June 2017, because the tablets were recently introduced, TDMs still had the option of recording their work on paper or using the tablet (Tr. 51).

On June 15, 2017, Mr. James was assigned to work with respondent. Mr. James testified that received their work assignments for the day on paper and also from the tablet and left the sign shop in DOT truck number 292C at 7:26 a.m. with respondent as the driver. Mr. James was operating the tablet (Tr. 69-70, 106).

Mr. James testified that TDMs are allowed to take a 15-minute break in the morning, a 45-minute break for lunch, and a 15-minute break in the afternoon. Mr. James stated that respondent took a 45-minute break at 8:30 a.m. prior to arriving at their work location but he could not recall the location of the break. Mr. James testified that he waited in the truck, respondent returned from his break with coffee and a bagel, and they proceeded to the job location (Tr. 62-64). Although he did not recall the route that respondent drove, Mr. James related that when he and respondent arrived at Gates and Knickerbocker Avenues, respondent drove around the block a few times before stopping the truck to get out (Tr. 78). Mr. James testified that he was “just sitting [in the truck]” and did not ask respondent why he was driving around (Tr. 63-64, 78). He offered that “[he doesn’t] really know Brooklyn, so the driver usually handles all the driving.” Mr. James did not recall if respondent called Superintendent McLaughlin (Tr. 77-78). When asked on cross-examination how long respondent’s break was, Mr. James responded “What I say? Forty-five minutes?” and when asked how he was able to recall this he responded, “I was basing off what they showed me on the timesheet thing. I don’t know” (Tr. 71). Mr. James recalled that he texted Mr. Fratianni on his personal mobile phone to report that he and respondent had not completed any jobs yet but he did not recall what he said or whether Mr. Fratianni responded to his text (Tr. 65-66). Mr. Fratianni stated that he replied to Mr. James’s text asking why no assignments were completed and that Mr. James responded that “[respondent’s] a fucking psychopath and does whatever he wants” (Tr. 44-45). Mr. Fratianni stated that he recalled the content of the texts because they were still in his phone.

Respondent offered a different version of events in the field that day. Respondent testified that he and Mr. James left the sign shop at 7:26 a.m., after getting the work assignments for the day. Respondent entered the work location into his mobile phone and used Google maps to determine the shortest route to the assignment (Tr. 111). Respondent testified that it took 45 minutes to get to the first location and they arrived at Gates and Central at 8:20 a.m. where their

assignment was to remove and replace a speed limit sign. He parked the truck at Central and Grove then left the truck to “scout the location.” Respondent identified the sign that was to be replaced and also noticed a coffee shop nearby. He returned to the truck and advised Mr. James that he was going to get a coffee and a bagel. Respondent testified that he returned to the truck less than six minutes later with coffee and a bagel and took his morning break in the truck with Mr. James (Tr. 112-13).

While in the truck, respondent reviewed the work assignment and noted that the locations of the work assignments were incorrect. Respondent again consulted Google maps which showed that Gates Avenue, which was listed as the main street, intersects with Knickerbocker, Wilson, and Central Avenues. Respondent stated that the assignment location of Gates Avenue from Central Avenue to Knickerbocker Avenue is inaccurate because Wilson Avenue, which was not listed, is between Central and Knickerbocker Avenues and therefore the work assignment would cover two blocks (Tr. 115). Respondent further testified that these orders should have been listed as intersection orders as the signs were located on the street corners rather than block orders which would indicate that the signs were 30 feet from street corners (Tr. 116). Respondent concluded that the jobs were written improperly because they omitted Wilson Avenue. He noted that sometimes the traffic control inspectors “make mistakes” (Resp. Ex. A; Tr. 116). He testified that he called BSS and spoke to Superintendent McLaughlin “to confirm the job that [he] had done, to validate the job that [he] was going to do [and that McLaughlin] concurred . . . that the order was written incorrectly and that [respondent] was to proceed with [his] day” (Tr. 132).

Respondent testified that he drove the truck toward Knickerbocker Avenue and saw the other speed limit sign that was listed as the second job on the work order. He decided to start with that sign rather than going back to the first location. Respondent testified that after he and Mr. James replaced the sign at Gates and Central, they returned to Gates and Knickerbocker to complete the work assignment for that location. Respondent testified that at each of the work locations, he set up safety zones around the work area. He followed the same basic procedure for each assignment. He testified that Mr. James got into the bucket and was “elevated him to the half the height of the pole. [Mr. James] cut down the old sign. [Respondent] stood guard underneath the sign so that no one would get hit by anything. [Mr. James] lowered the sign down to [respondent who] took the sign, put it in the appropriate bin and then [respondent]

constructed the sign with the appropriate hardware, handed it to Mr. James, and he installed it on the pole” (Tr. 133-34).

Respondent testified that although he and Mr. James arrived at the first job location at 8:20 a.m., the daily work report (“DWR”) indicates an arrival time of 9:23 a.m. because that was when the tablet was activated (Tr. 117). Mr. James testified that he assumed he operated the tablet but did not recall pressing the start button to activate the tablet. He testified that he has “seen the pictures. It says I started [the tablet]” (Tr. 69).

Mr. James testified that when he and respondent returned to BSS, he signed the DWR to document the status of the work assignments and their breaks. Mr. James gave the form to a supervisor, but he did not know which one. Mr. James could not recall whether he filled out the form during the course of the day or at the end of the day (Tr. 71-72, 74). Mr. James testified that the work and break times he reported on the daily work report represented both his and respondent’s times. Mr. James recorded the morning break from 8:30 to 8:44 a.m. (Resp. Ex. A; Tr. 72, 81-82). He stated that this 14-minute break was actually the 45-minute coffee break he referenced previously. He explained that even though he recorded a 14-minute coffee break “[s]ometimes [the times] aren’t exactly right” and that “[they] don’t exactly take the 15-minute coffee break” (Tr. 72). Mr. James did not otherwise account for the 31-minute discrepancy between the time he reported on the DWR and the time relayed in his testimony. Respondent testified that he had not seen the DWR before Mr. James submitted it. Although there is a line for the driver to sign the form, respondent did not sign this form because it was not given to him before it was submitted (Tr. 142).

Mr. James also filled out the Weekly Vehicle Trip Log (“Trip Log”) for the week ending June 17, 2017. On that form, he indicated that on June 15, 2017 he was the driver of vehicle 292C (Resp. Ex. B). He acknowledged that this was false and that respondent was the driver on that date. Mr. James guessed that the reason for his mistake was that he “probably just had the paperwork in [his] hand at that time and just [he] filled it out” (Tr. 79). He also supposed that putting his name on the form, rather than respondent’s name “could have been just an oversight on my thing” (Tr. 80).

Mr. Fratianni testified that when respondent and Mr. James returned to BSS at the end of their shift, he was not in the shop and did not speak with respondent about Mr. James’s report that respondent took a 45-minute break prior to starting any jobs. Mr. Fratianni testified that he

reviewed the submitted paperwork and served respondent with the written warning on June 16, the following morning. Mr. Fratianni testified that he drafted the written warning to respondent based on the text message from Mr. James regarding the events of the day (Pet. Ex. 1; Tr. 52-53). He testified that Mr. James did not give him any information other than what was in the text. Mr. Fratianni did not know whether respondent called BSS or contacted Superintendent McLaughlin (Tr. 52). Mr. Fratianni did not speak to respondent prior to drafting the warning to ask what had occurred in the field or to confirm if Mr. James's report of events was accurate (Tr. 53).

In support of his testimony regarding his location on June 15, 2017, respondent submitted global positioning system (GPS) information from his mobile phone from that date. Respondent testified that he obtained this information through his Google account (Resp. Ex. F; Tr. 118-19). In general, GPS has been found to be reliable to the extent that the tribunal may take official notice of research amassed by the federal government in support of its accuracy for location and time. *See* 48 RCNY § 1-48 (Lexis 2018). According to the federal National Space-Based Positioning, Navigation, and Timing Coordination Office, the Global Positioning System "is a U.S. space-based radionavigation system that provides reliable positioning, navigation, and timing services to civilian users on a continuous worldwide basis – freely available to all" GPS-enabled smartphones are typically accurate to within a 4.9 m (16 ft.) radius under open sky. *See* www.gps.gov. This is the official U.S. government website for information about the Global Positioning System (GPS) and related topics. This site does not address the detection of modes of transportation.

The timeline and general location markers on respondent's GPS printout indicate that respondent and Mr. James left BSS at approximately 7:35 a.m. and arrived at the first work location at approximately 8:20 a.m. remaining there until 8:27 a.m. The printout indicates that respondent and Mr. James traveled to another location remaining there for 45 minutes then [returned back] to the first location and remained there for 27 minutes. The printout listed names of nearby establishments rather than street coordinates. Respondent explained that [it was] more specific than the general street names given for the work assignments. This route corroborates respondent's testimony that he arrived at the first work location, scouted and got breakfast, traveled to the next location, performed work there, then returned to the first location to remove the sign (Tr. 120-22).

On cross-examination, respondent acknowledged that the Google timeline incorrectly indicated that respondent was traveling by subway or by bicycle (Resp. Ex. G; Tr. 149-50). However, respondent testified that the travel times and duration of travel associated with respondent's location and movement were accurate. Respondent noted that while the locations listed with Google timeline indicated incorrectly that he was in Hope Gardens, respondent explained that the location was Wilson Avenue and Grove Street and he was at that street location but not in that building. Respondent further explained that Google Maps sometimes uses the closest geographical landmark as a reference point (Tr. 124).

Given that Mr. James and respondent gave differing accounts of the routes driven, times worked, and location of the job assignments, it is necessary to assess the credibility of the witnesses to determine the reliability of their respective recollections. When analyzing witness credibility, this tribunal may consider such factors as witness demeanor, consistency of 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); *see also Admin. for Children's Services v. Yu*, OATH Index No. 269/13 at 4 (Apr. 4, 2013).

I credit the testimony of respondent over Mr. James. Respondent testified in an earnest, sincere, and direct manner. He recounted the events in the field including arrival times, work locations, and work performed with convincing detail. He provided credible explanations for his seemingly indirect route to work assignments. Respondent's testimony regarding the time of his morning break, time of arrival at work assignments and routes taken were corroborated by GPS evidence that this tribunal has found reliable. Inaccuracies regarding the method of transportation, e.g., cycling versus driving, or the establishments at the locations listed on the Google timeline, did not affect the accuracy of the arrival times and duration of travel reported on the timeline and did not diminish respondent's credibility. Respondent's credibility was further bolstered by the fact that he acknowledged his misconduct in the previous charge, accepted responsibility for his actions and apologized to his supervisor for the condition of the truck.

I do not credit the testimony of Mr. James. He provided a general and uncorroborated account of what he was able to recall about June 15, 2017. Mr. James testified that he was not

sure where in Brooklyn he was, whether he operated the tablet, or whether respondent was performing work. He could not recall when he filled out the DWR or to whom he submitted it. Most troubling about Mr. James's testimony is that what he was able to recall differs significantly from the documents he completed on the date of the alleged misconduct. While Mr. James testified that respondent took a 45-minute morning break, Mr. James reported on the DWR that the morning break was 14 minutes, from 8:30 to 8:44 a.m. His vague explanation for this discrepancy that "sometimes [the times] aren't exactly right" might suffice to account for a discrepancy of a minute or two. However, this supposition is insufficient to address a 31-minute difference between reported break times. Mr. James also inaccurately completed the Trip Log on the same day supposing that he just happened to have the form, so he recorded his name even though that was not accurate. Given that Mr. James' testimony is directly contradicted by forms that he completed and submitted, I find that Mr. James is not a reliable witness and I do not credit his testimony.

This charge is based largely on Mr. James's account of respondent's conduct to Mr. Fratianni, an account which this tribunal has concluded is not a reliable. As a result, petitioner failed to establish that respondent did not report to a work assignment in a timely manner. Thus, this charge should be dismissed.

Charges 2 and 3

In Charge 2, petitioner charges respondent with violation of its Code of Conduct in that respondent engaged in conduct prejudicial to the good order of discipline of DOT as evidenced by respondent's alleged conduct in Specifications contained in Charge 1. Similarly, in Charge 3, petitioner alleges that respondent engaged in conduct tending to bring the City, DOT or any other City agency into disrepute as evidenced by respondent's alleged conduct in Specifications contained in Charge 1. However, petitioner has not brought forth any evidence to support the charge that respondent's proved misconduct in Charge 1, Specification 1, tended to bring New York City, DOT or any other agency into disrepute. Likewise this cumulative charge is not sustained regarding Charge 1, Specification 2 as petitioner did not prove the alleged misconduct.

Since these charges repeated the factual allegations addressed in previous charge and specifications, the charges are cumulative. These charges are sustained in part and dismissed in part consistent with the analysis of the specifications in the previous section. Where the charges

are sustained, there would be no additional penalty. See *Savello v. Frank*, 48 A.D.2d 699 (2d Dep't 1975) (petitioner should not receive two punishments for one offense when the two departmental rules cited covered identical conduct and were duplicative); *Human Resources Admin. v. Mays*, OATH Index No. 1299/11 at 2 n.1 (Mar. 16, 2011), *modified on penalty*, Comm'r Dec. (Apr. 19, 2011), *rev'd*, NYC Civ. Serv. Comm'n Item No. CD 12-8-R (Jan. 31, 2012) ("This tribunal has held that if the same conduct violates multiple provisions of petitioner's executive order, such conduct will only exact a single penalty"), *Fire Dep't v. Feret*, OATH Index No. 885/00 at 37 (Mar. 10, 2000).

FINDINGS AND CONCLUSIONS

1. Petitioner established that on April 6, 2017, respondent failed to secure his work tools in the proper compartments and failed to keep the back of his utility truck clean in violation of paragraph 31 of petitioner's Code of Conduct.
2. Petitioner did not establish that on June 15, 2017, respondent failed to report to his field work assignment in a timely manner in violation of paragraph 31 of petitioner's Code of Conduct.
3. Charges 2 and 3 are cumulative charges. They are sustained in part and dismissed in part consistent with the analysis of the charges and specifications in the previous section.

RECOMMENDATION

Upon making the above findings and conclusions, I reviewed an abstract of respondent's personnel record provided to me by petitioner. This personnel record included respondent's any prior discipline and written evaluations for the past 5 years. Respondent has been employed by the Department of Transportation as a TDM since 1997. This abstract revealed that respondent was disciplined twice during that period. Respondent served an eight-day suspension and forfeited three days of annual leave in 2013 for leaving the worksite without authorization, improper performance, speaking and acting discourteously to supervisor. In 2015, respondent served a one-day suspension for incurring eight unexcused absences. Petitioner produced performance evaluations for four years: 2013-2016. During this four-year period, and

notwithstanding the documented discipline, respondent achieved an overall rating of “good” on each of these evaluations. There were no commendations issued to respondent.

In this matter, petitioner has requested a penalty of a two-week suspension without pay. I find this penalty excessive given that petition failed to one of the two specifications of misconduct brought against respondent. Petitioner did establish that respondent failed to secure his work tools in the proper compartments and that he failed to keep the back of his truck clean. The reason for this requirement is so that TDMs will have all tools necessary to perform the maintenance and repair required on work assignments. Quite simply, if TDMs cannot locate their tools, they cannot perform their jobs. Although this seems like a minor task, the impact on the ability of workers to function effectively can be significant. Further, since this task is easily completed, it is unreasonable that respondent has not complied with his supervisor’s repeated requests that he perform this routine responsibility of his job.

This tribunal had recommended penalties with a minimum of five-day suspension for failure to safeguard of equipment. However in those cases, the failure to safeguard resulted in the loss or destruction of agency property. *See Dep’t of Sanitation v. Nieves*, OATH Index No. 1683/07 (Sept. 19, 2007) (ALJ recommended a five-day suspension where employee’s negligence caused the destruction of a tire on a salt spreader); *NYPD v. Herald*, OATH Index No. 800/90 (April 10, 1990) (ALJ recommended a five-day penalty for each item lost due to employee’s failure to safeguard department property); *DEP v. Rodriguez*, OATH Index No. 1138/90 (May 11, 1990), *aff’d* NYLJ, Feb 2, 1993 at 26, col.5 (1st Dep’t) (ALJ recommended a five-day suspension where employee lost a block and tackle). In this case, respondent’s failure to secure tools did not result in any loss or destruction of the tools or any other DOT property. In light of this mitigating factor, a lesser penalty is warranted. I recommend a three-day suspension for this misconduct.

Joycelyn McGeachy-Kuls
Administrative Law Judge

June 1, 2018

SUBMITTED TO:

POLLY TROTTENBERG
Commissioner

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