Dep't of Social Services (Human Resources Admin.) v. *Miles*

OATH Index No. 1432/20 (Dec. 10, 2020), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2021-0126 (Aug. 19, 2021), **appended**

Petitioner proved that respondent, a job opportunity specialist, engaged in several instances of discourteous and threatening conduct. Termination of respondent's employment is recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF SOCIAL SERVICES (HUMAN RESOURCES ADMINISTRATION)
Petitioner
- against -
AARON MILES
Respondent

REPORT AND RECOMMENDATION

NOEL R. GARCIA, *Administrative Law Judge*

This disciplinary proceeding was referred to me in accordance with section 75 of the Civil Service Law. Respondent Aaron Miles is a job opportunity specialist ("JOS") employed by petitioner, the Department of Social Services (Human Resources Administration) ("HRA"). He is charged with several instances of threatening and discourteous conduct at the workplace and on social media (ALJ Ex. 1).[1]

Respondent appeared *pro se*. At the commencement of trial, I explained to respondent the trial process and his right to be represented by counsel, and that his union could provide him with an attorney. Respondent stated that he understood his right to counsel but elected to proceed without representation (Tr. 4-6). At trial, respondent was afforded the opportunity to fully participate in the proceedings, including by presenting evidence, providing testimony, stating

[1] Petitioner also alleges that respondent violated other provisions of HRA's Code of Conduct, including rules prohibiting an employee from conduct detrimental to the agency, or activity that would compromise the effectiveness of an employee in the performance of the employee's duties. However, HRA never specified in its petition or at trial how respondent violated these rules. In any event, as these charges stem from the same alleged facts that gave rise to the charges of threatening and discourteous conduct, the charges are duplicative.

objections, cross-examining witnesses, and making arguments. Both parties were also permitted to submit post-trial memorandums, but respondent declined to do so.

Petitioner relied on the testimony of five witnesses, and presented documentary and video evidence. Respondent testified on his own behalf, and also offered documentary and audio evidence.

For the reasons explained below, I find that petitioner proved by a preponderance of the evidence that respondent engaged in threatening and discourteous conduct.

ANALYSIS

According to petitioner's amended charges, between the months of June and August 2019, respondent engaged in various instances of threatening and discourteous conduct towards staff members at his assigned work place, culminating with making a statement on August 9, 2019, that "I'm going to shoot up this place." Respondent was suspended for 30 days shortly after making that statement. Petitioner also charges that between August 14 and August 31 of 2019, respondent posted on his personal Instagram account several discourteous and threatening statements regarding his co-workers (ALJ Ex. 1).

Respondent denied the charges and claimed that he did not make some of the statements alleged, or that certain statements he did make were not threatening or discourteous.

Specification I – Threatening and discourteous conduct

Petitioner alleged that respondent made threatening and discourteous statements on six different occasions, as follows.

1) Incident of July 17, 2019

Petitioner alleged that on July 17, 2019, respondent made the statement "I can be street" in front of staff members, and then met with Director Desiree Royer-Brown to discuss the statement.

Director Royer-Brown testified that she is the director of HRA's rental assistance program, and that respondent was a JOS assigned to her unit (Tr. 84-88). She stated that on July 17, 2019, several staff members, including Amador Suarez, Leisa Heckstall, and Esmeralda Gerena, approached her and said that respondent was "making threats . . . as he was walking by them" (Tr. 94-95). Specifically, the staff members told her that respondent had stated that he "could be

street," which they took as a threat (Tr. 95). Director Royer-Brown instructed the staff members to submit written statements, but they refused to do so (Tr. 99). She then met with respondent.

During the meeting, Director Royer-Brown informed respondent that staff members had told her that he had stated that he could "be street" (Tr. 98). Respondent replied "I can say that I could be street," that "people think that I can't be street," and that "just because people see me dressed all professional . . . people in here sleeping on me" (Tr. 98-99). Director Royer-Brown instructed respondent not to make the statement again and said that she would write a memorandum memorializing the meeting (Tr. 98).

The memorandum drafted by Director Royer-Brown states that she held a meeting with respondent "regarding the statement 'I can be street' that was said in front of staff and me. This statement can be interpreted as a threat" (Pet. Ex. 3). The memorandum further states that respondent was instructed to cease making the statement. There is no indication that respondent failed comply with Director Royer-Brown's directive.

Of the three staff members who allegedly heard respondent make the statement, only Ms. Gerena was called to testify. However, petitioner did not elicit any testimony from her regarding this incident. JOS Candi Rufus briefly testified that respondent told her that he could "be street" in June, and then again in July 2019. However, because Ms. Rufus: 1) did not provide a date as to when those comments took place; and 2) her description of those incidents is significantly different than the incident alleged here; and 3) Director Royer-Brown did not identify Ms. Rufus as one of the staff members who complained about respondent on this date, Ms. Rufus's testimony was not considered as part of this charge (Tr. 202-05).

Respondent denied making a threatening statement, but instead testified that he made a statement that he has a "street side," and that he has "frequently ma[de] reference to a lot of my co-workers . . . to my street culture influences because using phrases similar to these are commonly used to express levels of frustration." He further argued that the statement has "a range of interpretations, which are all subjective so I can't say how someone's going to interpret that" (Tr. 263-64). He alleged that he was the victim of "harassment and the abuse by upper management" and that some of his co-workers may have been misinterpreting his "agitation and frustration" with his work environment as threatening behavior (Tr. 263-64).

It is well settled that not every disagreement in the work place or expression of frustration rises to the level of misconduct. Any comments made, however, must remain within the bounds

of decorum and discretion. *See Dep't of Correction v. Martin*, OATH Index No. 431/95 at 14 (Jan. 17, 1995); *Human Resources Admin. v. Bichai*, OATH Index No. 211/90 at 13 (Nov. 21, 1989), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 90-54 (June 15, 1990). Relevant factors include the context, substance, tone, and duration of the remarks. *Human Resources Admin. v. Smart*, OATH Index No. 1325/16 at 7 (May 6, 2016).

Intimidating and threatening statements towards a co-worker are misconduct. *Dep't of Transportation v. Ferstler*, OATH Index No. 593/07 (June 25, 2007). Such misconduct may be established based upon the words used, tone in which they are said, gestures, and the overall circumstances. *See Dep't of Environmental Protection v. Sutton*, OATH Index No. 565/91 at 3 (Feb. 7, 1991) (language must be taken in its context, and language that might be inappropriate in one setting might be acceptable elsewhere).

Here, petitioner failed to provide sufficient evidence to establish that respondent's remark that "he could be street" rose to the level of discourteous or threatening conduct. Indeed, Ms. Gerena, the only staff member who allegedly heard respondent make the statement and appeared at trial, was never asked to describe the circumstances under which the comment was made, including who respondent was speaking to, his tone, gestures or other actions. While Director Royer-Brown correctly noted in her memorandum that respondent's statement could be perceived as a threat, she was not present when the statement was heard by the staff members, and provided no details as to how and to whom the statement was made. Lastly, while respondent admitted to telling co-workers that he has "a street side," the phrase, standing only, is insufficient to constitute a threat, where respondent explained that he was merely expressing frustration.

Therefore, petitioner did not prove by a preponderance of the evidence that respondent's statement rose to the level of threatening or discourteous conduct.

2) Incident of July 29, 2019

Petitioner alleged that on July 29, 2019, respondent asked Special Officer Charlie Waller "what would happen if I wild out on someone?" and stated that his co-workers were trying to provoke him into an argument.

Officer Waller testified that he is an HRA Special Officer whose duties include providing security for petitioner (Tr. 234-35). On the day in question, a security guard telephoned him to report that an altercation was taking place between respondent and another co-worker in room 102

of the work building. When Officer Waller arrived to the room, he saw respondent visibly upset. He invited respondent to leave the area and talk with him in order to calm him down, and told respondent that "its not worth it" (Tr. 238-40). Then Officer Waller heard respondent say, to no one in particular, "what would happen if I wild out on someone?" (Tr. 248). Officer Waller told respondent "not to take it any further" (Tr. 249).

Officer Waller was later instructed to draft a statement regarding the incident (Tr. 246, 250). In his Security Incident Report Witness Statement, dated August 13, 2019, Officer Waller wrote that respondent asked him "what would happen if I wild out on someone?" (Pet. Ex. 10). Officer Waller answered "that it wouldn't be worth it" and respondent replied that a co-worker was "trying to provoke him into an argument."

Respondent admitted making the statement at issue, but explained that he uses such language to express frustration, that his co-workers are misinterpreting his behavior, and that management is seeking to unfairly terminate his employment (Tr. 263-65).

Respondent's statement, under the circumstance here, did not rise to the level of misconduct. According to Officer Waller's witness statement, respondent addressed his question to him. The question was not made in a threatening manner, as Officer Waller made no mention of feeling threatened by respondent or concerned that respondent was intending to physically harm someone else. While respondent was visibly upset, Officer Waller also did not describe respondent's tone or actions as aggressive or hostile. Indeed, Officer Waller, who has been a Special Officer with HRA for 15 years, testified that while he reported the incident, he did not write a witness statement until almost two weeks later, when instructed to do so by a sergeant (Tr. 234-36, 246, 250). This further indicates that Officer Waller was not particularly alarmed by respondent's comment.

While certainly such a statement could be perceived, under different circumstances, as a threat, here respondent's comment was nothing more than an ill-advised expression of frustration which respondent should avoid in the future. *See Human Resources Admin. v. Bobb*, OATH Index No. 406/92 (July 2, 1992) (respondent's statement that "there is no guarantee that one would always be rational" was found to be "too vague to constitute an expressed or implied threat warranting discipline.").

3) Incident of August 2, 2019

Petitioner alleged that on August 2, 2019, respondent was involved in a verbal altercation with JOS Candi Rufus. Petitioner further alleged that after the disagreement ended, respondent walked back and forth from his cubicle towards Ms. Rufus's cubicle while staring at her in a menacing manner, and that respondent then went to an empty cubicle and continued to stare at her. A co-worker, Ms. Heckstall, advised respondent to walk with her so he could calm down.

Ms. Rufus testified that one of her duties was to assign cases to other HRA staff members, including respondent (Tr. 197-00). She explained that when she would assign a case to respondent, he would often become upset and would "look at her like he wanted to do something" or "walk around mumbling all the time, around my desk" (Tr. 203).

As to the incident in question, Ms. Rufus testified that sometime in August of 2019, respondent kept walking back and forth in front of her desk. Another staff member, Ms. Vazquez, told her that respondent was staring at her. When Ms. Rufus looked up, she saw respondent "just standing there, staring, and he refused to do anything. That's all he did all day, walk back and forth" (Tr. 204-05). She then saw respondent speaking with Ms. Heckstall, but he later returned and continued to "walk back and forth" in front of her (Tr. 205). Ms. Rufus testified that she waited for Director Royer-Brown to arrive to the office and spoke to her regarding respondent's behavior (Tr. 206). Petitioner did not elicit any testimony regarding this incident from Director Royer-Brown.

In an e-mail regarding the incident, Ms. Heckstall wrote that "[l]ast Friday was the scariest because I thought for sure that [respondent] was going to hit Ms. Rufus" (Pet. Ex. 8). She wrote that it appeared to her that respondent and Ms. Rufus had a disagreement before her arrival. After hearing respondent on the phone cursing, she approached respondent to ask if "he was alright," to which he replied "yes." A few minutes later she observed respondent leave the room, but when he returned "he started walking back and forth from his cubicle to Ms. Rufus's cubicle staring her down. He then stood up by the vacant cubicle and started to stare her down." Ms. Heckstall again "went to him but this time I told him to take a walk with me because I felt that he was going to hit Ms. Rufus." Respondent offered no testimony regarding this incident.

Ms. Rufus's testimony, as corroborated by Ms. Heckstall's e-mail, is sufficient to establish that on the day in question respondent walked back and forth in front of Ms. Rufus' cubicle multiple times and stared down at her in a manner that was hostile and aggressive. Moreover, even though respondent left the area for a time, he returned and continued to pace in front of her cubicle.

Even without the use of threatening language, respondent's menacing behavior constitutes misconduct. *See Admin. of Children's Services v. Lin*, OATH Index No. 414/00 at 8 (Sept. 5, 2000) (during argument with supervisor, respondent found to have committed disciplinable misconduct by standing so close to the supervisor as to be intimidating).

4) Incident of August 9, 2019

Petitioner alleged that on August 9, 2019, respondent was at his cubicle speaking on the phone in an agitated manner when he stated "I'm going to shoot up this place." Petitioner further alleged that respondent posted a video on his personal Instagram account in which he stated "So I'mma call this drama in the office. You know this some Watergate up in this HRA over here . . . They wanna play with your boy man. They don't understand there's ramifications, there's ramifications to messing with me man. I'm not like these regular peoples in here. I moved different."

To prove the allegation, petitioner presented the testimony of Ms. Gerena. Ms. Gerena testified that respondent was a co-worker who sat behind her in an open area with cubicles (Tr. 162-64, 183). On August 9, 2019, Ms. Gerena noticed that respondent was apparently having difficulties logging into his computer, and that he was continuously getting up from his desk, walking in circles, and speaking on the phone. While respondent was on the phone, Ms. Gerena heard him say "I'm going to shoot up this place, I feel like shooting up this place" (Tr. 165-66). Ms. Genera immediately reported respondent's behavior and statement to Ms. Heckstall, who in turn spoke to a supervisor, Ms. Vasquez (Tr.165-67). A few minutes later, Ms. Gerena was called to Director Royer-Brown's office to discuss what she had witnessed. Ms. Gerena testified that she related the same description of events to Director Royer-Brown; that she saw respondent "walking in circles on the phone" and that she heard him say that he was going to "shoot up this place" (Tr. 171-72). As per Director Royer-Brown's instructions, Ms. Gerena wrote an e-mail memorializing her observations of respondent's behavior (Tr. 172-73). In her e-mail, dated August 9, 2019, Ms. Gerena wrote that she heard respondent "on the phone saying 'I'm going to shoot up this place'" and that "[h]e sounds very hostile and not stable when he speaks." (Pet. Ex. 11).

Director Royer-Brown testified that several staff members, including Mr. Suarez, Ms. Heckstall and Ms. Genera, came to her office that day to report that respondent had made threatening statements. She instructed them to write down their observations (Tr. 101-05). Aside

from the e-mail she received from Ms. Gerena, she also received e-mails from Ms. Heckstall and Mr. Suarez, who is a union representative.

In her e-mail, Ms. Heckstall wrote that when she arrived at the office that morning, she heard respondent "on the phone and he sounded irritated" (Pet. Ex. 9). A short time later, "Ms. Genera called [her] over to her cubicle and told [her] that [respondent] was on the phone saying to someone that he will shoot up this place." In Mr. Suarez's e-mail, he states that it was "brought to [his] attention today . . . that [respondent] was very agitated this morning and speaking loudly on the phone and stated that he will shoot this place up" (Pet. Ex. 4).

Based on the e-mails and verbal reports regarding respondent's behavior, Director Royer-Brown received authorization from her superiors to suspend respondent for 30 days (Pet. Ex. 7; Tr. 106, 112-14).

Respondent denied making the statement that he would "shoot up" the office (Tr. 263, 269-70). Instead, he claimed that he was unfairly given a suspension for allegations that Director Royer-Brown had already "dismissed as rumors" (Tr. 268-70). He testified that a rumor that he had threatened to "shoot up the office" began on June 17, 2019 (Tr. 269-70). Respondent did not explain how he discovered the alleged rumor, but instead pointed to an e-mail dated June 20, 2019, where he requested an urgent meeting with Director Royer-Brown. In that e-mail, respondent claimed that he was being "accused of saying that he had intentions of '[s]hooting up the office'" and was requesting a meeting to "verify this slander and seek immediate resolution" (Resp. Ex. A; Tr. 273). Respondent stated that during the meeting, Director Royer-Brown instructed him to stop making comments that he would "shoot up the office," but he denied making the statement.

Respondent also presented a surreptitiously made audio recording of a meeting he had with Director Royer-Brown, which, according to respondent's e-mail containing a link to the recording, occurred on July 17, 2019. However, when the recording is uploaded, a notation on the audio file states that it was created on August 6, 2019 (Resp. Ex. B, ALJ Ex. 2).[2] In any event, the sum and substance of the meeting, which runs for about 42 minutes, is that respondent expresses concern that he is being accused of threatening to "shoot up the office." Director Royer-Brown repeatedly

[2] Respondent Exhibit B consists of three recordings that respondent surreptitiously made of three meetings. The other two recordings bear little relevance to the issues here: one recording is when Assistant Deputy Commissioner Jessie Poli and Director Royer-Brown inform respondent of his suspension; the second is a meeting with Director Royer-Brown and Ms. Vasquez regarding the dress code. ALJ Ex. 2, admitted post-trial *sua sponte* to complete the record, are three of respondent's e-mails, dated August 10, 2020, containing links to the recordings.

states that because she has no written statements from staff members, such allegations are gossip or rumor. She warns respondent to be careful with his statements, and that she would take action if someone made written allegations. Respondent further alleged that his suspension was retaliatory because it was imposed two days after he submitted a grievance against Director Royer-Brown (Tr. 268-69).

A credibility determination is required where, as here, the parties have presented conflicting testimony on relevant facts. In making a credibility determination, this tribunal may consider such factors as witness demeanor; consistency of the witness's testimony; supporting or corroborating evidence; witness motivation, bias, or prejudice; and the degree to which a witness's 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).

Petitioner's evidence was credible. Specifically, I credit Ms. Gerena's consistent and detailed testimony that on August 9, 2019, she observed respondent in an aggravated state, apparently due to difficulties logging into his computer, and heard him say "I'm going to shoot up this place." Her testimony was consistent with her e-mail, which she wrote on the same morning that she heard the statement. *Transit Auth. v. Victor*, OATH Index No. 799/11 at 4 (Mar. 3, 2011), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 11-52-A (Aug. 9, 2011) ("contemporaneous statements evince reliability").

Ms. Genera's testimony was further corroborated by Ms. Heckstall's e-mail, which stated that Ms. Heckstall heard respondent sounding irritated on the phone, and that Ms. Gerena told her that respondent had said that "he will shoot up this place."

Ms. Gerena and Ms. Heckstall had no reason to fabricate their statements. Respondent's speculative claim that "an isolated close-knit group of employees [were] conspiring at the direction of [Director Royer-Brown] to paint me as violently as they could to effect my termination" was not substantiated by any credible evidence (Tr. 264).

Respondent, on the other hand, has a compelling motive to deny any wrongdoing and avoid being penalized. Respondent's testimony was less credible, and, outside of his blanket denial of the threatening statement, failed to discuss the events of that day. Respondent's contention that this disciplinary charge resulted from a rumor is unavailing.

The evidence reveals that staff members had previously informed Director Royer-Brown and Mr. Suarez, the union representative, that respondent often behaved in a hostile manner and made threatening comments. Indeed, in an e-mail dated August 9, 2019, Mr. Suarez states that "in the past" respondent had spoken of "shooting this location up or burning the place down," but that the staff members who heard the comments had been unwilling to submit written statements out of concern for their safety (Pet. Ex. 4). The recording of the meeting between respondent and Director Royer-Brown only confirms that respondent had been warned to be careful with his statements around the office. Therefore, the most likely version of events is not that unfounded rumors were circulating regarding respondent, but instead that respondent had previously made threatening statements that staff members had been unwilling to put in writing.

Further, respondent's claim that his suspension was retaliatory is without merit. Section 75-b(2)(a) of the Civil Service Law prohibits a public employer from dismissing or taking other disciplinary or adverse personnel action "against a public employee . . . because the employee discloses to a governmental body information: . . . (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action." "Improper governmental action" is defined as "any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties . . . which is in violation of any federal, state or local law, rule or regulation." Civ. Serv. Law § 75-b(2)(a) (Lexis 2020).

Under section 75-b(3)(a), where an employee is subject to dismissal or other disciplinary action and the employee reasonable believes such action

> would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a defense before the designated arbitrator or hearing officer. The merits of such defense shall be considered and determined as part of the arbitration award or hearing officer decision of the matter. If there is a finding that the dismissal or other disciplinary action is based *solely* on a violation by the employer of such subdivision, the arbitrator or hearing officer shall dismiss or recommend dismissal of the disciplinary proceeding, as appropriate . . .

Civ. Serv. Law §75-b(3)(a) (emphasis added).

Therefore, to establish a "whistleblower" defense, respondent must show that the *sole* motivation for petitioner's charges was to retaliate against him for the alleged grievance he filed against Director Royer-Brown, which he suggested was based on a claim of sexual harassment

(Tr. 155-56, 268-69). However, despite being offered the opportunity to submit evidence into the record, respondent never offered the grievance into evidence, and never specified the office with which he filed his grievance, or how Director Royer-Brown would have known at the time of his suspension that he filed a complaint against her.

Even accepting that respondent did file a grievance and that Director Royer-Brown was aware of it, the allegation that formed the basis of this disciplinary charge and his suspension was made by Ms. Genera, and corroborated by Ms. Heckstall. Assistant Deputy Commissioner Jessie Poli, Director Royer-Brown's supervisor, credibly testified that while Director Royer-Brown requested a suspension, the decision to suspend respondent was made by senior management upon review of several e-mails by staff members which described respondent's conduct (Tr. 38-39, 50). Therefore, respondent did not establish that Director Royer-Brown acted, in part or in whole, with retaliatory intent. Instead, the credible evidence establishes that Director Royer-Brown took action because she received written statements from staff members that respondent had stated that "he will shoot up this place," which caused alarm amongst his co-workers.

Lastly, aside from the grievance respondent allegedly filed against Director Royer-Brown, respondent claimed that his suspension violated the Civil Service Law and other agency policy and procedures (Tr. 265-69). However, as I explained to respondent at trial, the purpose of this proceeding is to adjudicate the disciplinary charges against him, and not his allegations against the agency or Director Royer-Brown (Tr. 62, 265-66). To the extent respondent's allegations formed part of his defense, such as his claim that his suspension was retaliatory, the allegations have been fully considered and discussed as warranted.[3]

Petitioner additionally claimed that on the same day, respondent posted a video on his personal Instagram account in which he stated "So I'mma call this drama in the office. You know this some Watergate up in this HRA over here . . . They wanna play with your boy man. They don't understand there's ramifications, there's ramifications to messing with me man. I'm not like these regular peoples in here. I moved different." Petitioner argued that the video statements were a continuation of respondent's threatening conduct.

[3] Respondent indicated that he availed himself of his right to file a grievance against Director Royer-Brown. Respondent may also wish to speak to an attorney or his union regarding his allegations.

Respondent did not contest that he posted the video, but instead argued that the video did not contain a threatening statement.

Petitioner's claim is unconvincing. Nothing in the video constitutes an expressed or implied threat of violence, and the statements do not rise to the level of discourteous conduct.

In all, petitioner proved that respondent committed misconduct by stating, while on the phone, that he "will shoot up this place," as charged.

5) First undated incident

Petitioner alleged that on one occasion, a co-worker attempted to calm respondent down after witnessing him have a violent verbal outburst, telling him that he needed "to calm down, you know you can't hurt anyone in here you will get in trouble." In response, respondent told the co-worker "I don't have to do it here, I can find out where they live and get them."

The only evidence that petitioner presented to support this claim is an e-mail, dated August 9, 2019, from Mr. Suarez to Director Royer-Brown. In that e-mail, Mr. Suarez states that on one occasion when respondent was having a "violent verbal outburst," a staff member told him "to calm down, you know you can't hurt anyone in here you will get in trouble." In response, the staff member claimed that respondent stated "I don't have to do it here, I can find out where they live and get them." (Pet. Ex. 4).

While the initial statement from respondent to the staff member is not hearsay because it is a statement by a party-opponent, the communicating of that statement from the staff member to Mr. Suarez, who did not testify, is hearsay. While hearsay is admissible under our rules, in cases where a charge is based primarily on hearsay, hearsay has been deemed sufficiently reliable only if the statement is detailed and corroborated. *Human Resources Admin. v. Green*, OATH Index No. 3347/09 at 8 (Nov. 18, 2009) (citing *Calhoun v. Bailar*, 626 F.2d 145, 148-49 (9th Cir. 1980)); *Dep't of Environmental Protection v. Ginty*, OATH Index No. 1627/07 at 16, 20 (Aug. 10, 2007). Here, the statement is neither sufficiently detailed nor corroborated to be deemed reliable.

Therefore, as the e-mail evidence is insufficient to sustain the allegation, petitioner failed to prove misconduct.

6) Second undated incident

Petitioner alleged that on another occasion, Mr. Suarez heard respondent tell an unnamed HRA Special Officer "People in here get it twisted they think I'm soft, but I will take it to the streets in here. People don't know how I know I don't have to do anything myself."

The evidence for this allegation is also based on Mr. Suarez's August 9, 2019 e-mail, where he wrote that a few weeks prior he spoke to respondent regarding "a verbal blow-up." (Pet. Ex. 4). During the conversation, respondent allegedly stated to Mr. Suarez that "[p]eople in here get it twisted they think I'm soft, but I will take it to the streets in here. People don't know how I know I don't have to do anything myself." However, Mr. Suarez did not testify, and no other evidence was presented to corroborate the statement.

Because I find that the e-mail alone is insufficient to prove the allegation, petitioner failed to prove misconduct.

In sum, petitioner proved two instances of threatening and offensive behavior by respondent, specifically: 1) that on August 2, 2019, respondent walked back and forth in front of Ms. Rufus' cubicle multiple times and stared down at her in manner that was hostile and aggressive; and 2) that on August 9, 2019, respondent stated, while on the phone, that he "will shoot up this place," in violation of HRA's Code of Conduct.

Specification II – Threatening and discourteous statements on social media

Petitioner alleged that on nine different occasions, from August 14 to August 31, 2019, while serving a 30-day suspension, respondent made threatening and inappropriate comments about his co-workers on videos posted to his personal Instagram account, as follows:

- August 14, 2019 - "Yeah, so I'm home now . . . with my 30 days suspension, vacation. I mean suspension . . . So I'm check y'all niggas. And I'mma take these 30 days vacation, I mean suspension, and I'll see y'all niggas in 30 days and we gonna play ball."

- August 15, 2019 - "I'll be back in 30 days to play ball with all of y'all."

- August 16, 2019 - "Enjoying the second day of my 30 day vacation, courtesy of Ms. Royer."
- August 17, 2019 - "I'm still on my 30 day vacation, courtesy of Ms. Desiree Royer-Brown."

- August 18, 2019 - "Still on my 30 day vacation courtesy of Ms. Royer-Brown . . . I needed this break, away from their stupid dumbass motherfuckers up there."

- August 20, 2019 - "My director Ms. Royer-Brown suspended me for 30 days . . . she thought it was going to end there . . . I just served a grievance on her for sexual harassment and misconduct, and I'm going to see how they deal with that. We're gonna keep playing ball."

- August 24, 2019 - "Just enjoying the day man, 30 day vacation, courtesy of Ms. Royer-Brown man."

- August 26, 2019 - "Never expected I'd be getting a 30-day vacation like this, courtesy of Ms. Royer-Brown."

- August 31, 2019 - "30 day vacation baby, what can I say? Thank you Ms. Royer-Brown. I know you thought you were doing something to hurt a brotha but you ain't doing nothing but help a brotha. I hope you're enjoying your leave of absence as well."

Director Royer-Brown testified that several unidentified staff members informed her, within a month of respondent's suspension, that he was making comments about her in videos posted to his Instagram account. Director Royer-Brown explained that she discovered that respondent had a public account, which meant that "everybody [could] see it." She saw respondent's videos and confirmed that respondent was making statements about her. She testified that she was "floored," that the videos were "degrading" to her, and that respondent acted like he was "out to get [her]" (Tr. 114-17).

Petitioner argued that the statements violated HRA's Code of Conduct as well as its social media policy, which states, in relevant part, that

> Employees participating in social media are subject to the DSS/HRA and DHS Codes of Conduct and City policies even when engaging in social media while off duty. For example, be aware that being uncivil or discourteous, or engaging in conduct tending to bring the City or DSS-HRA-DHS into disrepute, or engaging in harassing or discriminatory conduct are prohibited by the Code of Conduct and City policy. Engaging in such behavior online, even in a personal capacity, may subject an employee to disciplinary action.

Respondent admitted that he posted videos containing the alleged statements on his personal Instagram account. He argued that the statements did not constitute misconduct (Tr. 293). As a matter of clarification, the statements highlighted by petitioner are, for the most part, smaller sections of longer commentary made by respondent on each video, and his commentary is not always limited to his work issues.

Upon review of each of the videos, I find that none of the alleged statements rise to the level of threatening conduct (Pet. Exs. 6a-6j). For the most part, respondent speaks in a serious or bemused tone, and the statements are not made in a manner that is loud, menacing or hostile. Respondent's sarcastic expression of frustration regarding his suspension, or his comments that he would "play ball" upon his return to work, do not express or imply a threat.

However, at least four of the statements rise to the level of discourteous and inappropriate conduct, as charged.

In his statements of August 14 and 18, 2019, respondent uses profanity and racial epithets in describing his co-workers, specifically, describing them as "niggas" and "stupid dumbass motherfuckers." The use of profanity generally constitutes *per se* discourtesy and disrespect. *See Health & Hospitals Corp. (North Bronx Healthcare Network) v. Wolfe*, OATH Index No. 2844/08 at 6-7 (Sept. 8, 2008) (citing *Dep't of Correction v. Shark,* OATH Index Nos. 1668/02 & 1828/02 at 20 (July 3, 2003)). *See also Admin. for Children's Services v. Goldman*, OATH Index No. 985/12 at 6 (July 3, 2012), *adopted*, Comm'r Dec. (July 13, 2012). Further, the use of a racial epithet to describe a co-worker, even without malicious intent, constitutes misconduct. *See Transit Auth. v. Kerr*, OATH Index No. 1234/00 (May 10, 2000), *modified on penalty*, Authority Dec. (July 18, 2000), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 03-22-M (Feb. 5, 2003) (finding that use of the term "nigger" is misconduct, even where uttered by an African-American employee without malicious intent); *Police Dep't v. Kilroy*, OATH Index No. 1096/91 (July 10, 1991), *aff'd* 190 A.D.2d 530 (1st Dep't 1993) (finding that the term "nigger" is an ethnic slur and its use in the workplace constitutes misconduct, regardless of whether it was uttered in a casual conversation and not directed at the person who was offended); *Dep't of Correction v. Andino*, OATH Index No. 430/89 (Aug. 10, 1989), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 90-57 (June 20, 1990) (finding that the word "nigger" is a racial slur and its use in the workplace is subject to disciplinary sanction).

Further, the comments respondent made regarding Director Royer-Brown on August 20 and 31, 2019, where respondent states that in relation to his suspension he filed a sexual harassment complaint against her, and that he hopes she is "enjoying" her alleged leave of absence, were made in a taunting and retaliatory manner, and were clearly meant to demean and humiliate her. Accordingly, the comments are also misconduct.

The remaining statements are sarcastic in nature, but do not constitute misconduct because sarcasm is not per se misconduct. *See Triborough Bridge and Tunnel Auth. v. Klosner*, OATH Index No. 599/03 at 9 (Aug. 20, 2003) ("sarcastic work-related communication does not become misconduct due merely to its tone or the manner in which it is delivered"); *Dep't of Correction v. Hamlin*, OATH Index No. 110/02 at 14 (May 21, 2002) (sarcastic statements, "absent some disruption in the workplace, threats or manifest disrespect are permissible" even during confrontations between supervisors and subordinates).

The offending statements are also not protected speech. A public employee's speech that is expressed as a private citizen regarding a matter of public concern is protected by the First Amendment. *Montero v. City of Yonkers*, 890 F.3d 386, 393-94 (2d Cir. 2018). A matter of public concern includes those matters "fairly considered as relating to any matter of political, social, or other concern to the community" and be of "'general interest' or of 'legitimate news interest.'" *Id.* at 399. However, speech that "principally focuses on an issue that is personal in nature and generally related to the speaker's own situation or that is calculated to redress personal grievances even if touching on a matter of general importance does not qualify for First Amendment protection." *Id.* at 399-400 (internal quotation marks, citation, and alteration omitted).

For instance, in *Agosto v. NYC Dep't of Educ.*, No. 19-2738-cv at 14 (2d Cir. Dec. 4, 2020), the court held that a high school teacher's complaint against his principal was not protected speech because the grievances he filed did not address a matter of public concern, but instead "principally focuse[d] on an issue that is personal in nature and generally related to the speaker's own situation . . . " citing *Montero*, 890 F.3d at 399-400 (internal quotation marks, citation, and alteration omitted).

In another case, the court found that while a former fire captain began his social media post by commenting on a publicized school board incident, his speech devolved into his personal criticism of the fire district's board. The court held that because, on balance, the captain's speech was predominately of a private concern, he was not protected from disciplinary action by the First Amendment. *Moreau v. St. Landry Parish Fire District No. 3*, 2020 U.S. App. LEXIS 10912 (5th Cir. Apr. 7, 2020).

Here, the four discourteous statements made on respondent's Instagram videos related to his personal grievances with his supervisor and co-workers, and not to matters of public concern. Accordingly, such statements are not protected speech.

Therefore, petitioner proved that four of the nine comments were discourteous.

FINDINGS AND CONCLUSIONS

1. As per Specification 1, petitioner established by a preponderance of the evidence that respondent engaged in threatening and discourteous conduct on August 2 and August 9, 2019, respectively, by walking back and forth in front of a co-worker's cubicle multiple times and staring down at her in a manner that was hostile and aggressive; and by stating that he "will shoot up this place" while on the phone, in violation of HRA's Code of Conduct. Petitioner did not prove the remaining instances of alleged misconduct.

2. As per Specification 2, petitioner established by a preponderance of the evidence that respondent engaged in discourteous conduct by posting four videos on his personal Instagram account. On two of the videos respondent made statements related to his co-workers that contained profanity and a racial epithet, and the other two videos contained statements were that were taunting and retaliatory towards his supervisor. Petitioner did not prove that the remaining five statements were discourteous, or that any of the videos contained threatening statements.

RECOMMENDATION

Upon making the above findings, I requested and received respondent's personnel history (ALJ Ex. 3). Respondent began employment with HRA on August 10, 2015. In 2017, he accepted a 60-day suspension to resolve charges related to inappropriate contact with a client and abuse of official functions. Petitioner now seeks termination of respondent's employment.

Petitioner's request is appropriate. Here, petitioner proved that respondent engaged in threatening behavior on two occasions, including stating in the office that he would "shoot up this place," and that he made discourteous statements on four videos that he posted on his personal social media account. His threatening actions understandably caused alarm and fear amongst many of his co-workers, and his statements regarding his supervisor caused her to feel degraded (Tr. 31-32, 116).

Most City employees who have issued threats similar to those made by respondent have been terminated from City service. *Fire Dep't v. Krasner*, OATH Index No. 2967/09 at 11, 18-19 (Aug. 18, 2009), *adopted*, Comm'r Dec. (Nov. 20, 2009) (fire protection inspector's statement that "Metrotech equals Virginia Tech," along with other misconduct, results in termination); *Dep't of*

Environmental Protection v. Danko, OATH Index No. 1060/08 (Apr. 11, 2008), *modified on penalty*, Comm'r Dec. (Sept. 28, 2008), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 09-20-SA (Apr. 3, 2009) (termination for machinist who threatened to "go postal" and to act like "the Virginia Tech shooter"); *Health and Hospitals Corp. (Woodhull Medical and Mental Health Center) v. Pawlowski*, OATH Index No. 1836/00 (Oct. 4, 2000), *aff'd sub nom*. *Pawlowski v. North Brooklyn Health Network*, 299 A.D.2d 156 (1st Dep't 2002) (employee with lengthy disciplinary history terminated for threats to supervisors and co-workers).

Further, respondent did not offer any mitigation. Even when respondent admitted to posting the offending videos, he did not take any responsibility for his actions or express any regret. Respondent also has a prior significant penalty. Both the prior misconduct and the proven charges here, particularly relating to the threat to "shoot up the place," show that respondent lacks judgment and self-control in the work place.

Therefore, I recommend that respondent be terminated from his employment.

Noel R. Garcia
Administrative Law Judge

December 10, 2020

SUBMITTED TO:

STEVEN BANKS
Commissioner
APPEARANCES:

BRIANNA WILSON, ESQ.
Attorney for Petitioner

AARON MILES
Pro se

THE CITY OF NEW YORK
CIVIL SERVICE COMMISSION

In the Matter of the Appeal of

AARON MILES

Appellant

-against-

HUMAN RESOURCES ADMINISTRATION

Respondent

Pursuant to Section 76 of the New York State Civil Service Law

CSC Index No: 2021-0126

DECISION

AARON MILES ("Appellant") appealed from a determination of the Human Resources Administration ("HRA") finding Appellant guilty of incompetency and/or misconduct and imposing a penalty of termination following disciplinary proceedings conducted pursuant to Civil Service Law ("CSL") Section 75.

The Civil Service Commission ("Commission") requested written arguments from the parties on March 20, 2021. Appellant's brief was due by March 24, 2021, but he requested and received three extensions to retain counsel and/or submit a brief to the Commission. On July 7, 2021, the Commission informed Appellant that if he did not submit a brief by July 14, 2021, the Commission would review his appeal, pending HRA's submission, without it. Appellant did not submit any argument and HRA's brief was received on August 6, 2021.

The Commission has reviewed the record below, which we incorporate by reference into this decision, as well as arguments submitted on appeal, and find that there is sufficient evidence to support the final determination and that the penalty imposed is appropriate.

Therefore, the final decision and penalty imposed are hereby affirmed.

SO ORDERED.

Dated: August 19, 2021