

# ***Dep't of Transportation v. Mirhosseini***

OATH Index No. 916/18 (Oct. 12, 2018)

Respondent charged with using a Department vehicle on multiple occasions without authorization for non-work-related purposes, misrepresenting his personal usage of the vehicle on the trip log sheets, being absent from the workplace, fraudulently receiving compensation for time he did not work, and insubordination on multiple occasions. All of the charges, with the exception of falsifying his time records and fraudulently receiving compensation for time he did not work are sustained. Termination of employment is recommended.

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## **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF TRANSPORTATION**  
*Petitioner*  
*- against -*  
**SEYED MIRHOSSEINI**  
*Respondent*

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### **REPORT AND RECOMMENDATION**

**KARA J. MILLER**, *Administrative Law Judge*

This employee disciplinary proceeding was referred by the Department of Transportation (“DOT” or “petitioner”) pursuant to section 75 of the Civil Service Law. Respondent Seyed Mirhosseini, a civil engineer, was charged with using a Department vehicle without authorization for non-work related duties, multiple instances of falsifying his time records, and misrepresenting his usage of the vehicle by omitting entries on the trip log sheets in violation of paragraphs 20, 26, and 55 of the Code of Conduct; multiple instances of leaving his assigned work area without authorization, being absent from duty, being excessively absent, failing to obtain approval for multiple planned absences, and failing to notify his immediate supervisor of the planned absences in violation of paragraphs 33, 34, 35, 36, and 38 of the Code of Conduct; insubordination on multiple occasions in violation of paragraph 30 of the Code of Conduct; improperly performing his duties, engaging in conduct prejudicial to the good order and

discipline of DOT, and engaging in conduct tending to bring the City of New York and DOT into disrepute in violation of paragraphs 1, 2, and 31 of the Code of Conduct.<sup>1</sup>

Respondent appeared at the trial without counsel. In keeping with rule 103(A)(8) of Appendix A to title 48 of the Rules of the City of New York, the Rules of Conduct for Administrative Law Judges and Hearing Officers of the City of New York, I explained to respondent his right to be represented by an attorney and that an adjournment for purposes of securing legal representation would be granted. I also explained the nature and procedural aspects of the trial.

Respondent indicated that he did not wish to obtain legal representation and declared himself ready to proceed ignoring my urging at the start of the trial. At times during the trial, respondent questioned the meaning of several of the charges, which granted, were poorly drafted, duplicative, and confusing. At one point, at my behest, petitioner's counsel consented to explaining the charges to respondent (Tr. 271-72). It became clear that respondent understood what he was being charged with and that it was only the wording of the charges that was confusing to him. On eight occasions during the trial I suggested that respondent consult with an attorney to represent him in this case. Each time respondent refused and insisted that he wanted to represent himself (Tr. 5-6, 23, 99, 190, 245, 254-55, 273, 275-76).

At the trial, which took place over two days, petitioner relied upon documentary evidence and the testimony of Masroor Mahmood, Jyotish Shah, Jahec Marte, and Mitul Patel. Respondent presented documentary evidence and testified on his own behalf. I find that petitioner established that respondent had repeatedly used a City vehicle without authorization for non-City related purposes, altered trip log sheets, misrepresented his use of the vehicle by omitting entries on the trip log sheets, and was insubordinate on multiple occasions by failing to follow the directives of his supervisor and refusing to perform his job. Petitioner failed to establish that respondent falsified his time records and fraudulently received compensation on for time he was not working. I recommend that respondent be terminated from his position with DOT.

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<sup>1</sup> Petitioner's motion to withdraw Charge I, Specification 23 at the start of the trial was granted over respondent's objection.

### ANALYSIS

Respondent is a civil engineer in DOT's Bridge Inspection Unit. Respondent's responsibilities include performing bridge inspections in the field, writing reports, and assisting the team leader in the office (Tr. 139, 209). It is alleged that respondent used a DOT vehicle for his personal use without authorization and altered the vehicle's trip log sheets. It is further alleged that respondent departed his work location during work hours without authorization to run personal errands.

The director of the Bridge Inspection Unit, Mr. Shah, testified that the City requires employees to accurately document their usage of a City vehicle in the trip log sheets and that they indicate the mileage used (Tr. 154-55). Mr. Shah testified that respondent failed to follow the proper procedure for using the City vehicle. Sometimes he would use the van and not document the trip in the trip sheet logs (Tr. 155). Mr. Shah testified that he was "very upset" when he learned that respondent was not following the City vehicle policy and was using the van for non-City purposes (Tr. 157).

Mr. Mahmood became respondent's immediate supervisor and team leader on August 10, 2016 (Tr. 18). As the team leader, Mr. Mahmood is responsible for inspecting bridges, writing reports, issuing flags on unsafe bridges, and managing his staff (Tr. 17-18). Mr. Mahmood testified that a City van is assigned to the Bridge Inspection Unit for the inspectors to drive to various locations to perform inspections (Tr. 45-46). Since Mr. Mahmood forwards the assignments to the inspectors in the unit, he knows when someone is out of the office performing field work (Pet. Ex. 14 at 26; Tr. 86). Respondent has never been assigned to use the van to conduct field work by himself. Either Mr. Mahmood or another colleague always accompanies him for an inspection (Tr. 47). Mr. Mahmood maintained that respondent was not given field assignments for any of the dates in the charges and that respondent was instead using the van for non-City purposes (Tr. 86).

The keys to the Bridge Inspection Unit's van are located on a hook on the wall of the office. The entire team, including respondent, has access to the keys. Although the van should only be used for City-related work, incidental usage is permitted, such as stopping to pick up lunch on the way back to the office from a field inspection (Tr. 46, 156). Mr. Shah testified that

he has used his City assigned vehicle to pick up lunch on the way back from a field assignment, which is permissible (Tr. 171, 187).

Mr. Mahmood testified that he never gave respondent permission to use the van for personal purposes, nor did respondent ask his permission (Tr. 56, 122). Indeed, Mr. Mahmood maintained that he had told respondent several times that he was not permitted to use the van for his personal errands. He tried to restrict respondent's usage but respondent ignored him (Tr. 87). Mr. Mahmood testified that respondent's personal use of the City van was frequent and not incidental to his job. Respondent would regularly take the keys off the hook and announce that he was going to run an errand, such as going to the post office, or would say nothing and just leave the office (Tr. 46, 122).

Mr. Mahmood maintained that he would check the mileage on the van after respondent returned to the office and notice that eight or nine miles had been added to the odometer but there was no entry in the trip log sheets (Tr. 46-47). Mr. Mahmood testified that anyone who uses the van is required to fill out the trip logs, noting the date and time, who is driving the van, the initial and final destinations, and the mileage used. As the team leader, Mr. Mahmood was concerned because he was ultimately responsible for the van. He explained that it is important to complete the trip log to track who is driving the van, in case the driver runs a red light or the van is damaged in some way (Tr. 47). Mr. Mahmood had spoken to respondent about his responsibility to fill out the trip log sheets when he used the van, but respondent refused to do so (Tr. 52). Neither Mr. Mahmood nor Mr. Marte, respondent's co-worker, used the van for personal use and both filled out the trip log sheets every time they used the vehicle (Tr. 68).

Mr. Marte testified that he observed respondent take the van to run his personal errands. As he was leaving the office, respondent would say something to the effect, "if anyone asks, I'm at the post office" (Pet. Ex. 17 at 8; Tr. 194). Respondent would often not return for 40 minutes or longer (Tr. 194). Mr. Marte stated during his investigatory interview that he did not believe that respondent was going to the post office every time he took the van, because "no one goes to the post office that many times" (Pet. Ex. 17 at 12). On days when no inspections were scheduled, respondent would typically use the van for his errands in the late morning. On days when an inspection was scheduled, if respondent used the van he would do so very early in the

morning before the inspection (Pet. Ex. 17 at 12; Tr. 194-95). Mr. Marte testified that no one else in the unit used the van for non-City purposes (Tr. 195).

Mr. Marte was aware that some of the readings on the trip log sheets were inaccurate and did not reflect the mileage on the odometer (Pet. Ex. 17 at 9-10; Tr. 196). He corroborated that Mr. Mahmood had told respondent that he was not supposed to use the van for his personal purposes but respondent continued to do so (Tr. 197).

Respondent testified “I use the van. I, I never say I didn’t use like this. I use the van to go to the lunch, post office, go and get some food for myself. I use the van” (Tr. 279). Indeed, respondent acknowledged that he has been using the van for his personal use for 28 years and it had never been a problem until 2016, when Mr. Mahmood became his supervisor. Then everything changed (Tr. 15). Respondent analogized that his use of the van to run personal errands was similar to charging your cellphone at work. He asserted that no one complains about using electricity (Tr. 15).

Respondent insisted that Mr. Mahmood had given him permission to use the van to run his personal errands. Mr. Mahmood disagreed (Tr. 122). Mr. Mahmood admitted that the first time respondent had asked if he could take the van to go to the post office, he had said yes but later discovered that respondent had driven eight miles. Mr. Mahmood maintained that after that he told respondent that he could not take the van, but respondent ignored him (Tr. 102).

Respondent questioned Mr. Mahmood during the trial about why the keys are kept on the hook where they are accessible to everyone if the van was not supposed to be used. Mr. Mahmood replied that the first time he had placed the keys in his drawer, respondent became “mad as hell” and was “cursing” him (Tr. 123). Respondent started “making threats” against him on the few occasions that he placed the keys in his drawer (Tr. 124). When Mr. Mahmood contacted Mitul Patel, Deputy Director of the Bridge Inspection Unit, to ask if it was okay to keep the keys in his drawer, Mr. Patel said no. Consequently, Mr. Mahmood left the keys on the hook (Tr. 122-23).

Respondent contended that everyone uses the van for their personal use, such as picking up lunch or preparing for office parties (Tr. 259). Respondent insisted that over the years, Mr. Shah had seen respondent at the store or elsewhere and knew that he used the van for his errands. Respondent also accused Mr. Shah and others of using City vehicles to prepare for a Diwali

(Indian Festival of Lights) party. He testified that they had been shopping for Indian food for four days (Tr. 279). Respondent further testified that 20 days before Christmas, the van was never parked downstairs because everybody, including him, was using it to do their holiday shopping (Tr. 280).

Mr. Shah acknowledged that he and respondent have worked together for approximately 28 years, but denied being aware until recently that respondent was using a City vehicle for his personal errands (Tr. 169-70). During the trial, respondent questioned Mr. Shah about using his assigned City vehicle to pick up food for the Diwali party in November 2017 (Tr. 172-73). Mr. Shah testified that the Diwali party was sanctioned by the DOT Commissioner, who was invited to attend. The party was a celebration for the entire Bureau. Mr. Shah was one of the organizers and worked on the party during his lunch and on his own time (Tr. 174). Mr. Shah distinguished respondent's non-sanctioned use of the van to do his own personal errands from participating in and preparing for an office party (Tr. 175-76).

Respondent maintained that it was the regular practice to "imbed" the mileage used for personal errands in the documented mileage the following day. He asserted that if an employee uses the van to pick up lunch and drives three miles it should be incorporated into the next day's mileage so that the mileage on the odometer correlates with the trip log sheets. Respondent admitted that he does this and asserted that everyone who works in the Bridge Inspection Unit does the same (Tr. 295). Respondent testified that it does not matter if the vehicle trip log sheets are accurate because they are "so unimportant" (Tr. 305). There are only two occasions when it is important – a red light ticket and an accident (Tr. 305).

Respondent testified that at the time of these charges he commuted to work by driving his personal car. Respondent did not use his personal vehicle, however, to run his personal errands during work hours because the parking lot was a 15-minute walk from the office. In addition, he noted that a City vehicle does not receive parking tickets if it is illegally parked in a no standing or no parking zone. Moreover, he does not have to put money in the parking meters if he parks the City vehicle in a metered spot (Tr. 284).

In addition to being charged with using the City van during work hours without authorization for non-City purposes and falsifying or fraudulently altering the trip log sheets,

respondent was charged with failing to follow his supervisor's directives and refusing to perform his job.

Mr. Patel testified that as the Deputy Director and Field Supervisor his duties include preparing a monthly schedule for the bridge inspection teams, executing the bridge inspection plan, distributing the monthly schedule, assigning the daily assignments, scheduling emergency inspections, and supervising subordinates (Tr. 208-09). Mr. Patel is responsible for six teams. He is familiar with respondent, who is assigned to Mr. Mahmood's team (Tr. 209). Mr. Patel testified that respondent should have been performing hands-on field inspections (Tr. 212).

Respondent stated during his investigative interview that the inspector who drives the van to the inspection site usually stays in the van so that they do not get a ticket. Mr. Patel disagreed, stating that respondent's job is to perform bridge inspections, not drive to the location. Therefore, even if respondent drives the van to the inspection site, it does not excuse him from getting out of the van and performing the inspection (Pet. Ex. 18 at 7). Inspections cannot be performed from inside the van (Pet. Ex. 18 at 11).

Mr. Mahmood testified that respondent does not follow his directives. On many occasions while in the field, respondent has refused to get out of the van to either conduct the inspection himself or to assist a co-worker. On other occasions, he has refused to even go into the field to conduct an inspection and has even told Mr. Mahmood to take someone else with him instead. In addition, while in the field, respondent has refused to complete assignments because of his self-imposed limitation on how much work he is required to do in one day (Pet. Ex. 17 at 16; Tr. 30, 201).

Mr. Marte similarly testified that respondent is uncooperative and would refuse to come out of the van to conduct an inspection (Pet. Ex. 17 at 16; Tr. 201). Mr. Patel testified that Mr. Shah had told him that respondent has refused to leave the van to conduct inspections. Mr. Patel also observed respondent sitting in the van on one occasion while his supervisor, Mr. Mahmood, was doing the inspection by himself (Tr. 213).

Respondent testified that "everybody come to bridge inspection, after two or three weeks they, they think they are genius" (Tr. 315). Respondent asserted that his supervisor and colleagues are less qualified and experienced as him. Respondent testified that he is a Professional Engineer and obtained his Master's degree from a "very reputable college." He has

a scuba diving license, which he maintained is a plus in bridge inspection for underwater bridge inspections. In addition, he has a special investigator license and he speaks four languages (Tr. 322).

Respondent was annoyed that Mr. Patel and Mr. Mahmood were hired as his supervisors and maintained that DOT should have hired someone already in the unit for a supervisory position. He insisted that Mr. Shah hired Mr. Patel and kept promoting him because they are related (Tr. 323). He complained that DOT has been passing him over and paying these new supervisors \$15,000 to \$30,000 more than what he earns (Tr. 322). Respondent contended that it is not just the money that bothers him (Tr. 323). Yet, in the same breath he complained about Mr. Patel's salary. According to respondent, when Mr. Patel was put in charge, he was paid \$30,000 more than all of the team leaders and was permitted to work as much overtime as he wants (Tr. 324-25). Respondent testified that everyone was upset and complained to him about Mr. Patel's salary, but he is the only one who spoke up. Respondent told Bojdar Yanev, Executive Director of the Bridge Inspection Unit, that it was not fair because he has been a Professional Engineer for 23 years and some of the other inspectors have 15 to 17 years of experience. But, Mr. Patel's "license is not dry – the ink is not dry yet" and he should not be making so much money (Tr. 325).

Respondent contended that Mr. Patel fired all of the experienced engineers and replaced them with new people who are inexperienced and do not know what they are doing, such as Mr. Mahmood (Tr. 326). Respondent testified that when Mr. Mahmood started he was very nice and told everyone that he would leave the keys to the van on the hook on the wall and whoever wanted to use the van could use it. He maintained that Mr. Mahmood instructed them to add the extra mileage into the next day's trip (Tr. 327). But once Mr. Shah and Mr. Patel learned that he complained about them, they became his "enemies." They have had a "vendetta" against him ever since. Respondent contended that Mr. Shah and Mr. Patel have threatened Mr. Mahmood and told him that he would lose his job if he did not write negative e-mails about respondent (Tr. 327). "Since 2016 I became public enemy number one" (Tr. 327). Mr. Shah and Mr. Patel "destroyed bridge inspection" (Tr. 328). Respondent maintained that it is unsafe because no one knows what they are doing, other than him and Mr. Yanev (Tr. 328).

Respondent testified that “my personality . . . is if I see something, I say something” (Tr. 331). Respondent’s colleagues, however, view respondent not just as outspoken but difficult. Mr. Patel described respondent as unwilling to do assignments. He maintained that respondent sets a poor example for new employees. Mr. Patel blames respondent for creating an “unhealthy” work environment (Tr. 222). He believes that it is demoralizing to the other members on the team (Tr. 222). Moreover, respondent’s work performance is very poor (Tr. 223). Mr. Patel also testified that respondent does not listen to his directives because he believes that Mr. Patel is less qualified than him. Mr. Patel is younger than respondent and has worked as an engineer for fewer years. Respondent believes that Mr. Patel did not deserve to be promoted so he ignores him (Pet. Ex. 18 at 14-15; Tr. 213-14).

Mr. Shah described respondent as careless and unwilling to follow City rules or his supervisor’s directives. Mr. Shah testified that respondent’s work performance is poor and he does not complete his assigned work, which negatively impacts the rest of the unit (Tr. 160-61).

Mr. Mahmood testified that respondent was uncooperative and uninterested in working (Tr. 88). He maintained that respondent avoids doing work and tries to do as little as he can get away with (Tr. 90). Mr. Mahmood believes that respondent is setting a bad example for other employees in the unit (Tr. 88). Respondent’s refusal to do inspections and/or write reports creates a hardship for the other inspectors. Whenever he writes reports they are issued late, so others in the unit have to do his work (Tr. 88).

Mr. Marte testified that respondent and Mr. Mahmood had a “fight” the first day that Mr. Mahmood became the team leader. Respondent became angry because he was trying to sleep and Mr. Mahmood made some noise while he was eating his lunch (Pet. Ex. 17 at 6; Tr. 195). Mr. Marte testified that respondent takes a one-hour lunch break between noon and 1:00 p.m., while everyone else takes 30 minutes for lunch (Pet. Ex. 17 at 7; Tr. 195).

Mr. Marte testified about an incident when Mr. Mahmood had sent an e-mail to his supervisor, copying respondent, about respondent’s refusal to get out of the van to conduct an inspection. Respondent printed out the e-mail, taped it to the wall, and told Mr. Mahmood, “I don’t get back, I get even” (Pet. Ex. 14 at 6-7; Pet. Ex. 17 at 33; Tr. 203). Mr. Mahmood testified during his investigative interview that he felt threatened and was worried that respondent was going to become physical (Pet. Ex. 14 at 12-13).

Mr. Marte described respondent as unpleasant to work with and testified that his negative attitude impacts the morale of the unit (Tr. 203). Mr. Marte testified that in his opinion, respondent's work performance is poor (Tr. 203). During his investigative interview, Mr. Marte stated, "what I mean is that [respondent] doesn't do work, he literally does not work" (Pet. Ex. 17 at 24). Mr. Marte recounted that in the beginning, Mr. Mahmood would tell respondent to get out of the van and perform the inspection but respondent would ignore him. Eventually, Mr. Mahmood stopped telling respondent to do his job because there was no point (Pet. Ex. 17 at 26).

Because respondent was self-represented, he was afforded some latitude regarding his testimony. At times he would get off track and start discussing a litany of complaints dating as far back as 25-years ago and as recent as a few weeks before the trial. In essence, he believed that he needed to speak up for the safety of the public and because he pointed out that other people were inept, he was labeled a "black sheep" and persecuted for speaking his mind (Tr. 333). Now his supervisors "bother him" about "little things" like using the van (Tr. 337). Respondent maintained that "It's not fair. This is a vendetta against me" (Tr. 278).

Respondent's attempt to portray himself as a victim was belied by witness testimony and his own conduct throughout the trial. Instead, he demonstrated that he is a disgruntled employee, who has worked in the unit for a long time and does not want to be supervised or told what to do. Respondent displayed unbridled contempt for his supervisors and co-workers of Indian descent, questioning their ethics, religious commitment, integrity, professionalism, and capabilities. While cross-examining Mr. Patel, he accused him of lying and stated "I got my PE 23 years ago before you come to this country" (Tr. 232). During the trial respondent was also openly hostile towards Mr. Mahmood, asking him if he was a "true Muslim" and calling him a liar despite being admonished not to do so (Tr. 92, 97).

In analyzing credibility, this tribunal may consider such factors as: witness demeanor; consistency of a witness' testimony; supporting or corroborating evidence; witness motivation; bias or prejudice; and the degree to which a witness' testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd* NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998); *Dep't of Correction v. Hansley*, OATH Index No. 575/88 at 19 (Aug. 29, 1989), *aff'd*, 169 A.D.2d 545 (1st Dep't 1991). I found Mr. Shah, Mr. Patel, Mr. Mahmood, and Mr. Marte to be credible

witnesses. They expressed their frustration with respondent's attitude towards them and his job. Yet, they were constrained and professional in relating respondent's behavior. Moreover, their testimony was consistent and was corroborated by contemporaneous e-mails and photographs.

Respondent, on the other hand, was not credible. His testimony was self-serving and inconsistent. He was unable to control his anger and contempt at being charged with misconduct and bandied about conspiracy theories while inappropriately maligning the ethnicity of his colleagues. At one point he even compared Mr. Shah to Hitler (Tr. 268). Respondent displayed an over-developed sense of entitlement to do whatever he chooses because he believes he is smarter and more experienced than everyone else.

The charges were written in a duplicative and overlapping manner. The discussion of the charges, therefore, are organized chronologically by the individual dates that respondent was charged with misconduct. Individual charges relating to the same date are grouped together.

#### ***August 10, 2016***

Respondent is charged with driving a City vehicle for approximately 1.2 miles without authorization for non-City work purposes on August 10, 2016, failing to document the trip on the trip log sheets, misrepresenting his usage of the vehicle by omitting entries on the trip log sheets, falsifying his time and leave records, and fraudulently receiving compensation for time he did not work (Charge I, Specifications 1, 2, 3, 4; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

Petitioner presented the trip log sheets for the van assigned to the Bridge Inspection Unit for the period of August 1, 2016 to October 18, 2016 (Pet. Ex. 7). Mr. Mahmood testified that the trip log sheets are kept inside the van so they can be filled out as the vehicle is used (Tr. 50). On the trip log sheet for August 10, 2016, Mr. Mahmood indicated that respondent had driven the van 1.2 miles (Pet. Ex. 7; Tr. 51). Mr. Mahmood testified that he observed respondent take the keys for the van from the hook in the office. Respondent, however, had not filled out the trip log sheets, so Mr. Mahmood input the information to accurately reflect respondent's use of the City vehicle (Tr. 51).

Respondent testified that he does not remember the dates charged, but admitted using the van to run personal errands (Tr. 102). He justified his personal use of the van by asserting that

his co-workers also used the van for their personal use and no one else was disciplined (Tr. 277-78). Essentially, respondent asserted a claim of selective enforcement. *See Dep't of Transportation v. Jones*, OATH Index No. 1517/07 at 7 (Aug. 10, 2007), *aff'd* NYC Civ. Serv. Comm'n Item No. CD 08-16-SA (May 6, 2008) (highway repairer argued that it was unfair to enforce the rule prohibiting the use of a cellphone while on duty only against her when all of the highway repairers use their phones).

A claim of selective enforcement must be raised in a court of competent jurisdiction and not in an administrative proceeding. *See Bell v. New York State Liquor Auth.*, 48 A.D.2d 83, 84 (3d Dep't 1975) ("The proper manner in which to develop [a selective enforcement] defense is to raise it initially in an article 78 proceeding subsequent to the administrative hearing."); *Dep't of Correction v. Yovino*, OATH Index No. 1209/96 at 3 (Oct. 9, 1996), *rev'd in part on other grounds*, NYC Civ. Serv. Comm'n Item No. CD 97-109-O (Dec. 4, 1997) (the defense of selective enforcement is available only if the selective enforcement alleged is based on constitutionally suspect criteria, and even then, the defense can be asserted only upon judicial review of any adverse administrative determination). This tribunal is not the proper forum to address this claim.

Respondent was also charged with misrepresenting his usage of the vehicle by omitting entries on the trip log sheets on August 10, 2016. Respondent denied falsifying or misrepresenting his usage on the trip log sheets. Nevertheless, he asserted that the trip log sheets are not that important and acknowledged that he never enters information on the log sheets (Tr. 260, 294-95). Respondent failed to understand that his omissions from the trip log sheets constitutes misconduct because he misrepresented his usage of the van.

Respondent admitted to using the City van for his personal business and not entering the trip on the log sheets. Respondent's testimony that he was given permission by his supervisor to use the van for his personal purposes during work hours was not credible. Mr. Mahmood's testimony, as corroborated by Mr. Marte, that respondent never received permission to use a City vehicle to run errands was credible. The documentary evidence, witness testimony, and respondent's admissions established that he used the van without authorization on August 10, 2016. It further establishes that respondent misrepresented his usage of the vehicle by omitting entries on the trip log sheets for that day.

Respondent did not understand why he was charged with falsifying his time records “during the payroll period of August 7, 2016 through August 13, 2016,” and “fraudulently receiving compensation for time he did not work on August 10, 2016” (ALJ Ex. 1 – Charge I, Specifications 3, 4). It was explained to respondent, that he was charged with receiving compensation while he was out of the office running personal errands on August 10, 2016. Petitioner argued that respondent should have been working instead. Respondent expressed displeasure with how the charges were written and denied falsifying his time and leave data and fraudulently receiving compensation for time he did not work on August 10, 2016 (Tr. 273).

Petitioner failed to submit respondent’s time records for this date. Because there was no evidence that respondent failed to document his time out of the office or that he was compensated for time he was not working on August 10, 2016, petitioner did not prove Charge I, Specifications 3 and 4, should be dismissed. Petitioner established the remainder of the charges relating to respondent’s use of the van on August 10, 2016, by the preponderance of the credible evidence.

***August 16, 22, and 25, 2016, and September 6, 2016***

Respondent was charged with insubordination by failing, refusing or neglecting to obey a supervisor’s lawful order on August 16, 22, and 24,<sup>2</sup> 2016 and on September 6, and 16, 2016, and failing to properly perform his assigned duties (Charge IX, Specifications 1, 2, 3, 4, and 5; Charge X, Specification 2) (ALJ Ex. 1).

On September 15, 2016, respondent was issued a verbal warning by Mr. Shah regarding incidents on August 16, 22, and 25, 2016, and September 6, 2016 (Pet. Ex. 12; Tr. 140). Mr. Shah testified the September 15 verbal warning was issued to respondent because he was refusing to conduct assigned fieldwork (Tr. 142).

An employer must prove three elements to establish a charge of insubordination: (1) that an order was communicated to the employee and the employee heard and understood the order;

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<sup>2</sup> The charges state the date as August 25, 2016, which is the day Mr. Mahmood sent an email, reporting the alleged misconduct, which occurred on August 24, 2016. I amended the charge to correct the typo and comport with the testimony and evidence presented at trial since respondent had an opportunity to defend against this charge and there was no prejudice to him. *See, Dep’t of Housing Preservation & Development v. Hand*, OATH Index No. 2594/10 at 12 (Sept. 2, 2010) (petition amended *sua sponte* to correct a typographical error based on testimony and evidence presented at trial).

(2) the contents of the order were clear and unambiguous; and (3) the employee willfully refused to obey the order. *Human Resources Admin. v. Brown*, OATH Index No. 0038/15 at 5 (Oct. 3, 2014); *Health & Hospitals Corp. (Jacobi Hospital Ctr.) v. Cooper*, OATH Index No. 1748/12 at 3 (Sept. 17, 2012); *Dep't of Homeless Services v. Chappelle*, OATH Index No. 1918/07 at 3 (Aug. 30, 2007).

It is well settled that once an order has been given, an employee must abide by the principle of “obey now, grieve later.” This means that an employee is required to obey an order when it is given and subsequently challenge it through formal grievance procedures if there are any substantive or procedural objections. See *Ferreri v. NYS Thruway Auth.*, 62 N.Y.2d 855 (1984); *Strokes v. City of Albany*, 101 A.D.2d 944 (3d Dep't 1984); *Dep't of Correction v. Shabazz*, OATH Index No. 111/03 at 6 (Aug. 21, 2003); *Health & Hospitals Corp. (Kings County Hospital Ctr.) v. Gordon*, OATH Index No. 1843/98 at 8-9 (Nov. 2, 1998). This principle has three recognized exceptions including orders that are unlawful, *Alper v. Gaffney*, 73 A.D.2d 644 (2d Dep't 1979), clearly beyond the authority of the supervisor to make, *Ferreri*, 62 N.Y.2d at 856-57, or imminently threaten the health or safety of the employee or others, *Reisig v. Kirby*, 62 Misc. 2d 632 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969).

#### August 16, 2016

Mr. Patel forwards the team's assignments to Mr. Mahmood, who in turn directs the team members, including respondent, to perform bridge inspections (Tr. 210-11). Respondent's August 16, 2016, assignment was to inspect a bridge identified by its bin number as 22304060. Mr. Mahmood maintained that he directed respondent to accompany him into the field to conduct the inspection. Respondent refused and told Mr. Mahmood to take Mr. Marte (Tr. 25). Mr. Mahmood sent an e-mail to Mr. Patel, copying respondent, on August 16, 2016, stating that he was going to inspect “22304060 primary member/cladding” with Mr. Marte because respondent refused to conduct the inspection (Pet. Ex. 1; Pet. Ex. 15 at 8-9; Pet. Ex. 16 at 9; Tr. 25, 210). Respondent became very hostile after seeing the e-mail and started cursing at Mr. Mahmood, making Mr. Mahmood very nervous (Pet. Ex. 15 at 9-10).

Respondent denied refusing the assignment. He testified that Mr. Mahmood never asked him to go into the field with him (Tr. 311). Respondent's self-serving denial was not believable.

In contrast, Mr. Mahmood's credible testimony was corroborated by the contemporaneous e-mail that he sent to Mr. Patel. Respondent received an unambiguous, clearly communicated lawful order that he refused to comply with. Accordingly, I find that on August 16, 2016, respondent was insubordinate by refusing to follow Mr. Mahmood's directives and failed to properly perform his assigned duties.

August 22, 2016

Mr. Mahmood testified that on August 22, 2016, he received an assignment from his supervisor to inspect two bridges (224004F and 224004G). Mr. Mahmood directed respondent by e-mail to assist him on this field assignment but respondent refused and told him to take Mr. Marte (Pet. Ex. 2; Pet. Ex. 16 at 9; Tr. 27-28, 211). After respondent refused the assignment, Mr. Mahmood sent an e-mail to Mr. Patel, notifying him that respondent refused to inspect the bridges with him (Pet. Ex. 2; Tr. 26, 211).

During his investigative interview, respondent maintained that he did not go with Mr. Mahmood to perform the inspection because he had to do an errand. He stated that he had to give money to a "guy" who was going back home. He insisted that Mr. Mahmood gave him permission to take care of his personal business instead of going to the field inspection (Pet. Ex. 19 at 7). Respondent similarly testified at trial that he did not refuse to go out into the field on August 22, 2016. He maintained that Mr. Mahmood gave him permission to leave the office to take care of a "personal errand." According to respondent, Mr. Mahmood later changed his mind and said that respondent refused to go with him into the field (Tr. 312-13).

Mr. Mahmood's testimony that respondent refused to follow his directive on August 22, 2016, to go into the field to perform an inspection was credible and corroborated by the contemporaneous e-mail that he sent to Mr. Patel. I found respondent's testimony self-serving, incredible, and absurd. It is difficult to believe that Mr. Mahmood would permit respondent to conduct a personal errand in lieu of performing his job. Respondent's theory that Mr. Mahmood gave him permission and then later changed his mind due to pressure from Mr. Patel and Mr. Shah, is unsupported by the record. Respondent received an unambiguous, clearly communicated lawful order that he refused to comply with. Accordingly, I find that respondent

was insubordinate by refusing to follow Mr. Mahmood's directives and failed to properly perform his assigned duties on August 22, 2016.

August 24, 1016

On August 24, 2016, Mr. Mahmood received an assignment from Mr. Patel to inspect three culverts (R-24, R-25, and R-27) (Pet. Ex. 3; Tr. 28). A culvert is a channel under a roadway that allows water to flow from one side to the other (Tr. 199). It is basically a small bridge that is less than 20 feet long (Tr. 31). The three culverts assigned that day were in close proximity to each other (Tr. 199). It takes approximately 10 to 30 minutes to inspect a culvert (Tr. 31, 199).

Mr. Mahmood testified that he went into the field with Mr. Marte and respondent, who was driving the van to conduct the inspections. When they arrived at the first two locations, respondent refused to get out of the van to do the inspections in contravention of Mr. Mahmood's directive (Pet. Ex. 16 at 10-11; Tr. 30, 91, 93, 211). Mr. Patel testified that respondent should have been performing a hands-on inspection, which requires him to leave the van to take photographs, write inspection notes, read earlier reports, take measurements, and document defects in order to later write a comprehensive technical report in the office (Tr. 212).

After returning to the van, Mr. Mahmood directed respondent to drive to the third culvert. Despite having enough time to inspect the third culvert, respondent refused and drove back to the office so that only two of the assigned culverts were inspected that day (Tr. 30, 201). Mr. Marte testified that after inspecting two culverts, respondent said, "we don't do more than two bridges or culverts a day" (Tr. 199). Mr. Mahmood testified that respondent told him to tell Mr. Patel that they are only supposed to inspect two culverts, not three (Pet. Ex. 14 at 15-17; Tr. 30).

Mr. Mahmood testified that respondent was in such a hurry to return to the office after inspecting the second culvert, that he started to drive away before Mr. Marte was fully inside the vehicle (Tr. 30). Mr. Marte confirmed that as he was trying to get back into the van, respondent started driving off. Mr. Mahmood had to tell respondent to stop so that Mr. Marte could get in (Pet. Ex. 17 at 28; Tr. 199). Mr. Marte acknowledged that respondent did not purposely drive away while he was trying to get into the van (Tr. 204).

The following day, Mr. Mahmood sent an e-mail to Mr. Patel, informing him that respondent had refused to leave the van to conduct the culvert inspections on August 24 and refused to write the reports. Consequently, Mr. Marte had to write the reports (Pet. Ex. 3; Tr. 31-32).

Respondent denied the charge. Respondent testified that Mr. Mahmood did not ask him to get out of the van (Tr. 311). He further testified that they inspected all of the assigned culverts before returning to the office. Respondent maintained that he participated in all of the inspections (Tr. 313). He insisted that it is unnecessary for more than one person to conduct the inspection. The only time someone would need assistance is to hold one end of the tape measure if they were taking measurements (Tr. 315). He testified that on this day, others were doing the inspection and he exited the van and was “just walking around.” He contended that if they asked him a question, he answered (Tr. 316).

Respondent’s testimony was nonsensical. In contrast, Mr. Mahmood’s and Mr. Marte’s testimony was consistent and corroborative. The contemporaneous e-mail that Mr. Mahmood sent to Mr. Patel further supported his and Mr. Marte’s testimony. Respondent received an unambiguous, clearly communicated lawful order to inspect the culverts that he refused to comply with. He failed to exit the van to participate in the inspections, drove back to the office before completing all three inspections, and refused to write the reports. Accordingly, I find that respondent was insubordinate by refusing to follow Mr. Mahmood’s directives and failed to properly perform his assigned duties on August 24, 2016.

#### September 6, 2016

On September 6, 2016, Mr. Mahmood went into the field with respondent to inspect a bridge. Mr. Mahmood testified that respondent refused to leave the van to assist him in conducting the inspection (Pet. Ex. 14 at 17; Tr. 35). One of Mr. Patel’s duties is to go conduct random audits in the field. On September 6, 2016, when he went to check on Mr. Mahmood’s team, he saw respondent sitting in the van and Mr. Mahmood conducting the inspection by himself. Respondent did not exit the van when Mr. Patel arrived (Pet. Ex. 4; Pet. Ex. 16 at 15; Pet. Ex. 18 at 12-13; Tr. 35, 213).

Mr. Mahmood informed Mr. Patel that respondent refused to exit the van and participate in the inspection. Mr. Mahmood testified that when he goes out into the field with his staff he is there to supervise, not to do their work. It was respondent's responsibility on September 6, 2016, to conduct the inspection (Tr. 126). Mr. Patel agreed that it was respondent's responsibility to conduct the inspection. Mr. Patel testified that he did not speak to respondent because he knew that respondent would not listen to him (Pet. Ex. 18 at 13; Tr. 213).

Respondent testified that he drove to the location. It took them 45 minutes to get there because of a problem with the GPS and a lot of traffic. Respondent admitted that he was sitting in the van but blamed Mr. Mahmood for not asking for his assistance. Respondent asserted that if he had been asked, he would have assisted because "he would not say no" (Tr. 315). Respondent further contended that it was an easy inspection so his help was not needed (Tr. 317).

Respondent's testimony that he was not asked to do the inspection was not credible. It is unreasonable for respondent to believe that he should be asked to do his job. Mr. Mahmood's credible testimony that respondent was given a directive and refused to comply was corroborated by Mr. Patel and by a contemporaneous e-mail. Respondent's obstinacy and disregard for his supervisors' authority was further demonstrated by his unwillingness to come out of the van even when Mr. Patel appeared at the inspection. Accordingly, I find that on September 6, 2016, respondent was insubordinate by refusing to follow Mr. Mahmood's directives and failed to properly perform his assigned duties.

### ***August 30, 2016***

Respondent is charged with driving a City vehicle for approximately 11 miles<sup>3</sup> without authorization for non-City work purposes on August 30, 2016, failing to document the trip on the trip log sheets, misrepresenting his usage of the vehicle by omitting entries on the trip log sheets, falsifying his time and leave records, and fraudulently receiving compensation for time he did not work (Charge I, Specifications 5, 6, 7, 8; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

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<sup>3</sup> The charges incorrectly state that respondent drove the van 19 miles on August 30, 2016. The documentary evidence and testimony establish that respondent drove the van 11 miles. I am correcting the typographical error on Charge I, Specification 5 to comport with the evidence presented since respondent had an opportunity to defend against this charge and there was no prejudice to him.

Mr. Mahmood testified that he had driven the vehicle on August 29, 2016, and had entered the odometer reading on the log sheets when he finished his trip. On August 30, 2016, Mr. Mahmood observed respondent take the keys for the van and heard him say that he was going out. When Mr. Mahmood entered the van later that day, he noticed that the odometer reflected that the vehicle had been driven 11 miles. Mr. Mahmood testified that he entered the information on the trip log sheets because respondent failed to do so (Tr. 52). Consequently, the trip log reflects that respondent had driven the van for 11 miles on August 30, 2016 (Pet. Ex. 7).

Respondent admitted to driving the van on August 30 to run personal errands but denied driving the van 19 miles as alleged in the charges (ALJ Ex. 1; Tr. 271, 280). Respondent's testimony that he was given permission to drive the van for his personal purposes was not credible. Respondent admitted that he did not enter his personal trips on the trip log sheets (Tr. 260, 295-96). The documentary evidence, witness testimony, and respondent's admissions establish that he used the van without authorization on August 30, 2016. It further establishes that respondent misrepresented his usage of the vehicle by omitting entries on the trip log sheets.

Respondent denied falsifying his time records and fraudulently receiving compensation to time he did not work on August 30, 2016 (Tr. 276-77). Petitioner failed to submit respondent's time records for that date. Because there was no evidence that respondent failed to document his time out of the office or that he was compensated for time he was not working, Charge I, Specifications 7 and 8, should be dismissed. They require proof. Petitioner established the remainder of the charges relating to respondent's use of the van on August 30, 2016, by the preponderance of the credible evidence.

### ***September 8, 2016***

Respondent is charged with driving a City vehicle for approximately eight miles without authorization for non-City work purposes on September 8, 2016, failing to document his trip locations on the vehicle trip log sheets, misrepresenting his usage of the vehicle by omitting entries on the trip log sheets, falsifying his time and leave records, and fraudulently receiving compensation for time he did not work (Charge I, Specifications 9, 10, 11, 15; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

Mr. Mahmood testified that he drove the van assigned to the unit on September 8, 2016. Before starting his trip, he checked the mileage on the odometer to fill out the starting mileage on the trip log sheets and noticed that it was higher than the end mileage from the last time the vehicle was used. Mr. Mahmood created an entry to reflect that respondent had driven the vehicle for 8.4 miles on September 8, 2016, which was the difference between the end mileage and the mileage reflected on the odometer (Pet. Ex. 7; Tr. 52-53). Mr. Mahmood was certain that it was respondent who had taken the vehicle earlier that day and failed to log the mileage on the trip log sheets because he saw him take the keys off the hook. Respondent announced that he was going out but did not say where (Tr. 53).

Respondent testified that he does not remember the dates, but admitted using the van to run personal errands (Tr. 102). Respondent testified that he worked on September 8, 2016. He testified that, in general, the unit does not have that much work to do, but they have to do it because it affects public safety. Therefore, they go out into the field, do the inspection, and return to the office (Tr. 281).

Respondent denied falsifying his time and leave records and fraudulently receiving compensation for work he did not perform (Tr. 281-82). Petitioner failed to submit respondent's time records for September 8, 2016. Because there was no evidence that respondent failed to document his time out of the office or that he was compensated for time he was not working, Charge I, Specifications 10 and 11, should be dismissed. Petitioner established the remainder of the charges relating to respondent's use of the van on September 8, 2016, by the preponderance of the credible evidence.

### ***September 16, 2016***

Respondent was charged with insubordination by failing to obey a supervisor's lawful order to attend a mandatory training conducted by the Metropolitan Transit Authority ("MTA") and failing to perform his duties by not attending the training (Charge IX, Specification 6; Charge X, Specification 2) (ALJ Ex. 1).

Mr. Patel testified that all of the bridge inspectors are required to take safety training courses to perform inspections on bridges over railroad and subway tracks to avoid fatalities (Tr. 215). Mr. Patel sent an e-mail on July 21, 2016, to respondent giving him the date and time for

the training. He sent a reminder e-mail on September 6, 2016, because respondent had missed the first training session (Pet. Ex. 13; Pet. Ex. 18 at 19-20; Tr. 143-44). Mr. Mahmood stated during his investigatory interview that he reminded respondent the morning of the training, but respondent told him that he did not want to go (Pet. Ex. 15 at 20-21). Respondent did not attend the training and did not provide Mr. Shah with a reason for not attending (Tr. 145).

Respondent acknowledged that he did not attend the training. He testified that he forgot to go and blamed his supervisors for not reminding him closer to the time of the training (Tr. 318). The evidence demonstrated, however, that his supervisors told him about the training twice in writing and once verbally on the morning of the training. Accordingly, I find that on September 16, 2016, respondent was insubordinate by failing to follow a directive to attend a mandatory training and that he failed to properly perform his assigned duties.

### ***September 16, 2016***

Respondent is charged with departing his work location without authorization on September 16, 2016, failing to properly indicate on his time records that he took time off to get his personal car repaired, falsifying his time and leave records, and fraudulently receiving compensation for time he did not work on that day (Charge I, Specification 64).

Mr. Mahmood testified during his investigatory interview that once respondent refused to attend the MTA training on September 16, 2016, he gave respondent another assignment for the day (Pet. Ex. 15 at 21-22). At about 9:00 a.m., Mr. Mahmood directed respondent to assist him with an inspection of a bridge (#2076640). Respondent told Mr. Mahmood that he needed to take his car to the mechanic to have it repaired and that Mr. Mahmood should take Mr. Marte instead (Pet. Ex. 5; Pet. Ex. 15 at 22; Pet Ex. 16 at 20; Tr. 36, 38-39). Mr. Mahmood testified that he went into the field with Mr. Marte. Mr. Mahmood further testified that he did not give respondent permission to leave the office to have his car repaired (Tr. 39-40; 96-97).

Mr. Mahmood and Mr. Shah testified that respondent took his car to the mechanic during work hours (Tr. 40). Respondent's time records for September 16, 2016, indicate that respondent arrived at work at 8:00 a.m. and departed at 3:00 p.m. Respondent entered a 30-minute lunch from 12:00 p.m. to 12:30 p.m. (Pet. Ex. 5; Tr. 39-40). Petitioner submitted a copy of respondent's City Time records, which demonstrated that respondent took 30 minutes of

annual leave on September 16, 2016 from 7:30 to 8:00 a.m. (Pet. Ex. 5). Respondent, however, did not leave the office to take his car to be repaired until after Mr. Mahmood left for the inspection at 9:30 a.m. (Tr. 41, 145-47).

Mr. Patel testified that Mr. Mahmood notified him by e-mail that respondent did not go with him to perform the inspection because he needed to get his car repaired and that he charged 30 minutes to his annual leave from 7:30 a.m. to 8:00 a.m. (Tr. 217). Mr. Patel testified that he did not give the assignment to Mr. Mahmood until 8:30 a.m. and that he is certain that respondent took more than 30 minutes to have his car repaired because it takes 15 minutes to walk to where respondent's car was parked. Just walking back and forth from his car would have taken 30 minutes, without even adding the time to for his car to be repaired (Pet. Ex. 18 at 17-18; Tr. 216).

Respondent testified that he asked Mr. Mahmood if he could leave to get his car repaired. Respondent insisted that Mr. Mahmood had given him permission, stating, "they never say no anyway" (Tr. 307-08, 316). Respondent maintained that he went to the store, bought the part, and returned to the office (Tr. 308, 316).

Respondent testified that Mr. Mahmood changed his mind about authorizing respondent's absence and probably wrote the e-mail because he was pressured to do so (Tr. 316). Mr. Mahmood denied that he was forced to write the e-mail by Mr. Shah or Mr. Patel (Tr. 98).

Respondent's testimony that he was given permission to leave the office and not perform an inspection to either have his car repaired by a mechanic or to pick up an auto part is difficult to believe. Respondent has repeatedly demonstrated a lack of respect for Mr. Mahmood's authority. His testimony that Mr. Mahmood never says no to him shows that he has bullied his supervisor and will do whatever he chooses to do regardless of what Mr. Mahmood says.

In addition, respondent's time records for September 16, 2016, demonstrate that respondent did not accurately represent his absence from the office. As a consequence, he falsified his time records and fraudulently received compensation for time he did not actually work. Petitioner established all of the remaining charges relating to respondent's unauthorized absence from the office as well by the preponderance of the credible evidence.

***September 19, 2016***

Respondent is charged with driving a City vehicle approximately five miles without authorization for non-City work purposes on September 19, 2016, failing to document his trip on trip log sheets, misrepresenting his usage of the vehicle by omitting entries on the trip log sheets, falsifying his time and leave records, and fraudulently receiving compensation for time he did not work (Charge I, Specifications 12, 13, 14, 15; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

Mr. Mahmood testified that he entered respondent's name on the trip log sheets on September 19, 2016, to reflect that respondent had driven the van five miles. Respondent did not fill out the trip log sheets, but Mr. Mahmood noticed that the vehicle had been driven five miles by comparing the mileage on the odometer to the end mileage for the last recorded trip two days earlier. Mr. Mahmood testified that he either saw respondent take the keys for the van on September 19 or Mr. Marte reported it to him (Pet. Ex. 7; Tr. 53-54). Respondent testified that he does not remember the dates, but admitted using the van to run personal errands (Tr. 102, 279-80).

Respondent denied falsifying his time and leave record or receiving compensation for time he did not work on September 19, 2016 (Tr. 286-87). Petitioner failed to submit respondent's time records for September 19, 2016. Since there was no evidence that respondent failed to document his time out of the office or that he was compensated for time he was not working, Charge I, Specifications 13 and 14, should be dismissed. Petitioner established the remainder of the charges relating to respondent's use of the van on September 19, 2016, by the preponderance of the credible evidence.

***October 6, 2016***

Respondent is charged with driving a City vehicle approximately 10 miles without authorization for non-City work purposes on October 6, 2016, failing to document his trip locations on trip log sheets, falsifying his time and leave records, and fraudulently receiving compensation for time he did not work (Charge I, Specifications 16, 17, 18, 22; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

Mr. Mahmood took the vehicle for a field inspection on October 7, 2016, and before filling out the starting mileage on the trip log sheets he noticed a discrepancy between the odometer and the log sheets. Mr. Mahmood had driven the vehicle on October 5, 2016, and had entered the end mileage on the log sheets. Mr. Mahmood noticed, however, that on October 7, the odometer indicated that the vehicle had been driven ten miles but there was nothing entered on the trip log sheets to document the 10-mile trip. Mr. Mahmood testified that he knew respondent had used the van on October 6, 2016, because he had observed him take the keys off the hook before leaving the office. Consequently, Mr. Mahmood entered respondent's name on the trip log sheets to reflect that respondent had driven the van ten miles on October 6, 2016 (Pet. Ex. 7; Tr. 54).

Respondent did not deny driving the van on October 6, 2016, but denied that he drove it 10 miles (Tr. 287). He admitted that he regularly used the van for his personal purposes (Tr. 102). He also acknowledged that he did not fill out the trip log sheets when he used the van (Tr. 295).

Respondent further denied falsifying his time record and fraudulently receiving compensation for not working (Tr. 102, 287). Petitioner failed to submit respondent's time records for October 6, 2016. Since there was no evidence that respondent failed to document his time out of the office or that he was compensated for time he was not working, Charge I, Specifications 17 and 18, should be dismissed. Petitioner established the remainder of the charges relating to respondent's use of the van on October 6, 2016, by the preponderance of the credible evidence.

### ***October 18, 2016***

Respondent is charged with driving a City vehicle for approximately eight miles without authorization for non-City work purposes on October 18, 2016,<sup>4</sup> failing to document his trip locations on trip log sheets, misrepresenting his usage of the vehicle by omitting entries on the trip log sheets, falsifying his time and leave records, and fraudulently receiving compensation for

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<sup>4</sup> Charge I, Specifications 19 and 21, incorrectly state that the day in question as October 13, 2016, rather than October 18, 2016. Similarly, Charge I, Specification 20, refers to the incorrect payroll period of October 9 through 15, 2016, rather than October 16 through 22, 2016, referencing the same misconduct. I have amended the charges to comport with the testimony and evidence presented at trial (Tr. 54-55). Respondent had an opportunity to question the witness with respect to the correct date, October 18, 2016.

time he did not work (Charge I, Specifications 19, 20, 21, 22; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

Mr. Mahmood testified that he entered respondent's name on the trip log sheets on October 18, 2016, to reflect that respondent had driven the van eight miles. Respondent had not filled out the trip log sheets, but Mr. Mahmood realized that the odometer indicated that the vehicle had been driven this distance by comparing the mileage on the odometer to the end mileage recorded on the trip log sheets for the previous trip (Pet. Ex. 7; Tr. 54). Mr. Mahmood had driven the vehicle on the prior trip and had filled out the end mileage on the trip log sheets. He knew his entry was accurate (Tr. 55). Mr. Mahmood maintained that either he saw respondent take the keys for the van on October 18, 2016, or if he was in the bathroom, Mr. Marte subsequently reported to him that respondent went out and took the keys (Tr. 56).

Respondent testified that he does not remember on which dates he used the van to run personal errands, but admitted regularly using the van to do so (Tr. 102). Further, although he denied misrepresenting his usage of the vehicle, he acknowledged that he does not fill out the trip log sheets (Tr. 292). Respondent's failure to document his use of the City van is misrepresentation by omission.

Respondent denied falsifying his time record and receiving compensation for work he did not do (Tr. 288). He testified that just because he used the van does not mean that he falsified his time record. Petitioner failed to submit respondent's time records for October 18, 2016. Because there was no evidence that respondent failed to document his time out of the office or that he was compensated for time he was not working, Charge I, Specifications 20 and 21, should be dismissed. Petitioner established the remainder of the charges relating to respondent's use of the van on October 18, 2016, by the preponderance of the credible evidence.

### ***November 3, 2016***

Respondent is charged with departing his assigned work area without authorization on November 3, 2016, falsifying his time records, and fraudulently receiving compensation for time that he did not work (Charge I, Specifications 24, 25; Charge IV, Specification 1) (ALJ Ex. 1).

Mr. Patel testified that Mr. Mahmood had informed him that he and the rest of the team would be working in the office on November 3, 2016, writing reports (Pet. Ex. 6; Tr. 42, 219).

Mr. Mahmood was aware that respondent was scheduled to start his vacation on November 4, 2016. He testified that respondent, however, left the office by 9:00 a.m. on November 3, and did not return that day. Mr. Mahmood testified that he had not given respondent permission to leave (Tr. 100). Indeed, respondent did not notify Mr. Mahmood that he was leaving nor did he request permission (Tr. 42, 44-45).

Mr. Shah testified that he visited the field office on November 3, 2016, and discovered that respondent had left the office without permission. Respondent had not notified anyone where he was going. Mr. Shah left the field office around 12:00 p.m. and noted that respondent had not yet returned (Tr. 153). Mr. Shah told Mr. Mahmood to tell him when respondent returned. Mr. Shah sent an e-mail to respondent at 1:31 p.m. on November 3, 2016, stating that his absence from the office that day was unauthorized and would be charged to his annual leave (Pet. Ex. 6; Tr. 42, 153). The next day, Mr. Mahmood sent an e-mail to Mr. Shah confirming that when he left work at 4:00 p.m. on November 3, respondent had still not returned to the office (Pet. Ex. 6; Tr. 42, 44-45).

Mr. Shah testified that respondent had entered into City Time that he had worked the entire day on November 3, 2016. Mr. Shah subsequently changed the entry to leave without pay after discovering that respondent never returned to the office (Pet. Ex. 6; Resp. Ex. A; Tr. 154).

Charge I, Specification 24 states “During the payroll period of October 30, 2016 through November 6, 2016, the Respondent falsified his time and leave data on City documents” (ALJ Ex. 1). Charge I, Specification 25 states, “During the payroll period of October 30, 2016 through November 6, 2016, the Respondent fraudulently received compensation for time he did not work on November 3, 2016” (ALJ Ex. 1). Respondent denied falsifying his time and leave records and fraudulently receiving compensation for work he did not do (Tr. 288-89). Respondent submitted a copy of his time record for the week of October 30, 2016 through November 5, 2016, to demonstrate that he was on vacation on November 3, 4, and 5, 2016 (Resp. Ex. A; Tr. 266, 290). The time record has a handwritten annotation which states “I was in [sic] vacation” (Resp. Ex. A). Respondent testified that Charge I, Specifications 24 and 25 are “a lie” because it is contradicted by his time record.

Although the charges are imprecise, petitioner explained that it considers the weekly time record to be falsified because respondent falsely entered that he worked the entire day on

Thursday, November 3, 2016. The undisputed testimony was that respondent did not work that day and left the office before 9:00 a.m. Petitioner acknowledged that respondent was on an approved vacation starting Friday, November 4, 2016.

Respondent testified that he had asked Mr. Mahmood if he could leave to take care of some business (Tr. 309). Mr. Mahmood, however, credibly denied giving respondent permission (Tr. 100). Therefore, I find that respondent was scheduled to work on November 3, 2016, but left the office without authorization. I further find that respondent falsely entered on his time records that he worked on November 3, 2016, when he did not. Mr. Shah's testimony that respondent had to change respondent's time record from a paid day of work to leave without pay was credible and supported by respondent's time record (Resp. Ex A; Tr. 154). Indeed, respondent was indignant that Mr. Shah marked the time as leave without pay. He maintained that he asked them to take the time out of his annual leave but Mr. Shah refused (Tr. 309).

While the testimony demonstrates that respondent falsified his time sheets with respect to November 3, 2016, petitioner did not prove that respondent fraudulently received compensation for time he did not work. Since Mr. Shah changed respondent's time record to leave without pay for November 3, 2016, respondent was not actually paid for that date. Accordingly, Charge I, Specification 25 should be dismissed. Petitioner established the remainder of the charges regarding respondent's absence from the office on November 3, 2016.

### ***December 9, 2016***

Respondent is charged with driving a City vehicle without authorization approximately eight miles for non-City work purposes on December 9, 2016, failing to document his trip locations on trip log sheets, misrepresenting his usage of the vehicle by omitting entries on the trip log sheets, falsifying his time and leave records, and fraudulently receiving compensation for time he did not work that day (Charge I, Specifications 26, 27, 28, 29; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

On December 29, 2016, William Livingston sent an e-mail to respondent copying several others, including Mr. Mahmood, Mr. Shah, and Mr. Patel, regarding the December 2016 trip log sheets for the Building Inspection Unit's van (Pet. Ex. 8). The trip log sheets had an incomplete entry for December 9, 2016 (Tr. 56-57). Mr. Mahmood testified that either he saw respondent

take the keys on December 9, or Mr. Marte had informed him that respondent took the keys when he left the office. Mr. Mahmood entered respondent's name on the trip log sheets to reflect that respondent had driven the van on December 9, for eight miles because respondent failed to note the trip on the log (Pet. Ex. 8; Tr. 58).

Mr. Livingston asked respondent to explain the gap on the trip log sheets. Respondent replied to Mr. Livingston's e-mail on December 30, 2016, stating that the entry in question was not written by him. It is not his handwriting (Pet. Ex. 8).

Respondent testified that he does not remember on which dates he used the van to run personal errands, but admitted that he regularly did so (Tr. 102). Respondent did not deny using the van on December 9, 2016. To the contrary, he testified that "maybe" he used the van for eight miles that day (Tr. 291). He denied, however, misrepresenting his usage of the vehicle on the trip log sheets. Respondent's omission on the trip log sheet, however, is tantamount to misrepresenting his usage of the vehicle on these records.

Respondent denied falsifying his time record, and fraudulently receiving compensation for time he did not work (Tr. 291-92). Petitioner failed to submit respondent's time records for December 9, 2016. Since there was no evidence that respondent failed to document his time out of the office or that he was compensated for time he was not working, Charge I, Specifications 28 and 29, should be dismissed. Petitioner established the remainder of the charges relating to respondent's use of the van on December 9, 2016, by the preponderance of the credible evidence.

### ***January 13, 2017***

Respondent was charged with performing his assigned duties improperly, inefficiently or negligently by failing to inspect an assigned culvert and returning to the office three hours prior to the end of his shift on January 13, 2017 (Charge X, Specification 1) (ALJ Ex. 1).

Mr. Patel testified that Mr. Mahmood was out of the office on January 13, 2017, so he assigned work to his team. At 8:53 a.m., Mr. Patel sent an e-mail directing Mr. Marte, Jamal Sedrat, and respondent to inspect three culverts in Staten Island. He noted in the e-mail that all three culverts were in close proximity so the inspections could be completed in one day. He instructed the three inspectors to inspect one culvert each and write a report to document the work on the culverts (Pet. Ex. 14; Pet. Ex. 17 at 20; Pet. Ex. 18 at 21; Tr. 147, 150, 220).

Mr. Marte testified that he went with Mr. Sedrat and respondent to inspect the culverts in Staten Island (Tr. 200). They only inspected two of the culverts because respondent wanted to return to the office in Queens to avoid traffic. Mr. Marte testified that it was not unusual for respondent to refuse to inspect more than two culverts a day. Mr. Marte testified that they arrived back in the office between 12:00 and 1:00 p.m. on January 17 (Pet. Ex. 17 at 21; Tr. 201). Mr. Marte stated during his investigative interview that they had enough time to inspect the third culvert and would have arrived back at the office probably at about 2:00 p.m. (Pet. Ex. 17 at 22).

Mr. Patel learned that respondent refused to inspect the third culvert and instead drove back to the office, arriving about noon (Tr. 220-21). Mr. Patel maintained that inspecting three culverts is not too much for a team to do. He supervises other teams that have inspected four culverts in one day (Tr. 221). Mr. Patel contacted Mr. Shah to let him know what had happened (Pet. Ex. 18 at 23-26; Tr. 221).

Mr. Shah, in turn, sent an e-mail to Mr. Yanev, reporting that respondent failed to complete his assignment and requesting formal disciplinary action. Mr. Shah reported to Mr. Yanev that the inspectors returned to the office by lunchtime (Pet. Ex. 14; Pet. Ex. 16 at 21-24, 28; Tr. 150-51). Mr. Shah testified that respondent's work hours are from 7:30 a.m. to 3:00 p.m., with 30 minutes for lunch (Pet. Ex. 16 at 22, 29). Respondent, who was copied on the e-mail, complained that Mr. Shah and Mr. Patel had been scrutinizing everything he does. He wrote that in the past, if the inspectors were unable to complete an inspection, it would be postponed (Pet. Ex. 14; Tr. 147).

Respondent sent another e-mail on January 13, 2018, at 12:58 p.m. to Mr. Yanev, copying Mr. Shah, stating that it was "too much" work to inspect three culverts in one day, especially on a Friday afternoon because of the traffic. Respondent informed Mr. Yanev, that they inspected two culverts and "I helped as much as I could, I told the guys that we can do the remain [sic] next week" (Pet. Ex. 14).

Respondent testified that he was assigned to perform the inspections with two other inspectors. He was the senior person. According to respondent, whenever there are too many bridges to inspect in one day the inspectors do what they can and then return to the office and do the remaining inspections another day. Respondent admitted that he did not inspect the third

culvert. He testified that it was Friday afternoon and “they” wanted to go back to the office, insisting that it was a group decision and not his alone (Tr. 321-22). He denied that they returned to the office three hours early. He maintained that it was two and a half hours early; two hours plus lunch time (Tr. 319-20). He contended that this was “normal in bridge inspection.” “We’ve been doing this for 28 years” (Tr. 320). Respondent reluctantly admitted that they would have had enough time to conduct the third inspection after they ate lunch (Tr. 322).

Respondent repeatedly complained that his supervisors were unfairly scrutinizing everything that he does. Respondent’s belief that Mr. Patel, Mr. Shah, and Mr. Mahmood are treating him unfairly does not constitute a defense to insubordination. *Dep’t of Correction v. Joseph*, OATH Index No. 196/12 at 13 (Apr. 5, 2012), *modified on penalty*, Comm’r Dec. (Aug. 7, 2013) *aff’d*, NYC Civ. Serv. Comm’n Case No. 35608 (Mar. 12, 2014) (Even though respondent testified that his superiors “were biased against him and looking for an excuse to write him up, that does not constitute a defense to insubordination, nor to inefficient performance of duty.”).

Respondent was given an unambiguous, lawful directive that was clearly communicated. He understood that he was assigned three culvert inspections on January 13, 2017. He refused to perform the third inspection despite having enough time to do so. Accordingly, respondent was insubordinate for refusing to obey a lawful order and he failed to properly perform his assigned duties.

### ***January 24 and 31, 2017***

Respondent is charged with driving a City vehicle without authorization for non-City work purposes for approximately nine miles on January 24, 2017, and 11 miles on January 31, 2017; failing to document his trip locations on trip log sheets; falsifying his time and leave records; fraudulently receiving compensation for time he did not work on January 24 and 31, 2017; falsifying or misrepresenting mileage on the trip log sheets; and altering the ending mileage of the entry for January 23 and 30, 2017 on the vehicle trip log sheets (Charge I, Specifications 30, 31, 32, 33, 34, 35, 36, 37, 38, 39; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

Mr. Mahmood testified that when he returned from vacation in January 2017, he noticed that some entries on the trip log sheets had been altered or written over. Mr. Mahmood told respondent that he could not change the ending mileage entries on the trip log sheets because it was illegal. Mr. Mahmood maintained that respondent had said “okay,” but he continued to do it (Tr. 59).

On January 31, 2017, Mr. Mahmood sent an e-mail to Mr. Yanev, copying Mr. Shah and Mr. Patel, reporting that respondent altered the trip log sheets (Pet. Ex. 9; Tr. 60). Mr. Mahmood’s e-mail states that respondent was using the van assigned to the unit for his personal use and had been tampering with the vehicle log. Mr. Mahmood explained that in the past when respondent would use the van for his personal use, he would not write anything on the trip log sheets, leaving a gap in the mileage. Mr. Mahmood would subsequently fill in the trip log sheets to reflect the change in mileage and respondent’s name as the driver (Pet. Ex. 9; Tr. 62).

In the e-mail, Mr. Mahmood also stated that respondent altered the trip log sheets on January 24 and 31, 2017. Mr. Mahmood testified that he used the van on January 23, 2017, to inspect two bridges. On January 24, the ending mileage on the log sheets for his January 23 trip was written over, changing it from 11879 to 11889. When Mr. Mahmood used the van on January 25, the odometer reflected that the mileage was 11886, three miles less than the altered entry of 11889. Mr. Mahmood testified that there were no field assignments on January 24, and he knew respondent had taken the van that day because he saw him take the keys when he went out. Mr. Mahmood confronted respondent about altering the trip log but respondent did not reply (Pet. Ex. 9; Pet. Ex. 14 at 32-33 Tr. 62-66).

Mr. Shah agreed that the ending mileage entry on January 23, 2017, appeared to be altered. He testified that the entries on the log sheets reflect that the van was driven 19 miles from the office to the field location, but 29 miles for the return trip. Mr. Shah maintained that mileage should be approximately the same going and returning from a field inspection. He corroborated that the trip log sheets indicate that the starting mileage for the next trip on January 25, 2017 was 11886, rather than 11889, as reflected in the ending mileage for the previous trip on January 23. Mr. Shah was “shocked” to learn that respondent had changed the ending mileage on the January 23, 2017, entry and that he continued to use the van for non-City purposes (Tr. 158).

Mr. Mahmood testified that he was certain that it was respondent's handwriting that altered the mileage on the trip log sheets for January 24, 2017, but acknowledged that he did not observe respondent do it (Tr. 103). Respondent noted that a mileage number on the trip log sheets for January 18, 2017, entered by Dushawn Davis, appears to be altered. Mr. Mahmood agreed that the number had been changed by Mr. Davis, not by respondent (Tr. 106). Respondent understood that he had not been charged with changing the number for the January 18, 2017 entry, but wanted to point out that people make mistakes (Tr. 106). He further noted that the time had been changed on an entry made by Mr. Mahmood on January 26, 2017. Mr. Mahmood acknowledged that he had changed it, not respondent (Tr. 107).

On January 31, 2017, at 10:00 a.m., respondent took the keys and told Mr. Mahmood that he was going to the post office. He did not return until 11:00 a.m. Mr. Mahmood wanted to see if respondent entered the trip on the log sheets so he went to the van and checked the log and the vehicle's odometer. He discovered that respondent had not entered the trip on the log sheets. Instead, he wrote over the ending mileage for the previous trip on the log sheets changing it from 11695 to 11975. The actual reading on the odometer was 11976. No one, other than respondent, had used the van on January 31, 2017, because there was no field work that day (Pet. Ex. 9; Tr. 66, 108).

Respondent testified that he might have used the van on January 24, 2017 (Tr. 292). Respondent denied altering the trip log sheets and maintained that it was not his handwriting (Tr. 291, 293, 297-98). Respondent testified that he did not recall ever entering information on the trip log sheets because he usually is the driver and the passenger would fill them out (Tr. 294-95).

Respondent similarly testified that he did not think he drove the vehicle 11 miles on January 31, 2017, but emphasized that "I never say I didn't use the vehicle" (Tr. 297). In essence, respondent admitted to driving the vehicle to run his personal errands, but disputed the alleged distance that he had driven it (Tr. 296-98).

Respondent's denials of altering the end mileage on the trip log sheets for January 23 and 30, 2017, were not credible. Respondent admitted that he would imbed the mileage in the trip log sheets so that personal usage of the van was not reflected on the logs. Mr. Mahmood's testimony that he told respondent not to leave blank entries on the trip log sheets was very

credible and Mr. Livingston had already asked respondent to account for a missing entry on a previous log at the end of December. It is extremely plausible that respondent resorted to changing the ending mileage to “imbed” or cover up his personal use of the van in January. Furthermore, I found Mr. Mahmood’s analysis and determination that respondent had altered these entries on the trip log sheets far more credible than respondent’s self-serving denials.

Respondent denied falsifying his time record for this period of time and fraudulently receiving compensation for time he did not work on January 24 and 31, 2017 (Tr. 298-300). Petitioner failed to submit respondent’s time records for January 24 and 31, 2017. Because there was no evidence that respondent failed to document his time out of the office or that he was compensated for time he was not working, Charge I, Specifications 33, 34, 38, and 39, should be dismissed. Petitioner established the remainder of the charges relating to respondent’s use of the van on January 24 and 31, 2017, by the preponderance of the credible evidence.

***February 8, 2017***

Respondent is charged with driving a City vehicle approximately 12 miles without authorization for non-City work purposes on February 8, 2017, failing to document his trip locations on trip log sheets, falsifying his time and leave records, fraudulently receiving compensation for time he did not work, falsifying or misrepresenting mileage on the trip log sheets, and altering the ending mileage of the entry for February 8, 2017, on the vehicle trip log sheets (Charge I, Specifications 40, 41, 42, 43, 44; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

On March 6, 2017, Mr. Mahmood sent an e-mail to Mr. Livingston to clarify missing and/or altered entries on the February trip log sheets for the unit’s van (Pet. Ex. 10, Tr. 69). Mr. Mahmood testified that on February 8, 2017, he took a photograph of the trip log sheets to establish the ending mileage that he entered for his last trip in the van. He decided to start taking photos of the trip log and the odometer because respondent had written over several entries on the January trip logs. He thought if he had a photograph of the actual entry, it could be used for comparison if any entries were later altered. He also took a photograph of the odometer for verification of his end mileage entry on the trip log sheets (Tr. 72-73). Mr. Mahmood’s last

mileage entry on the trip log for February 8, 2017, was 12053, which was rounded up from the odometer reading of 12052.9 (Pet. Ex. 10; Tr. 73).

By February 10, 2017, the trip log sheets had been altered, to reflect the ending mileage for Mr. Mahmood's last trip from 12053 to 12063. The mileage on the odometer had changed from 12052.9 to 12065. Mr. Mahmood testified that he knows that respondent used the van and altered the trip log sheets because respondent had the keys in his possession on February 10, when Mr. Mahmood needed to use the van to drive into the field for an inspection. Respondent did not document his intervening trip on the log sheets, so Mr. Mahmood made an entry indicating that respondent had driven the van 12 miles (Pet. Ex. 10; Tr. 73-77, 159).

Respondent testified that he does not believe that he drove the vehicle 12 miles, but that he was not denying that he used the vehicle (Tr. 298). Respondent's denial of altering the ending mileage of the entry for February 8, 2017 or falsifying the trip log sheets was not believable (Tr. 299). In contrast, Mr. Mahmood's earnest and credible testimony that respondent altered the trip log sheets to hide that he used the van for his personal purposes on February 8, was corroborated by photographic evidence.

Respondent denied falsifying his time record for the period in question or fraudulently receiving compensation for time he did not work on February 8, 2017 (Tr. 299). Petitioner failed to submit respondent's time records for February 8, 2017. Because there was no evidence that respondent failed to document his time out of the office or that he was compensated for time he was not working, Charge I, Specifications 43 and 44, should be dismissed. Petitioner established the remainder of the charges relating to respondent's use of the van on February 8, 2017, by the preponderance of the credible evidence.

### ***February 22, 2017***

Respondent is charged with driving a City vehicle approximately 12 miles without authorization for non-City work purposes on February 22, 2017, failing to document his trip locations on trip log sheets, falsifying his time and leave records, fraudulently receiving compensation for time he did not work that day, falsifying or misrepresenting mileage on the trip log sheets, and altering the ending mileage of the entry for February 21, 2017, on the vehicle trip

log sheets (Charge I, Specifications 45, 46, 47, 48, 49; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

Mr. Mahmood photographed the trip log sheets and odometer on February 21, 2017. Mr. Mahmood's end mileage entry on the trip log sheets that day was 12271 and the odometer reflected the mileage as 12271.4 (Pet. Ex. 10; Tr. 78). Sometime between Mr. Mahmood's usage of the vehicle on February 21, 2017, and the next time he used it on February 23, 2017, the trip log sheets had been altered. The end mileage reading of 12271 for the February 21, 2017, trip was written over to indicate an end mileage of 12283. Mr. Mahmood testified that respondent had driven the van 12 miles for his personal use. Mr. Mahmood maintained that he either observed respondent take the keys or Mr. Marte reported it to him (Pet. Ex. 10; Tr. 78-81, 112). The van was not used for a field inspection between Mr. Mahmood's last entry at 1:15 p.m. on February 21, 2017, and 9:45 a.m. on February 23, 2017 (Pet. Ex. 10; Tr. 81, 159-60).

Respondent directed Mr. Mahmood's attention to the entry Mr. Mahmood had written on the trip sheets to reflect that respondent had driven the van 12 miles. Portions of the entry are crossed out with a single line going through them. Mr. Mahmood explained that he started to enter his starting mileage when he noticed that the end mileage on the prior trip had been altered. He wanted to reflect the missing entry so he crossed out what he started to fill in and skipped down two lines to document his use of the van on February 23, 2017. On the line where he had crossed out the information, he entered that respondent had driven the van 12 miles (Pet. Ex. 10; Tr. 109-111, 115, 128-29). Mr. Mahmood acknowledged that respondent did not cross out this information (Tr. 111).

Respondent noted another entry where one of the numbers in the mileage for a trip taken on February 21, 2017, had been written over. Mr. Mahmood testified that he was not claiming that respondent had changed that particular entry. It appeared to him that the person using the van made a mistake with a number with the end mileage and corrected it (Pet. Ex. 10; Tr. 112).

When challenged by respondent, Mr. Mahmood acknowledged that it is not his normal practice to photograph the trip log sheets or odometer (Tr. 113). He explained that he started photographing the trip log and odometer because he suspected that respondent was altering the trip log sheets and wanted to document what the end mileage was on the last entered trip (Tr. 130).

Respondent admitted driving the vehicle for his personal use, but denied that it was 12 miles (Tr. 300). Respondent additionally denied altering the end mileage on the entry for February 21, 2017, or falsifying the trip log sheets (Tr. 300). Respondent's denials, however, were not credible in light of Mr. Mahmood's testimony and photographic corroboration.

Petitioner alleged that "during the payroll period of February 19, 2017 through February 25, 2017, the Respondent falsified his time and leave data on City documents" and during the same payroll period "fraudulently received compensation for time he did not work on February 22, 2017" (Charge I, Specifications 48 and 49) (ALJ Ex. 1). Respondent denied falsifying his time record and fraudulently receiving compensation for time he did not work (Tr. 300-01). Respondent submitted a copy of his time record for the week of February 12, 2017, through February 16, 2017, with a handwritten annotation that states "Feb/14 to Feb 17, I was in Cancun. 19 & 20 son Washington" (Resp. Ex. A).

The official portion of the time record indicates that respondent worked seven hours on Monday, February 13, 2017, and the remainder of the week was categorized as annual leave (Resp. Ex. A). Respondent testified that he was on vacation February 15, 16, and 17, 2017 (Tr. 265-66). Respondent further indicated that he was with his son in Washington, D.C. on February 19, which was a Sunday, respondent's day off, and February 20, which was President's Day, an official City holiday. Respondent admitted, however, that he was not on vacation February 21 through 25, 2017 (Tr. 266).

Although the charge is imprecisely written and appears to indicate that the entire time record for February 19 through 25, 2017, was falsified, petitioner was actually charging respondent with falsifying his entry only for February 22, 2017. Petitioner alleged that respondent failed to enter the time that he was out of the office using the City van for his personal purposes on February 22, 2017. By not entering this information on his time records, petitioner alleged that respondent was paid for time he did not actually work.

The time record that respondent submitted does not include February 22, 2017, and petitioner failed to submit respondent's time records for February 22, 2017. Because there was no evidence to establish that respondent failed to document his time out of the office or that he was compensated for time he was not working, Charge I, Specifications 48 and 49, should be

dismissed. Petitioner established the remainder of the charges relating to respondent's use of the van on February 22, 2017, by the preponderance of the credible evidence.

***February 27, 2017***

Respondent is charged with driving a City vehicle approximately eight miles without authorization for non-City work purposes on February 27, 2017, failing to document his trip locations on trip log sheets, misrepresenting his usage of the vehicle by omitting entries on the trip log sheet, falsifying his time and leave records, and fraudulently receiving compensation for time he did not work (Charge I, Specifications 50, 51, 52, 53; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

Mr. Mahmood testified that he entered respondent's name on the trip log sheets for February 27, 2017, to reflect respondent's personal use of the van. The trip log sheets reflect that respondent drove eight miles on February 27 (Pet. Ex. 10; Tr. 82). Mr. Mahmood maintained that he either observed respondent taking the keys to the van on February 27 or he was informed by Mr. Marte that respondent had done so (Tr. 83). Mr. Mahmood reported to Mr. Livingston in his March 6, 2017, e-mail that respondent had altered the mileage on the trip log sheets from 12392 to 12400 (Pet. Ex. 10).

Respondent testified that he could not recall if he used the van on February 27, 2017, but stated "I am not going to deny it because I used the van" (Tr. 301). He qualified his answer, however, by stating that if he used the van he did not drive it eight miles (Tr. 301). Respondent denied falsifying and/or altering the trip log sheets. Respondent's denials were not credible. I found Mr. Mahmood's testimony and contemporaneous e-mail persuasive and supported the allegations.

Respondent further denied falsifying his time record and fraudulently receiving compensation for time he did not work (Tr. 302). Petitioner failed to submit respondent's time records for February 27, 2017. Because there was no evidence that respondent failed to document his time out of the office or that he was compensated for time he was not working, Charge I, Specifications 52 and 53, should be dismissed. Petitioner established the remainder of the charges relating to respondent's use of the van on February 27, 2017, by the preponderance of the credible evidence.

***March 6, 28, and 31, 2017***

Respondent is charged with using a City vehicle without authorization for non-City work purposes by driving approximately 11 miles on March 6, 2017, approximately eight miles on March 28, 2017, and approximately five miles on March 31, 2017; failing to document his trip locations on trip log sheets; misrepresenting his usage of the vehicle by omitting entries on the trip log sheets; falsifying his time and leave records, and fraudulently receiving compensation for time he did not work (Charge I, Specifications 54, 55, 56, 57, 58, 59, 60, 61, 62, 63; Charge II, Specification 1; Charge III, Specification 1) (ALJ Ex. 1).

Mr. Mahmood sent an e-mail to Mr. Livingston on April 5, 2017, to clarify missing or incomplete entries on the March 2017 trip log sheets for the unit's van. Mr. Mahmood testified that either he observed respondent take the keys to the van as he left the office or Mr. Marte reported it to him for the dates in question. Mr. Mahmood further testified that respondent was not performing field assignments for those March dates (Pet. Ex. 11; Tr. 83, 86).

Mr. Mahmood reported that on March 6, 2017, respondent drove the van 11 miles for his personal use and did not document the trip on the log sheets (Pet. Ex. 10; Tr. 83). Mr. Mahmood testified that on March 3, 2017, he used the van for field work and documented the ending mileage on the trip log sheets as 12482. Respondent used the van on March 6, 2017, for his personal use and failed to document the trip. When Mr. Mahmood used the van for field work the following day, he noticed that the mileage reflected on the odometer was 12493 (Pet. Ex. 11; Tr. 84).

Mr. Mahmood testified that respondent drove the van eight miles for personal use on March 28, 2017 (Pet. Ex. 10; Tr. 85). Mr. Mahmood used the van for field work on March 27, 2017, and documented the ending mileage as 12648. There were no field assignments on March 28, 2017, but when Mr. Mahmood used the van for a field assignment on March 29, 2017, he noticed a discrepancy on the mileage. The odometer read 12656, which was eight miles higher than the end mileage Mr. Mahmood had entered on the trip log sheets on March 27. Moreover, there were no trips documented on the trip log sheets to explain the discrepancy (Pet. Ex. 11; Tr. 85).

Mr. Mahmood similarly testified that on March 31, 2017, respondent drove the van five miles for his personal use and failed to document the trip on the log sheets (Pet. Ex. 11; Tr. 85).

The ending mileage for Mr. Mahmood's last trip in the van on March 30, 2017, was 12716. On March 31, 2017, the odometer reflected that the van had been driven five miles. The mileage reading was 12721. Once again there was nothing on the trip log sheets documenting this trip. Mr. Mahmood testified that respondent did not have a field assignment, so he knows that he took the van for personal use (Pet. Ex. 11; Tr. 85-86).

Respondent testified that he does not remember the dates, but admitted using the van to run personal errands (Tr. 115). Respondent testified that he might have used the van on March 6, 2017, but denied driving the van 11 miles. Indeed, he testified

“Believe me, even the post office is a, is a longest one and it's not no more than one and a half mile, 1.7. Between post office and the office is a fruit stand that we go there. The rest of 'em is like a .8 miles or .5 miles to go and get Chinese food, to go and get Burger King or pizza. They are not that far. That can't be 11 miles” (Tr. 302-03).

Respondent similarly testified that he probably used the van on March 28 and 31, 2017, but denied that he drove eight miles and five miles, respectively (Tr. 304-05). Respondent denied falsifying the trip log sheets for this period of time. Mr. Mahmood's credible testimony and contemporaneous e-mail sufficiently established that respondent misrepresented his usage of the vehicle by omitting entries on the trip log sheets for each of the March 2017 dates.

Respondent denied falsifying his time records and fraudulently receiving compensation for time he did not work on March 6, 28, and 31, 2017 (Tr. 306-07). Petitioner failed to submit respondent's time records for March 6, 28, and 31, 2017. Since there was no evidence that respondent failed to document his time out of the office or that he was compensated for time he was not working, Charge I, Specifications 56, 57, 61, 62, and 63 should be dismissed. Petitioner established the remainder of the charges relating to respondent's use of the van on March 6, 28, and 31, 2017, by the preponderance of the credible evidence.

### **FINDINGS AND CONCLUSIONS**

1. Petitioner established that respondent drove a City vehicle on August 10, 2016, without authorization for his personal use and misrepresented his usage of the vehicle by omitting entries on the trip log sheets.

2. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on August 10, 2016.
3. Petitioner established that respondent was insubordinate by refusing to follow his supervisor's directives and failed to properly perform his duties on August 16, 22, and 25, 2016, and September 6, 2016.
4. Petitioner established that respondent drove a City vehicle on August 30, 2016, without authorization for his personal use and misrepresented his usage of the vehicle by omitting entries on the trip log sheets.
5. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on August 30, 2016.
6. Petitioner established that respondent drove a City vehicle on September 8, 2016, without authorization for his personal use and misrepresented his usage of the vehicle by omitting entries on the trip log sheets.
7. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on September 8, 2016.
8. Petitioner established that respondent departed his work location without authorization on September 16, 2016, failed to properly indicate on his time records that he took time off for a personal errand, falsified his time and leave records, and fraudulently received compensation for time he did not work.
9. Petitioner established that respondent was insubordinate by failing to obey his supervisor's order to attend a mandatory training conducted by the MTA and failed to properly perform his duties by not attending the training on September 16, 2016.
10. Petitioner established that respondent drove a City vehicle on September 19, 2016, without authorization for his personal use and misrepresented his usage of the vehicle by omitting entries on the trip log sheets.

11. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on September 19, 2016.
12. Petitioner established that respondent drove a City vehicle on October 6, 2016, without authorization for his personal use and misrepresented his usage of the vehicle by omitting entries on the trip log sheets.
13. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on October 6, 2016.
14. Petitioner established that respondent drove a City vehicle on October 18, 2016, without authorization for his personal use and misrepresented his usage of the vehicle by omitting entries on the trip log sheets.
15. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on October 18, 2016.
16. Petitioner established that respondent was absent from his work location without authorization on November 3, 2016, and falsified his time and leave record.
17. Petitioner failed to establish that respondent fraudulently received compensation for time he did not work on November 3, 2016.
18. Petitioner established that respondent drove a City vehicle on December 9, 2016, without authorization for his personal use and misrepresented his usage of the vehicle by omitting entries on the trip log sheets.
19. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on December 9, 2016.
20. Petitioner established that respondent was insubordinate by failing to inspect an assigned culvert and failed to properly perform his duties on January 13, 2017.
21. Petitioner established that respondent drove a City vehicle on January 24 and 31, 2017, without authorization for his personal

use, misrepresented his usage of the vehicle by omitting entries on the trip log sheets, and altered the ending mileage entries for trips on January 23 and 30, 2017.

22. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on January 24 and 31, 2017.
23. Petitioner established that respondent drove a City vehicle on February 8, 2017, without authorization for his personal use, misrepresented his usage of the vehicle by omitting entries on the trip log sheets, and altered the ending mileage entries for a trip on February 8, 2017.
24. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on February 8, 2017.
25. Petitioner established that respondent drove a City vehicle on February 22, 2017, without authorization for his personal use, misrepresented his usage of the vehicle by omitting entries on the trip log sheets, and altered the ending mileage entries for a trip on February 22, 2017.
26. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on February 22, 2017.
27. Petitioner established that respondent drove a City vehicle on February 27, 2017, without authorization for his personal use and misrepresented his usage of the vehicle by omitting entries on the trip log sheets.
28. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on February 27, 2017.
29. Petitioner established that respondent drove a City vehicle on March 6, 28, and 31, 2017, without authorization for his personal use and misrepresented his usage of the vehicle by omitting entries on the trip log sheets.
30. Petitioner failed to establish that respondent falsified his time and leave record and fraudulently received compensation for time he did not work on March 6, 28, and 31, 2017.

### **RECOMMENDATION**

Upon sustaining the charges, I obtained and reviewed an abstract of respondent's personnel record provided to me by petitioner. Respondent was appointed as an Assistant Civil Engineer on July 17, 1989. He was provisionally promoted to the title of Civil Engineer on May 18, 1997, and permanently appointed to that position on November 17, 1999. Respondent took a leave of his permanent title with DOT and joined the Department of Buildings as a provisional Plan Examiner on February 27, 2006. He was terminated from his provisional appointment with the Department of Buildings on April 12, 2006 and returned to his position with DOT on April 13, 2006. During his tenure with DOT, he was formally disciplined on one occasion. In July 2006, respondent was suspended for two weeks without pay with a one-year probationary period pursuant to a stipulation of settlement for acting discourteously to his supervisor and refusing to do field work.

Petitioner requested that respondent be terminated from his position with DOT. Petitioner established that respondent was regularly insubordinate by refusing to obey the directives of his supervisors and that he failed to properly perform his job on multiple occasions. It was further established that respondent uses the City van as his private vehicle, taking it without authorization and using it for his personal purposes. Respondent repeatedly misrepresented his usage of the vehicle by omitting entries on the trip log sheets and/or fraudulently altering the end mileage to hide his unauthorized use.

Respondent's view of his duties is very limited. He demonstrated that he is a disgruntled long-time City employee, angry with being passed over for promotion and fixed in his ways. Respondent behaved as though he is entitled to act however he pleases because of his superior education and experience. It was very clear from respondent's testimony and demeanor that he does not hold his supervisors in high esteem. Respondent, however, does not have the prerogative to select his supervisors and even if he dislikes them, he is still obligated to be respectful and comply with their directives. *See Human Resources Admin. v. Brown*, OATH Index No. 0038/15 at 7 (Oct. 3, 2014); *Dep't of Health & Mental Hygiene v. Dillon*, OATH Index No. 108/14 at 16 (Feb. 14, 2014); *Health & Hospitals Corp. (Coler-Goldwater Specialty Hospital and Nursing Facility) v. Ramsey*, OATH Index No. 724/04 at 8-9 (Apr. 16, 2004); *Dep't of Transportation v. Solli*, OATH Index No. 2888/10 at 23 (Jan. 26, 2011).

Respondent believes his actions have no consequences. He is mistaken. Tampering with the trip log sheets is fraud and omitting entries to hide his use of the City van is misrepresentation. He has repeatedly proven to be an untrustworthy and unreliable employee. Respondent's attitude, insubordination, and refusal to do his job have created a negative work environment and a hardship on the Bridge Inspection Unit.

In *Department of Environmental Protection v. Freeman*, OATH Index No. 166/09 (Jan. 5, 2009), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 09-69-SA (Nov. 12, 2009), Administrative Law Judge ("ALJ") Alessandra Zoragniotti found that a water use inspector made false entries on her route sheet, used her agency vehicle for unauthorized purposes, neglected her duties, was insubordinate, and committed other misconduct. ALJ Zoragniotti held that "where an employee has proven [himself] to be utterly untrustworthy and has willfully and defiantly violated the most fundamental rules of [his] employing agency, termination is the only acceptable penalty." *Freeman*, OATH 166/09 at 26. *See also, Human Resources Admin. v. Lopez*, OATH Index No. 496/15 at 11 (Jan. 12, 2015) (termination recommended for an employee, who breached the trust his employer placed in him, demonstrated a lack of integrity and dishonesty, submitted a fraudulent medical note and provided blatantly false testimony); *Human Resources Admin. v. Allen*, OATH Index No. 212/06 at 38-39 (June 28, 2006) (termination recommended for a supervisor who sexually harassed three female security guards under his direction, misused the agency van for personal travel, logged excessive mileage, failed to submit daily route sheets, and knowingly submitted a false affidavit and other false statements about using the van for official purposes).

Even though respondent has a long tenure with DOT and a relatively minor disciplinary history, petitioner's request for termination of employment under these circumstances is reasonable. Respondent has refused to acknowledge that he has done anything wrong. Indeed, in his opinion everyone around him is intellectually and professionally inferior. Respondent has proven that he is unwilling to change because he sees his conduct as perfectly acceptable. As such, there is no point in imposing a penalty short of termination because respondent has demonstrated that he will continue to act the same way. *See Health & Hospital Corp. (Coler Goldwater Specialty Hospital & Nursing Facility) v. Ramsey*, OATH Index No. 1248/05 at 21-22 (Nov. 5, 2005) (termination recommended despite hospital employee's lengthy tenure and

relatively recent disciplinary history; ALJ found no reason to believe that the employee would deviate from his course of conduct of being insubordinate and disrespectful towards his supervisor); *Office of Management & Budget v. Perdum*, OATH Index No. 998/91 at 28-29 (June 17, 1991) (nineteen-year employee with no prior record terminated for repeated insubordination and incompetence where he demonstrated no willingness to change).

Accordingly, I recommend that respondent be terminated from his position with DOT.

Kara J. Miller  
Administrative Law Judge

October 12, 2018

SUBMITTED TO:

**POLLY TROTTENBERG**  
*Commissioner*

APPEARANCES:

**JEREMY WEINSTEIN, ESQ.**  
*Attorney for Petitioner*

**SYED MIRHOSSEINI**  
*Respondent – Self-represented*